



**IN THE COURT OF APPEAL**

**AT ELDORET**

**(CORAM: ASIKE-MAKHANDIA, KIAGE & OTIENO-ODEK, JJ. A)**

**CIVIL APPEAL NO. 115 of 2017**

**BETWEEN**

**PHILEMON L. WAMBIA.....APPELLANT**

**AND**

**GAITANO LUSITSA MUKOFU.....1<sup>st</sup> RESPONDENT**

**ATTORNEY GENERAL.....2<sup>nd</sup> RESPONDENT**

**THE SETTLEMENT FUND TRUSTEES....3<sup>rd</sup> RESPONDENT**

*(Being an appeal from the judgment of the Environment and Land Court at Kitale, (E. Obaga, J) dated 31<sup>st</sup> July, 2017*

*in*

*ELC No. 151 of 2007)*

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**JUDGMENT OF THE COURT**

1. By a Complaint dated 18<sup>th</sup> October 2007, the 1<sup>st</sup> respondent filed suit against the appellant seeking an order to evict him from Land Parcel No. Trans Nzoia/Maridadi/395 (hereinafter referred to as 'the suit property').
2. The 1<sup>st</sup> respondent averred that at all material times, he was the registered proprietor of the suit property with a title deed in his name issued on 18<sup>th</sup> October 1996. It was averred that the appellant without any colour of right or justification trespassed onto the suit property and unlawfully constructed some structures thereon.
3. By a Statement of Defence and Counterclaim dated 3<sup>rd</sup> December 2007, the appellant denied trespassing onto the suit property. He averred that he was the lawful owner of the suit property having been allotted the same by the Settlement Fund Trustees (3<sup>rd</sup> respondent) on 2<sup>nd</sup> January 1984. That upon allotment, he took immediate possession of the suit property in 1984. The appellant averred that he has been in continuous possession and occupation of the suit property to this date. That he paid the Settlement Fund Trustees the entire loan of Ksh. 6,100/=. That in 1996, he realized that the 1<sup>st</sup> respondent had fraudulently obtained a title deed to the suit property by misrepresenting to the Land Registrar that he was the owner thereof. The appellant therefore counter-claimed for a declaration that he is owner of the suit property and the 1<sup>st</sup> respondent's title be cancelled and a fresh title deed be issued in his name.
4. The 1<sup>st</sup> respondent filed a defence to the counter claim averring that the appellant had never been in possession of the suit property. He reiterated that he was the lawful registered proprietor of the property.
5. A Third Party Notice was issued enjoining the Settlement Fund Trustee (SFT) to the suit. SFT filed a Third Party Statement of Defence dated 14<sup>th</sup> August 2013. The SFT admitted that it was the original owner of the suit property and that it lawfully and procedurally transferred the suit property to the 1<sup>st</sup> respondent. That if at all the appellant was in possession of the suit property, the said possession was not authorized by the SFT. That the SFT never authorized the appellant to trespass on the suit property that belongs to the 1<sup>st</sup> respondent.

6. The appellant filed a reply to the Third Party Statement of Defence. In the reply, the appellant averred that the SFT is the cause of the confusion and problems relating to the suit property. That the SFT illegally transferred the property to the 1<sup>st</sup> respondent when it had already allotted the suit property to the appellant. The appellant sought indemnity and or contribution from the SFT for any liability to the 1<sup>st</sup> respondent.

## RELEVANT BACKGROUND FACTS

7. The facts relevant to the resolution of the dispute between the parties are discernible from the testimony of three key witnesses.

