



REPUBLIC OF KENYA



**Mburu v Kariuki & 2 others (Environment & Land Case E166 of 2020)
[2024] KEELC 13691 (KLR) (6 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13691 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E166 OF 2020
EK WABWOTO, J
DECEMBER 6, 2024**

BETWEEN

PAUL NJUGUNA MBURU PLAINTIFF

AND

MELODY WANGUI KARIUKI 1ST DEFENDANT

FRANCIS NDEGWA MWANGI 2ND DEFENDANT

CHIEF LAND REGISTRAR 3RD DEFENDANT

JUDGMENT

1. The dispute herein touches on property known as L.R No. 14717 and L.R No. 14718, which are being contested between the Plaintiff on one hand and the 1st and 2nd Defendants on the other hand.
2. The instant suit was commenced vide a plaint dated 5th October 2020 when the Plaintiff sought the following reliefs;
 - a. A declaration be and is hereby issued that the plaintiff lawfully acquired the properties known as L.R No 14717 IR No. 168924 and L.R No. 14718, IR No. 168923 and his registration as the proprietor therefore is legal.
 - b. A declaration be and is hereby issued that the plaintiff is entitled to ownership and possession of the properties known as L.R No. 14717, IR No. 168924 and L.R No. 14718, IR No. 168923 to the exclusion of the defendants herein.
 - c. A permanent injunction be issues restraining the defendants either by themselves, their agents or servants or otherwise howsoever from interfering with the plaintiffs quiet and peaceful occupation of the suit properties known as. L.R No. 14717, IR No. 168924 and L.R No. 14718, IR No. 168923.



- d. A permanent injunction against the defendants prohibiting whether by themselves, their agents or servants from entering upon, remaining on, transferring, occupying, leasing charging, assigning or interfering with the plaintiff's quiet possession of the suit properties known as L.R No. 14717, IR No. 168924 and L.R No. 14718, IR No. 168923, in default an eviction order do issue and which order should be enforced by the officer commanding station, industrial area Police Station or any other nearest Police Station.
 - e. Damages for trespass against the defendants.
 - f. Costs of the suit.
3. The suit was contested by the 1st and 2nd Defendants who filed a statement of Defence and counterclaim dated 11th September 2021, the 1st and 2nd Defendants sought the following reliefs in their counterclaim;
- a. A Declaration that the plaintiff does not hold valid certificates of title in respect of L.R No. 14717 and L.R No. 14718
 - b. An order that the plaintiff do hand over to them the original certificates of title in the name of the 2nd defendant handed over to him by the registrar of titles in 2016 in respect of the suit properties.
 - c. As an alternative to (b) above, a declaration that the 2nd defendant is entitled to be registered the proprietor of the said L.R No. 14717 and L.R No. 14718.
 - d. An order of mandamus/mandatory injunction that the 3rd defendants' issues to the 1st and 2nd defendant certificates of title in respect of the said L.R No. 14717 and L.R No. 14718
 - e. An order that the plaintiff delivers up the certificates of title in respect of L.R No. 14717 and L.R No. 14718 issued on 18th February, 2016 to the 3rd defendant in the suit for their cancellation.
 - f. An order that the 3rd defendant issue to the 2nd defendant the certificates of title in respect of L.R No. 14717 and L.R No. 14718 as per the deed plans entrusted to the 2nd defendant in 2013.
 - g. General damages for delay in issuing to the 2nd defendant certificates of title in respect of L.R No. 14717 and L.R No. 14718
 - h. An order that the plaintiff pulls down/destroys the semi-permanent buildings standing on L.R No. 14717 and L.R No. 14718.
 - i. An order that the plaintiff accounts to the 1st and 2nd defendants all the rent received by him from the tenant carrying on a gas distribution and refilling business on the said L.R No. 14717 and L.R No. 14718.
 - j. An order that the plaintiff give to the 1st and 2nd defendant vacant possession of the said L.R No. 14717 and L.R No. 14718.
 - k. A permanent injunction restraining the plaintiff from entering into or dealing in any way possible with the said L.R No. 14717 and L.R No. 14718.
 - l. Cost of this suit.
4. The 3rd Defendant filed a Statement of Defence dated 14th January 2021 wherein it was averred that as per its record, the only titles for L.R No. 14717 and 14718 are the ones that belong to the Plaintiff.



The Plaintiff's case

5. The Plaintiff averred that at all times material to this suit he is the lawful and registered proprietor of the property known as L.R No. 14717, IR No. 168924 and L.R No. 14718, IR No. 168923 pursuant to letters of allotment dated 1st July 1998.
6. Upon compliance with the conditions contained in the letters of allotment, the 3rd Defendant herein issued him with certificates of title for the suit properties on 18th February 2016. It was averred that both himself and his predecessor in title have been in occupation and possession of the suit properties from July 1998 when they complied with the conditions contained in the letters of allotment and have enjoyed quiet and uninterrupted possession thereof to date.
7. On about September 2019, the 1st and 2nd Defendants their agents and servants without any color of right, devoid of a lawful justification and wrongfully in that regard entered the suit properties, harassed and intimidated him and his employees who were working thereon. The said 1st and 2nd Defendants further threatened him with violent eviction from the suit properties without justification.
8. It was further averred that the impugned conduct of the 1st and 2nd Defendants is illegal and unlawful as they do not have any proprietary interest over the suit properties.
9. It was also averred that he had instituted proceedings in Nairobi Millimani Chief Magistrates Court Civil Suit No. 7980 of 2019 Paul Njuguna Mburu -vs- Melody Wangui Kariuki & Francis Ndegwa Mwangi wherein a temporary injunction was issued but the same was later withdrawn and he filed the instant suit.
10. During trial Paul Njuguna Mburu, the Plaintiff herein testified as PW1 and the sole Plaintiff's witness in the matter. He adopted the contents of his witness statement dated 5th October 2020 and produced his bundle of documents of even date in his evidence in chief and a further bundle of documents dated 25th October 2021 as exhibits.
11. It was his testimony that he is the duly registered owner of the suit properties having acquired them from his late mother, Ms. Tabitha Wanjiku Mburu who was the first lawful allottee of the same. His late mother, Tabitha Wanjiku Mburu, vide a letter dated 28th May 1998 addressed to the president of the republic of Kenya applied for allocation of the suit properties which were initially identified as industrial plots number 83 and 84 respectively at Embakasi.
12. It was his further testimony that vide a letter dated 14th June 1998, the Commissioner of Lands informed Ms. Tabitha Wanjiku Mburu that the Government had allocated her the suit properties and that the letters of allotment would be sent to her in due course. The letters of allotment were subsequently forwarded to Ms. Tabitha Wanjiku Mburu vide a letter dated 29th June 1998 which letters of allotment were in reference to un-surveyed industrial plots number 83 and 84 reference numbers 51776/XIV/62 and 51776/XIV/61 respectively as per the Part Development Plan which was attached to the said allotment letters. The letters of allotment also communicated to Ms. Tabitha Wanjiku Mburu that she was required to pay the sum of Ksh 44,530 each to the government and also communicate her acceptance of the offer within 30 days of receipt.
13. It was his further testimony that Ms. Tabitha Wanjiku Mburu, via her letter dated 3rd July 1998, communicated her acceptance to the offers contained in the letters of allotment and forwarded a banker's cheque of Ksh 89,060 being payment for un-surveyed plot numbers 83 and 84. PW1 in his testimony tendered in evidence receipts issued by the government on receipt of the payments for



