



**Ahmed v Wamalwa (Sued as the Legal Representative of the Estate of Cornelius Wanyonyi Wamalwa - Dcd) & 5 others (Environment & Land Case E003 of 2022) [2024] KEELC 4772 (KLR) (13 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4772 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT & LAND CASE E003 OF 2022**

**EC CHERONO, J  
JUNE 13, 2024**

**BETWEEN**

**ZEINAB ZULEKHA AHMED ..... PLAINTIFF**

**AND**

**IMELDA WAMALWA (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF CORNELIUS WANYONYI WAMALWA - DCD) ... 1<sup>ST</sup> DEFENDANT  
THE LAND REGISTRAR BUNGOMA ..... 2<sup>ND</sup> DEFENDANT  
THE CEC MEMBER IN-CHARGE OF LAND, BUNGOMA COUNTY GOVERNMENT ..... 3<sup>RD</sup> DEFENDANT  
THE BUNGOMA COUNTY GOVERNMENT ..... 4<sup>TH</sup> DEFENDANT  
THE NATIONAL LAND COMMISSION ..... 5<sup>TH</sup> DEFENDANT  
THE ATTORNEY GENERAL ..... 6<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**A. Introduction And Pleadings**

1. By way of a plaint filed on 6th February, 2022 the Plaintiff seeks for the following orders against the Defendants;
  - a. An order in terms of paragraph 20, 21 and 22 of the plaint above.
    20. The plaintiff's claim against the defendants jointly and severally is for a declaration that the certificate of lease issued to the late Cornelius Wanyonyi Wamalwa which now vests in his estate, in respect to Land Parcel No. Bungoma/Municipality/123 is null and void having been fraudulently obtained.



21. The plaintiff's further claim against the defendants jointly and severally is for an order for cancellation of the certificate of lease issued to the late Cornelius Wanyonyi Wamalwa, which now vest in his estate, in respect to Land Parcel No. Bungoma/Municipality/123 and title to revert back to the Plaintiff or in the alternative, an order for compensation of the Plaintiff for the value of the land at the current market value together with the cumulative amount remitted at rates to the 4<sup>th</sup> Defendant since 2007.
  22. The plaintiff further claims against the defendants jointly and severally is for an order of permanent injunction to restrain the defendants either by themselves or their servants, agents and/or agents form entering, taking possession and/or developing and/or utilizing Land Parcel No. Bungoma/Municipality/123.
    - b. Costs of this suit
    - c. Interests of (b) above at court rates.
    - d. Any other relief that the court deems fit and just to grant.
2. The plaintiff's case is that upon successful application for a plot to the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants, she was issued with a certificate of lease for land parcel no. Bungoma/Municipality/123 measuring approximately 0.0929hactres (hereinafter referred to as 'the suit land') by the 2<sup>nd</sup> Defendant on 1<sup>st</sup> November, 2007. That upon being issued with a certificate of lease, she obtained necessary approvals from the 4<sup>th</sup> defendant and begun developments on the said land investing to the tune of Kshs.40,000,000/=. She averred that she has been paying her rates to the 4<sup>th</sup> defendant and fully enjoying her proprietary rights over the said land including using the lease certificate as collateral for loan facilities. It was her statement that sometime in the year 2022, she conducted a search of her lease title at the 2<sup>nd</sup> defendants' offices for the purposes of applying for a loan with the First Community Bank and was shocked to learn that the lease title had been transferred to a third party, one Cornelius Wanyonyi Wamalwa.
  3. It is her contention that she was not notified of the purported transfer by the defendants. She averred that she later came to learn that the said transfer was effected way back in the year 2018 and that the said Cornelius Wanyonyi Wamalwa is now deceased and that his widow, the 1<sup>st</sup> defendant had taken out letters of administration of the estate and has included the suit land as one of his free property. She averred that the defendant's actions of transferring the title to the suit land was unlawful, illegal and fraudulent and that the same amounted to gross deprivation of her proprietary rights and interest in land. The plaintiff set out particulars of fraud against the defendants and sought for judgment against them jointly and severally.
  4. The 3<sup>rd</sup> and 4<sup>th</sup> defendant's entered appearance and filed a joint statement of defence dated 23<sup>rd</sup> March, 2022 denying the plaintiff's claim and averred that if indeed a certificate of Lease in favour of the 1<sup>st</sup> Defendant in respect of the suit land exist, the same was not issued by them or that the plaintiff obtained it illegally. They denied ever issuing an allotment letter to the plaintiff and stated that the developments undertaken by her were illegal and amount to trespass. The 3<sup>rd</sup> and 4<sup>th</sup> defendants denied receiving any land rates from the plaintiff and issuing any approvals with regard to the suit land. They further averred that they did not cause for a transfer or issue a certificate of lease to Cornelius Wanyonyi Wamalwa. They denied the particulars of fraud set out in the plaint and further argued that the plaintiff lacks locus standi to bring this suit since she is not the proprietor of the suit land. It was their contention that this suit is equally time barred and sought for the dismissal of the same with costs.