8. The 1<sup>st</sup> respondent, **Gaitan Litsutsa Mukofu**, who was the plaintiff before the trial court, testified as follows:

*I am a retired civil servant.... I was working with the Ministry of Lands. I am a resident of both Kakamega and Nairobi. I bought this land in 1986 from a one Joseph Muturi Muturania. I have a sale agreement with me.... The agreement is dated 4<sup>th</sup> February 1986. The plot had been allocated to Muturi Muturania. I have a charge from the Settlement Fund Trustees in the name of Muturi Muturania. I also have a letter dated 7<sup>th</sup> May 1986 which was copied to me. It was forwarding application for consent of Kwanza Land Control Board.... I also have a letter dated 24<sup>th</sup> July 1986 which was forwarding the consent which was granted..... I have a certificate of outright purchase confirming that I am the allottee of Plot No. 395 at Maridadi. I have a title deed with respect to the suit property Trans Nzoia/Marida/395 in my name..... The title deed was issued on 18<sup>th</sup> October 1996. I pray for an order of eviction of the defendant from my land. I produce all the documents as exhibits.*

*I went to the suit land in 1986. I went to the site before I bought the land. I visited the site in 1985. I did not find anyone in occupation of the land. There was no one who was ploughing the land. I was working with the Ministry of Lands. I was a land officer. I was in the land administration division.... Muturi Muturania used to work with the Ministry of Lands as a valuer. It is true once one is allocated land, a file has to be opened. There was a loan to be repaid because the plot was in a settlement scheme.... I bought the plot from the original allottee. The allottee had not completed paying the loan when I bought the land. I did not confirm from the lands file whether the same plot had been allotted to someone else. I have never stayed on the suit land. I have written several letters to the defendant to move out.*

9. The appellant, **Philemon Wambia** (DW1 before the trial court), testified as follows:

*I am Philemon Lumbasia Wambia .... I am a retired teacher. I am now engaged in farming. I do farming on Plot No. 395 at Maridadi Farm. The plot is five acres. I got the plot from the Settlement Fund Trustees. This is after I had made inquiries from the local office of the Settlement Fund Trustee. I was referred to Nairobi where I was allocated the land. This was in 1984. I was given an allotment letter dated 2<sup>nd</sup> January 1984 (sic). I wish to produce the allotment letter and the charge as defence exhibit. The charge is dated 2<sup>nd</sup> January 1984. The allotment letter is dated 1<sup>st</sup> January 1986. I took possession of the plot in 1984. The land was vacant when I took possession. I paid the SFT loan in full. I used to pay Ksh. 315/= per month which was deducted from my salary. I wish to produce the receipts as exhibits. The loan deducted was effected on 2<sup>nd</sup> April 1988. I cleared the loan in April 1991. I was expecting to get a letter of discharge from the Ministry of Lands and Settlement. However, I got a letter dated 9<sup>th</sup> July 1991 informing me that there was confusion and the plot did not belong to me..... I do not have title to the land. It is the plaintiff who has title. The plaintiff obtained the title because he was working with the Ministry of Lands. The plaintiff did not pay for the loan of the land. I am the one who paid the loan. I was the one on the land when the plaintiff got the title.... The plaintiff must have used his position in the Ministry of Lands to get the title. I cleared the loan. I have never been refunded any monies.*

10. The SFT gave evidence through the testimony of a **Third Party witness, Mr. Francis Obiria Oseko** who testified as follows:

*I am the current Land Adjudication and Settlement Officer Trans Nzoia County. I have parcel file for Plot No. 395 Maridadi Settlement Scheme. The first allottee of the plot is Joseph Muturi Muturania. Joseph was issued with an allotment letter dated 25<sup>th</sup> July 1985. I wish to produce it as Third Party Exhibit. Joseph paid 10% of the required amount. Joseph made further payment until he completed the payment. He later sold the plot to Gaitan Litsutsa Mukofu. Joseph sought consent of the Land Control Board through an application dated 7<sup>th</sup> May 1986. Consent of the Board was issued on 24<sup>th</sup> June 1986. Joseph signed transferring the land to Gaitan Mukofu. The transfer is dated 30<sup>th</sup> April 1986. The loan for the property had not been cleared. The loan was transferred to Gaitan Mukofu.....Gaitan Mukofu was issued with a certificate of outright purchase dated 24<sup>th</sup> September 1991.*

*In 1994, Maridadi Settlement Scheme was registered. The allottee paid for the title deed and a title deed was accordingly issued. Gaitan was registered as the owner of the land on 18<sup>th</sup> October 1996.*