- the allocations being receipts number 462729 and 462730 for un-surveyed plots number 83 and 84 respectively.
14. PW1 testified that by a letter dated 10th January 2002, Ms. Tabitha Wanjiku Mburu applied to the Commissioner of Lands to have the allocation of the suit properties to her be transferred to the Plaintiff and that the title documents be also issued to the Plaintiff, which application was approved subject to payment of stamp duty or consent fees and the government being made a party to the transfer vide a letter date 6th February 2002. PW1 tendered evidence of payment of the stamp duty of Ksh 16,000 which was the condition precedent to the informal transfer of allocations to the Plaintiff.
 15. He further told the Court that the interest over the suit properties was transferred from Ms. Tabitha Wanjiku Mburu to him vide informal transfers dated 5th August 2002 and franked on 7th August 2002 that were executed by himself, the Commissioner of Lands and Ms. Tabitha Wanjiku Mburu following which he took position of the suit properties.
 16. It was his testimony that pursuant to the request by the director of surveys for supply of indents for the suit properties and after a lot of follow ups, the Department of Lands eventually forwarded the indents for the suit properties both dated 14th January 2009 to the Director of Surveys. Subsequently the Director of Surveys issued the Plaintiff with deed plan numbers 328946 and 328947 for L.R No. 14718 and 14717 respectively after the Plaintiff paid the required survey fees which deed plans were forwarded to the office of the 3rd Defendant for the purposes of processing the title documents to the suit properties in favor of the Plaintiff.
 17. The Plaintiff further testified that the 3rd Defendant eventually prepared and released two sets of leases for the suit properties, L.R Nos. 14717 and 14718 which were duly executed by the Plaintiff and the 3rd Defendant on 29th January 2016 after which the leases were booked for registration on 18th February vide day book numbers 1740 and 1741 respectively at 12:30pm and were subsequently registered. The 3rd Defendant thereafter issued the Plaintiff with certificates of title for the suit properties.
 18. PW1 reiterated in his testimony that he is the lawful and registered owner of the suit properties and therefore entitled to their ownership and possession to the exclusion of the Defendants. He produced in evidence statements of payment of rates and rent clearance certificates to further support his position that he is the lawful owner and ratable owner of the suit properties.
 19. He further testified that whilst his late mother, Ms. Tabitha Wanjiku Mburu took vacant possession of the suit properties on 7th July 1998 upon compliance with the conditions of the letter of allotment, he took vacant possession of the suit properties following the registration of the informal transfers in the year 2002.
 20. It was his testimony that he instituted the current suit following the 1st and 2nd Defendants trespass on the suit properties and their attempt at violently evicting him from the suit property sometimes in September 2019, with an aim of getting orders permanently prohibiting the Defendants from interfering with his lawful ownership and occupation of the suit properties.
 21. When cross examined he reiterated that he is the lawful and registered owner of the suit properties and denied ever forging any document. He further testified that he has never lost occupation neither did he trespass onto the suit properties in any way. He also denied ever having anyone other than his agents on the suit properties and thus the allegations by the defendants that they were evicted from the suit properties are misleading. He denied ever stealing any deed plans as the deed plans for the suit properties that are in his possession were issued in his favor by the Director of Surveys after he paid the requisite fees.



22. He also stated in cross examination that he has never lost possession of the properties, the status quo show that he was the one to remain on the property and he receives monthly rent of Ksh 100,000. His documents are the correct documents. There were no Maasais on the property when he took possession of the same and there was no way he would have interfered with any records at the Ministry of Lands. He also stated that his late mother made an application and was subsequently allotted the properties.
23. When re-examined he stated that his titles are not forgeries. The case at the lower court was withdrawn because the value of the property exceeded Ksh 20,000,000 Million.
24. He also reiterated that he was never ordered to vacate the property. He has never been charged or convicted with any offence of forgeries. There is no investigative report confirming the alleged forgeries by the 1st and 2nd Defendants. The 1st and 2nd Defendants made payment for the allotment after 30 days, he had not seen any document from the County or Ministry of Lands indicating that the 1st and 2nd Defendants are the owners of the suit parcels and he is in possession and occupation of the suit properties.

