



REPUBLIC OF KENYA



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**Koech v Magondu & 3 others (Environment & Land Case 318 of 2021)
[2024] KEELC 13865 (KLR) (17 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13865 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE 318 OF 2021**

AE DENA, J

DECEMBER 17, 2024

BETWEEN

JOEL KIPKURUI ARAP KOECH PLAINTIFF

AND

ALICE WAMBUI MAGONDU 1ST DEFENDANT

LAND REGISTRAR KWALE 2ND DEFENDANT

**DEPARTMENT OF LAND ADJUDICATION & SETTLEMENT,
KWALE 3RD DEFENDANT**

ATTORNEY GENERAL 4TH DEFENDANT

JUDGMENT

Background

1. This suit was commenced by way of a Plaint dated 10th April 2017. The subject of the suit is land parcel Number Kwale/Shimoni/168 (herein the suit property). The Plaintiff avers that he is the beneficial owner of the Suit Property which was fraudulently registered in the name of the 1st Defendant through illegal means. It is averred that the process of acquiring the suit property started in 1988 under Shimoni Settlement Scheme. That the suit property was allocated to the Plaintiff through a Letter of offer Ref.No.C/CS/0017/165 dated 1st February 1991. That he accepted the offer by paying the necessary charges and was issued with a certificate of outright purchase Ref: LO/470/168/5 dated 21/2/1991. It is stated that upon payment of the requisite charges, transfer documents were prepared by the Ministry of Lands on 12/11/2007 and dispatched to the Plaintiff for signing whereupon he appeared in person before the officers of the Ministry of Lands, Housing and Urban Development on 18/3/16 and duly executed the discharge of charge and the transfer documents which documents were presented to the land registrar for execution.



2. It is averred that on dates unknown to the Plaintiff but purporting to be 17/2/2004, the 1st Defendant through the 2nd and 3rd Defendants without the consent or knowledge of the Plaintiff, or any lawful justification failed to register him as the owner and instead made an entry in the land register of the suit property purporting to register the 1st Defendant as the proprietor of the Suit Property.
3. The Plaintiff further contends that the registration of the 1st Defendant as the proprietor of the Suit Property was unlawful, illegal, fraudulent, through corrupt scheme and in violation of the law. The particulars are set out in paragraph 13 of the Plaintiff. The Plaintiff avers that to obstruct the efforts of the Plaintiff to investigate the fraud, the 2nd and 3rd Defendants refused to otherwise give him information on the identities of the persons who registered the 1st Defendant as the proprietor of the Suit Property.
4. The Plaintiff seeks judgement against the defendants jointly and severally for; -
 - a. A declaration that the purported registration of the 1st Defendant as the registered proprietor of Kwale/Shimoni/168 situate in Kwale County is unlawful fraudulent, corrupt, in violation of the Land Registration Act, void and did not extinguish the proprietorship of the Plaintiff on the suit property or pass any property interest in any part thereof to any of the defendants
 - b. An order directing the 1st and 2nd Defendants to rectify the register by cancelling the purported registration of the 1st Defendant and replace or enter the name of Joel Kipkurui Arap Koech as the registered owner and destruction of the title deeds or other title documents issued to the 1st Defendant.
 - c. A permanent injunction restraining the 1st to 4th Defendants by themselves, their servants and agents from selling, leasing, mortgaging, gifting or otherwise disposing any interest and from entering remaining on, constructing, cultivating or otherwise interfering with the Plaintiff's Title to and quiet possession of Kwale/Shimoni/168 situate in Kwale County.
 - d. In the alternative and without prejudice to foregoing and order directing the defendants to jointly and severally indemnify the Plaintiff for loss of Kwale/Shimoni/168 situate in Kwale County to the extent of the market value of the suit property or the subdivisions thereof at the time of the judgement.
 - e. Any other relief as the court may deem fit.
 - f. Cost of the suit.
5. The suit was defended. The 1st Defendant filed a Statement of Defence on 4th September 2017. It is averred that the 1st Defendant is the registered owner of the Suit Property having acquired it lawfully after a survey was conducted by the 3rd Defendant in 2004 when the suit property was allocated to her. The 1st Defendant states that she called upon the 3rd Defendant and confirmed that her name was in the register, the demarcation book and the accountability list and that she accepted the offer and allocation by paying the necessary charges and thereafter the process of transfer began. The 1st Defendant further avers that she was present during the demarcation together with the village elders and the family of the person who used to cultivate the land before the scheme allocated the land to her and that at that time there were mango trees which she agreed to and did compensate the owner. It is the 1st Defendant's contention that upon payment of the requisite charges, transfer documents were prepared by the Ministry of Lands and she was issued with a title Deed marked "A-3". The 1st Defendant further contends that in registering her as the owner, the 2nd Defendant relied on the records from the Department of Lands and Settlement and could not have issued the 1st Defendant with a title deed if her name was not appearing in the register. She states that all the documents relating to allotment,



