



**Martin v Loosenge (Environment and Land Appeal E020 of 2023)
[2024] KEELC 6427 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6427 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT AND LAND APPEAL E020 OF 2023**

**AK BOR, J
SEPTEMBER 26, 2024**

BETWEEN

MARGARET KIRIGO MARTIN APPELLANT

AND

RANKAS LOOSENGE RESPONDENT

JUDGMENT

1. In this appeal, the Appellant challenges the decision of the Hon. Mr. Stephen Mogute, Senior Principal Magistrate, delivered on 25/4/2023 in Nyahururu CM ELC Case No. 62 of 2019 vide which the court dismissed her suit and found that the Respondent had proved his counterclaim on a balance of probabilities and granted the orders sought in the counterclaim.
2. The genesis of this suit is ownership of the land known as Rumuruti Township Block 2/142 formerly known as Unsurveyed (Uns) Plot no. C Rumuruti Township. The Appellant filed suit on 27/5/2019 claiming that she was allocated Uns Commercial Plot No. C Rumuruti Township by the Commissioner of Lands vide the letter of allotment dated 13/10/1995. She paid the sum of Kshs. 11,430/= indicated on the letter of allotment on 12/7/1996. She claimed that she was shown the land by the surveyors who forwarded the survey to the Director of Surveys on 23/3/2007.
3. She claimed that she took possession of the plot after the survey in 2007 and later deposited building materials and fenced the plot. She averred that she had been paying land rates to the defunct Town Council of Rumuruti and the County Government of Laikipia. That while she was waiting for the lease to be processed, the survey documents for her plot went missing. She later learnt that the Respondent had been registered as the owner of Rumuruti Township Block 2/142 and a certificate of lease issued to him on 27/4/2015.
4. The Appellant maintained that the registration of the Respondent as the proprietor of the suit land was done illegally or fraudulently and that the lease was processed secretly in collusion with



persons within the Ministry of Lands and Department of Surveys. She added that the registration was obtained through a corrupt scheme or illegal means and sought cancellation of the registration of the Respondent as proprietor of the land known as Rumuruti Township Block 2/142 formerly known as Uns Plot No. C Rumuruti Township for being fraudulent. She also sought an injunction to restrain the Respondent from taking possession of, developing, constructing or in any manner interfering with the suit plot.

5. In the Amended Defence and Counterclaim filed in court on 15/4/2022, the Respondent denied the Appellant's claim and averred that he would suffer irreparable loss if his registration as proprietor of the suit land were cancelled. He maintained that he was legally and procedurally registered as proprietor and was entitled to and had a right to put the suit land into use.
6. The hearing proceeded and in its judgment, the trial court identified two main issues for determination, that is whether the Appellant had proved his case on a balance of probabilities to warrant the grant of the reliefs sought in the plaint, and whether the Respondent proved his counterclaim. The court found that the Appellant's averment that the registration of the suit land in the Respondent's name was done fraudulently required evidence to be adduced to support that contention. The court went on to state that the Appellant had not tendered evidence to prove that the registration in question was done illegally or fraudulently.
7. The court found that the Appellant's evidence on record that she was allotted the suit land was not supported by any other evidence showing the steps she took to acquire title over the suit land. Further, the court was not satisfied that the Appellant had ever occupied the suit land. The court wondered what the Appellant had been doing since 1995 when she claimed to have been allotted the suit land until 2019 when she filed suit. The court also took issue with the Appellant's statement during cross-examination that she did not accept the offer of the allotment in writing. The court noted that the Appellant failed to comply with the conditions stated in the letter of allotment and in view of that, the offer lapsed.
8. The trial court cited *Philma Farm Produce & Supplies & 4 Others v The Attorney General & 6 others* HC petition No. 164 of 2011 where Majanja J. held that if a letter of allotment lapsed due to failure to comply with the conditions on it, it could not be revived by making payment. The court found the Respondent's evidence more believable and found that the Appellant had failed to prove her case on a balance of probabilities. The court noted that there was double allocation of the suit land and that the Appellant failed to demonstrate that the Respondent obtained his title over the suit property fraudulently or through corrupt means. The court concluded that the Respondent was entitled to enjoy the rights of proprietorship of the suit land pursuant to Section 25 (1) of the [Land Registration Act](#).
9. The main grounds of appeal were firstly, that the Learned Magistrate erred by failing to find that the Respondent's title was acquired fraudulently yet the Respondent did not adequately explain the root of his title; secondly, that the trial court considered documents which were not produced as exhibits. The third ground was that the Learned Magistrate erred by failing to find that a letter of allotment was sufficient proof of alienation of land to one party and the same land could not be allocated to someone else. The Appellant contended that the Respondent failed to prove his counterclaim.
10. The court directed parties to file written submissions to dispose of the appeal. The Appellant submitted that she testified before the trial court that the suit land was allocated to her on 13/10/1995. She paid all the dues for the plot which was surveyed and she took possession of the land. As she was waiting for the lease to be processed, she learnt that her documents had gone missing and was to learn later that a title had been issued to the Respondent. She maintained that the Respondent's lease