The case of the 1st and 2nd Defendants

25. The 1st and 2nd Defendants filed a statement of Defence and counter claim dated 11th September 2021.
26. It was averred that the 1st and 2nd Defendants who are husband and wife are the beneficial and registered owners of the suit properties namely L.R No. 14717 and L.R No. 14718. It was also averred that they had erected some semi-permanent structures on the said properties which also had a stone perimeter wall.
27. It was averred that the suit properties had been surveyed and the Commissioner of Lands had deed plans forwarded to him in 2011 by the Director of Survey for the purposes of issuing grants to them which he had issued but not released to them.
28. The 1st and 2nd Defendants further averred that they accepted offers of grants dated 5th June 1997 which was issued to them by the Commissioner of Lands and in compliance with the terms of the offer they paid for each of the suit properties Ksh 63,950 on 28th July 1998 and were issued with receipts.
29. It was further averred that in 2012, the 3rd Defendant's office informed them that the receipts earlier issued had not been properly issued and requested them to pay the same amount which payment was done and other receipts issued.
30. It was contended that the suit by the Plaintiff is fraudulent and various particulars of fraud were pleaded at paragraph 15 of the Plaint.
31. During trial two witnesses testified on behalf of the 1st and 2nd Defendants. Francis Ndegwa Mwangi testified as DW1 while Melody Wangui Kariuki testified as DW2.
32. DW1 relied on his witness statement dated 11th September 2021 and bundle of documents of the same date. It was his testimony that he is married to the 1st Defendant and they therefore manage their finances and investments jointly. DW1 testified that sometimes in 1996 and 1997, they applied for allocation of the suit properties after which the Commissioner of Lands issued two letters of allotment in his name and they accepted the offer. DW1 further testified that they took possession of the suit properties during which the suit properties were surveyed and the deed plans prepared after which he presented the deed plans to the 3rd Defendant for issuance of certificates of title. DW1 also testified to paying the allocation fees again in 2014.



33. He accused the 3rd Defendant of preparing title documents to the suit properties and issuing them to the Plaintiff without his knowledge or consent and that he has since then received rent demands for the suit properties. He further contended that they put up a perimeter wall around the suit properties in 2011 and also let their agents to construct a semi perimeter structure on the suit properties which they allegedly lived in until they were evicted on 7th November 2019.
34. DW1 further accused the Plaintiff in conjunction with the 3rd Defendant of committing fraud and forging the title documents held by the Plaintiff. He concluded his testimony by maintaining that they the 1st and 2nd Defendants are the beneficial and registered owners of the suit properties after their allocation and payment of the allocation fees. DW1 further maintained that as a result of payment of the allocation fees, he became the indefeasible absolute owner of the suit properties.
35. On cross examination he stated that he neither had evidence of his application for allotment of the suit properties or the letter of allotment for the property, L.R 14717. DW1 also stated that the letter of allotment dated 5th June, 1997 related to property known as L.R 14718 which was an already surveyed property yet the property was un-surveyed at the time of alleged allocation.
36. He further stated that despite the letter of allotment communicating that the acceptance of the offer and payment of the allocation fees were to be made within 30 days of receipt of the offer, he allegedly communicated his acceptance vide a letter dated 20th August, 1997 and made payments on 28th July, 1998 which was well outside the required 30 days.
37. He also stated that his exhibited receipt at page 7 of his bundle of documents was in the name of one Lee Mwathi Kimani and not him, and further that the letters at page 10 and 11 of his documents were issued by the Director of Surveys and addressed to the Commissioner of Lands and were neither addressed to or copied to him. He also stated that despite claiming that he was the ratable owner of the suit properties, he had no title document evidencing the same and neither did he have any evidence of payments of the land rates. He could also not explain how he became a ratable owner at the Nairobi City County when it was his testimony that he had never been issued with the certificate of title over the suit properties and had not applied to be registered as such. He also stated that he was not in possession of the suit properties, having been allegedly kicked out in the year 2019 together with his agents but conceded that there was no evidence that the alleged eviction was reported to the police or any action taken on account of the alleged eviction.
38. He also testified that he made additional allocation fees on 29th January, 2014 but was surprisingly never issued any invoice. He further stated on cross examination that whilst the user of the suit properties was light industries, he allegedly constructed a perimeter wall in the year 2013, without applying to the county government for approval knowing very well that it was an offence not to get the county government approval.
39. When re-examined he stated that he did not have an allotment letter for L.R No. 14717. He also stated that the Plaintiff used his deed plan to get his certificate of title. That his payment and acceptance letter were accepted even though late.
40. DW2 Melody Wangui Kariuki relied on her witness statement dated 11th September 2021 in her evidence in chief. She stated they accepted the letters of allotment for the suit properties and she paid allotment fees for the suit properties using a banker's cheque after which she was issued with the deed plans to the suit properties which she signed for and collected on behalf of the 1st and 2nd Defendants.
41. On cross examination she stated that she did not have the application for allotment for the suit properties and neither did she have the letter of allotment for the property, L.R No. 14717. DW2 also