*There are no documents in the file to show that Philemon Wambia applied and was allocated Plot No. 395 at Maridadi Settlement Scheme. We do not have any of the defence exhibits documents in our file..... According to the records that we have, Plot No. 395 belongs to Gaitan Litsutsa Makofu. The defendant's allotment letter is suspect because no money payable is indicated and the receipt number is not indicated. This allotment letter is signed by one G. Muigai. G. Muigai is not known to the Settlement Office. The allotment letters are kept in the Settlement Office at Nairobi. The defendant's allotment letter is in respect of Plot 395 at Maridadi Settlement Scheme. The allotment letter is dated 2<sup>nd</sup> January 1984. The principal amount was Ksh. 6,100/=. G. Muigai has never been a settlement officer in Trans Nzoia. .... It is not true Philemon Wambia's documents were removed from the file at the Lands Office. I do not have a letter informing Wambia that there was a problem with Plot No.395 prior to 1991.*

11. Upon hearing *viva voce* evidence *inter alia* from the above key witnesses, the learned judge delivered a judgment ordering eviction of the appellant from the suit property. The appellants' claim for indemnity against the 3<sup>rd</sup> respondent was also dismissed. In relevant excerpts, the judge expressed himself and held as follows:

[15] It is clear that the defendant's documents are questionable. The said documents are not in the records and he did not bother to call any person from the head office where he allegedly obtained the documents from. The scheme was administered from the office on the ground. The defendant decided to go to the headquarter to get allocation from there. He was given documents which are not genuine. If the documents were genuine, he should have called those who gave him the documents. On the plaintiff's part, the Trans Nzoia Land Adjudication and Settlement Office confirmed that Muthurania was the one who was allocated the plot. I therefore find that the lawful allottee of the suit land was Muthurania....

[16] The defendant alleged that the plaintiff obtained registration of the suit land in his name in a fraudulent manner. The defendant enumerated the particulars of fraud.... Fraud is a serious allegation which requires proof beyond a balance of probabilities but not beyond reasonable doubt.....

[18] The plaintiff in this case bought the suit land from Muthurania. The process of transfer followed all the requirements of the law including the consent of the Land Control Board. ... There is a sale agreement which shows that the plaintiff paid Ksh. 29,000/=. The reason why the Board decided to indicate the consideration as a gift is not known and that cannot be attributed to the plaintiff as an indication of fraud. If this was meant to deceive the tax authorities that there was no monetary value for purposes of stamp duty, that cannot be a fraud intended for the defendant. The defendant has absolutely failed to prove any of the particulars of fraud attributed to the plaintiff.....

[20] The plaintiff is the registered owner of the suit land. The defendant has not adduced any evidence to show that the plaintiff was involved in any corrupt scheme or fraudulent activity towards the acquisition of the title.....It is the defendant who should be blamed for attempting to take land which had been allotted to Mr. Muthurania.....

[22] In the instant case, the documents show that Muthurania was allocated the land on 25<sup>th</sup> July 1985. He thereafter sold his interest in the property to the plaintiff who pursued and obtained title. The defendant was given allotment on the same land on 1<sup>st</sup> August 1986 but not even started paying for it until 1988 long after Muthurania had met the conditions in respect of the land which is the subject of the case. The defendant brought witnesses who claimed that he took possession in 1984. That he was shown the plot by the area chief and village elder. The evidence of these witnesses is not credible. It was contradictory... The proper procedure is that once one is allocated land, he is taken to the ground in the company of the SFT officials and a surveyor. I therefore find that there was no fraud involved in acquisition of the title by the plaintiff.

12. Aggrieved by the judgment of the trial court, the appellant has lodged the instant appeal citing the following grounds:

- (i) The judge erred in allowing the 1<sup>st</sup> respondent's case when there was overwhelming evidence that the title deed held by the 1<sup>st</sup> respondent was obtained by fraud.
- (ii) The judge erred in failing to find that the appellant had been the first to be allocated the suit property and he paid off the loan to the 3<sup>rd</sup> respondent.
- (iii) The judge failed to appreciate the fact that the appellant had been in possession and occupation of the suit property since 1984.
- (iv) The judge erred in law when he held that the appellant was not entitled to indemnity from the 3<sup>rd</sup> respondent.
- (v) The judge failed to analyze the evidence as presented and failed to reach a just decision.