was processed secretly through a corrupt scheme or illegal means. She did not agree with the Learned Magistrate that there was double allocation of the suit property. She argued that this was a question of fraud and faulted the Learned Magistrate for not paying proper attention to the flawed process by which the Respondent came to the title.

11. To support the contention that the Respondent's proprietorship over the suit property was acquired by fraud, the Appellant submitted that her letter of allotment dated 13/10/1995 preceded the Respondent's which is dated 19/3/1996 and that by the time the land was purportedly allocated to the Respondent it was not available for allocation since it had already been allocated to her. She maintained that her allocation had not been revoked or cancelled and that in fact she paid the sum demanded from her on 12/7/1996. She went further to argue that had the allocation been revoked, the Ministry of Lands would not have accepted her payment. She also pointed out that by contrast, the Respondent's payment was made on 5/3/2014 which was 18 years after she made her own payment.
12. She also relied on the acceptance of her payment of rent by the Ministry of Lands as late as 26/2/2009 and relied on the rent demand notes. The Appellant pointed out that the letter dated 8/6/2017 acknowledged her claim to the suit land vide the letter sent to the Director of Surveys. In her view, it demonstrated that as at 8/6/2017, the records held by the Government reflected that she was the bona fide owner of the suit land thereby bringing into question the manner in which the Respondent became the owner of the suit land.
13. The Appellant relied on *Salome Wangari Wamunyu v Irene Jane Njambi & 2 Others* [2021] eKLR where the court observed that once a letter of allotment was issued and the allottee met the conditions set out in the letter, the land in question was no longer available for allotment because a letter of allotment conferred rights of ownership unless it was challenged by the allocating authority. The court went on to state that where land had been allocated, the same land could not be reallocated unless the first allocation was validly and lawfully cancelled.
14. The Appellant also cited *Swaleh Mohamed Waziri & 3 Others v Houd Mohmoud Athman & Another* [2020] eKLR. She maintained that having been allotted the suit land by the Commissioner of Lands and having paid the stand premium long before the Respondent, she acquired rights over the suit land and that it was not available for reallocation to someone else. She emphasized that the second allocation was fraudulent because the first allocation was still in existence.
15. The Appellant questioned how the Respondent could have carried out the survey work before he paid the stand premium and the other charges stated in his letter of allotment. She added that the Respondent's beacon certificate read 4/9/2013 and yet his first payment for the land was made on 5/3/2014. She questioned who allowed the Respondent to do the survey on the suit land based on his testimony at the trial that he was allowed to pay for the land until 2014. She emphasised that as at 2014 when the survey is alleged to have been done, the Respondent had nothing worth surveying because he had not paid the stand premium for the land.
16. The Appellant pointed out that under the Respondent's letter of allotment he was required to pay Kshs. 12,016/= but he only paid Kshs. 9,560/= and failed to give reasons for the underpayment during the trial. She also questioned why the receipt dated 10/12/2014 produced by the Respondent indicated that the rent had been paid to the County Government of Laikipia and yet land rent is usually paid to the National Government.
17. The other red flag according to the Appellant was how the Respondent's file at Ardhi House was not opened until 2015 yet most of his documents dated back to 2013. She questioned the speed with which the transactions were carried out between March 2014 and 2015 after the Respondent made the payments. Lastly, the Appellant contended that when the authenticity of the Respondent's letter



