Kenya Agricultural Research Institute (KARI) v Farah Ali, Chairman Isahakia Self Help Group (Sued on His Own Behalf and on Behalf of Members of the Group) & another (Environment & Land Case 103 of 2019) [2024] KEELC 4964 (KLR) (27 June 2024) (Judgment)

Neutral citation: [2024] KEELC 4964 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ENVIRONMENT & LAND CASE 103 OF 2019

FM NJOROGE, J

JUNE 27, 2024

(FORMERLY NAKURU HCCC NO. 23 OF 2011)

BETWEEN

KENYA AGRICULTURAL RESEARCH INSTITUTE (KARI) ..... PLAINTIFF

AND

FARAH ALI, CHAIRMAN ISAHAKIA SELF HELP GROUP (SUED ON HIS OWN BEHALF AND ON BEHALF OF MEMBERS OF THE GROUP) ..... 1ST DEFENDANT

COMMISSIONER OF LANDS ..... 2ND DEFENDANT

JUDGMENT

1. On 24th February 2011, the Plaintiff filed a plaint dated 23rd February 2011 seeking the following reliefs against the Defendants: -

    a. A declaration that the letter of allotment dated 7th December 2010 in respect of Land Reference No. 5211/R in favour of the 1st Defendant is of no legal effect and is null and void ab initio and does not in any way nullify or in any way affect and or interfere with the Plaintiff's interest in and ownership rights to the Land Reference No. 5211.

    b. An order of unconditional delivery up of vacant possession of the said Land Reference No. 5211 to the Plaintiff.

    c. An injunction restraining the Defendants by themselves or through their agents, members, servants, employees or otherwise howsoever from issuing any certificate of title in respect of, transferring, disposing of, dealing in any manner whatsoever with Land Reference No. 5211

or any other parcel of land occupied by and used by the Plaintiff otherwise than by way of conveyance in favour of the Plaintiff.

d. Costs of the suit.

e. Any other relief this Honourable Court may deem fit and just to grant in the circumstances of this suit.

2. The Plaintiff's case was that upon being established in the year 1979, it acquired from the Ministry of Agriculture, assets and facilities under the Research Division. Among the assets it acquired were land parcel numbers 5210 and 5211 situate in Naivasha within Nakuru County (hereinafter the "suit property"); that by a letter dated 7th December 2010, the 2nd Defendant allotted to the 1st Defendant land parcel L.R. 5211/R measuring approximately 330.95 Ha for a term of 99 years with effect from 1st December 2010. Consequently, the members of the 1st Defendant entered the suit property and have since continued to occupy the same. The Plaintiff averred that the allotment letter issued to the 1st Defendant was illegal, unlawful, ultra vires and void ab initio for reasons that as at the time of the alleged allotment, the suit property was alienated public land; that the 2nd Defendant knowingly facilitated double allocation; that the Municipal Council of Naivasha did not consent to the allocation; and that the 2nd Defendant had no authority to allocate the suit property to the 1st Defendant.

3. On 18th October 2011, the 1st Defendant filed a statement of defence and counterclaim dated 17th October 2011, wherein he averred that the Plaintiff has no registrable interests recognized in law over the suit property. He averred that the Isahakiah community settled within the suit property from as early as 1852 until the year 1952 when they were banished by the then colonial government. That post-independence, the 1st Defendant community duly petitioned the then president and succeeding governments and upon due process, the letter of allotment for part of L.R No. 5211 was issued to them through the 2nd Defendant. The 1st Defendant added that the Plaintiff has never utilized the suit property as research land and that the houses within the suit property were staff quarters constructed by members of the 1st Defendant and Lord Delamere during the colonial times. In the counterclaim, the 1st Defendant added that despite the pending petition for formal registration of the suit property, sometime in the year 2006, the Plaintiff trespassed on the part of L.R 5211 and leased the same to a company named Trillvane (or Homegrown) to carry out horticultural activities; that the Plaintiff instituted the present suit and another Constitutional Petition No. 7 of 2011 through proxies, to forestall issuance of title documents to the 1st Defendant community. On its part, the 1st Defendant sought the following reliefs: -

a. A permanent injunction restraining the Defendant whether by itself, servant, agents or employees from interfering with the Plaintiffs quiet possession of the suit property.

b. A declaration that the suit property and L.R Nos. 5210, 5212, 1144 and 11517 the Plaintiffs, (sic) ancestral land, as recognized by law.

c. General damages.

d. Damages for trespass and mesne profits.

e. Exemplary and punitive damages.

