



**Wanjugu v Ngugi (Environment & Land Case 153 of 2018)  
[2024] KEELC 5649 (KLR) (30 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5649 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 153 OF 2018**

**JG KEMEI, J  
JULY 30, 2024**

**BETWEEN**

**ANGELA TAIYANA WANJUGU ..... PLAINTIFF**

**AND**

**FRANCIS KIMANI NGUGI ..... DEFENDANT**

**JUDGMENT**

1. The claim of the Plaintiff against the Defendant is comprised in the plaint filed on the 3/5/2018. It is averred that the Plaintiff is the registered owner of the Thika/Mun/Block38/267 (suit land) and that the Defendant has trespassed thereon and constructed structures without the consent and knowledge of the Plaintiff. In the main the Plaintiff seeks orders for eviction and demolition of the structures erected on the suit land.
2. Vide the statement of defence and counterclaim dated the 30/1/2023 the Defendant denied the Plaintiffs claim and sought strict proof. Further that the Plaintiff's suit is statute barred since the Defendant has been in occupation of the plot Nos 267 and 268 since 1998 pursuant to letters of allotment from the Commissioner of Lands.
3. By way of Counterclaim, the Defendant avers that he was allocated plot Nos 267 and 268 in 1998 whereupon he took possession and developed rental residential units thereon between 2012-2014. In addition, that he pays rates to the Thika Municipal Council for the two plots and further that he has enjoyed quiet and uninterrupted possession since 1998 to date.
4. The Defendant contends that the Plaintiff acquired the suit land through a fraudulent scheme and particulars of fraud are itemized under para 16 of the counterclaim. Ultimately, he sought the following orders;



- a. A declaration that the Defendant is the legitimate owner of all that parcel of land known as UNS Residential plot number 268 otherwise known as Thika Municipality Block 38/267 and UNS Residential Plot No. 267 Thika Municipality.
  - b. A declaration that the lease dated 10/1/2023 issued in favour of Perpetual Weru over all that parcel of land known as Thika Municipality Block 28/267, all the entries made in the green card thereof and the Certificate of Lease issued on 20/12/2016 in favour of Angela Taiyana Wanjugu are all null, void and of no legal consequence and are hereby cancelled forthwith.
  - c. An order cancelling the lease dated 10/1/2013 issued in favour of Perpetual Weru over all that parcel of land known as Thika Municipality Block 28/267 and all the entries made in the green card thereof and the Certificate of Lease issued on 20/12/2016 in favour of Angela Taiyana Wanjugu.
  - d. The Land Registrar, Thika be and is hereby ordered to issue a lease in favour of Francis Kimani Ngugi over the parcel of land known as UNS Residential Plot number 268, enter his name in the green cards thereof as the registered proprietor thereof and issue him with a Certificate of Lease over the same.
  - e. Costs of the suit and interest thereon.
5. At the hearing the Plaintiffs case was led by Angela Taiyana Wanjugu as PW1. She relied on her witness statement dated the 3/5/2018. In support of her case, she produced documents marked as PEX No 1-9. She stated that she is the registered owner of the suit land. That the suit land was initially allocated to Perpetual Weru, her deceased mother vide Letter of Allotment (Ref No 23136/XL111) dated the 4/9/98. That the plot No is 268.
  6. That upon her death the suit land devolved to her and that the Defendant has erected structures on the suit land without her consent nor the approval of the local authority hence the filing of the suit.
  7. In cross examination she explained that her mother sold the suit land to one Margaret Wangari Wachira in 2000 and the said Margaret was issued with an allotment letter dated the 4/9/1998 (Ref No 23136/XL111) for plot No 268 Thika Municipality. That in 2000 Perpetua wrote to the Commissioner of Lands advising the office that she had transferred the plot to Ms. Margaret Wangari.
  8. The witness informed the Court that her mother appeared for execution of the lease on the 3/4/2016, which lease was registered on the 18/5/2015. That her mother died in 2011 before the completion of the title processing. That the title was issued after the successful succession of the estate of her late mother where she was both an administrator and a beneficiary.
  9. That though her mother paid for the allotment charges and the lease, she did not have any evidence before the Court to support the said payments.
  10. The witness further informed the Court that though the first entry on the register is that of Perpetua Weru on the 18/5/2016 as per the lease aforesaid, there is no title that was issued in the name of Perpetua Weru. As to whether Margaret Wangari constructed any house on the land the witness stated that she did not know.
  11. PW1 further stated that she realized that the Defendant had constructed structures in 2017 and hence her plea for orders of eviction of the said Defendant from the suit land.