survey plans, the certificate of discharge and transfer in her favour are in the official custody of the 3rd Defendant. The 1st Defendant denied participating in the alleged fraud and that after demarcation and issuance of title deed, she took over the suit property and began development on it.

6. The 1st Defendant further avers that as an owner, in 2005, she charged the property to Agricultural Finance Corporation to secure a facility of Kshs.200,000 and applied for another loan of Kshs.800,000 in 2015 but the same was not approved because the Plaintiff had lodged a restriction on the Suit Property, an act that she alleges has caused her to suffer loss as a farmer and businesswoman. It is the 1st Defendant's contention that any subsequent allotment to the Plaintiff was through fraud and/or corrupt means and is of no effect. The 1st Defendant avers that as the first registered owner her title cannot be impeached and is entitled to title, quiet possession, use and all other rights over the Suit Property as guaranteed under Article 40 of the Constitution of Kenya, the Land Act and the Land Registration Act.

Counterclaim

7. The 1st Defendant also filed a counterclaim and states that the Plaintiff had without lawful cause lodged a restriction against the suit property. That as a farmer and business woman she suffered loss and damage following rejection of her loan due to the restriction. The Defendant prays for; -
 - a. A declaration that the Plaintiff in the counterclaim is the initial and only allottee of land number Kwale/Shimoni/168
 - b. A declaration that the Plaintiff in the counterclaim is the absolute and registered owner of LR Number Kwale/Shimoni/168 having complied with mandatory procedures.
 - c. A declaration that the purported discharge of charge and transfer in favour of the 1st Defendant in the counterclaim is void because it was obtained through illegal means
 - d. A permanent injunction restraining the 1st Defendant in the counterclaim by himself, agent and or servant from entering, remaining and or otherwise interfering with my (sic) quiet possession of LR No Kwale/Shimoni/168
 - e. An order directing the 2nd Defendant to remove the restriction placed by the 1st defendant in the counterclaim against my title Kwale/Shimoni/168
 - f. General damages as against 1st Defendant in the counterclaim for loss and damage caused by the restriction placed against the title to the suit property encumbering the plaintiffs title on LR No Kwale/Shimoni/168
 - g. Any other relief which this honourable court may deem just and expedient to award me in the circumstances of this case.
8. The 2nd 3rd and 4th Defendants filed statement of defence dated 11th March 2020 through the office of the Attorney General. All the allegations levelled against them were denied. It is averred that all the registration dealings were in accordance to the law and based on the documents present without intention to defraud the Plaintiffs.

Hearing

9. The suit was heard on 5/4/22 and 19/3/24. During the hearing Mr. Cheruiyot represented the Plaintiff, Mr. Mutugi the 1st Defendant while Mr. Mwandeje Senior State Counsel represented the 2nd 3rd and 4th Defendants.