4. On its part, the 2nd Defendant filed a statement of defence dated 3rd October 2011 stating that the allotment letter was issued to the 1st Defendant community based on misrepresentation that they were in occupation of the suit property; that upon establishing that the suit property LR 5211 belonged to

the Plaintiff, the 2nd Defendant wrote to the 1st Defendant communicating the decision to revoke the offer letter. To the 2nd Defendant therefore, this suit is unnecessary.

5. In response to the 1st Defendant's defence and counterclaim, the Plaintiff filed a response dated 24th October 2011. The Plaintiff contended that the suit property passed from the Maasai community to the British Crown Protectorate in 1904 and that members of the 1st Defendant community have never been in occupation thereof until January 2011 when they forcefully entered the suit property. They averred that the suit property was not available for allocation as it was not unalienated government land. The Plaintiff urged the court to dismiss the counterclaim with costs.

Evidence

Plaintiff's evidence

6. Charles Ragu Kamau (PW1) told the court that he worked for the Plaintiff from 1972 as a Research Officer until the year 1993 when he retired as the Centre Director. He stated that the Plaintiff was conducting research for improvement of animal breeds within the suit property and other plots. He explained that LR 5210 housed the station headquarters comprised of the main laboratory, offices, senior and junior staff quarters, the dairy training school, the sheep and coat unit and livestock recording centre; on portion LR 5211, there were paddocks and the largest portion was occupied by junior staff quarters, cattle handling yards, sheep bomas, dipping facilities and Malewa Primary School set up for children of the Plaintiff's employees. He explained that the two portions 5210 and 5211 measured approximately 500 acres each.

7. The witness told the court that there were government records showing that the suit property was allocated to the Plaintiff; a letter dated 6th November 1952 from the 2nd Defendant to the Minister for Local Government, and progress reports showing the activities that were conducted within the suit property. He produced the said letter as PEXH-1 and copies of reports for 1905-1906, 1913-1914, and 1962 as PEXH 2-4 respectively. According to PW1, while he worked for the Plaintiff there was no claim for encroachment brought against the Plaintiff.

8. On cross-examination by Mr. Athuok, counsel for the 1st Defendant, PW1 testified that the suit property was allocated to the Plaintiff in 1904 and that before its formation, there was the Animal Husbandry Research Station owned by the Ministry of Agriculture. The witness was further cross-examined by Ms. Cheruiyot, counsel for the 2nd Defendant. He told the court that he was not aware of the land records on plot 5211 and that he did not have any ownership documents to show that the suit property belongs to the Plaintiff.

9. Evans Iliatsia (PW2), Deputy Director General in charge of livestock research at KARLO (formerly KARI), testified that the suit property LR 5211 was set aside for livestock research and hosts facilities that were put up by the colonial government over 80 years ago. The witness added that part of the said suit property was even leased to Homegrown Limited for 15 years vide a lease dated 27th June 1995 (PEXH-5); that the 1st Defendant only came into the picture once the said lease expired. According to PW2, members of the 1st Defendant forcefully entered the suit property and occupied about 170 acres thereof, on the basis of a letter of allotment dated 7th December 2010(PEXH-6).

10. On cross-examination by Mr. Athuok, PW2 added that the suit property LR 5211 measures approximately 514.4Ha and that it has no title and that it was illegally subdivided. He told the court that the Plaintiff sought title for plots 5210 and 5211 on 25th July 2022. The witness added on re-examination that the letter of allotment was revoked when it was realized that the parcel number does not exist.