5. The 2<sup>nd</sup> and 6<sup>th</sup> defendant's entered appearance and filed a statement of defence dated 12<sup>th</sup> April, 2022 in which they deny the plaintiff's claim and put her to strict proof that she is the leasehold owner of the suit land and that a fraudulent transfer was effected by the 2<sup>nd</sup> defendant. They also denied the particulars of fraud on their part as set out in the plaint and sought for the dismissal of the case with costs.
6. The 1<sup>st</sup> defendant entered appearance and filed a defence dated 27<sup>th</sup> April, 2022 where she averred that Cornelius Wanyonyi Wamalwa is the registered leasehold owner of the suit land and that the transfer and registration of the said parcel of land to him was transparent and without any fraud and that the plaintiff was a trespasser. She denied the particulars of fraud particularized in the plaint and averred that the plaintiff is not entitled to the orders sought having illegally and unlawfully occupied LR NO. Bungoma/Municipality/123. She sought to have the claim against her dismissed with costs.
7. The First Community Bank Limited was enjoined as an interested party since it holds a legal charge over the subject land, LR NO. Bungoma/Municipality/123 as security to loan facilities advanced to the plaintiff.
8. When this suit came up for directions, the Advocates confirmed compliance with pre-trial directions and agreed that the matter would proceed for hearing by way of viva voce evidence. The case was fixed for hearing and parties called one witness each.

## **Parties Evidence;**

### **Plaintiff's Case**

9. PW1 Zainab Zulekha Ahmed adopted her witness statement dated 15<sup>th</sup> February, 2022 as her evidence in chief and equally produced into evidence her documentary evidence as itemized in her list of documents dated 15<sup>th</sup> February, 2022 which contains 22 items save for one item which was a letter dated 15/02/2021 marked for identification as MFI-15. She asked the court to grant her orders as prayed in the plaint.
10. In cross-examination by counsel for the 1<sup>st</sup> defendant, she testified that she was allocated the suit land in the year 2005 and that the previous allottee was George Makasi. She testified that she started developments in the year 2006 after obtaining all the necessary approvals. It was her evidence that she was issued with an allotment letter by the Municipal Council of Bungoma dated 19/02/2007 and was subsequently issued with a certificate of lease in the year 2007. She testified that according to the certificate of search produced as P-Exhibit 9, it indicates that she was registered as the owner in the year 2000 which was an error. She stated that she conducted a search on the suit land on 28<sup>th</sup> May, 2012 after someone claimed ownership of the land. It was her testimony that the lease is for a period of 99 years from 1/1/1998.
11. When cross-examined by counsel for the 2<sup>nd</sup> and 6<sup>th</sup> defendant's, she confirmed that before a certificate of lease is issued, one must have been issued with an allotment letter. She admitted that she did not produce an allotment letter but only produced a letter approving her development plan and minutes of the council approving the plans.
12. On cross-examination by counsel for the 3<sup>rd</sup> and 4<sup>th</sup> defendants, she testified that she reported to the DCIO on the issue of the double allocation of the suit land who investigated the issue and confirmed by the County Government of Bungoma that she was recorded as the owner of the suit land.
13. On cross examination by counsel for the interested party, she testified that the lease certificate was issued to her on 1/11/2007 although she took possession of the suit land in the year 2005. It was her



testimony that she has build a two storey building on the suit land after obtaining a loan facility from the interested party who did their due diligence before advancing and registering a legal charge over the same. It was her testimony that the certificate of lease issued to Cornelius Wanyonyi in 2018 was not genuine since she had already been issued with one and the same had not yet been cancelled.