Plaintiffs Evidence

10. PW1 was Joel Kipkurui Arap Koech the Plaintiff, residing in Kericho. He testified that before retirement he worked with the Ministry of lands and settlement as Principal Land Adjudication and settlement officer. That he does not know the 1st defendant and had sued her to retrieve his land parcel kwale /Shimoni/SS 168. That the parcel was in a settlement scheme and in 2018 he attended District Land Adjudication office Kwale where after paying the requisite amounts he was furnished with a discharge of charge. However, upon presenting the same to the land registry he was informed the title had been collected by Alice Wambui Magondu. That he then went to inquire with the officers administering S.S fund trustee at the ministry Headquarters and found the records still bore his name. PW1 reiterated he complied with the procedure for acquisition of title from Settlement scheme. That the scheme was conceived in 1988, he applied and was offered the land vide letter of offer dated 1st February 1991. That he paid the outright Purchase since he wasn't getting a loan from the trustees. He was issued with certificate of outright purchase dated 21st June 1991.
11. PW1 added that the next step was for survey and the issue of transfer. That he was issued with a transfer dated 17/11/2007, discharged of charge upon payment of Ksh. 2000. The title was to follow which was After this one is issued with a title which was issued to someone else. He then placed a restriction against the tittle. He obtained the Green card to confirm ownership. It revealed the 1st owner as the Settlement Fund Trustees and he was to be the 2nd owner. The file did not contain the transfer except the discharge from AFC no transfer document as I expected. That he still held the discharge he had gone to present in exchange for the transfer but it wasn't possible since he was told title had already been issued. According to the witness the land registrar facilitated the issuance of transfer. He had no issue with the land Adjudication office because they gave me the documents. That the 1st and 2nd defendants failed to comply procedure. He insisted there was fraud and he reported to the DCI. The witness produced a letter dated 17/05/2016 explaining the process which he validated. PW1 invited the court to cancel the title and issued the Plaintiff with title.
12. On cross examination by Mr. Mutugi the witness testified that he applied for allocation pursuant to an advertisement. That letter of offer was to Joel Koech and did not bear his ID Number which he did not deem necessary. He conceded the receipt for payment was not in the Plaintiffs list of documents. That the certificate of outright purchase does not bear his ID number. There is no condition for payment in the letter of offer and it didn't give the amount to be paid. The witness conceded the letter of offer was valid for 90 days from the date of offer but did not have the receipt. That he did not write back to show that he accepted the offer.
13. On being shown the transfer dated 8/03/2016 PW1 observed it was not dated. The witness agreed that the transfer moves together with the discharge since they are signed on the same day. The transfer was filed on 12/11/2007 but to me executed 8/03/2016. It was signed in my absence yes and I signed later. The witness stated he has been to the suit property only once in 1991 when he accepted the offer but did not take possession. That he was not present during adjudication. That he did not know the neighbours. The witness conceded he had filed this suit 14 to 15 years after allocation in 1991. That though he was aware the transfer had been signed he collected it in 2016 9 years later. PW1 agreed that if you do not accept the offer then you do not have the plot. That he was aware a letter of allocation is not title. That when one is being allocated the land you must be on the ground. He conceded he was not a resident of Kwale. The witness indicated he knew there is a title issued by the land registrar who is mandated to issue title but in accordance to land Adjudication. He conceded that the green card produced revealed the 1st defendant appearing in the documents.



14. Cross examined by Mr. Mwanjeje PW1 told the court he became aware of the 1st Defendants title in 2016. That in land adjudication there is a dispute resolution Committee but in his case it was outright purchase. That he went to Nairobi and never saw anything showing the 1st defendant as owner except in the green card produced. That to give title the land registrar is guided by the bundle sent by the chief land registrar to register in the name of SFT. Its after SFT registration that the title issue to the individuals. That though he had raised grounds of fraud and made a report to the police he did not have the requisite OB.
15. With the above evidence the Plaintiffs case was marked as closed.