11. Cleophas Gathara Wahome (PW3) adopted his written statement as part of his evidence-in-chief. He also produced as PEXH-8 and 9 copies of the status report of the suit properties 5211 and 5210 respectively.

1st Defendant's Evidence

12. Ahmed Ali Farah (DW1) testified that the 1st Defendant community consists of 31 members and that they made an application to the then Minister of Home Affairs and National Heritage seeking allocation of the suit property. The Petition in form of a letter dated 21st July 2003 was produced as DExh-1. He explained that the Isahakiah community came from Somalia as early as 1897 and were given the suit properties by the Legco. At that time, so he testified, there were 500 houses thereon but only 15 remain to date. It was his testimony that they have since planted food crops, miraa and heena plants. He added that sometime in 1960, a school was constructed on parcel no. 1144 by the then governor, Richard Tomboth, for the Isahakiah community living in East Africa and that he even attended the said school. The witness added that his grandfather resided on the suit property and that his house and grave were still standing on the suit property 5211.

13. DW1 explained that the five parcels of land mentioned in his counterclaim, LR 5210, 5211, 5212, 11517 and 1144 were all situated in one area stretching from the Malewa river to the road going to Karati. He produced an EIA report by Mashariki Consultancy dated 21st May 2011 as D. Exh 2 and a bundle of 17 letters between various government offices and the 1st Defendant community as D. Exh 3. In relation to the letter of allotment, DW1 told the court that he met the condition stated therein and paid the sum of Kshs. 6,800 on 21st January 2011. He stated that out of the five mentioned plots, the 1st Defendant were allocated LR 5211 and 1144 as approved by the Parliamentary Lands Committee, while the rest were still under the NLC for investigations on historical injustices. He added that suit property 5211 was partly leased to Homegrown Limited while the remainder was vacant and utilized by the Plaintiff to sell calves in what he called the black market.

14. It was DW1's testimony that the NLC visited the suit properties together with the county surveyor and officials of the 1st Defendant community. Another visit was conducted by the Parliamentary Lands Committee which recommended that the 1st Defendant community is first allocated plot 1144. During the said visit, the 1st Defendant presented a memorandum that DW1 produced as D. Exh 5, and a letter dated 10th December 2014 from the then Minister of Land, Housing and Physical Planning as D. Exh 6.

15. On cross-examination by Mr. Nguyo for the state, DW1 told the court that 15 houses built by his community in 1887, together with the heena and miraa plants were on plot 5211 while their forefathers' graves on plot 5212. On the cancellation of their allotment letter, DW1 testified that when he was informed of the same by his advocate, he consulted Mr. Kahuho in the Commissioner of Lands's office and Mr. Swazuri who confirmed to him otherwise. The witness asserted that their allotment letter was genuine and it had not been cancelled.

16. On further cross-examination by Mr. Anyona for the Plaintiff, DW1 clarified that the 1st Defendant community arrived in Naivasha in the year 1887 alongside Lord Delamere, as his workers and that they were given the suit property by Legco in the year 1950.

17. In re-examination, DW1 told the court that the 1st Defendant claims the remainder of plot 5210, being 1000 acres; 330.95 Ha out of plot 5211 as per the allotment letter; plot 5212, 11517 and 2500 acres being the remainder portion of plot 1144. According to DW1, the Plaintiff's parcel within the area was about 3-5 miles from plot 5211.

18. Zainab Ali Mohammed (DW2) testified that she was born in 1952 on the suit property and has continued to live thereon; that when Homegrown Limited vacated the suit property, they moved into the land they occupied. She narrated how the Plaintiff has continued to harass her community living within the suit property and letting its livestock graze thereon thus destroying their food crops.

19. The witness told the court on cross-examination by Mr. Nguyo, that the Plaintiff does not conduct any research within the suit property. She asserted that the aforementioned graves were about 400 all belonging to their forefathers. On further cross-examination by Mr. Anyona, the witness testified that the disputed area was all referred to as Kambi Somali and that the Plaintiff's land is situated about 5 km away from the suit properties herein. She added that the 1st Defendant community owns the 5 parcels of land mentioned in the counterclaim and that they have allotment letters to the same having been approved by the government.

