IN THE COURT OF APPEAL

AT MALINDI

(CORAM: OKWENGU, GATEMBU & MURGOR, JJ.A)

CIVIL APPEAL NO. 16 OF 2018

BETWEEN

PANKAJKUMAR HEMRAJ SHAH.....1ST APPELLANT

RAJESH HEMRAJ KESHAMJI SHAH.....2ND APPELLANT

VERSUS

ABBAS LALI AHMED.....1ST RESPONDENT

HABIB ABUMOHAMED.....2ND RESPONDENT

IBRAHIM MUKTAR ABASHEIKH.....3RD RESPONDENT

THE NATIONAL LAND COMMISSION.....4TH RESPONDENT

THE REGISTRAR OF LAND KILIFI.....5TH RESPONDENT

THE ATTORNEY GENERAL.....6TH RESPONDENT

(Appeal from the judgment of the Environment & Land Court at Malindi, ***(Angote, J.)*** *dated 5th October, 2017*

in

ELC Petition No. 2 of 2014)

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JUDGMENT OF THE COURT

[1] This is an appeal by **Pankajkumar Hemraj Shah** and **Rajesh Hemraj Keshamji Shah**, the 1st and 2nd appellants respectively. The appeal is against the decision of the Environment and Land Court (**Angote, J.**) delivered on 18th September, 2017 dismissing the appellant's petition and allowing the cross petition of **Habib Abumohamed** and **Ibrahim Muktar Abasheikh** (2nd and 3rd respondents respectively).

[2] The appellants' petition involved a dispute over a piece of land known as **Kilifi/Jimba/400** (suit property), which the appellants claimed to have purchased from one Roberto Arnoldi (Roberto). The 2nd and 3rd respondents, also claimed to be the owners of the suit property, through purchase from **Abbas Lali Ahmed** (the 1st respondent), one **Athman Shelali** and **Kahindi Karisa Ngala.** The three were alleged to be beneficial owners having been allotted the suit property by the Government. The 2nd and 3rd respondents claimed to have acquired a leasehold title pursuant to that purchase. The suit property, which measures approximately 1.8 hectares or thereabouts is situated in Watamu in Kilifi County.

[3] The 1st and 2nd appellants' petition was against the 1st, 2nd and 3rd respondents, the National Land Commission (4th respondent), the Registrar of Land Kilifi (5th respondent), and the Attorney General (6th respondent). The petition sought orders, *inter alia,* that the allocation of the suit property to the 2nd and 3rd respondents is null and void; that the 4th and 5th respondents be prohibited from leasing out, allocating or in any way interfering with the suit property; that the 1st, 2nd and 3rd respondents, their servants or agents, be restrained from trespassing upon, selling, mortgaging, transferring or in any way dealing with the suit property; and that the appellants be awarded damages and costs of the suit.

[4] The 1st respondent filed a reply, in which he admitted having sold the suit property to Roberto, but denied any knowledge of the appellants' claim or any dispute involving the suit property.

[5] The 2nd and 3rd respondents also filed a reply to the petition and a cross petition in which they claimed, that they were the beneficial owners of the suit property, having purchased the suit property from the 1st respondent, **Athman Shelali** and **Kahindi Karisa Ngala** who were each allotted a plot by the Government, which plots they consolidated into the suit property, which the three jointly sold to the 2nd and 3rd respondents. As a result, the 2nd and 3rd respondents were given a leasehold interest for the suit property. It is when the 2nd and 3rd respondents presented the lease for registration, that they learnt that the 1st respondent had obtained a title over the suit property, and transferred the suit property to Roberto, who in turn transferred the suit property to the appellants. The 2nd and 3rd respondents contended that the 1st respondent fraudulently obtained title to the suit property as he had already sold his interest in the suit property. Therefore, the appellants' title having been procured on the strength of an invalid process it was illegal null and void, and the appellants had no interest to transfer to Roberto. The 2nd and 3rd respondents sought a declaration that the registration of the 1st respondent as the absolute owner of the suit property was null and void, and consequently the appellants' title was also null and void.

[6] Hearing of the petition proceeded by way of oral evidence. The appellants called 3 witnesses. The first witness was the 1st appellant who testified how they bought the suit property from Roberto through Listonny Thoya Mraba (Mraba) who was the agent of Roberto. The second witness was Mraba the holder of a power of attorney donated by Roberto. He testified that he witnessed the sale of the suit property by 1st respondent to Roberto, and later sold the suit property to the appellants on behalf of Roberto using the power of Attorney donated to him. The third witness was Tusher Shah whose property borders the suit property. He alerted the appellants that the suit property was on sale, and later accompanied the appellants to their advocate for the conveyancing transaction.