12. Francis Kimani Ngugi testified online from the State of Delaware in the United States of America, as DW1 and relied on his witness statement dated the 13/1/2023 as his evidence in chief and produced documents in support of his defence and counterclaim marked as DEX No 1-4.
13. The witness stated that he relocated to the United States of America in 2003 with occasional visits to the country to visit kin and check on his investments. That in 1998 he was allocated two unsurveyed plots; 167 and 168 vide letters of allotments dated the 27/8/1998 whereupon he took possession and erected rental units between the years 2012-2014. That since 2014 he has been collecting rent from the said houses to date without any interruption or challenge from any quarters. He admitted that he is yet to process the titles for the plots.
14. That around the 5/4/2022 he was informed by the tenants that they had been served with a notice to vacate the premises which notice emanated from Court orders issued by the Court. He immediately instructed his lawyers to peruse the Court file and action to protect his interests.
15. In cross the witness stated that despite applying for the plot he had not produced the application letter, the acceptance of the terms and conditions of the Letter of Allotment nor any cheque signifying payment of the stand premium and other charges before the Court. He admitted that he is yet to process the titles for the plots. He also informed the Court that he did not obtain building approvals from the County Government before commencing the construction of the houses on the suit lands. He however informed the Court that he has been paying rates and annexed the rate payment receipts on page 20-24 of the trial bundle.

### **The written submissions**

16. Counsel for the Plaintiff framed the following issues for determination; whether the subject land parcel in this suit is Mun. Thika Block 39/267 formerly residential plot No 268 or is it land parcel UNS. Residential Plot No 267 Thika Municipality or both ?; whether the Plaintiff has a title for parcel 267 formerly UNS plot No 268?; whether the Plaintiff's title was lawfully regularly and procedurally obtained? Whether the Defendant has proved any fraud against the Plaintiff and who meets the cost of the suit.
17. On the first issue Counsel for the Plaintiff submitted that the Plaintiff's parcel of land is 267 as supported by the Letter of Allotment, beacon certificate, clearance certificate and County Government of Kiambu receipt all showing that UNS residential plot No 268 is parcel 267.
18. On the second issue, Counsel for the Plaintiff submitted that plot No 268 was allocated to the Plaintiff's mother namely Perpetual Weru vide the Letter of Allotment dated the 4/9/1998. That she later gifted the land to her relative namely Margaret Wangari Wachira who made payments of rates to the local authority as shown by the receipts on record. It was further submitted that Weru must have accepted the terms of the Letter of Allotment and made the requisite payments hence the issuance of a lease in her name and registration of the title in her name as shown in entry No 1 of the register.
19. Counsel further submitted that the Defendant has produced a suspect Letter of Allotment which does not bear the name of the signatory for the Commissioner of Lands save for an unknown signature. Further the Court was urged to find that the Defendant has not proved that he complied with the terms and conditions of the *Land Act*, accepted by the Letter of Allotment, paid the requisite stand premium. In addition, the Defendant failed to prove that he complied with the building code and regulations by obtaining a construction permit for development of the houses on the land.
20. On issue number three, it was submitted and observed that in the circumstances of the case before the Court, it is the duty of the Plaintiff to prove the root of her title by showing that she obtained legally



and in accordance with the lawful procedure prescribed in law and free from any encumbrances. That the procedure for acquiring an alienated Government land under the repealed Government Lands Act starts with the approval of a Part Development Plan, a Letter of Allotment issued to the allottee after which the allottee accepts the terms of the offer including payment of stand premiums and other related payments, thereafter a cadastral map is generated leading to the preparation and approval of the Registry Index Map (RIM) culminating into the process of titling. It was explained that the Plaintiff's mother must have complied with the above processes hence the issuance of the lease and registration of her name in the title as entry No 1. The Court was urged to protect the title of the Plaintiff in that regard.