- conceded that the acceptance to the letters of allotment and the payment thereof were made after the stipulated 30 days had lapsed. Contrary to DW1's testimony that they did the application together, DW2 testified that she was not present when DW1 allegedly requested for the allocation of the suit properties.
42. She further testified that the suit properties were surveyed sometime in October of 1998 after they had paid the requisite survey fees and issued with payment receipts. DW1 however also stated that they paid further survey fees in the year 2012 but did not have the payment receipts as evidence before the Court.
 43. DW2 also testified that she took the photos of the suit properties contained at page 33-36 of her bundle of documents using her phone but she did not have any evidence to confirm the same or the date on which they were taken.
 44. On the alleged invasion to the suit properties, DW2 testified that she reported the invasion at Embakasi Police Station but did not have evidence of the OB report tendered in Court. DW2 further conceded on cross examination that they, the 1st and 2nd Defendants, never applied to be rateable owners of the suit property.
 45. On re-examination, she stated that she visited the office of the Director of Survey several times and she complied with whatever directions and or requirements she was told.
 46. Wilfred Muchai, testified as DW3 pursuant to Court summons on the application of the 1st and 2nd Defendants. He stated that he holds a degree in Bachelor of Arts in Land Economics and a Bachelors in Law as well as a Diploma in Land Survey. He also stated that he is a full member of the institution of Surveyors of Kenya and a Licensed Surveyor and works in the office of the Director of Surveys.
 47. He testified that letters of allotment are typically issued by the Commissioner of Lands and the allottee has to comply with the conditions stipulated in the letters of allotment following which the director of surveys, on the instructions of the Commissioner of Lands surveys the property and issues a signed and sealed deed plan to the allottees after payment of the survey fees which are only payable to the Director of Survey or the Commissioner of Lands. The allottee or his appointed agent must then collect the deed plan and sign the register confirming collection of the deed plan. The deed plan may also be forwarded to the Commissioner of Lands for preparation of title documents.
 48. DW3 further testified that that a deed plan can either be prepared by the Director of Survey then submitted to the Commissioner of Lands for preparation of titles or be prepared by a private licensed surveyor who then submits the deed plan for approval and authentication to the Director of Surveys before the same is forwarded to the Commissioner of Lands.
 49. DW3 in his testimony denied having the deed plans contained at pages 14 and 18 of the 1st and 2nd Defendants bundles in their offices and neither did he have a copy of the letter dated 15th February, 2013 from Director of Surveys to the Commissioner of Lands or the letter dated 24th June, 2013 addressed to the Director of surveys contained at pages 26 and 27 of the same bundle.
 50. He further denied having a copy of the receipt dated 28th July, 1998 for payment of survey fees among other fees or the issue notes dated 23rd August, 2011 contained at pages 5, 10 and 11 of the same bundle respectively.
 51. On cross examination, he reiterated that the issue notes that appear at pages 10 to 11 of the 1st and 2nd Defendants' bundle do not appear in the Director of Surveys records and questioned their existence.
 52. He further stated that an issue note is a document pursuant to which the Director of Surveys would issue the deed plan and it would normally indicate the date, name and signature of the person who



- collected the deed plan. Based on this, he explained to the court that the issue notes held by the 1st and 2nd Defendants and produced at page 10 and 11 of their bundle did not indicate name, date of collection or signature of collector and hence the said issue notes are fundamentally defective.
53. He further testified that the issue note would also indicate the date, reference number and other details of the letter of allotment but the issue note at page 10 of the 1st and 2nd Defendants bundle relating to the parcel L.R No. 14717 did not have the details of the letter of allotment for the said parcel.
 54. It was his further testimony that the reference number mentioned on the issue note at page 11 of the 1st and 2nd Defendants bundle being 2568067 was fundamentally different with the file number for the said parcel of land hence a material defect.
 55. On the indents dated 14th January, 2009 both appearing at pages 24 and 25 of the Plaintiff's bundle, he testified to their regularity noting that there is no evidence or document contradicting the validity of the indents which is a document requesting the Director of Surveys to supply the deed plan for purposes of processing title documents. He further testified that the letter of allotment for L.R No. 14718 evidenced by the 1st and 2nd Defendants at page 1 related to an already surveyed plot of land with survey fees being indicated as Ksh 2,450 yet survey fees cannot be demanded for an already surveyed plot of land.
 56. He also testified that whilst the letter of allotment held by the 1st and 2nd Defendants required that payment of the required fees be made within 30 days of issuance of the letter of allotment, the 1st and 2nd Defendants made payment on the 28th July, 1998 which was about 13 months late.
 57. He further testified that whilst the receipt dated 29th January 2014 contained at page 20 of the 1st and 2nd Defendants bundle shows that one of the payments being made was for survey fees of Ksh 2,450, the deed plans at page 14 and 18 of the same bundle are both dated 23rd August, 2011 which is highly suspicious as a deed plan cannot be issued before the survey fees is paid.
 58. He also noted that the receipt evidenced by the 1st and 2nd Defendants at page 7 of their bundle was in the name of Lee Mwathi Kimani and referred to parcels L.R Nos. 17726,14712,14718,14717,14728 and 14723 but does not indicate how much was paid for each of the parcels. Additionally, one receipt could only be issued if the subject parcels of land are owned by the same person. DW3 further testified that whilst a deed plan is either issued to the allottee or his authorized agent, there is no letter of authority authorizing the 1st Defendant, Melody Wangui Kariuki to collect the deed plans on behalf of the 2nd Defendant, Francis Ndegwa Mwangi, the alleged allottee.
 59. DW3 further testified that according to the affidavit sworn by the 2nd Defendant in the lower court matter Millimani Commercial Magistrates Court Case No. 7980 of 2019; Paul Njuguna Mburu Versus Melody Wangui Kariuki and Francis Ndegwa Mwangi, the 2nd defendant had conceded that they had not been issued with the title documents to the suit properties as at the year 2019. Additionally, the 1st and 2nd Defendants counter claim seeks that he be declared the owner of the suit properties.
 60. He concluded his cross examination by stating that the title document at page 33 of the 3rd Defendants bundle of documents is in the name of the Plaintiff and is accompanied by a dully verified deed plan and there is no evidence that the said title is fake.
 61. Jepkemboi Sarah testified as DW4. She stated that she was the Court Administrator based at Milimani Commercial Court. She produced in evidence the court file in Millimani Commercial Magistrates Court Case No. 7980 of 2019; Paul Njuguna Mburu Versus Melody Wangui Kariuki and Francis Ndegwa Mwangi and the documents contained therein.