[7] The 1st respondent offered no evidence during the hearing but relied on the answer to the petition. The 2nd and 3rd respondent both testified and reiterated that the 1st respondent was allocated plot No 1028 and not plot No 400, and therefore plot No 400 did not belong to him, and the purported sale by 1st respondent to Roberto was fraudulent.

[8] Joseph Taura Bao (Joseph) the Land Registrar Kilifi testified on behalf of the 5th and 6th respondents. He produced the green card for the suit property which reflected the transactions involving the suit property from the time of its first registration in the name of the Government in 1986 to the last transaction on 18th November 2013 which resulted in the title in favour of the appellants.

[9] In his judgment, the trial Judge dismissed the appellants' petition and allowed the 2nd and 3rd respondent's cross petition rendering himself in part as follows:

> ***"There is no evidence before the court to show that the 1st respondent was allocated the suit property, either by the Government or the Settlement Funds Trustee. Indeed, the evidence before the court shows that the 1st respondent was allocated Plot No. 1028 on 30th June,1999 and paid to the Settlement Fund Trustee for the "outright purchase of Plot No. 1028." The voucher for the payment of Plot No. 1028 by the 1st respondent has been annexed on the 2nd and 3rd respondent's affidavits.***
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> ***Having been allocated Plot No. 1028 measuring 0.6 Ha and having paid for the said plot, the 1st respondent should have been registered as the proprietor of Plot No. 1028 measuring 0.6 Ha and not Plot No. 400 measuring 1.8 Ha.***
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> ***The 1st respondent had no registrable interest in the suit land as at the time he purported to transfer it to Roberto Arnoldi, a fact which he knew because he was allocated and paid for Plot No. 1028 measuring 0.6 Ha and not Plot No. 400 measuring 1.8 Ha.***
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> ***Having not denied the allegations that the Title Deed that was issued to the 1st respondent was issued fraudulently and or by misrepresentation, and having satisfied the court that indeed the 1st respondent was not entitled to Plot No. 400 measuring 1.8 Ha, I find that the Title Deed that was issued to the 1st respondent on 2nd August 2002 was a nullity and therefore the 1st respondent did not have a valid title to pass to Robert Arnoldi on 2nd August, 2003.***
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> ***Because the title document that was issued to the 1st respondent was null and void ab initio, whatever title that Roberto Arnoldi***

purported to pass to the Petitioners on 18th November, 2013 was a nullity." (emphasis added)

[10] It is this decision that led to this appeal. The appellants have raised 16 grounds in the memorandum of appeal that we have condensed into nine grounds. These are that the trial judge erred in law and fact:

(i) in failing to find that once the suit property was transferred from the Government to the Settlement

Fund Trustees, it ceased being available for allocation.

(ii) in failing to find that if the 2nd and 3rd respondents had any issue with the adjudication process and/or the register by which title to the suit property was transferred to the 1st respondent, they ought to have raised their objection in accordance with the provisions of Section 26 of the Land Adjudication Act.

(iii) in finding that the suit property was sold to the 2nd and 3rd respondents by the three allottees from the Settlement Fund Trustees.

(iv) in failing to find that the 1st respondent having been registered as the first proprietor of the suit property, became the indefeasible owner by dint of Sections 27 and 28 of the Registered Land Act (*repealed*).

(v) in failing to find that once the 1st respondent became the registered proprietor of the suit property, it ceased to be available for allocation, adjudication or disposition.

(vi) in finding that there was no evidence showing that the 1st respondent was allocated the suit property by the Government or the Settlement Fund Trustees.

(vii) in finding that the transfer of the suit property by the 1st respondent to Roberto Arnoldi was null and void for lack of consent of the Land Control Board whereas there was no evidence that the suit property was agricultural land.

(viii) finding that the title document issued to the 1st respondent was null and void *ab initio,* and that the title Robert Arnoldi passed to the appellants was a nullity.

(ix) in failing to find that the appellants having been registered as proprietors of the suit property became the indefeasible owners of the suit property by dint of Sections 24, 25 and 26 of the Land Registration Act.