14. In re-examination the plaintiff reiterated his evidence as above.

### **First Defendant's Case**

15. Imelda Wamalwa, the 1<sup>st</sup> defendant testified as DW1 Imelda Wamalwa and adopted her witness statement dated 27/04/2022 as her evidence in chief. She was also referred to her list of documents containing 8 items also dated the same day which she produced as D-Exhibit1-8 respectively. When cross -examined by the 3<sup>rd</sup> and 4<sup>th</sup> defendants, she testified that a transfer was done in favour of her deceased husband Cornelius Wamalwa in the year 1993 upon being allocated by the commissioner of lands and a certificate of lease issued on 9/7/2018. She testified that her husband died on 23/10/2018 and that the land is not developed.
16. On cross-examination by counsel for the interested party, she testified that she was not involved in the process of acquisition of the suit land but due process was followed. It was her further testimony that upon being allocated the land in 1993, they did not take possession of the land immediately but they would keep an eye occasionally. In her evidence, she could not ascertain whether her husband had paid rates as required. When cross-examined by counsel for the plaintiff, the 1<sup>st</sup> defendant testified that there is a construction on the suit land which is a two storey building. In re-examination, she stated that according to the green card produced as D-Exhibit 2, there is no indication that there was a change on the property.
17. The 3<sup>rd</sup> and 4<sup>th</sup> defendants called one witness namely Cleophas Wanyonyi Waswa-DW1 who stated that he was a senior land surveyor for the County Government of Bungoma. He adopted his witness statement dated 23/8/2022 as his evidence in chief. He was referred a list of documents also dated 23/8/2023 and produced them in evidence. He testified that their office has never received a complaint from the plaintiff.
18. When cross-examined by the plaintiff, he stated that for a party to develop a piece of land, permits have to be sought and obtained from the County Government. In approving the requests, they rely on records from both the land registrar's office and their own records. He stated that if the said records do not agree, then they do not grant the permits. He testified that if a person is granted an approval for development of a property, then the same implies that the person is the owner of the property and is required to pay for rates and rent.
19. On cross-examination by the 2<sup>nd</sup> and 6<sup>th</sup> defendant, the witness testified that according to their records, the plaintiff is the owner of the suit land. He stated that their office does not issue certificates of leases but only issue notification letters informing a person that they have been allocated the land by the Commissioner of Lands. On cross-examination by the 1<sup>st</sup> defendant, the witness testified that the plaintiff applied for allocation of the suit property in the year 2005 and that at times, the records in their office do not always tally with those at the land's office. He could not however ascertain whether the plaintiff was issued with an allotment letter but stated that she had been paying for land rates and rent to the County Government of Bungoma. Lastly, it was his evidence that ordinarily, acquisition of un-alienated public land starts with an application followed by a notification to the allottee and the commissioner of lands and issuance of a certificate of lease. When cross-examined by the interested party, the witness stated that according to their records, there has been no notification issued to Cornelius Wanyonyi Wamalwa. He stated that the lessor of the suit land is the County Government



of Bungoma and as such, the registration of any individual as owner is only with the approval of the County Government.

20. In re-examination, the witness reiterated his testimony-in-chief and added that the duty of the defunct County Council in disposition of un-alienated public land was to notify the Commissioner of lands and the allottee. When cross-examined by the court, the witness testified that the process of allocation of land is that once an application is received, it is placed before a committee by the Council which recommends for the allocation

### **Interested Party's Case**

21. As for the interested party's case, she called one witness namely Mohamed Ali Mohamed as DW-1 who identified himself as an employee of First Community Bank (nor Premier Bank). He testified that the plaintiff approached them for a facility and they advanced 3.5 Million and the certificate of Title to the suit land was given as security with a legal charge being registered. He was referred to the Interested party's list of documents dated 2/8/2022 and a supplementary list of documents dated 24/8/2022 all of which contained 8 items and produced as D-Exhibits 1-8 respectively. He testified that prior to registering the charge, they conducted due diligence.
22. On cross-examination by the 1<sup>st</sup> defendant, the witness stated that they conducted a search on the property before and after the charge was registered and confirmed both ownership of the property and registration of the charge. When cross-examined by counsel for the plaintiff and 3<sup>rd</sup> and 4<sup>th</sup> defendants, he reiterated his testimony-in-chief.
23. After the close of their respective cases, the parties took directions to file and serve their respective submissions within given timelines.