13. At the hearing of this appeal, learned counsel Ms Beatrice Munialo appeared for the appellant. Learned counsel Mr. G. Korongo appeared for the 1<sup>st</sup> respondent. Learned Litigation Counsel Mr. Dennis Wabwire appeared for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.

#### **APPELLANT'S SUBMISSIONS**

14. The appellant filed written submissions dated 12<sup>th</sup> October 2019. Counsel rehashed the background facts to the dispute between the parties. It was submitted the trial judge erred in dismissing the appellant's counterclaim and holding that the appellant was not entitled to indemnity from the 3<sup>rd</sup> respondent. Counsel reiterated that the appellant was allotted the suit property by the 3<sup>rd</sup> respondent on 2<sup>nd</sup> January 1984. That immediately upon allotment, the appellant took possession of the suit property. That from 5<sup>th</sup> January 1984, the appellant started paying a monthly sum of Ksh. 315 towards the loan to the SFT that was given on allotment of the land. That the sum of Ksh. 315 was religiously deducted from the appellant's salary by his employer, the Teachers Service Commission. That the appellant and his witnesses testified he had been in possession of the suit property. That the SFT witness Mr. Francis Obiria Oseko admitted that the 1<sup>st</sup> respondent had never been in occupation of the suit property. Counsel emphasized that the 1<sup>st</sup> respondent was working at the Lands Office and he used his position to obtain the title to the suit property. It was urged the trial judge erred in ordering eviction of the appellant from the suit property when in fact it is the appellant who paid the SFT loan and has been in occupation of the suit property from 1984 to date.

#### **1<sup>st</sup> RESPONDENT'S SUBMISSIONS**

15. The 1<sup>st</sup> respondent filed written submissions dated 15<sup>th</sup> October 2019. He submitted that there was no contention that title to the suit property is in the name of the 1<sup>st</sup> respondent. That there is also no contention that the appellant is in occupation of the suit property.

16. In his submission, the 1<sup>st</sup> respondent identified *inter alia* two critical issues for determination in this appeal namely: who was the lawful allottee of the suit property and whether the appellant was in lawful occupation of the suit property.

17. The 1<sup>st</sup> respondent urged that he purchased the suit property from the first allottee who was Mr. Joseph Muturi Muturania. That the Third Party witness Mr. Francis Obiria Oseko confirmed that the first allottee was Mr. Muturania who also lawfully obtained the consent of the Land Control Board to sell the suit property to the 1<sup>st</sup> respondent. Counsel emphasized that the trial court correctly held that no fraud was proved against the 1<sup>st</sup> respondent.

## **2<sup>nd</sup> and 3<sup>rd</sup> RESPONDENTS SUBMISIONS**

18. Litigation Counsel Mr. Dennis Wabwire appearing for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents urged us to dismiss the appeal. It was urged that the dispute before the trial court was between the appellant and 1<sup>st</sup> respondent.

19. Counsel submitted that the evidence on record shows that the appellant failed to establish that he applied to the SFT to be allocated the suit property. That the suit property having been government land, there had to be an application for allotment that was to be considered. That the appellant failed to explain how a charge document in respect of the suit property was allegedly executed on 2<sup>nd</sup> January 1984 yet the allotment letter in his possession is dated 1<sup>st</sup> January 1986. That an allotment letter is a primary document which must be prepared first before a charge can be created. That the anomaly in the dates between the charge instrument and the appellant's letter of allotment shows that the appellant's documents were not genuine. That it is common knowledge that the letter of allotment though executed by the Director of Land and Adjudication in Nairobi, the said letter is issued through the land adjudication and settlement officer in the District where the scheme is located. That the appellant confirmed he had never visited the land adjudication and settlement offices in Trans Nzoia.