20. Samuel Ngugi (DW3) the 1st Defendant group's secretary and member, testified that the Plaintiff invaded the suit property on 27th March 2011 when they forcefully drove their cattle into suit property 5211. He produced as DExh10, a letter dated 7th March 2016 and photographs of alleged Plaintiff's invasion as D. Exh. 9 (a,) (b) and (c.) On cross-examination by Mr. Otieno counsel for the Plaintiff, the witness added that the 1st Defendant community occupies the whole of parcel no 5211 and that there are some government institutions on parcel 5211 and 5210, to wit, the Rift Valley Water and Sewerage Company.

21. On cross-examination by Mr. Nguyo, DW3 told the court that his parents were sent away from the suit property in the year 1972 and they moved to Muguga where he was born; that despite that, his grandfather and sisters were buried on suit property 5211. The witness was not aware that the allotment letter had been revoked.

22. DW3 told the court in re-examination that within the disputed area, the Plaintiff only had title to Plot No. 427 measuring approximately 10,000 acres but it also had other lands, including land in the Ol Magogo area.

Submissions

Plaintiff's submissions dated 31st August 2023

23. Counsel reiterated contents of the background of the case and evidence presented before the court. He identified three issues for determination, namely: who is the lawful owner of the suit property; whether the counterclaim should be allowed; and what orders should issue and who should bear the costs of this suit.

24. Guided by Section 107, 108 and 109 of the *Evidence Act*, counsel argued that the Plaintiff had presented enough evidence to demonstrate that the suit property LR 5211 belongs to it. It was his submission that the said property falls within the description of public land under Article 62 of *the Constitution* of Kenya. Emphatically, counsel argued that by virtue of Article 62 (2) and (3) the NLC, national and county governments are barred from dealing with land held, used or occupied by a state organ. To counsel, it was for this reason that the allocation of LR 5211 to the 1st Defendant was revoked.

25. In relation to the second issue, that is whether the 1st Defendant's claim for LR 5210, 5212, 1144 and 11517 is merited, counsel submitted that having demonstrated that 5210, 5211 and 5212 are occupied by the Plaintiff and it having been allocated the same by the government, the same cannot be allocated to the 1st Defendant at this point. Counsel added that as established that LR 1144 is the entire Naivasha

town, the 1st Defendant has failed to show any evidence as to the basis for their claim. Similarly, so counsel submitted, the 1st Defendant's claim over LR 11517 was not justified.

26. Counsel urged the court to allow the prayers sought in the Plaint and dismiss the counterclaim with costs to the Plaintiff. On justification of costs, counsel relied on the cases of Orix (Kenya) Limited v Paul Kabeu & 2 others [2014] eKLR and JR Application No. 6 of 2014 Republic v Rosemary Wairimu Munene, ex-parte applicant v Ihururu Dairy Farmers Co-operative Society Ltd.

1st Defendant's Submissions Dated 19th September 2023

27. On his part, counsel for the 1st Defendant identified five issues for determination, namely- whether the Plaintiff is the rightful owner and/or registered proprietor of the suit property; whether the plaintiff trespassed to the 1st Defendant's suit property, whether the letter of allotment was lawfully and or procedurally revoked, whether the 1st Defendant is entitled to the counterclaim dated 17/10/2011, and who bears the costs of this suit.

28. In relation to the first issue, counsel argued that the legal requirements of justifiability of claims are that a plaintiff must first establish a legal right recognized in law; that its rights have been violated by the defendant; and that a plaintiff is before court seeking legally recognized remedies. Criticizing PW1's and PW2's testimony, counsel argued that the said testimony was proof that the Plaintiff had no title or documentation to ascertain ownership of the suit property hence it had no legal right whatsoever. Counsel relied on the case of Board of Governors Afraha High School & another v Kenya Commercial Bank [2004] eKLR.