DEFENCE EVIDENCE

16. DW1 was Alice Wangui Wangondu sued as the 1st defendant. She adopted the witness statement sworn on 10/03/2020 as her evidence in chief. She also produced the documents in the 1st Defendants list of documents dated 10/03/2020 (DW 1 Ex 1- 15th). DW1 stated she had proof of title deed issued 17/12/2004 and certified copy of the green card opened on 28/06/93 for plot 168. That she used to do business in Kwale and Shimoni in 1990 and needed a place to raise her children. That she knew schemes are given by the Government of Kenya and visited Adjudication office to find out and she was promised she would be considered when opportunity arises. That she kept follow up and her allocation letter came out in 1991. She confirmed her name was in the accountability list though written in pencil. That she was taken to the ground to be shown her plot beacons and neighbors. That in 1991 she paid in cash 30,000/= at the Adjudication officer and ensured she had all the originals. That usually after payment there is delay but she kept on following up and obtained her title in 2004 which she was given by the land registrar. That she built a simple house in 1991/1992 and later obtained a loan of 200,000/= from Agricultural Finance Corporation (AFC) using the title as security. That the bank did a search on the plot at Kwale Registry dated 21/10/2005 which revealed her as the owner. That the property was charged as evidenced in the green card.
17. DW1 testified that she had not produced her letter of offer as it got lost during the loan process, which she reported to the police. That the charge for a second loan from Consolidated Bank could not be registered due to a restriction lodged by the Plaintiff. That she then obtained a copy of the green card through the assistance of DCIO. The same depicted her as the owner while the 1st entry was for SFT. The Plaintiffs name did not feature. She prayed that the court give her the land which was her sweat. That the restriction had caused her suffering since 2016. That the orders of status quo restricted any activities on the property causing her to move out of the land. The witness denied she connived with the lands officials to obtain the title.
18. On cross examination by Mr. Cheruiyot the witness conceded she had not presented to court the allotment letter, certificate of outright purchase, transfer forms, discharge of charge, receipt for ksh.2000/= Though the witness had seen and signed all required documents and which she stated were removed at the instance of the Plaintiff she had no OB report. That though there was an accountability list from SFT she did not request for copy. The witness conceded though she produced title deed and searches she had not produced any documents predating title.
19. On cross examination by Mr. Mwanjeje DW1 testified that She paid Ksh. 30,000/= on the advise of adjudication office but had not produced a receipt. She conceded that her witness statement stated she developed the structure in 2004 though her oral testimony was she built the same in 1992. She conceded that though she accepted the offer the same was not produced. The witness reiterated that she would not have been issued with title if she did not have all the documents. That though she paid



some wazees for trees in the suit property they were not her witnesses in the matter. Though she was frustrated there was no documented complaint.

20. With the above evidence the 1st Defendants case was marked as closed.
21. DW2 was John Ngugi Karanja the Kwale County Land Adjudication & Settlement Officer. He testified that according to the parcel file, after demarcation and survey work was completed parcel number 165 was offered to Joel Kipkurui Arap Koech on 1/02/1991. He owned the offer by paying 2000/= on 8/03/2016 and the receipt was in the file. After payment the legal documents were prepared and the land transferred from the SFT to Mr. Koech who was therefore discharged because he had paid fully and was given the title. Mr. Njenga cleared Mr. Koech. That the discharge was signed on 8/05/2016 for Mr. Koech to go and collect the title. After signing the adjudication office remains with a copy of the discharge and Mr. Koech was to present the same at the land registrar. He emphasised that the parcel file only featured Mr. Joel Koech.
22. Upon cross examination by Mr. Cheruiyot DW2 stated the records at adjudication contained nothing showing that the 1st defendant was offered the same plot. The right person to be issued with the property is Joel Koech. The plaintiff complied with all the requirements for issuing him with a title. The records at Ministry of lands and the ones held at Kwale confirm that it is the plaintiff who was offered. He was not aware if title was issued to Mr. Koech since this is dealt by department of Land. The beneficiary is the one to present the originals to the land office and the department of land cannot issue the title to anyone else. That it is not possible for the title to issue to two different people unless it is a fraud. The other possibility is where parties agree and the 1st owner is shown.
23. On cross examination by Mr. Gathu the witness testified that the parcel file court must show the name of the beneficiary and the parcel number. That the only original document in the parcel was the certificate of outright purchase. He confirmed the receipt was not an original. That after the letter of offer Joel was supposed to visit the parcel to be shown the boundary however there was no record showing this happened neither any follow up documents /letter issued after site visit. That the offer was valid for 90 days and Joel was to accept the offer as per the letter of offer and pay 10% deposit. He confirmed such acceptance wasn't in the file. There was also no record reflecting the 10% deposit. That while Kshs 500 was required to be paid on the certificate of outright purchase there was no receipt in this regard. While there was a receipt for 2000/=, paid on 8/03/2016 the witness could not confirm what the same was in respect of though it is was in respect of this parcel of land.
24. On being shown the Transfer of Land In Settlement Scheme the witness pointed it had no signature, the bookings and presentation details were blank, that there was no reference to Joel Koech. However, the transferee had signed and officer confirmed that Joel signed before him. He stated there appeared to be no activity by Joel in the file between 1991 to 2016. The witness stated he was not aware that Joel used to work with the adjudication office. That during registering they adhere to details in the identity card though he noted mix up of use of initials of the beneficiary in the letter of offer, certificate of outright purchase and transfer. The witness declined to comment on the green card since he did not work in the ministry of lands. There was no receipt for the transfer in the parcel file. That the if a beneficiary doesn't accept the offer within 90 days the land still belongs to the SFT. However, it was possible after this for another person to benefit subject to process. If the next person becomes a beneficiary, then the previous allottee who didn't accept the offer cannot come to defeat the subsequent title. Ordinarily if there is a subsequent beneficiary a file is opened for him though from the record there is no other file after 168/5.
25. On re-examination the witness clarified that a subsequent owner must also adhere to process including having an offer and the other documents required. The witness indicated the file had no such