21. Lastly, it was submitted that the Defendant failed to prove fraud as alleged in the counterclaim and the Court was urged to dismiss the same with costs.
22. Counsel for the Defendant framed the following issues for determination;
  - a. Whether the Plaintiff's suit is time barred?
  - b. Whether the Defendant is the legitimate owner of the parcel of land known as UNS. Residential plot No 268 otherwise Known as Thika/Mun Block 38/267;
  - c. Whether the certificate of lease issued on the 20/12/2016 in the name of the Plaintiff should be cancelled;
  - d. Whether the orders sought in the counterclaim should be granted;
  - e. Costs.
23. It was submitted that the Plaintiff's suit is time barred on the grounds that the Defendant has been in possession of the suit land since 1998. That the suit having been filed in 2018, comes 20 years later remains unsustainable having been filed outside the 12 years provided for under Section 7 of the Limitation of Actions Act. The Defendant further submitted that the Plaintiff visited the suit land in 2016, 18 years after he entered the land.
24. Relying on the case of *Shanlaldurgadass Rajput & Anor Vs. Divisions Integrated Development Programs Co Ltd* (2021) where the Court held that a suit for the recovery of land filed outside 12 years since the cause of action arose is incompetent, the Court was urged to hold as such and strike the suit out and allow the counterclaim.
25. Is the Defendant the legitimate owner of the suit land? It was submitted that the Defendant was allocated the two plots 267 and 268 vide a Letter of Allotment dated the 27/8/98. On whether the Defendant complied with the terms and conditions of the Letter of Allotment, the Defendant stated that it is only the allotting authority that can challenge the Letter of Allotment and that in any event the Plaintiff also did not demonstrate that she complied with the terms of the Letter of Allotment in her possession.
26. On the authenticity of the Letter of Allotment, the Defendant argued that the Plaintiff failed to inspect the original Letter of Allotment in his possession and therefore cannot be heard to impeach his Letter of Allotments based on the copies he presented in Court. That there is no evidence that the Defendant's Letter of Allotments have been annulled and the failure to pay for the stamp duty is a minor lapse that can easily be rectified by late payments. That similarly lack of building approvals cannot invalidate the ownership of the land in favour of the Defendant.
27. It was further submitted that the Defendant's Letter of Allotment having been issued on the 27/8/98 was first in time in contrast of that of the Plaintiff which was issued on the 4/9/1998. That by the time



the Plaintiff was allotted the land the same had been allotted to the Defendant and therefore was not available for alienation. See the case of Republic Vs City Council of Nairobi & 3 Others (2014) eKLR. The Court was urged to find that the Plaintiff's allotment was a nullity.