20. It was further submitted that even if the appellant's letter of allotment were to be considered as genuine, he never complied with the terms and conditions of payment from 1<sup>st</sup> January 1986 until 1988 when he started making payment through salary deductions by his employer, the Teachers Service Commission. That it is common practice for the letter of allotment to be valid for 90 days. That the appellant never made any payment for a period 90 days and thus never complied with the terms and conditions of allotment. That the allotment letter held by the appellant cannot impeach the 1<sup>st</sup> respondent's title because the said allotment letter has no authenticity and its terms and conditions were not complied with.

21. It was further submitted that the trial court did not err in finding that fraud was not proved on the part of the 1<sup>st</sup> and 3<sup>rd</sup> respondents. That all procedures for acquisition of title to the suit property were followed by the 1<sup>st</sup> respondent. That the 1<sup>st</sup> respondent had consent from the relevant Land Control Board to purchase the suit property.

22. In concluding his submissions, counsel reiterated that the official records at the Lands office show that the appellant never applied for nor was he allocated the suit property by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. That the 3<sup>rd</sup> respondent never gave the appellant authority to make payments in respect of the suit property. That when the 3<sup>rd</sup> respondent noted the appellant was making payment for the suit property, he was advised to visit the SFT offices but he never did so. Counsel concluded that the appellant did not prove his case against the respondents on a balance of probabilities.

## **ANALYSIS and DETERMINATION**

23. We have considered the grounds of appeal, submissions by both counsel, the authorities cited and the law. As this is a first appeal, we are guided by the principles stated in *Ephantus Mwangi and another –v- Duncan Mwangi (1982-1988) 1 KAR 278*, *Williamsons Diamonds Ltd –v- Brown (1970) EA 1* and *Selle –v- Associated Motor Boat Company Limited (1968) EA 123*, that in a first appeal this Court is obliged to reconsider the evidence, assess it and make appropriate conclusions about it, remembering that it had not seen or heard the witnesses and make due allowance for that.

24. A ground urged in this appeal is that the trial judge erred in failing to analyze the evidence presented in court and to reach a just decision. We have appraised the judgment of the trial court to determine if the judge properly analyzed the evidence on record. The record shows that the appellant gave evidence and called several witnesses. On the other hand, the 1<sup>st</sup> respondent testified on his own behalf and the SFT called a Third Party Witness **Mr. Francis Obiria Oseko**. The learned judge in evaluating the evidence on record did comment on the credibility of the appellant's witnesses. In this regard, the judge stated:

*The defendant brought witnesses who claimed that he took possession in 1984. That he was shown the plot by the area chief and village elder. The evidence of these witnesses is not credible. It was contradictory...*

25. The Supreme Court in **Gatirau Peter Munya - v - Dickson Mwenda Kithinji & 3 others [2014] eKLR; Petition No. 2B** stated that an appeal court expressed:

*[82] Flowing from these guiding principles, it follows that a petition which requires the appellate Court to re-examine the probative value of the evidence tendered at the trial Court, or invites the Court to calibrate any such evidence, especially calling into question the credibility of witnesses, ought not to be admitted. We believe that these principles strike a balance between the need for an appellate Court to proceed from a position of deference to the trial Judge and the trial record, on the one hand, and the trial Judge's commitment to the highest standards of knowledge, technical competence, and probity in electoral-dispute adjudication, on the other hand.*

26. In the instant matter, the trial court was better placed and had the opportunity to consider the credibility of all witnesses who appeared before the court. A finding on credibility of the appellant's witnesses has been made and guided by the dicta of the Supreme Court in

**Gatirau Peter Munya -v- Dickson Mwenda Kithinji & 3 others (supra)** we find no reason to doubt the trial court's finding that the appellant's witnesses were not credible.

27. We now turn to consider the critical issue of letter of allotment. Both the appellant and 1<sup>st</sup> respondent produced letters of allotment SFT.

28. The appellant contends that he received a letter of allotment of the suit property dated 2<sup>nd</sup> January 1984 from the SFT offices in Nairobi. However, the appellant's letter of allotment is dated 1<sup>st</sup> January 1986.

29. On the other hand, the 1<sup>st</sup> respondent purchased the suit property from one Joseph Muthurania whose letter of allotment is dated 25<sup>th</sup> July 1985.