documents for the 1st Defendant. The reference number in the letter of offer need not tally with the plot number since it is just a reference number. Explaining the inaction during the period 1991 to 2016 stated that ordinarily once the land adjudication finalises with their process the rest is for the land owner to deal. That the original discharge should be with the land office if at all the owner presented it there. The original offer and receipt should be with the beneficiary and left at the lands office to be used for issuance of the title. The adjudication department only has duplicates. He confirmed what was contained in the parcel file is what ought procedurally to be there.

26. with the above the 2nd 3rd and 4th Defendant's case was marked as closed.

Submissions

27. Parties filed and exchanged submissions.

Plaintiffs Submissions

28. The Plaintiffs submission are dated 20th November 2024 which was out of time. However, in the interests of justice the court considered the same as the mistake of counsel should not be visited upon the Plaintiff.
29. On whether the Plaintiff is the rightful owner of the suit property the court is referred to Article 40 of the Constitution as to right to property and protection as to deprivation without compensation. It is submitted that the Plaintiff through his evidence and the evidence of the 2nd and 3rd Defendants proved that the Plaintiff was the initial allottee of the suit property by the Settlement Fund Trustees. Citing the provisions of section 26 of the Land Registration Act the Plaintiff challenges the 1st Defendant title. It is submitted that other than the title dated 17/12/2004 in the 1st defendant's name they had failed to produce any documentary proof on the root of the said title. That this is opposed to the Plaintiffs documents which included the letter of offer and certificate of outright purchase and which tallied with the records kept at the Kwale Land Adjudication office and Ministry of Land Headquarters. The case of Dina Management SC Petition 8 (E010) of 2021 Dina Management Limited Vs County Government of Mombasa & 5 Others (2023) KESC 30 KLR is cited. The court is further referred to the case of Mohamed Ibrahim Alio & 6 Others Vs Mandera County Government & 6 Others (2021) eKLR to buttress the position that though the Plaintiff did not have title there was legitimate expectation that title would issue.
30. The Plaintiffs also invite the court to exercise its power under section 80(1) of the Land Registration Act to rectify the Register in favor of the Plaintiff since the 1st Defendant did not prove that her registration was obtained lawfully.

Submissions of the 1st Defendant

31. 30 The 1st Defendant's submissions are dated 15th September 2024. According to counsel these were prepared without the benefit of the other parties' submissions which had not been filed as at that date.
32. It is submitted on behalf of the 1st Defendant that no rights of ownership were vested in the Plaintiff as he did not perfect the conditions in the letter of offer, neither did he acquire a title deed before the registration of the 1st defendant as owner of the suit property. Further that a letter of allotment does not confer interest in land and cannot be used to defeat a title of a person who is registered as the proprietor of that land. Reference is made to the case of Torino Enterprises Ltd Vs. Attorney General (Petition 5 (E006) of 2022 (2023) KESC 79 (KLR) and Dr. Joseph N.K Arap Ngok Vs. Moijo Ole Keiyua & 4 Others C.A 60/1997. The case of Commissioner for lands & Another Vs. Kithinji Murugu M'agare (2014) eKLR to buttress the point that failure to accept the offer and within the stipulated time is fatal.