### **C) Parties Submissions**

24. Pursuant to the directions taken, the plaintiff filed her submissions dated 5<sup>th</sup> March, 2024 in which she submitted on three issues. The first issue is whether the plaintiff is the legal proprietor of the suit property. On this issue, the learned counsel submitted that the plaintiff is the owner of the suit land and has proved her claim by producing documents showing how she acquired the same from the defunct County Council of Bungoma. It was her submission that the process of acquisition of both the allotment letter and certificate of lease can be traced and that the legal requirement for the issuance of the certificate of lease was followed. She submitted that the plaintiff has proved her claim by providing sufficient evidence to show her ownership of the suit land as required under Section 107 and 108 of the Evidence Act. It was further submitted that the plaintiff fulfilled the steps required in the process of allocation of a plot by the defunct county Council of Bungoma and the Commissioner of Lands which were first to process an application for allocation and confirm the availability of the plot and approval, provision of a Part Development Plan (PDP) then a survey conducted for the purpose of issuance of a certificate of lease. Reliance was placed in the case of Mako Abdi Dolal vs. Ali Duane & 2 Other (2019) eKLR, Harrison Mangi Nyota vs. Naivasha Municipal Council & 20 Others (2019) eKLR, Nelson Kazungu Chai & 9 Others vs. Pwani University College (2014) eKLR, African Line Transport Co. Ltd vs. The Hon. AG Mombasa HCCC No. 276 of 2013 and Ali Mohamed Dagne (Granted power of attorney by Abdillahi Muhamed Dagne, suing on behalf of the estate of Mohammed Haji Dagne) vs. Hakar Abshi 7 3 Others (2021) eKLR.
25. On whether the title to the suit property was unlawfully and fraudulently transferred to the 1<sup>st</sup> defendant by the defendants, it was submitted that the plaintiff has been in occupation of the suit land paying all land rates which are up to date. It was further submitted that it was odd that the 1<sup>st</sup>



defendant was issued with a certificate of lease on 05/07/2018 having applied for allocation of the same on 01/01/1993. The plaintiff's counsel referred to the evidence of Cleophas Waswa who testified on behalf of the 3<sup>rd</sup> and 4<sup>th</sup> defendants and confirmed that the plaintiff was the owner of the suit land according to their records. It was also submitted that at the time the said Cornelius Wamalwa was being issued with a certificate of lease for the suit land, the same was not available for re-allocation. Reliance was placed in the case of Rukaya Ali Mohammed vs. David Gikonyo Nmbachia 7 Another Kisumu HCCA 9 OF 2004. The learned counsel submitted that the plaintiff had not been served with a notice of repossession and cancellation of allotment.

26. On the 3<sup>rd</sup> issue, the learned counsel sought judgment to be entered in favour of the plaintiff as prayed in the plaint with costs.
27. The interested party filed submissions dated 9<sup>th</sup> April, 2024 where she submitted on two issues. The first issue is whether the plaintiff is the legal proprietor of the suit property. On that issue, the learned counsel submitted that the plaintiff had sufficiently proved that she was allotted the suit land in 2005 and a certificate of lease issued in 2007 as can be shown in the documents produced in support of her case. Reliance was placed in the case of Gitwany Investment Ltd vs. Taj Mall Ltd & 3 Others Nairobi HCC No. 1114 of 2002 and Henry Muthee Kathurima vs. Commissioner of Lands & Another (2015) eKLR.
28. The 2<sup>nd</sup> issue submitted on was whether the certificate of lease issued to Cornelius Wamalwa was illegal and fraudulent. The interested party submitted to the affirmative. She cited the case of Daudi Kiptegun vs. Commissioner of Lands & 4 Others (2015) eKLR. She further submitted that the 4<sup>th</sup> defendant through its witness denied ever issuing a notification to the Commissioner of Lands for allotment of the suit land to the said Cornelius Wamalwa. Further, she argued that the land registrar who was sued as the 2<sup>nd</sup> defendant only entered appearance but failed to file defence and/or even call any witness to clarify the anomaly despite being the custodian of all land records. Reliance was placed on the case of Avtar Singh Bahra and Another vs. Raju Govindji HCC No. 548 of 1998. It was the interested party's submission that the suit land was allocated to the plaintiff and was never repossessed/revoked and as such, the same was not available for re-allocation to the 1<sup>st</sup> defendant or any other person. They cited the case of Republic Vs. City Council of Nairobi & 3 Others (2014) eKLR. They further submitted that it was puzzling that the said Cornelius Wamalwa acquired title to the suit land 10 years after the plaintiff had been registered. They relied on the case of Gitwany Investment Ltd vs. Taj Mall Ltd & 3 Others (supra). They submitted that the title issued in favour of Cornelius Wamalwa is not absolute or indefeasible and urged the court not to protect a title acquired fraudulently and submitted that the plaintiff's title is legitimate and ought to be protected and upheld.
29. The 3<sup>rd</sup> and 4<sup>th</sup> defendants filed their submissions dated 12<sup>th</sup> April, 2024 and submitted on three issues. The first issue is whether the plaintiff is the absolute owner of the suit land and submitted in the affirmative. The learned counsel argued from the evidence adduced, the plaintiff is indeed the registered owner of the suit land and that her title ought to be protected pursuant to Section 24 and 26 of the [Land Registration Act](#), 2012. She also relied on the case of Gitwany Investment Ltd vs. Taj Mall Ltd & 3 Others (supra) and Republic Vs. City Council of Nairobi & 3 Others. The second issue is whether the plaintiff has proved her case on a balance of probabilities. On this, the learned counsel also submitted in the affirmative. Lastly, the learned counsel urged the court to exonerate the plaintiff from paying costs arguing that no evidence was adduced to show that they were involved in any fraudulent and corrupt scheme regarding the issuance of the said certificate of lease.
30. The 1<sup>st</sup> defendant filed submissions dated 11<sup>th</sup> April, 2024 where she submitted on three issues. The first issue was whether the registration of the plaintiff is tainted with fraud. The learned counsel for