The case of the 3rd Defendant

62. The 3rd Defendant filed a statement of Defence dated 14th January 2021 and bundle of documents dated 24th September 2021. It was averred that there is no other title issued save for the Plaintiff in L.R 14717 IR 168924 and L.R 14718 IR 168923.
63. During trial Wanderi Mark Mungai testified as DW5 on behalf of the 3rd defendant. He stated that he is a Principal Land Registrar and adopted the content of his witness statement dated 22nd July 2024 and also produced the 3rd Defendants bundle of documents dated 24th September 2021 in his evidence in chief.
64. It was his testimony that according to the 3rd Defendants records, the title documents held and or claimed by the 2nd Defendant being grant No. 132546 dated 24th August 2012 relates to parcel of land known as L.R No. 209/1721 issued on 3rd October, 2011 registered in the name of Anne Wagikuyu Kamwati and measuring 0.017 Ha while grant No. 132547, dated 24th August 2012 relates to a parcel of land known as L.R No. 209/17193 issued on 3rd October, 2011 and registered in the name of Sivad Construction Limited and measuring 0.0162 Ha.
65. He further noted in his testimony that the 2nd Defendant holds a letter of allotment ref no. 178034/4 dated 5th June, 1997 and in respect of L.R No. 14718. DW5 testified that the suit properties including L.R No. 14718 are industrial plots situated at Embakasi Village Block in Nairobi Airport whose alienation file has a reference no. 51776/XIV which file has since been closed. As such, all letters of allotment in respect to the industrial plots in Nairobi Embakasi Village were issued under alienation file ref no. 51776/XIV.
66. He further noted that whilst the reference number quoted on the 2nd Defendant's letter of allotment corresponds to a purported correspondence file number, the practice is that the reference number in allotment letters is the alienation file number and not the correspondence file number as correspondence files are opened once letters of allotment are issued, duly conditions complied with and at the point of registration and issuance of a title document.
67. He testified that the 2nd Defendants' letter of allotment ref no. 178034/4 was not issued under the proper alienation file held at the ministry of lands and could therefore not be supported by any records.
68. It was his further testimony that the suit properties were previously identified as un-surveyed plot numbers 83 and 84 respectively and fall among uns. Plot numbers 55-98. DW5 stated that pursuant to a valuation requisition dated 19th May, 1994 it was recommended that allottees of the industrial plot numbers 55-98 at Embakasi Village measuring 0.1 Ha pay stand premium and annual rent of Ksh 35,000 and Ksh 7,000 respectively.
69. He stated that the 2nd Defendants' letter of allotment was irregular as it suggests that the payable stand premium is Ksh 60,000 and annual rent is Ksh 10,000.
70. On cross examination, he reiterated that she is the Principal Land Registrar, an Advocate of the High Court of Kenya and has been a registrar for about 16 years now.
71. He further testified that the records held at the 3rd Defendants offices indicate that the late Ms. Tabitha Wanjiku Mburu paid survey fees of Ksh 2,290 each for unsurveyed plots no. 83 and 84 and was issued with receipts both dated 7th July, 1998. Additionally, the 3rd Defendant holds in its records indents both dated 14th January, 2009 for L.R No. 14717 and L.R No. 14718 and thus speaking to the payment



of survey fees and which further correspond to the lease issued to and held by Plaintiff, Paul Njuguna Mburu.

72. It was his further testimony that according to their records, un-surveyed plots number 83 and 84 initially allocated to Ms. Tabitha Wanjiku Mburu were surveyed and given L.R Nos. by the director of surveys and hence mutated to L.R No. 14717 and L.R. No. 14718 respectively. Additionally, DW5 testified that the letters of allotment for un-surveyed plots no.83 and 84 held by the plaintiff correspond with the reference on the general alienation file unlike that held by the 1st and 2nd Defendant which has a different reference number different from the alienation file for Embakasi village.
73. He further testified that according to their records, the grants held by the 1st and 2nd defendant being No. 132546 and 132547 were issued to someone different and cannot therefore be purported to be held by two people.
74. It was his further testimony that there is no letter of allotment for L.R No. 14717 issued to the 2nd Defendant presented before court. Additionally, according to the evidence on record, the 1st and 2nd Defendants failed to comply with the conditions of allotment being acceptance and payment of the requisite fees within 30 days.
75. DW5 further testified that according to the documents produced by the 1st and 2nd defendant, the land rates demand issued to the 2nd defendant was dated 13th July, 2012 which was before the purported registration of the grant issued in their name which was registered on 24th August, 2012. Additionally, there was no evidence of payment of land rates by the 2nd defendant.

The Plaintiff's submissions

76. The Plaintiff filed with submissions dated 6th September 2024 and supplementary submissions dated 9th October 2024. The Plaintiff submitted on the following issues;
 - i. Whether the Plaintiff has a cause of action.
 - ii. Who between the Plaintiff and the 1st and 2nd defendants are the legal beneficial owners of the suit property.
 - iii. Whether the 1st and 2nd Defendants have demonstrated fraud as against the plaintiff to the required standard.
 - iv. Whether the Plaintiff is entitled to the reliefs sought.
 - v. Costs.
77. In respect to whether or not the Plaintiff has a cause of action, it was argued that the Plaintiff has a cause of action against the 1st and 2nd Defendants because the 1st and 2nd Defendants interest over the suit parcels is founded on an illegality that cannot be supported by law since the 3rd Defendants position was that the 1st and 2nd Defendants titles were not issued by its office.
78. It was also submitted that the Plaintiff had adduced evidence showing that his late mother, Ms. Tabitha Wanjiku Mburu was allocated the suit properties as un-surveyed plots No. 83 and 84 vide letters of allotment both dated 1st July, 1998 and which were accompanied by a part development plan, following her application of the same vide a letter dated 28th May, 1998 which was duly received by the government.
79. The Plaintiff also presented evidence in the form of an acceptance letter dated 3rd July 1998 which also forwarded a bankers Cheque of Ksh 89,060 demonstrating compliance with the conditions as to



acceptance and payment of the requisite allocation fees within 30 days from the day of allocation. In this regard the Plaintiff also presented receipts number 462729 and 4627330 for un-surveyed industrial plot No. 83 and Un-surveyed Industrial plot No. 84 respectively as further evidence of payment of the allocation fees. The Plaintiff's evidence on compliance was corroborated by the certified records filled by the 3rd Defendant as well as the testimony of DW5.