33. It is further stated that no particulars of fraud were proved by the Plaintiff to warrant the impeachment of the 1st Defendants title under the provisions of section 24 and 26 of the Land Registration Act. That the fact that acquisition of the suit property by the 1st defendant after the Plaintiff failed to meet the conditions of the letter of offer is not in itself is not a ground to plead and or justify fraud. Moreover, the right of ownership had already crystallised as opposed to the person holding a letter of offer. Reliance is placed on the case of Muthithi Investments Ltd Vs Andrew S. Kyendo & 22 Others (2014) eKLR.
34. The court is invited to dismiss and or strike out the Plaintiffs suit and make a finding that the 1st Defendant is the lawfully registered proprietor of the suit property. That costs be awarded to the 1st defendant for incurring expenses towards the prosecution of this suit.

Second to 4th Defendants Submissions

35. The submissions of the 2nd to 4th Defendant dated 5th July 2024 narrowed the issues for determination to one, who is the bonafide owner of the suit property known as Kwale/Shimoni/168. Citing Article 40 (1) and 40(6) of the Constitution it is submitted that title to land found to have been unlawfully acquired cannot be sheltered under these provisions. Enumerating the documentary evidence furnished by the Plaintiff in support of their claim vis a vis that of the 1st defendants and further that of the Land Adjudication Officer including the burden of proof as outlined in section 107 of the Evidence Act and citing various court decisions on the need to demonstrate root of title the court was invited to make sound judgement based on the evidence and the law.

Analysis and Determination

36. Having considered the pleadings, the evidence both oral and documentary and the submissions of the Parties the main issues for determination is who between the Plaintiff and the 1st Defendant is the lawful owner of the suit property Kwale/Shimoni/168 and whether the Plaintiff and 1st Defendants are entitled to the prayers sought.
37. The Plaintiffs case is that he was the beneficial owner of the suit property which she was the first allottee by its original owner the Settlement Fund Trustee under Shimoni Settlement Scheme. That upon survey in 1991 he was allocated the property vide a letter of offer dated 1/02/1991. That she paid the requisite charges and was issued with a Certificate of Outright purchase dated 21/06/1991. It is further pleaded the Ministry of Lands prepared the documents of transfer on 12/11/2007 which he executed. That on 18/03/16 he appeared before officers at the said Ministry and executed the discharge of charge and the transfer documents which were presented to the Registrar for execution. It emerged that after all this the suit property was registered in the name of the 1st Defendant in the year 2004 and title issued fraudulently.
38. The 1st Defendants case is that she is the lawful registered owner of the suit property and wants to be declared as such. The Plaintiff is before court to challenge the registration of the 1st Defendants title and seeks among other orders a declaration that the said purported registration is unlawful, fraudulent and did not extinguish the proprietorship of the Plaintiff.
39. It is important to note at this stage that title may be impeached under the following provisions; -

Section 26 of the Land Registration Act provides thus;-

- 26 The certificate of title issued by the Registrar upon registration or to a
- (1) 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.