29. To counsel, the 1st Defendant had demonstrated that they had been living on the suit property and were issued with a letter of allotment to that effect, as such they had proven ownership as opposed to the Plaintiff. He emphasized that the Torrens land system used in Kenya, stipulates that a claim of ownership of land can only be proven by way of registration as provided under Section 2, 26 (1) and 35 (3) of the *Land Registration Act*.

30. Counsel submitted that in the absence of a registered interest, the Plaintiff could therefore not sustain the suit or be entitled to any equitable remedy. Counsel relied on the cases of Kenya Commercial Finance Company Limited v Afraha Education Society Civil Appeal No. 142 of 1999 (Nakuru) [2001] 1 EA 86; Attorney General v Kenya Commercial Bank Limited and others HCCC No. 260 of 2004 [2004] eKLR; Mitchell & others v Director of Public Prosecution [1987] L.R.C 127; Geoffrey Makana Asanyo v Kenya Agricultural Research Insititute HCCC No. 151 of 2003 [2010] eKLR; HCCC No. 107 of 2010 Kuria Greens Limited v Registrar of Titles and another [2010] eKLR.

31. Counsel added that this Court and the Court of Appeal having declined to grant an injunction against the 1st Defendant was confirmation that the 1st Defendant occupied the suit property. Further, it was counsel's argument that the 1st Defendant is the registered owner of the suit property having met the conditions in the letter of allotment issued to them. To buttress this argument, counsel relied on the case of Ali Mohamed Dagane (granted power of attorney by Abdullahi Mohamed Dagane, suing on behalf of the estate of Mohamed Haji Dagane) v Hakar Abshir & 3 others [2021] eKLR and Supreme Court Petition No. 8 (E010) OF 2021 Dina Management Limited v County Government of Mombasa & 5 others.

32. In relation to the second issue, counsel cited the definition of trespass in the Black's Law Dictionary as an unlawful act committed against the person or property of another; especially, wrongful entry on another's real property. Counsel argued that the Plaintiff has never disputed being in occupation of the suit property while in full knowledge of the 1st Defendant's ownership. To counsel, having proved

that the Plaintiff is a trespasser, the 1st Defendant was therefore entitled to nominal, actual, exemplary and punitive damages. He relied on the cases of Ochako Obinchu v Zachary Oyoti Nyamongo [2018] eKLR; Rookes v Barnard and others [1964] AC 1129 and Obonyo & anpther v Municipal Council of Kisumu [1971] EA 91.

33. On whether the allotment letter dated 7th December 2010 was procedurally revoked, counsel argued that the 1st Defendant was not accorded any opportunity or notice to explain his case before the same was revoked, thus violating the 1st Defendant's rights to fair hearing as provided under Article 47 and 50 (1) of *the Constitution*. Counsel cited the case of Emange Se-Semata Investments Limited v Attorney General & 4 others [2012] eKLR and Kuria Greens Limited v Regsitrar of Titles & another [supra].

34. On whether the 1st Defendant is entitled to the prayers sought in the counterclaim, counsel reiterated the evidence presented by the 1st Defendant and the history of the land. Quoting the case of Safepak Limited v Henry Wambega & 11 others [2019] eKLR, counsel submitted that the 1st Defendant has proven ownership based on historical land injustices on a balance of probabilities, as such, the counterclaim should be allowed. Counsel urged the court to condemn the Plaintiff to costs in the circumstances.

35. Having considered the pleadings, evidence, arguments and authorities presented by parties herein, I find that the relevant issues for determination are: -

    i. Whether the suit property Plot No. 5211 constitutes part of land set apart for the Kenya Agricultural Research Institute for purposes of research;

    ii. Whether the suit property Plot No. 5211 was available for allocation to the 1st Defendant;

    iii. Whether there is a valid letter of allotment in favour of the 1st Defendant;

    iv. Whether the counterclaim is merited;

    v. What orders should be granted.

Analysis And Determination

36. The Plaintiff claims to have acquired the suit property back in 1904 from the Maasai community when the same was set aside for purposes of research; that the suit property was initially allocated to the Veterinary Department, later given to Agricultural Experimental Station and at independence, the land became government land under the Government Lands Act. Subsequently, when the plaintiff (KARI) was established in 1979 as a successor to the Government Research Station, the suit properties were given to the Plaintiff; that although the Plaintiff has never been issued with the titles thereto, the suit properties remains to be the Plaintiff's.