- of allotment and receipt were called into question, they were only marked for identification but were never produced in evidence.
18. The Appellant relied on *Munyu Maina v Hiram Gathiha Maina* [2013] eKLR on the reasoning that when a registered proprietor's root of title is under challenge, it was not sufficient to dangle the title document as proof of ownership but that the proprietor must go beyond the documents and prove the legality of how he acquired the title by demonstrating that the acquisition was legal, formal and free from any encumbrances including all interests which need not be noted on the register. The Appellant contended that when the Respondent's title was called into question, he was required to prove the legality of how he acquired the title. She maintained that the Respondent's lease over the suit land could not have been held to be authentic.
 19. She also urged that legally speaking, since her allotment was first in time, it should prevail over that of the Respondent. Based on this contention, the Appellant submitted that she had proved that the Respondent's proprietorship of the suit land was acquired irregularly, by fraud and or illegal means. She maintained that she had produced a letter of allotment, receipts for payment of the stand premium and land rent as well as the surveyor's letter.
 20. The Appellant submitted that vide the letter dated 17/7/2017, the Director of Surveys questioned the authenticity of the Respondent's documentation because the Survey Department had received two sets of documentations one from the Appellant and the second set from the Charles Maina Waruta. This according to the Appellant, meant that as at 17/7/2017, the Respondent did not appear in the records of the Ministry of Land as the owner of the suit property. She questioned how the Respondent was able to hijack documents which did not belong to him.
 21. The Appellant questioned the Learned Magistrate's finding in the judgment to the effect that the Respondent had followed the proper procedure in acquiring his title over the suit land. She submitted that the suit land was to be allocated by the Commissioner of Lands through the issuance of a letter of allotment and payment of stand premium. She was emphatic that the Learned Magistrate could not have determined that the proper procedure was followed without making reference to the letter of allotment and the payment receipt which were not produced. She submitted that the trial court arrived at a wrong conclusion by basing its decision on documents which were not properly produced.
 22. The Appellant rejected the trial court's finding that a letter of allotment was an intention by the government to alienate land while arguing that court decisions support the position that a letter of allotment was not a mere expression of the intention to alienate land but that it was equal to proper alienation of land. The Appellant relied on the *Salome Wangari Wamunyu* decision to support this contention.
 23. She also cited *Benson Mukuwa Wachira v Assumption Sisters of Nairobi Registered Trustees* [2016] eKLR where the court reiterated that registration of title to land was the culmination of governmental processes entailing allotment, surveying and the registration which ascribe ownership of a parcel of land to a particular individual. The court went on to define "owner of land" as referring to a person who either already bore a title or a process document secured by law leading to the issuance of the final paper title. The Appellant maintained that the suit land having been allocated to her, it could not have been alienated to someone else including the Respondent.
 24. The Appellant relied on Sections 26 and 80 of the *Land Registration Act* which give instances when the court may order rectification of the register by directing the cancellation or amendment of any registration if the court is satisfied that the registration was obtained, made or omitted by fraud or mischief. The Appellant contended that she in fact proved to the required standards that the



- Respondent's title to the suit land was acquired unprocedurally and fraudulently and that it ought to have been cancelled under Sections 26 and 80 of the *Land Registration Act*.
25. The Respondent submitted that the Commissioner of Lands allotted him Uns Commercial Plot No. C Rumuruti Township vide the letter of allotment reference No. 14602/11 on 7/3/1996 together with the approved part development plan (pdp) which identified the position of the plot. He accepted the offer but was told not to pay until a later date when he paid Kshs. 9560/= vide a banker's cheque and was issued a receipt dated 5/3/2014 when file no. 195796 was opened. He made payments to the County Government of Laikipia and was issued a clearance certificate which was valid up to 31/12/2014.
 26. He went on to add that he engaged a private surveyor to undertake the survey, and that vide the letter dated 3/2/2015, the Director of Surveys forwarded to the Chief Land Registrar the amended registry index map (RIM) which clearly identified the position of Rumuruti Township/Block II/142. The Chief Land Registrar forwarded the lease in triplicate for registration on 15/3/2015, which he executed on 23/2/2015 and after registration a lease was issued to him on 27/4/2015.
 27. The Respondent submitted that his registration as proprietor of the suit land was proper, procedural and lawful. That he followed the proper procedure by engaging a licensed land surveyor to survey the suit land, was issued a beacon certificate and paid the requisite stand premium land rates and rents. He maintained that there was an unbroken chain in his acquisition of the suit land which resulted in him holding a good title coupled with the fact that he had been in occupation and possession of the suit land. He cited *Naftal Kerongo Ongweso v Simon Mogere & Another* [2021] eKLR. He maintained that the trial court made the right finding that he had proved his counterclaim and deserved the orders he sought.
 28. The Respondent contended that despite laying claim to the suit property, the Appellant did not take any steps to have the title registered in her name and that there was no evidence placed before the court to show that she had ever occupied the land since 1995. The Respondent contended that under Section 109 of the *Evidence Act*, the burden of proving any particular fact lies on the person who wishes to have the court believe in its existence unless the law provided that proof of that fact lies on any particular person. Further, that under Section 112 of the *Evidence Act*, when any fact is especially within the knowledge of any party to civil proceedings, the burden of proving or disapproving that fact was upon him.
 29. The Respondent relied on *Vijay Morjaria v Nansingh Madhusingh Darbar & Another* [2000] eKLR where the court stated that fraud must be specifically pleaded and that fraudulent conduct must be distinctly alleged and distinctly proved because it is not allowed to leave fraud to be inferred from the facts. The Respondent relied on *Kinyanjui Kamau v George Kamau* [2015] eKLR on the standard of proof required for fraud in ordinary civil cases and that where fraud was alleged, it was not enough to simply infer fraud from the facts.
 30. The Respondent contended that the onus was on the Appellant to prove to the court that his registration as the owner of the suit land was done illegally or fraudulently but the Appellant failed to discharge that burden. He maintained that he held an indefeasible title to the suit property which he regularly obtained and was entitled to the absolute rights of proprietorship under the law.
 31. The Respondent submitted that he was allotted Uns Commercial Plot C reference no. 14602/11 through an approved pdp while the Appellant was allotted Uns commercial Plot C Rumuruti reference no. 16323/14 through an unapproved pdp. He contended that the two were distinct plots and that the Appellant did not produce any document that identified the location of her plot and that she could not