80. It was submitted that the Plaintiff has additionally provided evidence of the informal transfer of the allocation of the suit properties to him from Ms. Tabitha Wanjiku Mburu in the form of her application dated 10th January 2002 which application was approved and allowed vide the Commissioner of Lands letter dated 6th February 2002 consequent to which the Plaintiff paid the required stamp duty and was issued with a payment receipt dated 7th August 2002 and the informal transfers franked on even date. The allocation of the suit properties was therefore lawfully transferred to the Plaintiff.
81. It was further submitted that whereas the Plaintiff availed evidence of formal application for allocation by his late mother, approval of the request, issuance of the letters of allotment dated 1st July 1998, compliance with the conditions of the letters of allotment being acceptance and payment of allotment fees within 30 days and the subsequent execution of informal transfer of the allocation to him, the 1st and 2nd Defendants on their part only placed before the court an alleged letter of allotment dated 5th June, 1997 for one of the suit properties, being L.R No. 14718 and never tendered in evidence the letter of allotment for the property L.R No. 14717.
82. It was further submitted that the 1st and 2nd Defendants did not have any iota of evidence to show that they made any application for the allocation of the suit properties. Notably the 2nd Defendant conceded during hearing that his letter of allotment for L.R No. 14718 dated 5th June, 1997 required him to communicate acceptance and remit the necessary payments within 30 days but the alleged communication of acceptance was done vide a letter dated 20th August, 1997 while the payment was made on 28th July 1998 both being well outside the required 30 days.
83. The Plaintiff also submitted that the implication of failing to meet the set conditions in a letter of allotment is that the offer contained therein is to be considered to have lapsed by operation of the law. Reliance was placed to the case *Torino enterprises Limited -vs- Attorney General (Petition 5 (E006) of 2022) KESC 79 (KLR) (22 September 2023) (Judgement)* reaffirmed the jurisprudence and stated thus;

“While the allotment letter is dated December 19, 1999, Renton Company Limited made the specified payments on April 24, 2001, One Hundred and Twenty-Seven (127) days from the date of the offer. It is not in question that Renton had not complied with the terms and conditions of the allotment letter. Therefore, the letter ought to have been deemed as lapsed at the time if purported to transfer the same to the appellant.”
84. The cases of *Dr. Joseph N.K Arap Ngok -Vs- Justice Mwijo ole Keyua & 4 others C.A 60 of 1997, Munyua Maria -vs- Hiram Maina (2013) eKLR Dina Management Limited -Vs- County Government of Mombasa and 5 others petition to 8 (E010) of 2021* among others were cited in support.
85. As to whether the 1st and 2nd Defendants have demonstrated fraud against the Plaintiff to the required standard, it was submitted that the 1st and 2nd Defendants despite uttering such grave and serious allegations of fraud that boarder on criminality as against the Plaintiff and the 3rd Defendant have not tendered any evidence before court as proof of the serious allegations. The 1st and 2nd Defendants have



just but pleaded to the alleged fraud committed by the Plaintiff and the 3rd Defendant in the acquisition of the suit properties.

86. It was further submitted that the Plaintiff has however through evidence tendered before the court, which documents have been corroborated by the records held by the 3rd Defendant, illustrated that his acquisition of the suit properties was pursuant to a legal and lawful process from the application for allotment of the suit properties by his late mother, subsequent allocation and compliance with the conditions of the allocation, registered informal transfers of the allocation to him, survey of the suit properties and issuance of deed plans and the ultimate registration and issuance of certificates of title to the suit properties.
87. It was contended that the 1st and 2nd Defendants despite alleging fraud on the part of the Plaintiff, failed to tender any evidence to contradict the title documents held by the Plaintiff. The 1st and 2nd Defendants have not even exhibited any investigation report that has found anyone culpable of fraud as proof of the said allegations. Despite also claiming that the Plaintiff evicted them, the 1st and 2nd Defendants admitted during hearing that they had not reported the Plaintiff for the alleged trespass or fraudulent actions.
88. It was contended that the 3rd Defendant's witness, DW5 tendered evidence confirming that the title and interest held by the Plaintiff over the suit properties originated from the Ministry of Lands pursuant to a lawful allocation to the late Tabitha, additionally DW5 noted that the purported letter of allotment for L.R No. 14718 held by the 1st and 2nd Defendants could not have originated from the offices of the 3rd Defendant given that the reference number of the letter of allotment, 178034/4, hugely differed from the reference number, 51776/XIV on the alienation file for the properties located at Embakasi hence is irregular.
89. It was submitted that DW5 further produced in evidence a valuation requisition dated 19th May, 1994, in which it was recommended that allottees of Un-surveyed industrial lot numbers 55-98 at Embakasi village including the suit properties identified as un-surveyed plot nos. 83 and 84, pay stand premium and annual rent of Ksh 35,000 and Ksh 7,000 respectively. DW5 further pointed out that the alleged deed plans anchoring the 2nd Defendant's interest over the suit property contained unexplained and un-countersigned alterations which is irregular unlike the ones supporting the Plaintiff's certificates of title which were validly issued and registered by the 3rd Defendant.
90. It was argued that the 1st and 2nd Defendants neither adduced evidence to convert the testimony and evidence tendered on behalf of the 3rd Defendant and neither have they placed before the Court any material to suggest that the interest the plaintiff holds over the suit properties is illegal, fraudulent, irregular and or was acquired by mistake.
91. The cases of the Fanikiwa Limited & 3 Others -vs- Sirikwa squatters' group & 18 others (2023), Moses Parantai & Peres Wanjiku Mukuru suing as the legal representative of the Estate of Sospeter Mukuru Mbeere (deceased) -vs- Stephen Njoroge Macharia (2020) eKLR among others were cited in support.
92. As to whether the Plaintiff is entitled to the reliefs sought it was submitted that the Plaintiff is entitled to the reliefs sought since the 1st and 2nd Defendants have failed to demonstrate how they acquired the suit properties given that they did not tender any evidence of the alleged letter of allotment for L.R No. 14717, they also conceded to non-compliance with the conditions of the allotment hence the offer was to have lapsed. The Court was urged to grant the reliefs sought as per the plaint dated 5th October 2020 and to dismiss the counterclaim dated 11th September 2021.