[11] At the hearing of the appeal, learned counsel Mr. Ole Kina appeared for the appellants, learned counsel Mr. Maurice Kilonzo appeared for the 1st respondent, and learned counsel Mr. Shujaa appeared for the 2nd and 3rd respondent. There was no representation for the 4th, 5th and 6th respondents.

[12] Counsel for the appellants filed written submissions, that were orally highlighted during the hearing. In the submissions it was emphasized that the appellants were bona fide purchasers for value without notice as they did not participate in, nor were they aware of any fraudulent scheme in the registration of 1st respondent as first proprietor of the suit property, or the subsequent transfer of the suit property to Roberto. Nor were the appellants party to any fraud in the sale of the suit property to them by Roberto.

[13] The appellants argued that once the suit property was transferred from the Government to the Settlement Fund Trustees, it ceased to be public land and became private land. In addition, under the Government Lands Act, only government land could be lawfully allocated by the government. The Government could not therefore purport to issue a letter of allotment over the suit property after it ceased to be government land. Nor could the government purport to create a leasehold interest in favour of the 2nd and 3rd respondents over the suit property which was private land. Consequently, the purported alienation of the suit property to 2nd and 3rd respondent by the Government was illegal and the letter of allotment issued to the 2nd and 3rd respondents was void *ab initio*.

[14] The appellants took issue with the learned Judge's reliance on a sale agreement said to have been entered into between the 2nd and 3rd respondent on one hand and the 1st respondent, Athman Shelali and Kahindi Karisa on the other hand. It was pointed out that there was no consideration for the purported sale, nor was there any evidence regarding the alleged merger of Plots No. 1028, 1029 and 400 into the suit property (Kilifi/Jimba/400. Nor was any evidence of consent for the transfer from the Land Control Board produced. It was submitted that such consent was imperative if indeed the land was agricultural land as submitted by the 2nd and 3rd respondent.

[15] The appellants pointed out that under **Section 143(1)** of the **Registered Land Act** (now repealed), the court could not interfere with a first registration other than on account of fraud. It was submitted that there were no proven allegations of impropriety relating to the appellants in regard to the first registration, the sale to their predecessor in title or the sale to them, and that the trial court erred in impeaching the appellants'

title on the ground that the 1st respondent's first registration over the suit property was unlawful.

[16] In addition, the trial Judge was faulted for ignoring the evidence of Joseph the Land Registrar, Kilifi, who produced the green card detailing the origin and ownership of the suit property. This evidence confirmed that the suit property was first owned by the Government, then transferred to the Settlement Fund

Trustees, then transferred to the 1st respondent, and later to Roberto who transferred the suit property to the appellants. It was asserted that the appellants were innocent purchasers for value, and that a title deed having been issued to them, under the provisions of **section 26(1)** of the **Land Registration Act**, the certificate of title operates as *prima facie* proof that they are the absolute and indefeasible owners of the suit property.

[17] Finally, the appellants submitted that the learned Judge misdirected himself in finding that the appellants did not respond to the 2nd and 3rd respondents cross petition. Contrary to this finding, the appellants had filed a response to the cross petition in which they had denied the allegations of fraud that had been made against them. Consequently, the learned Judge erroneously entered judgment in favour of the respondent on the cross petition.

[18] The 1st respondent supported the appeal and aligned himself to the submissions of the appellants. The 4th respondent having not participated in the proceedings in the lower court, its presence was dispensed with. While the 5th and 6th respondent though served with a hearing notice through the Attorney-General did not attend Court for the hearing of the appeal.

[19] The 2nd and 3rd respondents opposed the appeal through written submissions which were orally highlighted by their counsel. These two respondents maintained that they were the lawful owners of the suit property having been issued with a leasehold interest by the 4th respondent. They argued that the 1st respondent obtained title to the suit property through fraud, mistake or misrepresentation. This was because the 1st respondent was not entitled to ownership of plot No. 400 whose acreage was 1.8 Hectares. They maintained that the 2nd and 3rd respondent did not file any reply to the cross petition nor did they traverse the allegations of fraud made in the cross petition.

[20] Further, the 2 and 3rd respondent argued that there was sufficient evidence adduced which confirmed that the 1st respondent, **Athman Shelali** and **Kahindi Karisa Ngala**, who were the allottees of the three parcels forming the suit property, sold their beneficial interest to them; and that the suit property being government land, the 4th respondent was entitled to issue a leasehold interest to the 2nd and 3rd respondent. In addition, the 2nd and 3rd respondents were able to show that the allocation to the three original allottees was valid, hence the parcels of land subject of the allocations were still available for alienation and eligible for transfer to the 2nd and 3rd respondents. This was unlike the title deed that was issued to the 1st respondent which title deed was fraudulent.