28. Should the title in the name of the Plaintiff be cancelled? The Defendant submitted that the title issued in the name of the Plaintiff was obtained through a corrupt scheme and should be cancelled; that the root of the title has not been proven; it is doubtful if the title emanates from the Letter of Allotment issued to Perpetual Weru or Margaret Wangai Wachira; was the Letter of Allotment in the name of Weru annulled or not; that the presence of two allotment letters in itself is an illegality; that the Defendant's Letter of Allotment having been issued first and there being no evidence that it was annulled means that the Letter of Allotment in the name of the Plaintiff's mother and Wachira are but illegalities; that according to the Plaintiff, her mother Weru died in 2011 and if that be the case then the lease could not have been prepared in 2013 in her name because by that time she was already deceased. The Court was urged to find that the lease document is a forgery. Further according to the lease on record, the said Weru is said to have signed the lease in 2016 before an advocate called Mr Ngigi, an act which was an impossibility since she died in 2011. The lease was signed in 2016 and registered in 2015 and the question is whether the lease was registered before it was executed. That the Land Registrar was not summoned to Court to explain the anomalies and neither the lawyer who witnessed the lease was availed to offer any explanation on the same and saving the Plaintiff's explanation that she was not in control of the lease preparation, the Court was urged to note the forgeries written all over the documents of the Plaintiff.
29. Parties are bound by their pleadings. Counsel for the Defendant submitted and highlighted the contradictions in the pleadings of the Plaintiff to wit; in her plaint she claims that the land was allocated to her late mother Weru, then in her Reply to defense and answer to the counterclaim, she stated that the land was allocated to one Margret Wachira and in between that the land was gifted to the said Wachira. The Court was urged to disregard any evidence that is contrary to the pleadings of the Plaintiff.
30. It was further urged that Weru did not acquire any interest in the property and therefore it was wrong for her estate to include it in the succession proceedings. That the inclusion was fraudulent and a corrupt scheme to illegally obtain title to the suit property.
31. Lastly the Court was urged to dismiss the suit and allow the counterclaim of the Defendant.

### **Analysis and determination**

32. Having considered the pleadings of the parties, the rival submissions and all the material placed before the Court the issues that commend themselves for determination are;
  - a. Whether the suit is time barred
  - b. Whether the Defendant obtained a valid interest pursuant to the letters allotments for plot Nos 167 and 168
  - c. Whether the Plaintiff obtained a valid title in plot 268 or 267
  - d. What orders should the Court grant?
  - e. Costs of the suit and the counterclaim.
33. In brief the case of the Plaintiff is that she is the registered owner of the suit land having inherited the suit land from her deceased mother Perpetual Weru (Weru). That in 2016 she visited the suit land and



found that the Defendant without her consent and knowledge trespassed onto the suit land erected structures thus sought orders of eviction and demolition of the structures.

34. The Defendant on the other hand denied the claim of the Plaintiff and averred in his counterclaim that he is the owner and in possession of plot Nos 267 and 268 pursuant to letters of allotments issued to him by the Commissioner of Lands dated the 27/8/98. That he took possession in 1998 and erected rental units between the years 2012-2014. He accused the Plaintiff of fraudulently obtaining title in the suit land as cited under para 16 of the counterclaim and urged the Court to nullify the lease and the title in the name of Plaintiff.

### **Issue No 1 – time bar**

35. On time bar, the Defendant has argued that he took possession of the land in 1998 and made developments without any challenge or protest least of all from the Plaintiff between 2012 – 2014. That the cause of action of the Plaintiff stems from 2016 when she alleges to have visited the land and discovered the occupation of the Defendant through his tenants in the houses. That this was 18 years after the Defendant took possession of the land. That the suit having been filed in 2018 comes about 20 years since his uninterrupted and peaceful occupation. That in accordance with Section 7 of the [Limitation of Actions Act](#), a suit for the recovery of land after the period of 12 years is incompetent and urged the Court to find so.

36. Section 7 of the [Limitation of Actions Act](#) states as follows;

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

37. The purpose of the Law of Limitation was stated in the case of Mehta Vs. Shah [1965] E.A 321, as follows;

“The object of any limitation enactment is to prevent a Plaintiff from prosecuting stale claims on the one hand, and on the other hand protect a Defendant after he has lost evidence for his defence from being disturbed after a long lapse of time. The effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case.”

38. In Gathoni Vs. Kenya Co-operative Creameries Ltd [1982] KLR 104, the Court of Appeal held as follows;

“...The Law of Limitation of Actions is intended to protect Defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending Plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.”