37. The 1st Respondent opposed the Petitioner's claim and stated that the suit property forms part of their ancestral land allocated to the Isahakia community vide a letter of allotment dated 7/12/2010. PW1's evidence is that the Isahakiah community came from Somalia as early as 1897 and were given the suit properties by the Legco. According to his oral evidence which was unsupported by any document, the 1st defendant was given LR 5210, 5211,5212,11517 and 1144 and that the 1st defendant now claims all those parcels. He admits that of the 500 or so houses he claims were built on the land, presumably by his forefathers, only 15 remain and even those are being leased out by the plaintiff. The 1st Respondent claims that the community first settled within the suit property from as early as 1887 and remained thereon until the year 1952 when they were banished by the then colonial government; that they only returned post-independence and petitioned the government to allocate the same to them. They forcefully took possession upon issuance of the letter of allotment.

38. Article 62 (1) (b) of *the Constitution* describes public land to include-

(b) land lawfully held, used or occupied by any State organ, except any such land that is occupied by the State organ as lessee under a private lease;

On the other hand, Article 63 describes community land as follows: -

63. Community land

(1) Community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest.

(2) Community land consists of—

(a) land lawfully registered in the name of group representatives under the provisions of any law;

(b) land lawfully transferred to a specific community by any process of law;

(c) any other land declared to be community land by an Act of Parliament; and

(d) land that is—

(i) lawfully held, managed or used by specific communities as community forests, grazing areas or shrines;

(ii) ancestral lands and lands traditionally occupied by hunter-gatherer communities; or

(iii) lawfully held as trust land by the county governments, but not including any public land held in trust by the county government under Article 62 (2).

(3) Any unregistered community land shall be held in trust by county governments on behalf of the communities for which it is held.

39. I have carefully considered the evidence presented by the Plaintiff, it is clear that the Plaintiff has been in occupation of the suit property from as early as the 1900s. PW1 exhibited as P. Exh 1 letter dated 6/11/1952 authored by the then acting Commissioner of Lands to the Member for Health, Lands and Local Government. In the said letter, the Commissioner of Lands indicated that the suit properties to wit L.R Nos. 5210 and 5211 comprising approximately 2578 acres, were set aside in 1904 for the use of the Veterinary Department as a government stock farm. PExh1 also states that Plots Nos LR 5212 and LR 427 were also being utilized by the Government Stock Farm in the 1900s. The letter shows that all the afore mentioned plots were extensively developed by then. Similarly, the Plaintiff exhibited copies of rates demand notices from Naivasha County Council dating back to as early as 27th February 1998 and payment receipts thereof showing that the Plaintiff has all along been in occupation of the suit property. It is also not disputed that the Plaintiff has over the years further developed the suit property in one way or another.

40. The 2nd Defendant averred that the letter of allotment dated 7th December 2010, which forms the basis of the 1st Defendant's claim was revoked once the Plaintiff filed a complaint regarding the same. The revocation letter is said to be dated 11th April 2011. The 1st Defendant's case was that they were not afforded an opportunity to be heard before a decision to revoke their letter of allotment was made.

However, no evidence has been adduced that the 1st defendant ever lodged any proceedings in court to quash the Commissioner's decision to cancel their letter of allotment. In this court's view, that cancellation still stands.

41. Section 3 of the former Government Lands Act (GLA) vested upon the President authority to alienate unalienated government land. The power to alienate was delegated to the Commissioner of Lands in limited circumstances for educational, charitable, sports and other purposes as set in the GLA. Such alienation could not be exercised in respect of land which had been committed for a public purpose; that commitment is already an alienation itself.

42. In NBI, HC. Misc. Appl. 1732 of 2004, James Joram Nyaga & Another –v- Attorney General & Another [2007] eKLR the court referring to Section 3 and 7 of the GLA observed thus:

> " The above section clearly limits the power of the Commissioner to executing leases or, conveyances on behalf of the President and the proviso to the section specifically limits the power to alienate unalienated land to the President. We find and hold that the Commissioner of Lands had no authority to alienate the disputed plot to the Applicants as he purported to do vide the letter of 18th December, 1997. That was the preserve of the president. It follows that the Commissioner of Lands could not have made any grant under the Government Lands Act Cap. 280 Laws of Kenya nor could he pass any registerable title under the Registration of Titles Act Cap. 281 of the Laws of Kenya."

43. Further, in Paul Nderitu Ndung'u & 20 Others –V- Pashito Holdings Limited & Another (Nairobi HCCC No. 3063 of 1996) it was held that the Commissioner of Lands had no legal authority to allocate the two pieces of land which had been reserved for a Police Post and a Water Reservoir as they had already been alienated. The court held: -

> " Under the Government Lands Act (Cap 280, Laws of Kenya) the Commissioner of Lands can only make grants or dispositions of any estates, interests or rights in over unalienated government land. (Section 3). In the instant case, the two parcels of land among others had been alienated and designated for particular purposes. It was not open for the Commissioner of Lands to re-alienate the same. So the alienated was void ab initio."

44. Having established that the suit property was set apart for purposes of agricultural research from as early as 1904, it is evident that the same was not available for alienation to the 1st Defendant in 2010 as the same was alienated government land. There is overwhelming evidence adduced by the plaintiff showing that the land has since the 1900s been in use by the plaintiff. There are too many documents letters and reports which weigh heavily against the 1st defendant's lack of documentary evidence, of which it is therefore not essential to replicate the contents thereof in this judgment. The 1st defendant has failed to establish the commencement of its occupation of the land or developments thereon, and in any event, perchance they had done so, they admit that they lost possession of the land for a long period, that they lack title to the land and that their letter of allotment was cancelled when it was realized that it had been irregularly issued.

45. The 1st defendant relies on Geoffrey Makana Asanyo (supra) and Kuria Greens(supra) to state that first, the plaintiff herein lost when the court ruled that it had no registered interest and that it therefore could not sustain the claim, and secondly, that the property having been legally alienated (by way of the letter of allotment), the only avenue open to the Commissioner of Lands was to compulsorily acquire it and pay prompt and fair compensation. With all due respect, I do not concur with the 1st defendant on those two points for reasons. First, Geoffrey Makana Asanyo (supra) was lodged in 2003

and decided before *the Constitution* of Kenya 2010 was promulgated, and, contrary to the situation herein, Geoffrey had a title issued to him which can not be comparable to the letter of allotment issued and later cancelled in this case. Article 62 (1) (b) and Article 63 of *the constitution* were not in existence. Secondly, Sections 25 and 26 of the *Land Registration Act* provide for the indefeasibility of a registered title and not a letter of offer or a letter of allotment. I have also earlier stated that no evidence has been adduced that the 1st defendant ever lodged any proceedings in court to quash the Commissioner's decision to cancel their letter of allotment. If the 1st defendant was so aggrieved by that cancellation, the present suit is not the remedy for such cancellation. In Kuria Greens (supra) too, contrary to the situation herein, title had already issued to the petitioner in that case before the Registrar of Titles purported to issue a Gazette Notice notifying all and sundry that the titles listed therein, including the petitioner's, had been cancelled; the proceedings in that case were specifically tailored at quashing the cancellation of the petitioner's title. In contrast to the cited cases, the present suit has been filed by the plaintiff to assert its rights to the land by seeking inter alia, a declaration that the letter of allotment issued to the 1st defendant is null and void ab initio.

46. No submission made in this suit can be more wrong than the bold submission made at paragraph 37 of the 1st defendant's submission to the effect that the 1st defendant is the registered proprietor having been issued with a letter of allotment on 7th December 2010. Issuance of a letter of allotment per se is not evidence of title or sufficient to grant indefeasible rights to the 1st defendant as provided for under *the Constitution* of Kenya or Sections 25 and 26 of the *Land Registration Act*. Numerous letters of allotments have been issued in this nation in times past with no title issuing in the end for different reasons, including, as in this case, earlier commitment of the targeted land for a public purpose. No evidence of issuance of title to the 1st defendant was presented to this court by any of the defendant's witnesses and in any event such title, perchance issued, would be questionable given that the 2nd defendant has already declared that the letter of allotment on which it could be founded had been cancelled earlier due to misrepresentation by the 1st defendant that it was in occupation of the suit property. I find that cancellation of the letter of allotment in the context of the present case did not violate the 1st defendant's property rights or infringe on its rights under Article 40 of the laws of Kenya.

47. The conclusion I draw from the foregoing analysis is that the letter of allotment dated 7th December 2010 was issued notwithstanding the use and occupation of the suit land by the plaintiff, and the plaintiff being a government corporation, the provisions of Article 62 and 63 of *the Constitution* bar such allocation and it is therefore void ab initio. The argument by Counsel for the 1st defendant that in the absence of a registered interest, the Plaintiff could not sustain the suit or be entitled to any equitable remedy is incorrect in view of the provision in Article 63 to the effect that public land includes "land lawfully held, used or occupied by any State organ, except any such land that is occupied by the State organ as lessee under a private lease." It is due to the plaintiff's occupation of and use of the suit land without being subjected to any lease terms by anyone that attracts application of Article 62 to it. Besides, the 2nd defendant has confirmed that the letter of allotment was eventually cancelled and for that reason, the same is of no effect. The effect of the cancellation by the 2nd defendant is that the assertion by the 1st defendant, which has been disproved, that the allocation followed due process ceases to matter at all. The end result is that the allocation and the process both remain a nullity.

48. Finally, as to whether or not the process of revocation or cancellation of the latter of allotment was proper, the issue is of no consequence whatsoever, this court having found that the issuance thereof was illegal ab initio; it suffices to state that as it was illegally issued, there was no valid letter of allotment in place, an illegal act in itself being null and void ab initio. The allegations of impropriety in the process of cancellation thereof are of no consequence since the letter itself was illegally issued. (See Mcfoy v United Africa Co. Ltd [1961].)

49. With regard to the counterclaim, there is indeed no evidence to support the allegations by the 1st Defendant. The Defendant has not laid out a basis for their claim that Plot Nos. 5210, 5211, 5212, 1144 and 11517 are their ancestral land as alleged in the counterclaim. The principle is that whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of fact which he asserts, must prove that those facts exist. The burden of proof in a suit or proceeding, lies on that person, who would fail if no evidence at all were given on either side (See Section 107 of the *Evidence Act*). In this court's opinion, the 1st Defendant has failed to discharge that burden and his claim must fail.

50. The outcome is that the prayers sought in the Plaint dated 23rd February 2011 are merited. I therefore enter judgment against the defendants and I issue the following final orders:

    a. The 1st defendant's counterclaim is hereby dismissed;

    b. A declaration is hereby issued declaring that the letter of allotment dated 7th December 2010 in respect of Land Reference No. 5211/R in favour of the 1st Defendant is of no legal effect and is null and void ab initio and does not in any way nullify or in any way affect and or interfere with the Plaintiff's interest in and ownership rights to the Land Reference No. 5211;

    c. The 1st defendant and all its members shall unconditionally delivery up of vacant possession of the said Land Reference No. 5211 to the Plaintiff forthwith;

    d. an injunction order is hereby issued restraining the Defendants by themselves or through their agents, members, servants, employees or otherwise howsoever from issuing any certificate of title in respect of, transferring, disposing of, dealing in any manner whatsoever with Land Reference No. 5211 or any other parcel of land occupied by and used by the Plaintiff otherwise than by way of conveyance in favour of the Plaintiff;

    e. The costs of this suit and counterclaim shall be borne by the 1st defendant only.

JUDGMENT DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 27TH DAY OF JUNE 2024.

MWANGI NJOROGE

JUDGE, ELC, MALINDI