[21] The two respondents submitted that the 1st respondent did not adduce any evidence showing how he was allocated the suit property or issued with a title deed, and that he knowingly misrepresented himself as the genuine allottee of the suit property. This was evident from the title obtained by the 1st respondent in regard to the suit property that was obtained fraudulently as the 1st respondent was allocated plot No 1028 measuring 0.6 Hectares and not the suit property which measured 1.8 Hectares. Thus the 1st respondent's title was null and void *ab initio,* and incapable of conferring any valid title to Roberto or the appellants. The protection of indefeasibility of title provided under Section 28 of the Registered Land Act Chapter 300 (repealed) or Section 24, 25 and 26 of the Land Registration Act, could also not apply as the title in existence was invalid.

[22] Furthermore, the 2nd and 3rd respondents argued that since Roberto did not obtain a land control board consent while transferring the suit property to the appellants, the transaction was rendered null and void, hence the appellants did not acquire a good title. In regard to the agreement of sale, the 2nd and 3rd respondent maintained that the sale was not disputed; and that the provisions of the Land Control Act requiring consent of the land control Board was not applicable to the sale of the land to 2nd and 3rd respondent, as the land was not registered in the names of the vendors who only had offers from the government. Finally, the 2nd and 3rd respondents pointed out that the appellants cannot deny that the consent of the Land Control Board was required, in regard to the sale of the suit property to the appellants, when they had in fact applied for and received the consent for the transfer in their name, and yet there was no evidence of any consent having been received for the transfer from 1st respondent to Roberto, and therefore on this ground the sale was void.

[23] This being a first appeal, the principles guiding the duty of this Court is as was stated by Sir Clement De Lestang, V.P., in ***Selle -vs- Associated Motor Boat Co. [1968] EA 123*:**

"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in

such appeal are well settled. Briefly put they are, that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

[24] From the evidence that was adduced in the trial court, it was common ground that the suit property was initially Government land, and that it was part of a settlement scheme. The green card produced by Joseph (the Land Registrar), for land registered as Kilifi/Jimba/400 which is the suit property, showed that the suit property was transferred by the Government to the Settlement Fund Trustees, who in turn transferred it to the 1st respondent who transferred it to Roberto. If these transactions were genuine then the appellants who derived their ownership from Roberto would have a good title to transfer.

[25] The learned Judge in dismissing the appellants' petition found that the appellants never disputed the allegation by the 2nd and 3rd respondents in their cross petition that the 1st respondent was initially allocated Plot No. 1028 and not Plot No. 400, and that the 1st respondent never presented evidence on how the 1st respondent was allotted the suit property. It was this assertion that led the learned Judge to find that the title issued to the 1st respondent was issued fraudulently and or by misrepresentation. The appellants' appeal is mainly grounded on the assertion that the appellants are the indefeasible and absolute owners of the suit property.

[26] From the extract of the judgment reproduced herein the learned Judge found that there was no denial of the allegation that the title deed of the 1st respondent was issued fraudulently or by misrepresentation. This is consistent with what the learned Judge noted at page 6 of his judgment that none of the respondents in the cross petition filed a response to the cross petition. Our perusal of the record of appeal has however revealed something different.

[27] We have noted that at page 296 to 297 of the record, there is the 1st respondent's reply to the cross petition in which he denied the claims that were made by the 2nd and 3rd respondents in the cross petition, and maintained that he was solely allocated the suit property which he later sold to Roberto. Similarly, at page 291 to 294 of the record there is the appellants' reply to the cross petition wherein they denied the claims made by the 2nd and 3rd respondents in the cross petition. In particular, at paragraph 12 of the reply to the cross petition, the appellants specifically denied paragraph 17 and 18 of the cross-petition, wherein the 2nd and 3rd respondents had pleaded fraud, mistake and representation. There was therefore a joinder of issue in the pleadings on the question of fraud, mistake and misrepresentation, and the learned Judge grossly misapprehended the pleadings and misdirected himself on this important issue, and this no doubt clouded his mind.