30. The appellant asserts that since his letter of allotment is dated 2<sup>nd</sup> January 1984 (*sic*) and that of Mr. Joseph Muthurania is dated 25<sup>th</sup> July 1985, then he is the first allottee of the suit property. That the trial court erred in failing to find as such.

31. As between the appellant and Mr. Muthurania who was the first allottee of the suit property? In answering the question, the trial court held as follows:

*[22] In the instant case, the documents show that Muthurania was allocated the land on 25<sup>th</sup> July 1985. He thereafter sold his interest in the property to the plaintiff who pursued and obtained title. The defendant was given allotment on the same land on 1<sup>st</sup> August 1986 but not even started paying for it until 1988 long after Muthurania had met the conditions in respect of the land which is the subject of the case.*

32. From the foregoing statement, the trial court arrived at a finding of fact that the first allotment was to Mr. Joseph Muturi Muthurania. The appellant faults the trial court for failing to find that the first allotment was to the appellant on 2<sup>nd</sup> January 1984.

33. We have considered the appellants ground of appeal as to who was the first allottee of the suit property. The factual dilemma is that the Third Party witness, Mr. Oseko the Land Adjudication and Settlement Officer denied the authenticity and existence of the appellant's letter of allotment dated 2<sup>nd</sup> January 1984. In his testimony, he stated that the official land parcel file for the suit property does not contain any of the letters referred to by the appellant and tendered in court as defence exhibits.

34. On this issue, the learned judge expressed himself as follow:

*[15] It is clear that the defendant's documents are questionable. The said documents are not in the records and he did not bother to call any person from the head office where he allegedly obtained the documents from. The scheme was administered from the office on the ground. The defendant decided to go to the headquarter to get allocation from there. He was given documents which are not genuine. If the documents were genuine, he should have called those who gave him the documents.....*

35. In the persuasive High Court case of **Gitwany Investment Limited -v- Tajmal Limited & 2 others, (2006) eKLR, Lenaola, J. (as he then was)** correctly stated:

*[46]... the title given to Gitwany in the first instance and which I have held to be absolute and indefeasible as regards the suit land is the earlier grant and in the words of the Court of Appeal in Wreck Motors Enterprises vs. commissioner of Lands, C.A. No. 71/1997 (unreported) – is the “grant [that] takes priority. The land is alienated already.” This decision was gain upheld in Faraj Maharus vs. J.B. Martin glass Industries and 3 others C.A 130/2003 (unreported). Like equity keeps teaching us, the first in time prevails so that in the event such as this one where, by a mistake that is admitted, the Commissioner of Lands issues two titles in respect of the same parcel for land, then if both are apparently and in the fact to them, issued regularly and procedurally without fraud save for the mistake, then the first in time must prevail. It must prevail because without cancellation of the original title, it retains its sanctity....*

36. On our part, we have considered the evidence on record on the two letters of allotment. The evidence on record shows that the first allotment to the suit property was to Mr. Joseph Muturi Muthurania. In **Benja Properties Limited -v- Syedna Mohammed Burhannudin Sahed & 4 others [2015] eKLR**, this Court stated that an allotment of an interest in land is a transaction *in rem* attaching to and running with a specific parcel of land.

37. In the instant case, the second letter of allotment to the appellant did not attach *in rem* to any land since there was no parcel upon which the allotment could attach. The first allotment to Mr. Joseph Muturi Muthurania effectively made the suit property unavailable for allotment to the appellant the more when the first allottee had fulfilled the terms and conditions of the allotment.

38. In this matter, we note that the appellant during cross-examination of the Third Party witness Mr. Oseko contended that the lands office had conspired to remove his documents from the file in order to assist the 1<sup>st</sup> respondent who used to work at the lands office.

39. In **Solomon Omwega Omache & another -v- Zackery O. Ayieko & 2 others (2016) e KLR** it was stated that the court has the duty to uphold the sanctity of the record at the Lands office. The official record at the lands office in relation to the suit property shows that the first allottee was Mr. Joseph Muturi Muthurania. The Third Party witness testified that the letter of allotment held by the appellant was not available at the lands office record file of the suit property. No evidence is on record to persuade us doubt the integrity and accuracy of the official records at the lands office.