39. A suit barred by limitation is a claim barred by law, hence by operation of law, the Court cannot grant the relief sought. In the case of Iga Vs. Makerere University [1972] EA, the Court had this to say on the Law of Limitation;

“A Plaint which is barred by limitation is a Plaint barred by law. Reading these Provisions together it seems clear that unless the Applicant in this case had put himself within the limitation period by showing grounds upon which he could claim exemption, the Court shall reject his claim. The Limitations Act does not extinguish a suit or action itself, but



operates to bar the claim or remedy sought for and when a suit is time barred the Court cannot grant the remedy or relief sought.”

40. Section 7 of the *Limitation of Actions Act* provides that an action for recovery of land may not be brought after the lapse of 12 years from the date the right of action accrued to the Plaintiff. Ordinarily the right to the land would accrued to a party from the time that the party acquires a valid title in the land. If the Court were to take the period of 2016 as being the time of accrual of any right in the Plaintiff then the suit having been filed in 2018 cannot be termed as time barred.
41. There is another fundamental reason why I think this objection cannot stand and that is found in Section 42 of the *Limitation of Actions Act* which states as follows;

- “(1) This Act does not apply to-
- a. criminal proceedings; or
  - b. matrimonial proceedings; or
  - c. an action to recover possession of Trust land; or
  - d. proceedings by the Government to recover possession of Government land, or to recover any tax or duty, or the interest on any tax or duty, or any penalty for non-payment or late payment of any tax or duty, or any costs or expense in connexion with any such recovery; or
  - e. proceedings to which the *Public Authorities Limitation Act* (Cap. 39.) applies; or
  - f. forfeiture proceedings under the East African Customs Management Act, 1952 (*Act No. 12 of 1952*), or the East African Excise Management *Act, 1952 (No. 13 of 1952)*, of the High Commission; or
  - g. proceedings in respect of the forfeiture of a ship or an aircraft; or
  - h. civil proceedings brought under the *National Social Security Fund Act* (Cap. 258.) for the recovery of any contributions or any other sum and any penalty or interest thereon; or
  - i. civil proceedings brought under the *Higher Education Loans Board Act* 1995, (No. 3 of 1995.) for the recovery of any loans owed to the Board including any penalty or interest thereon; or
  - j. a proceeding to recover an amount for which a person is liable under section 51 or 52 of the *Anti-Corruption and Economic Crimes Act*, 2003 (No. 3 of 2003.) or a proceeding under section 55 or 56 of that Act.
  - k. actions, including actions claiming equitable relief, in which recovery or compensation in respect of the loss of or damage to any public property is sought.
- (2) Subsection (1)(k) shall apply retroactively.”



42. It follows that the provisions of Section 42 of the Act exempts all Government land from statutory limitations. In this case it is commonly adverted by both parties that their ownership is traced to letters of allotments issued in 1998 which lays credence to the fact that the suit land was Government land. The import is that before the process of title processing is concluded the land remained Government land in the process of alienation and therefore exempted by the provisions set out above.
43. For the reasons above the Court finds that the suit is not time barred.

**Issue No 2 - Whether the Defendant obtained a valid interest pursuant to the letters allotments for plot Nos 167 and 168**

44. It is the Defendant's case that he is the owner of the plots Nos 267 and 268 pursuant to Letters Allotments issued to him by the Commissioner of Lands. The Defendant produced the two Letters of Allotment one dated the 27/8/98 (Ref No 23136/XLIII for plot No 267 for a period of 99 years from the 1/9/98 measuring 0.045 ha at a stand premium of Kshs 9,000/- together with other charges. The second Letter of Allotment for plot No 268 bears the same date and reference number, land measurement and tenure and stand premium. Both letters though signed do not disclose the name of the person who signed. On this account alone, the Court finds the letters of allotment doubtful as to their authenticity. I say this because a Letter of Allotment in common parlance is a contract of land in law and going by the provisions of Section 38 of the Land Act, the execution of the contract is therefore incompetent. The Section states as follows;