[28] In their petition the appellants had contended that pursuant to the provisions of **Section 24, 25** and **26** of the **Land Registration Act**, having been registered as proprietors of the suit property their title was indefeasible. Nor was the suit property available for alienation by the Government such as to justify the action of the Government in creating a leasehold interest over the suit property in favour of the 2nd and 3rd respondents. In a letter dated 28th June 2013 addressed to the 4th respondent, the 2nd and 3rd respondents alleged that their family had always been in occupation of the suit property. This was obviously untrue as the evidence was clear that 2nd and 3rd respondents have never been in possession of the suit property, and that as at that date the suit property was in the possession of Roberto who subsequently transferred the property to the appellants who have remained in possession.

[29] We reiterate what this Court stated in **Benja Properties Limited vs. Syedna Mohammed Burhannudin Sahed & 4 others [2015] eKLR,** that:

"It is trite law that all titles to land are ultimately based upon possession in the sense that the title of the man seised prevails against all who can show no better right to seisin. Seisin is a root of title. The 1st, 2nd and 3rd respondents being in possession of the suit land have a better right to the same as against the appellant. The maxim is that possession is nine-tenths ownership. As was stated by the Privy Council in Ghana of Wuta-Ofei -v-Danquah [1961] All ER 596 at 600, the slightest amount of possession would be sufficient."

[30] In addition section 116 of the Evidence Act states that:

When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.

[31] The 2nd and 3rd respondents had therefore the burden to establish their allegation that the title of the appellants' who were in possession of the suit property, is tainted as it is rooted in the title of 1st respondent which was obtained through fraud and misrepresentation. To the extent that the appellants are the registered proprietors of the suit property who are in possession, and the 2nd and 3rd respondents who are not in possession seek to assail the title of the appellants, the position is distinguishable from that in **Munyu Maina v Hiram Gathiha Maina [2013] eKLR** in which the respondent who was questioning the title of the registered proprietor was in actual possession of the disputed land, and this Court ruled that the registered proprietor had to prove how he acquired the title and that the acquisition was legal.

[32] We note that other than filing a reply to the 2nd and 3rd respondent's cross petition the 1st respondent did not adduce any evidence at the trial. This notwithstanding, we find from the green card that was produced and the evidence of Joseph, a land registrar, that the suit property was transferred to the 1st respondent by the Settlement Fund Trustee, and this was authoritative in establishing *prima facie* that the 1st respondent was allotted the suit property, and became the registered proprietor and a title deed issued to him.

[33] In the recent five Judge Bench, **Embakasi Properties Limited & Anor. v Commissioner of Lands & Anor [2019] eKLR** decision this Court stated as follows:

> ***"Although it has been held time without end that the certificate of title is: "....conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof", it is equally true that ownership can only be challenged on the ground of fraud or misrepresentation to which the proprietor named is proved to be a party. See section 23 of the repealed Registration of Titles Act. Section 26 of the Land Registration Act, 2012 though not as emphatic as section 23 aforesaid on the conclusive nature of ownership, confirms that the certificate is prima facie evidence that the person named as proprietor is the absolute and indefeasible owner. It adds that apart from encumbrances, easements, restrictions to which the title is subject, there is no guarantee of the title if it is acquired by fraud or misrepresentation or where it has been acquired "illegally, unprocedurally or through a corrupt scheme".***

[34] Thus, the pertinent issue that we must address is whether there was proof of the allegations made by the 2nd and 3rd respondents that the title of the 1st respondent from whom the appellants traced their title was obtained fraudulently or by misrepresentation thereby tainting the appellants' title. In doing so we bear in mind the standard of proof of fraud as stated in **Ratilal Gordhanbhai Patel v Lalji Makanji *[1957] EA 314, 317:***

> **"Allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, but something more than a mere balance of probabilities is required."**

[35] The 2nd and 3rd respondents' cross petition was supported by an affidavit that was sworn by the 2nd respondent on his own behalf and on behalf of the 3rd respondent. During the trial the 2nd respondent was again the one who testified and he basically adopted the evidence that was in the affidavit. He maintained that the suit property was allocated to three allottees who sold the land to them and therefore the title deed held by the appellants was a fraud. The 2nd respondent averred in the affidavit, that together with the 3rd respondent, they purchased the interests of the 1st respondent, Athman Shelali and Kahindi Karisa Ngala who were

the original allottees of the suit property. Annexed to the affidavit of 2nd respondent was an agreement dated 15th November 2012 in which the three allottees agreed by mutual consent to have the letter of allotment issued to them in respect of the suit property, reissued in favour of the 2nd and 3rd respondents.