the 1<sup>st</sup> defendant begun by describing the meaning of fraud and submitted that from the evidence presented in court, the plaintiff obtained title to the suit land illegally and unprocedurally and that her title cannot stand. Reliance was placed in the case of Lazarus Estate vs. Peasley (1956) QB 702 and Matkula International vs. His Eminence Cardinal Nsubuga (1982) HCB 12. The 2<sup>nd</sup> issue was whether the plaintiff is entitled to the orders sought and submitted that the plaintiff does not hold a good title to the suit property to warrant her benefit from the rights and privileges that come with a good title. It was also argued that the plaintiff did not have locus standi since she was not the proprietor of the suit land. The 3<sup>rd</sup> issue raised is whether Cornelius Wanyonyi Wamalwa is the owner of the suit land. On this issue, it was submitted that the said Cornelius Wamalwa was issued with an allotment letter on 05/01/1993 and a certificate of lease upon payment of the stand premium on 09/07/2018. It was argued that the said Cornelius was not involved in any fraudulent activities and that his title is beyond reproach. The counsel for the 1<sup>st</sup> respondent further argued that the plaintiff had not proved the commission of fraud on the part of the 1<sup>st</sup> defendant as required in law. She placed reliance in the case of Kinyanjui Kamau vs. George Kamau (2015) eKLR. In conclusion, she argued the court to dismiss the suit with costs.

#### **D)Analysis And Determination**

31. I have considered the pleadings, evidence, submissions, authorities cited by both parties and the applicable law and in my view find the following issues commend for determination;
  - a. Who is the legal proprietor of the suit land.
  - b. Whether the plaintiff is entitled to the orders sought in the plaint.
  - c. Who shall bear the costs of the suit.
32. Both the Plaintiff and the 1<sup>st</sup> Defendant claim ownership of the suit land and produced titles and documents in support of their respective titles. The Plaintiff as PW1 testified that the defunct Bungoma Municipal Council approved her application for allocation of a plot in a meeting held on 30<sup>th</sup> August, 2024 (P-Exhibit 5) after revoking the initial allocation to one George Makasi vide its letter dated 25<sup>th</sup> November, 2004 (P-Exhibit 2). The plaintiff stated that upon the said approval, a letter dated 19<sup>th</sup> October, 2005(PExhibit 3) the resolution was communicated to the Commissioner of Lands through the Land registrar asking that a lease certificate be prepared in her favour. This is confirmed by a second letter to the Commissioner of lands dated 19<sup>th</sup> February, 2007 (P-Exhibit 4) where the town clerk was asking the Commissioner of lands to provide the plaintiff with an allotment letter. Despite the plaintiff testimony on oath that a letter of allotment was issued to her, none was presented in court as evidence. The plaintiff further produced a rates clearance certificate (P-Exhibit 16) to show that she has been paying rates with regard to the suit land. Certificate of search dated 28<sup>th</sup> May,2012(P-Exhibit 9) was also produced showing that the plaintiff was registered as the proprietor of the suit land on 1<sup>st</sup> January, 2000. The plaintiff testified that before developing the suit property, she procured building plans which she used to secure loan from the interested party.
33. The 1<sup>st</sup> defendant on his part testified and produced a certificate of lease (DExhibit 1) issued to her deceased husband- Cornelius Wanyonyi Wamalwa on 9<sup>th</sup> July, 2018 after being allotted the suit land as per the letter of allotment dated 5<sup>th</sup> January, 1993(DExhibit 6). It was her (DW1)testimony that the requisite fees was paid for the issuance of the letter of allotment and the certificate of lease as per D-Exhibit 2&8. She stated that the suit land forms part of the estate of her deceased husband as was dealt with in Succession Cause No.520 of 2019.