“Validity of contracts in sale of land

1. Other than as provided by this Act or by any other written law, no suit shall be brought upon a contract for the disposition of an interest in land-
    - 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 to by a witness who was present when the contract was signed by such party.”
45. Allocation of land under the old land law regime was undertaken by the Commissioner of Lands on behalf of the President of Kenya pursuant to Section 3 of the Government Lands Act (GLA) which stated as follows;

“Section 3 of the GLA which gave the president power to interalia:-

- a. subject to any other written law, make grants or dispositions of any estates, interests or rights in or over unalienated government land;
- b. with the consent of the purchaser, lessee or licensee, vary or remit, either wholly or partially, all or any of the covenants, agreements or conditions contained in any agreement, lease or licence, as he may think fit, or, with the like consent, vary any rent reserved thereby;
- c. extend, except as otherwise provided, the time to the purchaser, lessee or licensee for performing the conditions contained in any agreement, lease



or licence liable to revocation for such period, and upon such terms and conditions, as he may think fit, and the period so extended, and the terms and conditions so imposed, shall be deemed to be inserted in the agreement, lease or licence and shall be binding on the purchaser, lessee or licensee, and on all transferees, mortgagees, assignees and other persons claiming through him;

- d. accept the surrender of any lease or licence under this Act;
- e. accept the surrender of any certificate granted under the East Africa Land Regulations, 1897, or of any lease granted under the Crown Lands Ordinance, 1902, and grant to the lessee a lease under this Act of the area the subject of the surrendered certificate or lease, provided such surrender is made within such period as the President may by notice in the Gazette direct, such period to be not less than twelve months from the commencement of this Act.”
  1. Once land is identified for alienation, there are key processes that are undertaken by both the applicant and the office of the Commissioner of Lands and now the National Land Commission; the applicant must apply for the land indicating the intended user; the Commissioner of Lands will prepare and approve a part development plan ; if the availability and suitability of the land is established a Letter of Allotment is issued to the applicant; the applicant is given 30 days to accept the terms and conditions of allotment including payment of the requisite stand premium and charges within 30 days in default the Letter of Allotment lapses; once the applicant has complied the Commissioner of Lands directs the Director of Survey or the applicant as the case may be to carry out the survey of the land; the survey is approved by the Director of Survey who issues the RIM or deed plan where applicable; the Commissioner of Lands through the Registrar of Titles draws the lease which is executed by the applicant and the Commissioner of Lands; the Lease is registered ; the register for the land is opened and the title registered in the name of the applicant.
  2. In this case the Defendant admitted that he has not complied with the terms of the Letter of Allotment and for that reason no interest passed to him. Simply put, he acquired no interest in the suit land and therefore his plea for ownership and or title for plot No 267 and or 268 is without any legal basis.

### **Issue No 3- Whether the Plaintiff obtained a valid title in plot 268 or 267**

48. It is the Plaintiff’s case that she is the registered owner of the suit land being parcel 268 having inherited it from the estate of her late Mother Weru pursuant to a confirmation of grant issued in 2015 following the death of her mother in 2011. The Defendant has sought to impeach the title of the Plaintiff on grounds that it is a product of an illegal and fraudulent process and urges the Court so dismiss.
49. Title in Kenya is protected by law as long as it is obtained lawfully. Article 40 (6) of *the Constitution* of Kenya provides that any title that is tainted is not protected in law.



50. Section 26 of the [Land Registration Act](#) provides ways in which a title may be impeached as follows;

- “(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
  - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original”

51. Section 26 of the [Land Registration Act](#) cited above provides two instances where a title can be challenged. The first is on the ground of fraud and/or misrepresentation to which the person is proved to be privy to and/or a party and secondly where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

52. It is now settled law that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. At page 427 in Bullen & Leake & Jacobs, Precedent of pleadings 13th Edition quoting with approval the cases of Wallingford v Mutual Society (1880) 5 App. Cas.685 at 697, 701, 709, Garden Neptune V Occident [1989] 1 Lloyd’s Rep. 305, 308, Lawrence V Lord Norreys (1880) 15 App. Cas. 210 at 221 and Davy V Garrett (1878) 7 ch.D. 473 at 489 it is stated that: -

“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged. The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (I). “General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice.”