The Submissions of the 1st and 2nd Defendants

93. The 1st and 2nd Defendants filed written submissions dated 28th September 2024. Counsel submitted on the following issues;
- i. Whether the Plaintiff has a cause for action.
 - ii. Whether the 1st and 2nd defendants are the bonafide purchaser of land for value.
 - iii. Whether the 1st and 2nd Defendants are entitled to the reliefs sought including possession of the suit property.
 - iv. Costs.
94. In respect to the cause of action, it was submitted that the first cause of action is based on the nature of a grant by the state in land law. The next cause of action was founded on the principle that where the Commissioner of Lands issues two or more grants to two different people, only the first one is valid. The case of *Gitwany Investments Ltd -vs- Tajmal Ltd (2006) eKLR* was cited in support. The other cause of action arises from disobedience of court orders.
95. It was contended that the Plaintiff is founding his claim on his own word contrary to the maxim stated in the case of *Nabo properties Ltd -vs- Sky Structures Ltd (2002) 2 KLR 299* where it was held that no person should take advantage of his own way.
96. It was also submitted that the Plaintiff allegedly conspired with the 3rd Defendant to fraudulently obtain new titles using their deed plans.
97. Citing the case of *Chemey Investments Limited -vs- Attorney General and Others (2018) eKLR*, it was submitted that the Plaintiff's title was not lawfully acquired.
98. On whether the 1st and 2nd Defendants were bona fide purchasers of the value, it was submitted that the evidence on record demonstrates that the 1st and 2nd Defendants acquired L.R No. 14717 and L.R No. 14718 through legitimate means. They applied for the same in the 1990s and they produced receipts dated 16th August 2011, deed plans dated 23rd August 2011 and letters of allotment dated August 1997 and 2011.
99. In respect to the reliefs sought, it was submitted that the 1st and 2nd Defendants are entitled to the reliefs sought including possession of the suit properties based on their status as bona fide purchasers. The 1st and 2nd Defendants also prayed for costs of the suit.

The 3rd Defendant's submissions

100. The 3rd Defendants filed submissions dated 1st October 2024 and submitted on the following issues;
- i. Whether the Plaintiff is the legal owner of the suit land.
 - ii. Whether the 1st and 2nd Defendants has proved their counterclaim.
101. It was submitted that the Plaintiff produced the letters of allocation of the suit parcels and even paid for the same and complied with the required conditions within the stipulated timelines, the 1st and 2nd Defendants did not comply with the conditions of the allotment during the stipulated time.
102. In respect to the 1st and 2nd Defendants' counterclaim, it was argued that the 1st and 2nd Defendants had failed to prove that the Plaintiff's title was issued illegally. They had also failed to prove fraud on the



part of the Plaintiff and they had also failed to produce any allotment letter issued in respect to L.R No. 14717. The Court was urged to dismiss the counterclaim with costs.

Analysis and Determination

103. This Court having considered the pleadings, together with the written submissions filed by all the parties herein and the oral and documentary evidence of the parties is of the view that the following are the salient issues for determination herein;
- i. Who between the Plaintiff and the 1st and 2nd Defendants are the bonafide and legal owners of the suit properties.
 - ii. Whether the 1st and 2nd Defendants have proved fraud as pleaded on the part of the Plaintiff and the 3rd Defendant.
 - iii. Whether the 1st and 2nd Defendants counter claim has been proved to the required standard and is merited.
 - iv. What are the appropriate reliefs to grant herein.

Issue number i Who between the Plaintiff and the 1st and 2nd Defendants are the bonafide and legal owners of the suit properties.

104. The question that the court must grapple with is who among the Plaintiff and the 1st and 2nd Defendants are the lawful and bonafide owner of the suit parcels known as L.R No. 14717 and 14718.
105. The Plaintiff testified and adduced evidence that his late Mother, Tabitha Wanjiku Mburu vide a letter dated 28th May 1998 addressed to the President of the Republic of Kenya applied for allocation of the suit properties which were initially identified as industrial plots number 83 and 84 respectively at Embakasi.
106. The evidence on record also shows that vide a letter dated 14th June 1998, the Commissioner of Lands informed Ms. Tabitha Wanjiku Mburu that the government had allocated her the suit properties, further vide a letter dated 3rd July 1998, she communicated her acceptance to the offers contained in the letter of allotment and forwarded a banker's cheque of Ksh 89,060 being payment for unsurveyed plot numbers 83 and 84. There was also evidence that was produced in form of receipt number 462729 and 462730 for unsurveyed plot number 83 and 84 respectively.
107. Both the Plaintiff's and the 1st and 2nd Defendants are laying claim to the suit properties. Interestingly they are both claiming on the basis of allocation at one point or the other. They are also both claiming to have been in possession of the suit property at various times. They are also both claiming to have ownership documents in relation to the same. Where a court is faced with two or more interests over the same suit property, it must look into the root of ownership of the suit said. This approach was well appreciated in the case of Hubert L. Martin & 2 Others vs Margaret J. Kamar & 5 Others [2016] eKLR.
108. Equally it is not automatic that simply accepting titles as conclusive, incontestable and indefeasible or the concomitant argument that in the face of two or more competing titles, the first in time automatically prevails. It is not enough to wave an instrument of title or rest easy on the former rock of chronological primacy. What must now be established by he who would prevail is the solidity of the root of title. No flowery foliage, absent a sturdy and settled root speaking to a regular and legal process preceding the product that is the title, will avail the holder. That much is now the law pronounced in a lengthening line of authorities such as Munyu Maina vs Hiram Gathiha Maina (Supra) And Funzi Development Ltd & Others vs Country Council of Kwale [2014] eKLR, and by the Supreme Court



in its authoritative and all-binding decision of *Dina Management Limited vs County Government of Mombasa & 5 Others* [2023] eKLR.