40. However to impeach the title herein it was incumbent upon the Plaintiff to prove his beneficial interest in the property and if the circumstances under which the same can defeat the title issued to the 1st Defendant. The burden of proof lay on the Plaintiff to prove that the above facts exist. Section 107 of the Evidence Act Chapter 80 of the Laws of Kenya, provides that whoever 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.
41. The Plaintiff gave evidence on his own behalf as PW1. He produced as part of his documentary evidence letter dated 17/05/16 by the Ministry of Lands, Letter of offer dated 11/02/1991, Certificate of Outright purchase dated 21/06/91, Transfer Form, Discharge of Charge dated 12/11/2007, Official receipt No. 6003793, Plaintiffs IC card, purported letter of demand by Akanga Alera Advocates dated 3/5/2016, Application for restriction and Certified copy of Green Card.
42. From the proceedings there is no argument that the land was subject of a settlement scheme. This is clear from a perusal of the documents produced hereinabove and those by the 2nd Defendant. The same is also confirmed by John Ngugi Karanja the Kwale County Land Adjudication & Settlement Officer who testified that the land was transferred from the Settlement Fund Trustee to the Plaintiff. The Plaintiffs documentation must therefore be reviewed in tandem with the procedure for acquiring land under a scheme.
43. The Settlement Fund Trustees, is a body of Trustees established pursuant to the provisions of Section 167 of the Agriculture Act, Cap 318 (now repealed) and is mandated to settle “settlers” on either un-alienated Government land or on land purchased from private owners by the Settlement Fund Trustee. I picked some of the steps to be complied with for such settlement from the evidence of DW2 John Ngugi Karanja the Kwale County Land Adjudication & Settlement Officer. From his evidence it emerges that there must be a letter of offer, the offeree must visit the parcel to be shown the boundaries to enable documentation, the offer is valid for 90 days, it must be accepted by the offeree, follow up with a 10% deposit. I must also add that it goes without say that an offer is not automatic one must express an interest by applying to be allocated especially if they are not residents of the area. PW1 testified that he hails from Kericho. Transfer from the Settlement Fund Trustee to the allottee is also a requirement to enable the processing of title appropriately.
44. Having outlined the above I will proceed to interrogate if the requirements were met.
45. Indeed, PW1 stated in his evidence in chief that he applied and was offered plot 168. It is noteworthy that such application to the Minister asking to be allocated the land was not produced before court as part of the Plaintiffs evidence. It was also expected to be part of the documents in the parcel file which was brought before court by DW2. The letter dated 17th May 2016 from the Department of Land adjudication addressed to Akanga Alera & Associates Advocates does not make reference to an application to be allocated the property. It was not part of the Defendants list of documents filed by the State Counsel.



46. But what about the conditions in the letter of offer were they met? The letter of offer was produced by the Plaintiff and also formed part of the 2-4th Defendants list of documents. My perusal of the same reveals a number of conditions that were to be satisfied by the offeree Joel Koech. These are attending the District Land Adjudication and Settlement Officer Kwale to be shown the boundaries of the plot and issued with a letter; the offer was valid for 90 days from the date of the letter that is 1/02/1991; offer was to be accepted in writing within the 90 days' period and at the same time pay 10% deposit for purpose of documentation.
47. PW1 answer in cross examination to whether he attended for purposes of being shown the boundaries to the plot stated that he did not attend the same. DW2 confirmed there was no record showing this happened neither was there any follow up documents /letter issued after site visit. PW1 also conceded that he did not write back to show that he accepted the offer. DW2 confirmed such acceptance wasn't in the file. PW1 also contradicted himself when he stated he visited the property only once in 1991 when he accepted the offer when there is no such evidence of acceptance.
48. From the evidence in cross examination of the Land Adjudication & Settlement Officer it emerged that there was also no record reflecting the payment of 10% deposit. That while Kshs 500 was required to be paid on the certificate of outright purchase there was no receipt in this regard. While there was a receipt for 2000/=, paid on 8/03/2016 the witness could not confirm what the same was in respect of though it was obvious it was in respect of the suit property.
49. Clearly the conditions of the letter of offer were not met by the Plaintiff offeree. What then are the ensuing legal consequences?
50. According to the letter of offer, the consequences for failure to meet the conditions set out is that the offer would lapse and be cancelled without reference to the offeree. Clearly the offer lapsed. PW1 further agreed in cross examination that if you do not accept the offer then you do not have the plot. That he was aware a letter of allocation is not title. That when one is being allocated the land you must be on the ground. But let me add that even the receipt for 2000/= having been paid on 8/03/2016 way after the letter of offer had lapsed would be of no consequence. On being shown the transfer dated 8/03/2016 PW1 observed it was not dated. The witness agreed that the transfer moves together with the discharge since they are signed on the same day yet he admitted he signed it later in 2016.
51. It is therefore not clear how the witness was documented if he never attended to be shown his boundaries and never accepted the offer in writing.
52. But of utmost importance is the import of the letter of offer and whether it did confer a beneficiary interest or ownership on the property as the Plaintiff would want this court to believe. 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. I have already made a finding that the conditions were never met. See the Gladys Wanjiru Ngacha v Teresa Chepsaat & 4 others 182/1992 (Nyeri).
53. In the case of Dr. Joseph N.K. Arap Ng'ok v Justice Moiyo Ole Keiyua & 4 others C.A.60/1997 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 offerer 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.”



54. In the case of *Mbau Saw Mills Ltd v Attorney General for and on behalf of the Commissioner of Lands) & 2 others* [2014] eKLR the court stated thus; -

“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.”

55. The upshot of the foregoing is that the Plaintiff has not demonstrated his interest in the suit property. It is this court’s finding the Plaintiff is not the lawful owner of the suit property Kwale/Shimoni/168. Having made this finding the Plaintiff has no right to impeach the 1st Defendant title.
56. The 1st defendant case is that she is the owner of the suit property. It was her evidence that she has held title to the suit property since December 2004. DW1 produced in evidence a copy of the title deed for Kwale/Shimoni/168 dated 17/12/2004 and a Certificate of Official Search dated 21/10/2005 confirming that the 1st Defendant was the proprietor as at 17/12/2004. It is trite that under section 26(1) of the Land Registration Act that 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 on grounds of fraud or misrepresentation. See ELC Case No. 61 of 217 *Johah Omoyoma Vs. Bonface Oure & 2 Others* (2021) EKLRL
57. Firstly I have already made a finding that the Plaintiff having failed to establish his interest in suit property has no basis or right to impeach the 1st Defendants title and on this ground alone the 1st Defendants counterclaim would succeed.
58. Additionally I’m aware that the 1st Defendant title is impeachable on grounds of fraud or misrepresentation for which the owner was aware of or was party to. The absence of the letter of offer was explained as having been lost and reported to the police. Evidence was led of possession as opposed to the Plaintiff who had nothing to show for possession and conceded he never took possession. Green cards have been produced to show that the property was used as security in the year 2005. There was no evidence that was led by the 2nd Defendant to displace the 1st Defendants evidence that she was the lawfully registered owner of the suit property. As it is, the title the certificates of official searches and the green cards produced by the 1st Defendant remain uncontroverted.



59. In view of the foregoing, I find no reason to impeach the 1st Defendants title. The court makes a finding that the 1st Defendant is the lawfully registered owner of the suit property herein.
60. The upshot of the foregoing is that the court finds that the Plaintiff has failed to prove his claim over against the Defendants. The Plaintiffs suit is hereby dismissed with costs.
61. Accordingly, judgement is entered in favor of the 1st Defendant by dint of the counterclaim as follows; -
- a. A declaration that the Plaintiff in the counterclaim is the lawfully registered owner of LR Number Kwale/Shimoni/168.
 - b. A permanent injunction restraining the 1st Defendant in the counterclaim by himself, agent and or servant from entering, remaining and or otherwise interfering with the quiet possession of LR No Kwale/Shimoni/168
 - c. An order directing the 2nd Defendant to remove the restriction placed by the 1st Defendant in the counterclaim against the title Kwale/Shimoni/168
 - d. The court declines to grant General damages as prayed since there were no submissions made in this regard for consideration by the court.
 - e. It is trite that pursuant to the provisions of section 27 of the Civil Procedure Act, costs follow the event. Costs are awarded to the 1st Defendant being the Plaintiff in the counterclaim.

Orders accordingly.

JUDGEMENT DATED SIGNED AND DELIVERED THIS 17TH DAY OF DECEMBER 2024.

A E DENA

JUDGE

Mr. Cheruiyot for the Plaintiffs

Mr. Gathu for the 1st Defendant

Mr. Mwanje for the 2nd to 4th Defendants

Daniel Disii Court Assistant.

HON. LADY JUSTICE A.E DENA