53. In Civil Appeal No. 246 of 2013 between Arthi Highway Developers Limited Vs. West End Butchery Limited and 6 Others [2015] eKLR the Court of Appeal expressly stated that the law on fraud and indefeasibility of Title has been settled. The Court specifically referred to the law as stated in the case of Dr. [Joseph Arap Ngok Vs. Justice Moiwo ole Keiwua & 5 Others, Civil Appeal No. Nai. 60 of 1997](#) where the Court categorically declared that:-

“Section 23(1) of the then Registration of Titles Act (now reproduced substantially as Sections 25 and 26 of the [Land Registration Act](#) set out below) gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject



to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”

54. As regards standard of proof in respect to a charge of fraud, the law is quite clear. In *R.G. Patel Vs. Lalji Makanji*(1957) EA 314 the former Court of Appeal for Eastern Africa stated thus:

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

55. In the case of *Vijay Morjaria Vs. Nansingh Madhusingh Darbar & Another* [2000] eKLR, Tunoi, JA. (as he then was) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

56. In this case, the Plaintiff’s title is traceable to an allotment issued in the name of Weru on 4/9/1998 under reference Number 231336/XLIII for residential plot No 268 Thika Municipality for a period of 99 years from 1/9/1998 measuring 0.045 ha with the stand premium in the sum of Kshs 9,000/- coupled with other charges. The applicant was expected to comply with the terms of the offer including paying the stand premium within 30 days in default the offer would lapse. The Plaintiff failed to demonstrate that the applicant complied with the terms of the Letter of Allotment. Instead she explained that since the lease was issued in the name of Weru, the Court should presume that Weru complied. Unfortunately, the Court is unable to make the presumption in the absence of evidence. The Court holds that in the absence of any compliance, the said Weru acquired no interest in the land as the Letter of Allotment lapsed on 4/10/1998.

57. Further a close look at the Letter of Allotment shows it was for plot No 268 – Thika Municipality. The title of the suit land is for parcel No 267 Thika Municipality which is different from the primary document that generated the suit land. The Plaintiff was at a loss to explain how plot no 268 was converted to parcel 267 in the title. In the Plaintiff’s reply to defense and counterclaim dated the 15/2/2023, the Plaintiff stated as follows;

“The Plaintiff avers that she shall move the Court to order a survey report by the Government Surveyor to be availed to the Court to determine the location on the ground and the boundaries of Thika Municipality/Block 38/267 and Thika Municipality Block 38/268.”

58. Despite the above undertaking in her pleadings the Plaintiff failed to demonstrate that plot 268 is the same as parcel 267. The beacon certificate on page 27 of the Plaintiff’s trial bundle was not helpful in answering to the controversy. In the absence of a professional surveyors report, the Court will never know the truth. For this reason, the Court finds that on the basis of the Letter of Allotment being for plot No 268, neither Weru nor the Plaintiff acquired any interest in parcel 267. The current title in the name of the Plaintiff is therefore null and void to the extent that its root has not been established.