34. The 3<sup>rd</sup> and 4<sup>th</sup> defendants through their witness testified that according to their records, the plaintiff was the registered owner of the suit land. The 3<sup>rd</sup> and 4<sup>th</sup> defendants testified that despite entering appearance and filing a statement of defence, the 2<sup>nd</sup> and 6<sup>th</sup> defendants did not call any witness in support of their case and therefore, failed to substantiate the allegations made in their Defence. They argued that the 2<sup>nd</sup> and 6<sup>th</sup> defendants failed to produce any documents in evidence to counter the Plaintiffs testimony. The 3<sup>rd</sup> and 4<sup>th</sup> defendants submitted that the 2<sup>nd</sup> and 6<sup>th</sup> defendants' statement of Defense on record are mere allegations and the Plaintiff's testimony and evidence remain uncontroverted. See the case of Kenya Power & Lighting Co Ltd ....Vs... Rassul Nzembe Mwadzaya [2020] eKLR. The interested party on the other hand stated that it conducted due diligence prior to advancing Kshs 3,500,000/= to the plaintiff secured by her certificate of lease for the suit land.
35. The summary of facts and evidence above culminated in both the plaintiff and the 1<sup>st</sup> defendant each waving a certificate of lease and claiming ownership of the suit land. This brings me to the next question whether it is possible for a parcel of land to have duplicate titles and if so, what the root of each title.
36. It is trite law that whosoever asserts the existence of a legal right or liability is incumbent upon him to proof the existence of that right or liability asserted.

Section 107 of the [Evidence Act](#) (Cap 80 Laws of Kenya) succinctly states:

“Whosoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

37. Section 108 of the same [Evidence Act](#) (Cap 80 Laws of Kenya) further states thus:

“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.”

38. In the case of Mako Abdi Dolal v Ali Duane & 2 others [2019] eKLR which I had the privilege of determining, I opined that prior to the promulgation of the 2010 Constitution and the 2012 amendments to the body of Land Laws in Kenya, disposition of government land was governed by the Government Lands Act (Repealed). In the abovementioned case, I outlined the procedure of obtaining a certificate of lease arising from a letter of allotment as follows; Section 4 of the Act provided as follows:

“All conveyances, leases and licenses of or for the occupation of Government Lands, and all proceedings, notices and documents neither this Act, made, taken, issued or drawn, shall serve as otherwise provided, be deemed to be made, taken, issued or drawn under and subject to the provisions of this Act.”

Accordingly, under Sections 3 and 9 respectively the Government [Land Act](#) the Power to dispose of public land was vested in two entities: The President and the Commissioner of Lands. The process of the disposition of government land followed the following procedure: First, the respective municipal council in which the land to be disposed was situate had the mandate of advising the Commissioner of Lands on which portions of land could be disposed. This step would have required the responsible council to visit the area or to carry out a fact-finding mission to satisfy itself that the land was first of all government land and second that it was indeed available for disposition.

In Harison Mwangi Nyota v Naivasha Municipal Council & 20 others [2019] eKLR the court held;



“...The question that the plaintiff seemed to raise is what role the Municipal Council of Naivasha had in the issuance of allotment letters to the defendants in 1992. According to DW1, an employee of the 1<sup>st</sup> defendant, the local authority (1<sup>st</sup> defendant) has to recommend that the land is available for allocation before an allotment letter can issue. DW13 also told the court that the Council oversees all developments in its jurisdiction and allocates land on advisory basis for the Commissioner. It seems that even if the 1<sup>st</sup> defendant issued the letters dated 1/12/1992, it was mere advisory to the Commissioner of Lands. The allotment of the land had to be ratified by the Commissioner for Lands. It is obvious even from the communication between the Municipal Council and the Office of the Commissioner of Lands that the Council played an important role in identifying what land was available for purposes of alienation.”

The second step would be for the part development plan to be drawn up and approved by the Commissioner of Lands. See *Nelson Kazungu Chai & 9 Others vs. Pwani University College* (2014) eKLR where the court held;

“It is trite law that under the repealed Government Lands Act, a Part Development Plan must be drawn and approved by the Commissioner of Lands or the Minister of Lands before any unalienated Government land could be allocated. After a Part Development Plan (PDP) has been drawn, a letter of allotment based on the approved Part Development Plan is then issued to the allottee.”

The third step involved the determination of certain matters by the Commissioner of lands which matters are listed under Section 11 of the Government Lands Act (Repealed). The matters to be determined include; - the upset price at which the lease of the plot would be sold, the conditions to be inserted into the lease; the determination of any attaching special covenants and the period into which the term is to be divided and the annual rent payable in respect of each period.

The fourth step would be for the gazettment of the plots to be sold, at least four weeks prior to the sale of the plots by auction under Section 13 of the Government Lands Act (Repealed). The notice was required to indicate the number of plots situate in an area; the upset price in respect of every plot; the term of the lease and rent payable, building conditions and any attaching special covenants.

The fifth step would be for the sale of the plots by public auction to the highest bidder. Section 15 of the Government Lands Act (Repealed).

The sixth step would be for the issuance of an allotment letter to the allottee.

It is trite that for an allotment letter to become operative, the allottee was required to comply with the conditions set out therein, including the payment of stand premium and ground rent within the prescribed period. See the decision in: *Mbau Saw Mills Ltd v Attorney General for and on behalf of the Commissioner of Lands & 2 others* [2014] eKLR

I have considered the evidence on record and the submission of the parties and do find that a letter of allotment was issued to Mr. Joseph K. Mugambi on 21/10/1971 with a condition to accept the offer within 30 days. He did not do so and thereafter the offer lapsed 30 days after it was made in accordance with the allotment letter. Having failed to accept the offer as stipulated in the letter of allotment Mr. J.K. Mugambi did not acquire interest in the unsurveyed lorry depot and therefore had no interest to transfer to the plaintiff. This court holds that a letter of allotment does not confer any property rights to a person unless there is acceptance and payment of the stand premium and ground rent. In the letter



dated 17/6/1988 which was written about 17 years after the allotment letter was issued, the Commissioner of Lands confirmed that the plot was allocated to Joseph M. Mugambi in 1971 for lorry depot. However, the plot had neither been paid for nor an acceptance of the offer in the allotment letter made. The implication of this letter was that the allottee had not complied with the terms of the allotment letter and therefore the offer had lapsed. The offer having lapsed, the allottee Mr. Joseph M. Mugambi did not have any interest to transfer to the plaintiff and therefore all transactions between the allottee and the plaintiff were a nullity in law.”

It is noteworthy that an allotment letter has been held not to be capable of conferring an interest in land, being nothing more than an offer, awaiting the fulfilment of the conditions stipulated therein by the offeree. See the decisions in: *Gladys Wanjiru Ngacha v Teresa Chepsaat & 4 others* 182/1992 (Nyeri); and in *Dr. Joseph N.K. Arap Ng'ok v Justice Moiyo Ole Keiyua & 4 others* C.A.60/1997 where the Court of Appeal held as follows:

“It has been held severally that a letter of allotment per se is nothing but invitation to treat. It does not constitute a contract between the offer and the offeree and does not confer interest in land at all. It cannot thus be used to defeat a title of a person who is the registered proprietor of the said parcel of land.”

The allotment letter also must have attached to it a part development plan (PDP). See the decision in *African Line Transport Co. Ltd Vs The Hon .AG, Mombasa HCCC No.276 of 2013* where Njagi J held as follows:

“...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.”

The seventh step, which comes after the allottee has complied with the conditions set out in the allotment letter is the survey, its authentication and approval by the Director of Surveys and the issuance of a beacon certificate. The survey process precipitates the issuance of land reference numbers and finally the issuance of a certificate of lease. In the case of *Nelson Kazungu Chai & 9 Others vs. Pwani University College* (2014) eKLR the court held as follows:

‘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.

39. Having set out in detail the necessary steps to be followed in the acquisition of a Government land, it behoves a litigant basing his/her interest in land on the basis of a letter of allotment to provide the following proof: First, the allotment letter from the Commissioner of Lands; Secondly, a part development plan attached to the allotment letter. Thirdly, proof that they complied with the conditions set out in the allotment letter, primarily that the stand premium and ground rent were paid, within the specified timeline given. It would also help a litigant’s case, although this may not be mandatory based on the stage of the transaction, to have a certified beacon certificate.
40. The Court of Appeal in the case of *Munyu Maina v Hiram Gathiha Maina* [2013] eKLR, held as follows:

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the



legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.”

41. Section 80 (1) of the [Land Registration Act](#) NO. 6 of 2012 provides as follows:-

“Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”

42. From the above provisions, it is clear that the court has powers to order rectification of a register by directing that the registration be cancelled and/or amended if it is satisfied that such registration was obtained, made or omitted by fraud or mistake.

43. In the present case, the plaintiff has demonstrated that she applied for the allocation of a plot within Bungoma Municipality and the Town Planning and Works Committee approved her application and thereafter made a recommendation to the Commissioner of Lands to issue her with an allotment letter. As earlier noted elsewhere in this judgment, the plaintiff failed to produce any evidence to prove that she was issued with an allotment letter in relation to the suit land. She equally did not produce any receipts for payment of the fees attached to issuance and acceptance of an allotment letter. In the absence of these two crucial documents, this court is not persuaded that this critical step was complied with. I say so because it is only after an allotment letter is issued and the conditions set out therein are complied with that informs the issuance of a certificate of lease. Therefore, it is not enough to wave a certificate of lease without following the requisite legal steps. The process is as good and important as the final outcome.

44. Further, this court notes the discrepancy as can be seen on the certificates of search and the plaintiff's certificate of lease in terms of the date of issuance. It is clear from the certificate of search that the plaintiff was issued with her lease on 1<sup>st</sup> January, 2000 while the certificate of lease indicates 1<sup>st</sup> November, 2007. This anomaly has not been explained/clarified. The plaintiff did not summon the land Registrar to explain the discrepancy. According to the 3<sup>rd</sup> and 4<sup>th</sup> defendants, their records indicate that suit land was allocated to the plaintiff and that they are not responsible for issuing allotment letters and lease certificates, and therefore, could not verify whether these were issued and, if so, whether the issuance followed proper procedures.

45. In view of the matters aforesaid, I find that the plaintiff has not proved that she acquired the suit land procedurally and in accordance with the law.

46. Regarding the 1<sup>st</sup> defendant's case, the plaintiff stated that he obtained title to the suit land through fraud and that no material was placed before this Court to show that he applied for allocation of a plot through the correct agency i.e. the de funct Bungoma Municipal Council. She stated that it appears that the 1<sup>st</sup> defendant applied directly for allocation of a plot to the National Government as can be seen in the letter dated 22<sup>nd</sup> August, 1988 produced by as P-Exhibit 1. The stated that the 1<sup>st</sup> defendant has nothing to show that indeed the Municipal Council of Bungoma was involved in the allocation of what he claims to be his land. This being the first step, it is very crucial since it determined whether the land/plot applied for was a government land and secondly, the same was indeed available for disposition. Further, it is generally curious how a fresh certificate of lease was issued to him in 2018 despite there being an existing certificate in the name of the plaintiff. It is also unbelievable that the 1<sup>st</sup> defendant was issued with an allotment letter in the year 1993 and has not developed the same to date.



- 47. Therefore, it is my considered opinion that, Cornelius Wanyonyi Wamalwa as represented by the 1<sup>st</sup> defendant obtained his certificate in blatant disregard of the procedural requirements.
- 48. It is also my view that though the plaintiff's claim partially succeeds and having made a finding that the defendants title was obtained illegally, unprocedurally and through a corrupt scheme and liable for cancellation.
- 49. Section 13 (5) of the *Environment and Land Court Act* empowers this to make any order and grant any relief as the court deems fit and just. Having found that the plaintiff has failed to proof her case on a balance of probabilities, this suit is hereby dismissed. This Court must continuously uphold the principle of justice flowing like a river. Both the plaintiff and the 1<sup>st</sup> defendant having failed to proof ownership of the suit property, it follows that the land must therefore revert to the owner who legally owned the same before the irregularities and illegalities set out herein. It is for these reasons that I make the following consequential orders:
  - a. A declaration be and is hereby made that the alienation and double allocation of certificates of lease to the plaintiff and Cornelius Wanyonyi Wamalwa was unprocedural, illegal, null and void ab initio.
  - b. An order be and is hereby issued cancelling all entries and transaction arising from land parcel No. Bungoma/Municipality/123
  - c. The 2<sup>nd</sup> defendant shall rectify the register book by removing the names of the plaintiff and Cornelius Wanyonyi Wamalwa and any other entries thereto with respect to land parcel No. Bungoma/Municipality/123 and revert back to the proprietorship of the County Government of Bungoma
  - d. Each party shall bear its own costs of this suit.
- 50. Orders accordingly.

**DATED SIGNED AND DELIVERED AT BUNGOMA THIS 13<sup>TH</sup> DAY OF JUNE, 2024.**

.....  
**HON.E.C CHERONO**  
**ELC JUDGE**

In the presence of;  
 Mr. Abdi Noor for the plaintiff  
 Mr. Murunga for 1<sup>st</sup> Defendant  
 Mr. Wanjala for 3<sup>rd</sup> and 4<sup>th</sup> Defendants  
 Mr. Kipkoech for Interested Party.