- therefore be heard to claim that the Respondent's plot was hers without any documents identifying her land.
32. He pointed out that at the trial, the defendant admitted that she did not comply with the conditions set out in the letter of allotment and that she did not accept the offer in writing or make the payment within 30 days as required. That based on this, the Commissioner of Lands was justified in giving the land to someone else. Further, the Respondent contended that the Appellant admitted that she did not follow up to ensure that the suit land was registered under her name and that as such, she had no legal or equitable remedy over the suit property.
 33. The Respondent contended that the offer of allotment which the Appellant relied on had lapsed, and that in any event, that letter of allotment was irrelevant at this point because there exists a lawful certificate of lease in respect of the suit plot and that that certificate of lease overrides the letter of allotment. He relied on *Muthithi Investments Limited v Andrew S. Kyendo & 22 others* (2014) eKLR where the court stated that the interests of a validly registered title was superior to that of the holder of a letter of allotment over the same property even if the letter of allotment was issued earlier than the title. The Respondent also relied on *Lilian Waitera Gachuhi v David Shikuku Mzee* in which the court cited the case of *Njuwangu Holdings Ltd v Langata KPA Nairobi & 5 Others*. In that case, the court reiterated that a registered title was superior to a letter of allotment and that barring any fraud on the part of the party holding the registered title, the letter of allotment had to give way since the rights of the party who holds the registered title had crystalized as opposed to those of the party holding the letter of allotment which were yet to crystalize.
 34. The Respondent maintained that the Appellant failed to lead any evidence to prove that he obtained title over the suit property through fraudulent and corrupt means and he was entitled to enjoy the rights of proprietorship conferred by Section 25 (1) of the *Land Registration Act*. He concluded that the Appellant failed to prove her case on a balance of probabilities. He also argued that the Appellant should have directed her claim for the land she was allotted to the Commissioner of Lands and not him while urging the court to dismiss the appeal with costs.
 35. The issue for determination is whether the court should allow the appeal and set aside the findings of the Learned Magistrate and proceed to enter judgment in favour of the Appellant in terms of the prayers she sought before the trial court.
 36. The Appellant claims that she was allotted Uns Plot No. C Rumuruti Township on 13/10/1995 and that she paid the stand premium and other fees indicated in the letter of allotment on 12/7/1996. The letter of allotment required the Appellant to accept the offer of allotment and pay the sum of Kshs. 11,430/= within 30 days of the postmark. From the evidence which the Appellant tendered before the trial, she paid the requisite sum well after the 30 days indicated in the letter. The letter mentions that there were Special Conditions attached to it but none were produced by the Appellant.
 37. It was expressly indicated on the letter of allotment that if acceptance and payment respectively were not received within the said 30 days from the date of the letter, the offer would be considered to have lapsed. There is no indication that the Appellant accepted the offer or that she sought extension of the time within which to pay the stand premium and other charges indicated in the letter. The last paragraph of the letter stated that the Government would not accept any liability whatsoever in the event of prior commitment or otherwise.
 38. After paying the sum of Kshs. 11,430/= on 12/7/1996, the Appellant does not seem to have taken any steps to have the plot surveyed and registered in her name until 23/3/2007 when J.R.R. Aganyo & Associates Licensed Surveyors forwarded some specified documents to the Director of Surveys. There is nothing to show what further steps the Appellant took regarding the survey of the plot. The receipt