[36] The question is whether as at 15th November 2012 the suit property was available for allotment. According to the evidence that was adduced by Joseph the suit property was first registered on 21st December 1986 with the first owner as the Government who transferred the land to the Settlement Fund Trustee (SFT) on the 2nd August 2002. On the same date the land was transferred to the 1st respondent. On the 28th August 2003 the land was transferred to Roberto who transferred the land on 18th November 2013 to the appellants. Therefore, as at 15th November 2012 when the 2nd and 3rd respondents purported to have entered into an agreement with the three allottees to purchase their allotment interest, the suit property was already registered and title vested in Roberto.

[37] The 2nd and 3rd respondents have maintained that the 1st respondent had actually no interest in the suit property as his allotment was in regard to a different parcel, that is, Plot No. 1028 which measured 0.6 hectares and not the suit property which measured 1.8 hectares. The 2nd and 3rd respondents did not call any of the three allottees who allegedly transferred their interest to them as witnesses. They relied on letters of offer signed by the Director of Land Adjudication and Settlement that were annexed to the 2nd respondent's affidavit. The first letter which is undated is an offer to Abbas Lali (1st respondent) for Plot No. 1028 measuring 0.6 hectares. The second letter dated 30th June 1999 is an offer to Athman Shelali for Plot No. 400 measuring 0.6 hectares and the third letter which is also dated 30th June 1999 is an offer to Kahindi Karisa Ngala for Plot No. 1629 measuring 0.6 hectares. Of note is that the letters are not letters of allotment, but are all letters of offer.

[38] The letters of offer all indicated that the offer was valid for 90 days within which a deposit of 10% was to be paid. There was no evidence that any of the three purported allottees accepted the offers to them or paid the 10% deposit, or that they were actually issued with

letters of allotment. In the circumstances the 2nd and 3rd respondents failed to adduce evidence to confirm the validity of the agreement that they entered into as this agreement was anchored on purported allotments which were not established.

[39] In his affidavit the 2nd respondent made reference to planning, mapping, demarcation and identification of the squatters in the Jimba Settlement Scheme in 1986, pursuant to which the three plots were consolidated into one plot known as Plot No. 400 measuring 1.6 hectares. There is no evidence as to who did the mapping, demarcation and identification of the squatters or the consolidation of the three plots into one, nor has the 2nd respondent revealed the source of his information. The 2nd respondent also made reference to and annexed a copy of the list of beneficiaries of Jimba Squatter Settlement Scheme prepared by the Land Adjudication and Settlement Department. The 2nd respondent did not reveal who prepared the list or how he (i.e. 2nd respondent) came to be in possession of it. Nor was any witness called from the Land Adjudication and Settlement Department to produce the list. In the circumstances the evidence could not be relied upon by the Court as it was unverified.

[40] In addition, the 2nd respondent also relied on a voucher purported to be evidence of an outright purchase made by the 1st respondent in regard to Plot No. 1028. Our perusal of this document reveals that the plot number on the document appears to have been interfered with. Without verification from the Land Adjudication and Settlement office where the payment was allegedly made, the document could not be relied upon.

[41] The statement made by this Court in **Elizabeth Kamene Ndolo v George Matata Ndolo [1996] eKLR** on proof of fraud is instructive:

> ***"We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases."***

[42] We reiterate that allegations of fraud are serious allegations basically imputing a criminal intent. Evidence relating to such allegations must be critically analysed. It was for the 2nd and 3rd respondents who were alleging that the 1st respondent was not allotted the suit property and that his registration was procured through fraud and misrepresentation to establish that fact on the higher standard required. As we have endeavoured to demonstrate above, the evidence adduced by the 2nd and 3rd respondents fell far short of proving any fraud and therefore the 2nd and 3rd respondents failed to discharge the burden of proof and the standard of proof, as required of them.

[43] Furthermore, the green card that was produced by Joseph showed that by 21st June 2013 when the Commissioner of Lands purported to issue a letter of allotment to the 2nd and 3rd appellants, the suit property had long been allotted and a title issued to 1st respondent, and the suit property had changed hands several times. The letter of allotment from the Commissioner of Lands could not confer any interest as the Government no longer had any interest in the suit property nor was the suit property available for allocation as it had become private property.