59. The Court agrees with the Defendant that there are contradictions apparent in the pleadings of the Plaintiff. As is the norm parties are bound by their pleadings. In the main the Plaintiff averred that the land was allocated to her mother, Weru in 1998, but in 2000 she sold the land to Margaret Wachira who was issued with a Letter of Allotment dated the 4/9/1998. This letter is similar in all aspects with the letter issued to Weru in 1998 with the exception of the name of the allottee. This Letter of Allotment could only have been issued to Wachira in the year 2000 and not before. Backdating the letter to 1998 is to show the length of forgeries and fraud the Plaintiff and her conspirators were prepared to go to. Even if I was to take that the letter issued to Wachira to be genuine (which is not), the question is what happened to the one issued to Weru in 1998. The Plaintiff failed to explain this except to state that two letters could not be issued to two different persons over the same suit land. There is no evidence that the Letter of Allotment in the name of Weru was ever cancelled to allow issuance of another Letter of Allotment in the name of Wachira for the same land. That being the case, the Court finds that this letter was an illegality for being backdated and for noncompliance.
60. In any event the Court agrees with the decision of the Supreme Court of Kenya in the case of Torino Enterprises Limited Vs. Attorney General [2023] KESC 79 (KLR) that the alleged transfer of the land vide the Letter of Allotment by Weru to Wachira was and is null and void as by 2000 Weru had not acquired any interest capable of being conveyed to Wachira. In the Torino case the Apex Court stated as follows:-
- “ Suffice it to say that an Allottee, in whose name the allotment letter is issued, must perfect the same by fulfilling the conditions therein. These conditions include but are not limited to, the payment of a stand premium and ground rent within prescribed timelines. But even after the perfection of an allotment letter through the fulfillment of the conditions stipulated therein, an allottee cannot pass valid title to a third party unless and until he acquires title to the land through registration under the applicable law. It is the act of registration that confers a transferable title to the registered proprietor, and not the possession of an allotment letter.”
61. Unchallenged evidence was led by the Plaintiff that Weru died on 23/5/2011 and her estate was fully administered vide the confirmation of grant issued in 2016 wherein the suit land was allocated to the Plaintiff as an inheritance. The lease for the suit land is dated the 10/1/2013 after the demise of Weru. It shows that Weru appeared before an advocate namely Ngigi on the 3/4/2016 and executed the same. On the said document, the lease became registered on the 18/5/2015. Neither the Land Registrar nor Mr Ngigi were called to testify on the possibility of a document being executed by a deceased person. In the absence of any explanation the Court finds the lease was not executed by Weru and it is anybody's guess who might have signed it. The totality of the evidence is that the lease was procured by way of a fraud as the deceased could not have resurrected from her grave signed the documents and died again!
62. The claims of both parties to the ownership of the title parcels fail. This Court does not have power to allocate land. It suffices to find that both parties acquired no legal interest in the suit lands.

#### **Issue No 4- what orders should the Court grant?**

63. The lease documents having been held to be a fraud, the title document in my view is tainted beyond redemption. The same cannot be allowed to stand. Under the powers donated to this Court under Section 80 of the [Land Registration Act](#) and having found the title to be a nullity, the same stands cancelled.



64. The Plaintiffs claim in the main was on trespass against the Defendant, the Court having held that the Plaintiff failed to prove title to the suit land, the claim of trespass is untenable and it is dismissed.

### **Costs**

65. The last issue for determination is who bears costs? Section 26 of the *Civil Procedure Act* provides that costs generally follow the event. The Supreme Court in the case of *Jasbir Singh Rai & 3 Others Vs. Tarlochan Singh Rai & 4 Others* [2014] eKLR affirmed that costs must always follow the event unless the Court has a good reason to order otherwise. In this case both parties have lost their claims and I order that each bears their costs in the circumstances.

### **Final orders for disposal**

66. In the end I make orders as follows;

- a. The Plaintiff's claim is unavailing. It is dismissed.
- b. The counterclaim partially succeeds to the extent of prayer Nos. b and c only.
- c. The title in the name of the Plaintiff hereby stands cancelled. The Land Registrar is ordered to cancel the lease, the green card and the title in the name of the Plaintiff.
- d. Prayers Nos (a) and (d) of the counterclaim are dismissed.
- e. Each to meet their costs.

67. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 30<sup>TH</sup> DAY OF JULY 2024  
VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of;**

Waithera Mwangi for the Plaintiff

Thuku for the Defendant

Court Assistants – Phyllis/Oliver