40. The appellant further testified that he was given the letter of allotment from the Nairobi office of the SFT. The SFT witness testified that letters of allotment are issued at the Land Adjudication and Settlement Office located in the District where the settlement scheme is found. It is not in dispute that the appellant did not obtain his letter of allotment from the lands office in Trans Nzoia. The authenticity of the appellant's letter of allotment is therefore in issue. The legal adage is that he who alleges must prove. In this matter, the appellant has not tendered any evidence to support the counterclaim that his letter of allotment is genuine. When the authenticity and genuineness of the appellant's letter of allotment was raised, it was incumbent upon the appellant to prove the genuineness of his letter of allotment. As the trial court correctly stated, the appellant ought to have called a witness from the Nairobi Lands Office where he claimed he obtained the letter of allotment. Failure on the part of the appellant to call a witness from the lands office means that he did not prove the counter claim on a balance of probabilities.

41. On the issue of fraud, we have considered the evidence on record. Two items of evidence were tendered to support the allegation of fraud on the part of the respondents. The first is that the 1<sup>st</sup> respondent and Mr. Joseph Muturi Mutorania both worked at the lands office and thus used their office to obtain the letter of allotment and the title deed to the suit property. The other item of evidence is that the letter of the Land Control Board's consent indicates that the suit property was transferred from Mr. Mutorania to the 1<sup>st</sup> respondent as a gift. The appellant invited us to find that from these two items of evidence, the trial judge erred in failing to find that fraud had been proved.

42. In **Ndolo – v- Ndolo (2008) 1 KLR (G & F) 742** it was stated that in cases where fraud is alleged, it is not enough to simply infer fraud from the facts. In this matter, the appellant has invited us to infer fraud from the fact that the 1<sup>st</sup> respondent was working at the land office. Allegations of fraud cannot be proved by inference. There is no evidence on record showing a fraudulent act of omission or commission on the part of the respondents. Specific evidence proving fraud must be distinctly alleged, tendered and proved in court. We find that the trial court did not err in finding that the allegations on fraud were not proved.

43. Peradventure, even if we were to assume that the appellant's letter of allotment was authentic and genuine and we further assumed that the 1<sup>st</sup> respondent's letter of allotment was genuine and authentic, the legal principle stated in the persuasive case of **Stephen Mburu & 4 Others –v- Comat Merchants Ltd & Anor [2012] eKLR** by Kimondo, J becomes relevant. The learned judge correctly stated that:

*“... from a legal standpoint, a letter of allotment is not a title to property. It is a transient and [is] often a right or offer to take property”*

44. In this context, the 1<sup>st</sup> respondent by virtue of being registered owner of the suit land has vested rights and privileges which no person should interfere with. The position is reaffirmed in the persuasive case of **Ahmed Ibrahim Suleiman and Another -v- Noor Khamisi Surur (2013) eKLR** where it was stated that *“the plaintiff having been registered as proprietor and having been issued with a certificate of lease over title is entitled to the protection of the law.”* Persuaded by the sound legal principles enunciated above, we find that the letter of allotment issued to Mr. Joseph Muturi Mutorania was the first allotment and the 1<sup>st</sup> respondent through purchase lawfully acquired title to the suit property.

45. On the issue of indemnity, the appellant in the Third Party Notice sought indemnity from the SFT. Having held that the appellant did not have a genuine and authentic letter of allotment, it follows that the SFT cannot indemnify the appellant. However, we note that the SFT received monies from the appellant. Subject to the law on limitation, it is incumbent on the part of the appellant to pursue refund or any other appropriate remedy to recover any monies he paid to SFT.

46. For the foregoing reasons, we affirm and uphold the judgment of the trial court and find that this appeal has no merit and is hereby dismissed with costs.

**Dated and delivered at Eldoret this 28<sup>th</sup> day of November, 2019.**

**ASIKE-MAKHANDIA**

.....

**JUDGE OF APPEAL**

**P. O. KIAGE**

.....

**JUDGE OF APPEAL**

**OTIENO-ODEK**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR.**