[44] We cannot put the position in this matter any better than the Court did when dealing with a similar situation in **Benja Properties Limited vs. Syedna Mohammed Burhannudin Sahed & 4 others** (supra). We reproduce the relevant abstract of that judgment.

> ***"21. The foundation of the appellant's claim is that the Commissioner of Lands allotted the suit land to the original four allottees who subsequently sold it to the appellant. This may be so; however, the legal question is, was there unalienated government land capable of being allotted to the original four allottees? The trial judge answered this question in the negative. We concur with the court's finding. The 1st, 2nd and 3rd respondents' title to the suit property has its root of title to a grant and title issued in 1907 and 1911. By various deeds of assignment, the 1st respondent became the registered proprietor of LR No. 209/136/269 registered in 1911 as N64 428/1 20772 while the 2nd and 3rd respondents are registered proprietors of LR No. 209/136/239 registered in 1907 as N64 425/1 20769. The legal effect of the registrations***
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> ***made in 1907 and 1911 was to convert the suit property at that time from un-alienated government land to alienated government land with the consequence that the suit land became private property and moved out of the ambit and confines of the GLA. This made the suit property unavailable for subsequent allotment and alienation by the Commissioner of Lands or the President of Kenya. The appellant's title to the suit property was thus anchored on land that was not unalienated government land. We concur with the trial judge's finding that 'the suit land having been owned privately was not GLA land, and was not available for alienation. Its alienation was illegal and void ab initio.'***

22. We hasten to add that the issue in this case is not a question of double allotment of land. Double allotment occurs when a specific unalienated government land is allotted to two different persons. In this case, there is no unalienated government land to be allotted. What we have is a purported allotment of private property – land that is neither government land nor unalienated government land."

[45] We find that the learned Judge misapprehended the pleadings and misdirected himself in material particular. He also failed to take into account relevant matters that he ought to have taken into account. As a result, he erroneously dismissed the appellant's petition when it was evident that the appellants were the proprietors of the suit property and that the 2nd and 3rd respondents had failed to prove that the appellants' ownership was rooted on a title procured by 1st respondent through fraud. In our view the appellants were entitled to the declaratory orders, order of cancellation, order of prohibition, and order of injunction sought in prayers (a),(b), (c), and (d) of their petition.

[46] As regards the appellants' claim for Kshs45,581/-, although it appears that the claim was a special damage claim the same was not specifically pleaded. At paragraph 27 of the petition, the appellants talked of a fee note of Kshs45,581/-. A proforma invoice for Kshs 48,581/- and what appears to be a receipt superimposed on a document from Nation Media Group Limited, is annexed to the affidavit sworn in support of the petition. There is nothing to show that the appellants made the payments either to the advocate or to Nation Media. The claim was for loss incurred and therefore it ought to have been specifically proven.

[47] As regards the claim for damages, the appellants brought their claim by way of a constitutional reference. It is therefore a claim in public law and not a claim in tort anchored on private law. Under Article 23 of the Constitution the High Court had the liberty to grant any appropriate relief which includes an order for compensation. The compensation is for the violation of the fundamental rights and therefore may not necessarily compensate the petitioner for the damages suffered. In this case the appellants swore in the supporting affidavit that they suffered damages as a result of an attack by a mob, some of who were arrested and charged in a criminal court. Although the appellants believed that the mob were acting "at the behest of the 2nd and 3rd respondent" there was nothing to prove this. There was evidence that an allotment letter for the suit property was issued to the 2nd and 3rd respondent and that a lease was prepared by the 4th respondent and forwarded to the 5th respondent for registration. However, the lease was never registered precisely because there was already a title to the suit property in the name of the appellants. In the circumstances the appellants did not suffer much in terms of material damage. The declaratory orders, the order of prohibition and injunction proposed would be sufficient to vindicate the threatened violation of the appellants' constitutional rights to property.

[47] For these reasons we allow the appeal, set aside the judgment of the trial court and substituted thereto an order allowing the appellants' petition to the extent of issuing declaratory orders, order of cancellation, order of prohibition, and order of injunction as sought in prayers (a), (b), (c), and (d) of the petition. The cross appeal of the 2nd and 3rd respondent is dismissed with costs to the appellants. The 2nd and 3rd appellants the costs of the appeal. respondents shall also pay to the appellants the costs of the suit in the ELC and costs of this appeal.

These shall be the orders of this Court.

Dated and Delivered at Malindi this 28th day of November, 2019.

HANNAH OKWENGU

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR