Mwosoti v Wandia & another (Environment and Land Appeal E021 of 2023) [2024] KEELC 4425 (KLR) (30 May 2024) (Judgment)

Neutral citation: [2024] KEELC 4425 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND APPEAL E021 OF 2023

JO MBOYA, J

MAY 30, 2024

BETWEEN

MARY KWAMBOKA MWOSOTI ..... APPELLANT

AND

MARGARET W. WANDIA ..... 1ST RESPONDENT

CITY COUNCIL OF NAIROBI ..... 2ND RESPONDENT

JUDGMENT

1. The Appellant herein had hitherto filed a suit before the Chief Magistrate's Court, namely, Milimani MCELC No. 1203 of 2004 and in respect of which same [the Appellant] sought for various reliefs pertaining to and concerning L.R No. Nairobi/Block 63/515 [hereinafter referred to as the suit property].

2. Subsequently, the said suit, [details in terms of the preceding paragraph] was heard and determined vide Judgment rendered on the 25th of August 2023, whereupon the trial court [Chief Magistrate] found and held that the Appellant herein had failed to prove her claim to and in respect of the suit property. Consequently, the trial court proceeded to and dismissed the Appellant's suit.

3. On the other hand, the trial court proceeded to and allowed the Counterclaim which had been filed by the 1st Respondent, and who had similarly sought to be declared as the lawful and legitimate proprietor of the suit property.

4. Aggrieved and dissatisfied by the Judgment and Decree of the trial court dated 25th August 2023, the Appellant filed and lodged the instant Appeal vide a Memorandum of Appeal dated 18th September

2023, and in respect of which same, [Appellant] has highlighted six pertinent grounds of appeal as hereunder:

i. The learned trial magistrate erred in law and in fact in holding that the Certificate of Title held by the Appellant was obtained through fraud, when no evidence as to how the Appellant had participated had been tendered nor was any fraud established;

ii. The learned trial magistrate erred in law and in fact when she held that the 1st Respondent has validly proved her ownership when in fact the evidence tendered by the 1st Respondent did not satisfactorily prove the 1st respondent's ownership to the property;

iii. The learned trial magistrate erred in law and in fact when she held that the Appellant had not proved on a balance of probability the process in which she had acquired the Title when in real sense she had given uncontroverted evidence in that regard;

iv. The learned trial magistrate erred in law and in fact when she held that the Appellant had not paid any rent and all other outgoings due to the 2nd Respondent, when in fact the evidence on record demonstrated that it is only the Appellant who had been paying the same to the 2nd Respondent;

v. The learned trial magistrate erred in law and in fact when she held that the 2nd Respondent had confirmed that the records showed that the 1st Respondent was the registered owner of the property without any evidence in that regard, and furthermore without putting to task the 2nd Respondent why it continued to receive rates from the Appellant; and

vi. The learned trial magistrate erred in law and in fact when she condemned the Appellant to bear the costs of the suit when in fact there was overwhelming evidence on record to prove that the filing of the suit was necessitated and sustained by the 2nd Respondent's conduct and actions.

5. The Appeal beforehand came up for directions on 9th November 2023; with a view to ascertaining whether the Appellant had filed the Record of Appeal, and thereafter to issue directions in line with the provisions of Order 42 Rule 13 of the Civil Procedure Rules, 2010.

6. Notably, the Appellant duly confirmed that same had indeed filed the Record of Appeal and thereafter the court proceeded to and issued directions pertaining to and concerning the hearing and disposal of the Appeal. For coherence, the directions were to the effect that the Appeal beforehand be canvassed and disposed of by way of written submissions.

7. Other than the foregoing, the court thereafter circumscribed the timelines for the filing and exchange of the written submissions. Instructively, the Appellant proceeded to and filed written submissions dated 26th January 2024, whereas the 1st Respondent filed written submissions dated 13th March 2024.

8. Both sets of written submissions [details in terms of the preceding paragraph] form part of the record.

PARTIES' SUBMISSIONS:

a. Appellant's Submissions

9. Th Appellant filed written submissions dated 26th January 2024, and in respect of which the Appellant herein clustered the grounds of appeal into three categories, [groups] and thereafter proceeded to render her submissions on pointed issues.

10. In respect of grounds 1, 2, and 3 of the Memorandum of Appeal, learned counsel for the Appellant submitted that the trial court erred in law in finding and holding that the Appellant had neither laid nor placed before the court credible and plausible evidence to demonstrate the manner in which same [Appellant] acquired her Title to and in respect of the suit property.

11. At any rate, learned counsel for the Appellant submitted that the finding and holding of the learned trial magistrate was slanted and skewed insofar as the said findings are at variance with the totality of the evidence that was tendered by and on behalf of the Appellant.

12. Furthermore, learned counsel submitted that in proceeding to and in impugning the Appellant's Title to the suit property, the learned trial magistrate failed to appreciate that no fraud had been impleaded and/or particularized as against the Appellant and in any event, no evidence was tendered to establish and/or prove fraud.

13. Arising from the foregoing, learned counsel for the Appellant has therefore invited the Court to find and hold that the findings by the trial court leading to the cancellation of the Appellant's Title to the suit property are therefore erroneous and legally untenable.

14. To this end, learned counsel for the Appellant has cited and relied on various decisions inter alia: Demutila Nanyama Pururmu vs Salim Mohammed Salim 2021 eKLR, Kinyanjui Kamau vs George Kamau 2015 eKLR, and Ndolo vs Ndolo 2008 1KLR 742 respectively, to demonstrate that no finding anchored on fraud could have been arrived at by the trial court in the absence of appropriate pleadings and requisite particulars as pertains to fraud.

15. In respect of the second cluster of the grounds of appeal, namely, ground 5 of the Memorandum of Appeal, learned counsel for the Appellant has submitted that the learned trial magistrate failed to properly interrogate the evidence that was tendered by the 2nd Respondent as pertains to ownership of the suit property.

16. Further and in any event, learned counsel for the Appellant submitted that without proper interrogation and appreciation of the evidence by and on behalf of the 2nd Respondent, the trial court proceeded and erroneously held that the 2nd Respondent had resoundingly acknowledged and confirmed that the 1st Respondent was the lawful/registered owner of the suit property.

17. Nevertheless, learned counsel for the Appellant contended that had the learned trial magistrate appreciated the totality of the evidence, same [trial magistrate] would have arrived at a different conclusion insofar as it was the Appellant that held the Certificate of Title to the suit property and had been paying the Land rates thereto.

18. In respect of ground 6 of the Memorandum of Appeal, the learned counsel for the Appellant contended that the learned trial magistrate erred in law in condemning the Appellant to pay the costs of the suit beforehand, yet the filing of the suit was precipitated by inter alia, the actions of the 2nd Respondent who continued to receive land rates from the Appellant herein as pertains to and in respect of the Suit Property.

19. Furthermore, learned counsel for the Appellant submitted that the Appellant herein had a legitimate cause and/or basis in filing the instant suit taking into account that same [Appellant] was the bearer of a Certificate of Title over and in respect of the suit property.

20. Consequently and in view of the foregoing, learned counsel for the Appellant has challenged the propriety of the award of costs to and in favor of the 1st Respondent.

21. In support of her submissions as pertains to the question of costs, learned counsel for the Appellant has invoked and cited the decision in the case of Behan & Okero Advocates vs National Bank of Kenya Limited [2007] eKLR.

22. In a nutshell, learned counsel for the Appellant has therefore submitted that the Appellant has demonstrated that the decision of the learned trial magistrate was wrought with and replete of various errors, and thus worthy of being upset. In short, counsel has contended that the Appeal beforehand is meritorious.

b. 1st Respondent's Submissions

23. The 1st Respondent filed written submissions dated 13th March 2024, and wherein same [1st Respondent] has ventilated the submissions in three [3] clusters.

24. Firstly, learned counsel for the 1st Respondent has submitted that the Appellant herein did not tender and/or produce credible evidence to demonstrate the manner in which same [Appellant] acquired the Title to the suit property.

25. Furthermore, learned counsel for the 1st Respondent submitted that it is not enough to possess and waive a Certificate of Title. For good measure, learned counsel for the 1st Respondent posited that it was incumbent upon the Appellant to avail to the court the requisite documents underpinning the process leading to the issuance of the impugned Certificate of Title.

26. Nevertheless, counsel pointed out that despite being chargeable with the obligation [duty] to prove the root of her Title, the Appellant herein was content, nay, satisfied with waving the Certificate of Title and same [Appellant] imagined that the mere possession of such Certificate of Title would suffice.

27. To buttress the foregoing submissions, learned counsel for the 1st Respondent has cited and relied upon the holding in the case of Munyu Maina vs Hiram Gathiha Maina [2013] eKLR, where the Court of Appeal underscored the position that where a Certificate of Title is under challenge, it behooves the bearer thereof, [the Appellant herein not excepted] to justify the legality of the Title under reference.

28. In respect of ground 5 of the Memorandum of Appeal, learned counsel for the 1st Respondent submitted that the 2nd Respondent herein tendered and produced before the court documents which demonstrated that what now constitutes the suit property, was lawfully allocated to and in favor of the 1st Respondent.

29. Additionally, learned counsel for the 1st Respondent pointed out that the 1st Respondent was also able to place before the Honourable court the Letter of allotment, as well as documentary proof to show that same [1st Respondent] duly complied with the terms of the letter of allotment.

30. Pertinently, learned counsel for the 1st Respondent therefore invited the court to find and hold that the 1st Respondent had placed before the court plausible and cogent evidence to demonstrate the manner in which same [1st Respondent] acquired the suit property. In any event, learned counsel for the 1st Respondent contended that once a letter of allotment had been issued and the terms thereof complied with, the land in question ceased to be available for further allocation or alienation or at all.

31. In respect of ground 6 of the Memorandum of Appeal, learned counsel for the 1st Respondent has submitted that the trial court properly exercised her discretion in awarding costs to the 1st Respondent. For good measure, learned counsel invited the court to find and hold that the award of costs constitutes

an exercise of judicial discretion and that this court should be reluctant to interfere with the discretion as pertains to the award of costs.

32. Other than the foregoing, learned counsel for the 1st Respondent has submitted that the Appellant has neither placed before the court any basis to warrant interference with the discretion leading to the award of costs in favor of the 1st Respondent.

33. Premised on the foregoing, learned counsel for the 1st Respondent has submitted that the Appeal beforehand is devoid of merits and thus same, [Appeal] ought to be dismissed with costs to the 1st Respondent.

c. 2nd Respondent's Submissions

34. Though the 2nd Respondent was present and participated during the issuance of the directions pertaining to the manner of disposal of the Appeal, same [2nd Respondent] did not file any written submissions either within the prescribed timelines or at all.

35. Suffice to point out that the only submissions on record are the ones filed by the Appellant and the 1st Respondent and whose details have been highlighted elsewhere herein before.

ISSUES FOR DETERMINATION:

36. Having reviewed the pleadings that were filed by and on behalf of the parties, having appraised the record of Appeal; and the proceedings before the trial court and upon consideration of the written submissions filed by and on behalf of the parties, the following issues crystalize [emerge] and are thus worthy of determination:

i. Whether the Appellant herein placed before the court credible evidence to justify the process underpinning the acquisition of the suit property and the ultimate issuance of the Certificate of Title;

ii. Whether the Certificate of Title in favor of the Appellant was acquired unprocedurally and/or illegally and thus vitiated; and

iii. Whether the suit property lawfully belongs to the 1st Respondent or otherwise.

ANALYSIS AND DETERMINATION

ISSUE ONE (1)

Whether the Appellant herein placed before the court credible evidence to justify the process underpinning the acquisition of the suit property and the ultimate issuance of the Certificate of Title.

37. Before venturing to address the issue hereinbefore mentioned, it is imperative to note that this is a First Appeal and therefore, the mandate and jurisdiction of the court is circumscribed. In particular, though the court is called upon to re-evaluate and re-analyze the evidence that was placed before the trial court and to arrive at its own conclusion, the court must exercise due caution and deference noting that the court neither saw nor heard the witnesses who testified.

38. Furthermore, it is important to underscore that the manner in which the first appellate court is to deal with and interrogate the factual scenario is now well established. In this regard, it suffices to take

cognizance of the holding in the case of Selle Limited & Another vs Associated Motor Boat Limited 1968 EA where the Court stated and held thus:

> " ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an 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 this respect..."

39. Similarly, the scope and extent of the Court while dealing with a First Appeal was also highlighted and elaborated upon in the case of Abok James Odera T/A A. J Odera & Company Advocates vs J. P. Machira T/A Machira & Company Advocates [2013] eKLR, whereupon it was held that:

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2EA 212, wherein the Court of Appeal held inter alia that:-
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> "On a first appeal from the High Court, the Court of Appeal should 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. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence"

40. Having taken cognizance of the requisite principle[s] that governs the scope and mandate of the first appellate court in its endeavor in reviewing the judgment and/or decision of the court of first instance, [chief magistrate's court] it is now appropriate to venture forward and consider the factual scenario that was placed before the trial court and which was considered prior to and before the delivery of the judgment complained of.

41. To start with, it is import to state and underscore that it is the Appellant who had filed the suit before the Chief Magistrate's court, claiming that same [Appellant] is the lawful and legitimate proprietor of the suit property. Consequently and in this regard, it was therefore incumbent upon the Appellant to place before the court plausible and cogent evidence to prove her claim to and in respect of the suit property.

42. Put differently, the burden of proof, [namely of proving the claim before the court] laid on the Appellant and not otherwise. For coherence, the nature and extent of the burden placed on the shoulders of the Appellant are stipulated vide the provisions of Sections 107, 108, and 109 of the *Evidence Act* Chapter 80 Laws of Kenya.

43. The question that the court must grapple with and thereafter answer touches on and concerns whether the Appellant herein, [who was the plaintiff in the subordinate court] discharged the burden of proof as pertains to ownership of the suit property.

44. According to the Appellant, same [Appellant] entered into a Sale Agreement with one Juliet Wairimu, pertaining to and concerning the sale [purchase] of L.R No. Nairobi/ Block 63/515 [suit property]. Furthermore, the Appellant contended that the Sale Agreement was reduced into writing and same [sale agreement] was dated 26th January 2004.

45. Additionally, it was the evidence of the Appellant that prior to and/or before entering into the Sale Agreement, [details in terms of the preceding paragraph] same [Appellant] undertook a search at the Ministry of Lands and thereafter confirmed that the suit property belonged to and was registered in the name of Juliet Wairimu [Vendor].

46. Besides, the Appellant testified that after carrying out and undertaking the Search at the Lands Registry, same [Appellant] proceeded to and paid the sum of Kenya Shillings Seven Hundred Thousand Only [Kshs. 700,000], which was the agreed consideration.

47. Other than the foregoing, it was the testimony of the Appellant that subsequently, the Vendor [Juliet Wairimu] executed the Transfer instrument which was consented to and sealed by the Town Clerk of Nairobi City Council [now defunct].

48. Arising from the foregoing, the Appellant contended that same thereafter proceeded to and lodged the Transfer documents with the Chief Land Registrar, culminating into the Transfer and Registration of the suit property unto her. Instructively, the Appellant averred that same was thereafter issued with the Certificate of Lease, a copy of which was tendered and produced in evidence before the court.

49. Be that as it may, it is important to recall that the Appellant herein did not tender and/or produce before the court a copy of the Sale Agreement which was [sic] entered into and executed between Juliet Wairimu [Vendor] and herself [Appellant].

50. To my mind, the existence of the Sale Agreement, [if any], was critical in determining whether or not there was compliance with the provision of Section 3(3) of the Law of Contract Chapter 23 of the Laws of Kenya, whose contents are couched in mandatory terms.

51. For the sake of brevity, it suffices to reproduce the provisions of Section 3(3) of the Law of Contract [supra].

52. Same are reproduced as hereunder:

> No suit shall be brought upon a contract for the disposition of an interest in land unless—
>
> (a) The contract upon which the suit is founded—
>
> i. is in writing;
>
> ii. is signed by all the parties thereto; and
>
> (b) The signature of each party signing has been attested by a witness who is present when the contract was signed by such party:
>
> Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the *Auctioneers Act* (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.

53. To the extent that the Appellant herein neither tendered nor produced before the court the Sale Agreement, if any, it is difficult to ascertain whether the contract leading to the acquisition of the Certificate of Title in favor of the Appellant was lawful and legitimate.

54. Secondly, it was incumbent upon the Appellant herein to demonstrate that her predecessor in title, namely Juliet Wairimu, had indeed been allocated the suit property by the 2nd Respondent herein. However, it is worthy to recall that the Appellant neither tendered nor produced a copy of the letter of allotment, if any, that was ever issued to the Vendor.

55. At any rate, it is imperative to recall that the Appellant herein stated and averred that the Vendor did not avail unto her a copy of the letter of allotment.

56. Be that as it may, it is common ground that prior to and before one, the Appellant not excepted, can acquire a Certificate of Title, same must be issued with a letter of allotment by the allocating authority, in this case Nairobi City Council [now defunct]. For clarity, there is no way that Juliet Wairimu, who sold the suit property to the Appellant, could have acquired the suit property without same being allocated unto her.

57. In my humble view, the absence of a letter of allotment, which is the foundation upon which the Certificate of Title would have issued, clearly negates and vitiates the validity and propriety of the Certificate of Title that is held by and on behalf of the Appellant.

58. To buttress the foregoing exposition of the law, it suffices to take cognizance of the holding of the Court of Appeal in the case of *Waterfront Holdings Limited vs Kandie & 2 others (Civil Appeal 88 of 2019)* [2023] KECA 1223 (KLR) (6 October 2023) (Judgment), where the Court held that:

> " It is only after the issuance of the letter of allotment, and the compliance of the terms therein, that a cadastral survey can be conducted for the purpose of issuance of a certificate of lease. This procedural requirement was confirmed by the surveyor, PW3.
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> The process was also reinstated in the case of African Line Transport Co. Ltd vs. The Hon. Attorney General, Mombasa HCCC No. 276 of 2013 where Njagi J. held as follows:
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> "Secondly, all the defence witnesses were unanimous that in the normal course of events, planning comes first, then surveying follows. A letter of allotment is invariably accompanied by a PDP with a definite number. These are then taken to the department of survey, who undertake the surveying. Once the surveying is complete, it is then referred to the Director of Surveys for authentication and approval. Thereafter, a land reference number is issued in respect of the plot.132. A part development plan (PDP) can only be prepared in respect to Government land that has not been alienated or surveyed.'
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> This process is restated in African Line Transport Co. Ltd v The Hon. Attorney General, Mombasa, HCCC No.276 of 2003 [2007] eKLR where it was held that:
>
> "Planning comes first, then surveying. A letter of allotment is invariably accompanied by a PDP with a definite number, which would then be taken to the Department of Survey for surveying. Thereafter, it is then referred to the Director of Surveys for authentication and approval. It is after that process that a land reference number is issued in respect of the plot."

59. Simply put, without having tendered and produced before the trial court a copy of the letter of allotment, if any, that was ever issued in favor of one Juliet Wairimu [the Vendor], there is no way that the Appellant herein can state that same placed before the trial court credible evidence to vindicate her [Appellant's] acquisition of Title to the suit property.

60. Arising from the foregoing analysis, my answer to issue number one [1] is to the effect that the Appellant herein neither tendered nor produced before the trial court the requisite documents [evidence] to support the validity of the Certificate of Title in her name.

ISSUES TWO (2)

Whether the Certificate of Title in favor of the Appellant was acquired unprocedurally and/or illegally and thus vitiated.

61. To start with, it is common ground that a Certificate of Title is an end product and thus the justification as pertains to the validity and propriety of its acquisition must depend on the process [read procedure] that was followed prior to and before the issuance of the said Certificate of Title.

62. In any event, case law abound that the issuance of the Certificate of Title by itself does not confer ownership rights to and in favor of the bearer thereof. In particular, where such a certificate is challenged, then it behooves the holder thereof, in this case the Appellant, to demonstrate the process [read procedure] culminating into the issuance thereof.

63. Pertinently, the Court of Appeal in the case of Munyu Maina vs Hiram Gathiha Maina 2013 eKLR stated and held thus:

> "We have stated that when a registered proprietor's root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register."

64. Other than the foregoing decision, the Court of Appeal in the case of Funzi Development Ltd & others vs County Council of Kwale, Mombasa Civil Appeal No 252 of 2005 [2014] eKLR, also had occasion to speak to the significance of the process leading to the acquisition of title.

65. For coherence, the court stated and observed thus:

> "...a registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular. A court of law cannot on the basis of indefeasibility of title sanction an illegality or gives its seal of approval to an illegal or irregularly obtained title."

66. Without endeavoring to exhaust all the decisions where the significance of the process leading to the issuance of the Certificate of Title has been highlighted and amplified, it suffices to reiterate the holding of the Court of Appeal in the case of *Wambui v Mwangi & 3 others (Civil Appeal 465 of 2019*) [2021] KECA 144 (KLR) (19 November 2021) (Judgment), where it was observed that:

> "The jurisprudence relied upon by the appellant and which we find prudent not to replicate are as already highlighted above. We have given due consideration to them in light of the record as assessed herein by us. Our take on the same is that the jurisprudential thread running through all of them is that no court of law should sanction and pass as valid any title to property founded on: fraud; deceitfulness; a contrived decree; illegality; nullity; irregularity, unprocedurality or otherwise a product of a corrupt scheme."

67. From the foregoing analysis, there is no gainsaying that the mere holding of a Certificate of Title does not justify its propriety and validity. Indeed, the acquisition of Title to land is dependent on the process. Simply put, the means justifies the end as opposed to the Machiavellian principle which espouses the concept of the end justifies the means.

68. Having highlighted the foregoing jurisprudence that touches on and/or concerns the significance of process, I beg to state and underscore that the Appellant herein did not justify how same came to acquire and own the Certificate of Title. In this regard, it is crystal clear that without the requisite justification, the Title held and waved by the Appellant was acquired in vacuum.

69. Finally, even though the Appellant contended that no evidence was tendered to demonstrate that her Title was acquired vide fraud, however, I hold the position that there are two aspects to impugning a Title.

70. Firstly, a Title like the one held by the Appellant can be vitiated vide the provisions of Section 26 (1) (a) of the *Land Registration Act* 2012 [2016] and in which case, fraud and/or misrepresentation attendant to the acquisition of title must be established and proven. [See the Decision in the case of Dr. Joseph N.K Arap Ngok versus Moijo Ole Kieuwa [1997] eklr; Arthi Highway Developers Limited versus West End Butchery Limited and 6 Others [2015] eklr and Kuria Kiarie versus Sammy Magera [2018]eklr, respectively]

71. Secondly, a Certificate of Title like the one held by the Appellant herein can also be vitiated and/or negated by the invocation and application of the provisions of Section 26 (1) (b) of the *Land Registration Act* 2012, and in which case the process underpinning the acquisition of the title becomes paramount.

72. To my mind, the circumstances surrounding the process leading to the acquisition of the title by and in favor of the Appellant herein fall within the circumscription of the provisions of Section 26 (1) (b) of the *Land Registration Act* 2012 and hence, the learned trial magistrate was right in finding and holding that the process leading to the issuance of the Appellant's title was indeed vitiated by illegalities.

73. In a nutshell, I find and hold that the learned trial magistrate arrived at and reached a correct finding as pertains to the legality of the Certificate of Title held by the Appellant. In any event, the learned trial magistrate correctly appreciated and applied the legal principle espoused and highlighted in the case of Hubert L. Martin & 2 Others vs Margaret J. Kamar & 5 Others 2016 eKLR.

ISSUE THREE (3)

Whether the suit property lawfully belongs to the 1st Respondent or otherwise.

74. Other than the claim that was propagated by and on behalf of the Appellant, it is worth recalling that the 1st Respondent herein also laid a claim to ownership of the suit property. Consequently and in this regard, it is appropriate to interrogate the documentation held by and on behalf of the 1st Respondent and which underpin her claim to the suit property.

75. First and foremost, it was the evidence of the 1st Respondent that the suit property was lawfully and legally allocated unto her vide a letter of allotment dated 13th February 1992. Furthermore, the 1st Respondent averred that upon being issued with the letter of allotment, same [1st Respondent] proceeded to and complied with the terms of the letter of allotment.

76. As pertains to the compliance with the terms of the letter of allotment, the 1st Respondent tendered and produced before the Honourable court [the Trial Court] various receipts, inter alia the revenue receipt by the Nairobi City Commission [now defunct] which was issued on 4th March 1992.

77. To my mind, it is evident and apparent that upon being issued with the letter of allotment, the 1st Respondent herein proceeded to and made the requisite payments within the stipulated timelines alluded to under the letter of allotment. Notably, the payment under reference was made within the requisite 30-day period highlighted at the foot of the letter of allotment.

78. Pertinently, upon complying with the terms of the letter of allotment, the property underpinned by the letter of allotment stood alienated and indeed committed to the 1st Respondent herein and thus same [suit property] ceased to be available for further allocation or alienation.

79. To the extent that the suit property had already been allocated to and in favor of the 1st Respondent, [who tendered and produced before the court the letter of allotment and revenue receipts attesting to compliance with the terms of the letter of allotment], there is no way that the same plot/property could have been allocated to [sic] Juliet Wairimu, who reportedly sold the suit property to the Appellant in 2004.

80. To this end, I beg to adopt and reiterate the holding of the Court of Appeal in the case of Benja Properties Limited vs Syedna Mohammed Burhannudin Sahed & 4 others [2015] eKLR, where the Court held that:

> " The alienation to the 1st, 2nd and 3rd Respondents is the grant [that] takes priority; at the time another grant was being made to the appellant, the suit land had already been alienated; there was nothing for the 5th respondent to allot and alienate to the original allottees.
>
> In arriving at our decision, we note that an interest in land cannot be allotted, alienated or transferred when the specific parcel of land allotted is not in existence. Allotment of an interest in land is a transaction in rem attaching to and running with a specific parcel of land. In the instant case, the allotment by the Commissioner of Land to the original allottees did not attach in rem to any land since there was no parcel upon which the allotment could attach. What the 5th respondent, the appellant and the original allottees did was to engage in paper transactions without a parcel of land upon which any interest in land would attach and vest – it was paper transactions without any parcel of land as its substratum."

81. Furthermore, the legal position that land that has since been alienated cannot be re-allocated, [if at all] was also calibrated upon in the case of Philemon L. Wambia vs Gaitano Lusitsa Mukofu & 2 others [2019] eKLR, where the court stated thus:

> " 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.
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> 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 Muturania 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."

82. Instructively, once the suit property was allocated to and in favor of the 1st Respondent, who even proceeded to and complied with the terms of the letter of allotment, same [suit property] ceased to be available and hence could not (sic) be allocated to anyone else, including the Vendor who purported to sell same to and in favor of the Appellant herein.

83. Nevertheless and in any event, it is worthy to recall that the Appellant herein neither tendered nor produced before the court any letter of allotment [if at all any was ever issued]. Consequently, the letter of allotment to and in favor of the 1st Respondent remains the only legitimate letter of allotment that was tendered and placed before the court.

84. Before departing from the issue herein, it is also worth recalling that the 2nd Respondent [the allocating authority] tendered and produced before the court various documents including a comprehensive list of the allottees pertaining to and concerning the plot[s] at Jamhuri Phase II. For clarity, the name of the 1st Respondent is contained in the said list which the 2nd Respondent confirmed to have been the only list [inventory] speaking to the allocation of the plots.

85. For the avoidance of doubt, the 2nd Respondent herein stated and clarified that same did not issue any letter of allotment to and in favor of one Juliet Wairimu. Consequently and in this regard, it then means that without any letter of allotment having been issued to (sic) Juliet Wairimu, there is no way same [Juliet Wairimu] could have acquired the suit property.

86. In view of the foregoing, it is my finding and holding that the 1st Respondent herein is possessed of the requisite documentation pertaining to and concerning ownership to and respect of the suit property. Consequently and in this regard, it is the 1st Respondent who should have been issued with the Certificate of Title and not otherwise.

87. In sum, my answer to issue number three [3] is twofold. Firstly, the Certificate of Title which was issued to and is currently held by the Appellant is illegal, null and void. Indeed, the Certificate of Title came out of nothing and hence the doctrine of ex nihilo nihil fit [out of nothing comes nothing] applies.

88. Secondly, there is no gainsaying that the 1st Respondent has ably demonstrated her entitlement to and in respect of the suit property, by tendering and producing before the Court the requisite Document[s] underpinning her Rights to and in respect thereof.

FINAL DISPOSITION:

89. From the foregoing analysis, [details in terms of the preceding paragraphs] it must have become crystal clear and indeed evident that the Appellant has not established and/or demonstrated that the judgment of the trial court was vitiated by any error, either of commission or omission.

90. Conversely, it is imperative to outline and underscore that the judgment by the trial court indeed took cognizance of the salient facts, features and the evidence pertaining to the case beforehand [which was ventilated before the said court] and thereafter came to the correct conclusion.

91. In view of the foregoing, it is my finding and holding that the Appeal beforehand is devoid and bereft of merits and thus same [Appeal] is a candidate for dismissal. In short, the Appeal be and is hereby dismissed with costs to the 1st Respondent only.

92. For the avoidance of doubt, the judgment of the trial court rendered on 25th August 2023; be and is hereby affirmed in its entirety.

93. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF MAY 2024.

OGUTTU MBOYA,

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of:

Brian – Court Assistant.

Ms. Melissa Ng'ania for the Appellant;

Mr. Kiania Njau for the 1st Respondent

Mr. Munai for the 2nd Respondent