issued by the Town Council of Rumuruti on 19/1/09 shows that she paid rates for the plot for the years 1995 to 2009. The Appellant paid land rent for 14 years on 26/2/2009 according to the receipts she produced in court. These payments were made 14 years after the allocation of the plot to the Appellant. If the land were surveyed in 2007 by J.R.R Aganyo Licensed Surveyors, then by 2009 the plot ought to have been registered. The other receipt which the Appellant tendered in evidence is dated 7/6/017 issued by the County Government of Laikipia on account of rates.

39. The letter from the Secretary of Lands dated 8/6/2017 sought a sealed copy of the RIM from the Director of Surveys. In what appears to be a response to that letter, the Director of Surveys wrote that he had received two sets of allocation documents for Plot No. C Rumuruti, that is for the Appellant and the second set was for Charles Maina Waruta based on a letter of allotment date 7/3/1996. The search dated 26/4/2019 which the Appellant produced in court confirmed that the Respondent was registered as lessee of Rumuruti Township Block 2/142 and a certificate of lease issued to him on 27/4/2015.
40. The pdp attached to the Appellant's letter of allotment had a sketch of the plots numbered A to I, which necessitated the survey of the land and issuance of title under the relevant law. The Appellant claimed that she was shown the land by the surveyors and that she took possession of the plot after the survey in 2007 and later deposited building materials and fenced the plot. The Appellant was expected to take steps to have the land surveyed and to follow up the registration and issuance of a lease in her name once the survey was completed.
41. She did not lead any evidence to prove that she got the land which she was allotted surveyed and registered for over 20 years. She merely stated that she was shown the land in 2007 and that the survey was forwarded to the Director of Surveys in 2007. For 10 years from 1995 when she was allotted the land until 2007, the Appellant did not take steps to have the land surveyed in line with the pdp annexed to her letter of allotment.
42. On his part, the Respondent produced the indent dated 18/9/2013 confirming survey of the land known as Rumuruti Township Block 2 parcel no. 142 pursuant to survey plan no. F/R 550/42. He also produced a copy of the banker's cheque dated 5/3/2014 for Kshs. 9,566/= payable to the Commissioner of Lands, which ostensibly was for stand premium and other charges. He produced a copy of the receipt for Kshs. 35,750/= dated 10/12/2014 issued by the County Government of Laikipia on account of several charges including survey for Plot C Commercial Rumuruti Town. He produced a copy of the rent certificate issued by the County Government of Laikipia on 11/12/2014 for Plot C Commercial Rumuruti Town together with a copy of the certificate of lease issued on 27/4/2015 to him as well as the lease registered on the same date.
43. The court notes that the Respondent's lease dated 23/2/2015 is between the County Government of Laikipia and the Respondent shows the annual rent payable as Kshs. 1,000/=. The lease was registered on 27/4/2015.
44. At the time the Appellant was allocated Plot C Commercial Rumuruti Town, the body mandated to allocate land was the Commissioner of Lands. The Appellant's main contention is that the suit plot was not available for allocation to the Respondent since the Commissioner of Lands had already allocated it to her on 13/10/1995. Both the Appellant and the Respondent claim to have been allocated the suit land by the Commissioner of Lands. The Appellant should have joined the Commissioner of Lands or its successor in title to the proceedings to explain why it re-allocated the same plot that it had already allocated to her to the Respondent.
45. The Appellant failed to prove on a balance of probabilities that the Respondent obtained registration as the proprietor of the suit plot through fraud. Not having proved any fraud on the part of the



Respondent holding the registered title, the Appellant's letter of allotment must give way since the Respondent's rights crystalized as opposed to those of the Appellant holding the letter of allotment whose rights were yet to crystalize.

46. In this court's view, it was not enough for the Appellant to allege that the Respondent acquired the suit land fraudulently, she needed to prove this to the required standard, which she failed to do. In her submissions, the Appellant invited the court to infer fraud.

47. The appeal lacks merit and is dismissed. Each party will bear its own costs.

DELIVERED VIRTUALLY AT NANYUKI THIS 26TH DAY OF SEPTEMBER 2024.

K. BOR

JUDGE

In the presence of: -

Ms. Eunice Ndegwa for the Appellant

Ms. Elizabeth Mwangi for the Respondent