109. As earlier stated, both parties are laying claim to the suit property. It is trite law that It is trite law that he who alleges must prove. This is set out under Section 107(1)(2) of the *Evidence Act*, which provides as follows:

- “(1) 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.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

Sections 109 and 112 of the same Act states;

“

“109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

“112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

110. In discussing the standard of proof in civil liability claims in this jurisdiction, the Court of Appeal in *Mumbi M’Nabea vs David M. Wachira* [2016] eKLR stated as follows:

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not.

...The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M’airanyi & Others v Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000* [2005] 1 EA 280 where it was held that:

“Whereas under section 107 of the *Evidence Act*, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”

111. With respect to the burden of proof, the learned Judges of Appeal in the case of *Palace Investments Limited vs Geoffrey Kariuki Mwenda & another* [2015] eKLR, posited thus:

“Denning J, in *Miller –vs- Minister of Pensions* [1947] 2 All ER 372 discussing the burden of proof had this to say; -

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.



This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”

112. The Court will be guided by the aforementioned provisions and cases. During trial, the 1st and 2nd Defendants witnesses conceded in their cross examination that they did not have evidence for the allotment of L.R No. 14717 and in respect to L.R No. 14718, they made payment after the stipulated 30 days.
113. The evidence of DW5, the Principal Land Registrar who testified on behalf of the Chief Land Registrar confirmed that according to the records of the 3rd Defendant the parcel L.R No. 14717 and L.R No. 14718 belong to the Plaintiff herein and that the documents held by the 2nd Defendant being grant No. 132546 dated 29th August 2012 relates to parcel of land known as L.R No. 209/1721 issued on 3rd October 2011 registered in the name of Anne Wagikuyu Kamwathi and measuring 0.017 Ha while grant No. 132547 dated 24th August 2012 relates to a parcel of land known as L.R No. 209/17193 issued on 3rd October 2011 and registered in the name of Sirad construction limited and measuring 0.0162 Ha.
114. From the evidence tendered herein, it is evident that the 1st and 2nd Defendants did not have any details of the letter of allotment of L.R No. 14717 and in respect to L.R No. 14718, they neither complied neither adhered to the terms of the letter of allotment within the stipulated time frame. The evidence on record confirmed that they were issued with an allotment letter for L.R No. 14718 on 5th June 1997 but payment was made on 28th July 1998 which was about 13 months later.
115. The Court of Appeal in the case of Cabin Crew Investments Limited v Kenya Medical Training College & 4 others (Civil Appeal 441 of 2019) [2021] KECA 49 (KLR) (23 September 2021) (Judgment), held as hereunder:

“ 35. On the second issue, the elephant in the room is whether the suit property was available for alienation when the same was allocated to the appellant. As stated earlier, it is common ground that the 1st respondent was allocated the suit property and was supposed to comply with the terms stipulated in the letter of offer. The 1st respondent accepted the offer and paid the required monies albeit outside the thirty days stipulated in the letter of offer. Having done so, responsibility to process and issue the title documents rested with the 3rd respondent. Although the acceptance and payment of the premium was done outside the stipulated time, the 3rd respondent accepted the money and issued a receipt for the same and never informed the 1st respondent that the offer had been withdrawn or had lapsed. In the circumstances, the Commissioner of Lands could not purport to deem the suit property as unalienated and purport to allocate the same to another party.”

116. In the case of Joseph Kamau Muhoro versus The Attorney General & Another (2021) eKLR; where it was held that:

“ 34. Besides, I also hold the humble opinion that having not formally accepted the Letter of Allotment, [in writing as required], the Letter of Allotment, on which the Plaintiff/Applicant has premised his claim, was rendered void and non-existent.



35. In support of the foregoing holdings, it is important to take cognizance of the Decision in the case of Dr. Syedna Mohammed Burhannuddin Saheb & 2 others vs Benja Properties & 2 others [2007] eKLR;
- “ In any event, the letter of allotment relied upon by the Defendant had itself expired, and was therefore invalid. I do not accept Mr. Kirundi, Counsel for Defendant’s argument, that the expired letter, when acted upon, had been “revived” through conduct. The letter had expired. It was dead. There was nothing to “revive.”
117. The Court of Appeal in the case of Waterfront *Holdings Limited v Kandie & 2 others (Civil Appeal 88 of 2019)* [2023] KECA 1223 (KLR) (6 October 2023) (Judgment), where the court stated and held as hereunder:
- “ 52. Just as in the previous case, the issue as to whether the stand premium for the first allotment was paid or not was not an issue. However, this Court in Swaleh Mohamed Waziri & 3 Others v Houd Mohmoud Athman & Another [2020] eKLR held that:- “...an allottee having been allotted land by the Commissioner of Lands and duly paid all the stand premiums and other related charges, is considered to have acquired rights over such land, which thereafter rendered it unavailable for allocation to other persons or entities.”
53. There is therefore no difficulty in situations where an allottee has duly paid the stand premiums and related charges and the title documents issued. In those circumstances, the allottee, now the registered proprietor, acquires all the rights to that land hence removing the land from the ambit of further allotment. That position is reflected in this Court’s decision in Dr. *Joseph N K Arap N’gok v Justice Moiwo Ole Keiwua & Others Civil Application No. Nai. 60 of 1997* where this Court held that title to landed property can only come into existence after the issuance of the letter of allotment meeting the conditions stated therein and actual issuance thereafter of title documents pursuant to the provisions under which the property is held.
54. From the foregoing, the legal position is not that once issued, the letter of allotment lasts indefinitely. There must be an acceptance of the offer to allot the land by the allottee fulfilling the conditions specified for the said allotment. To that extent, we associate ourselves with this Court’s decision in *Fidelity Commercial Bank Limited v Kenya Grange Vehicle Industries Limited* [2017] eKLR which express the general law in contractual matters. “It is elementary learning that for there to be a contract, there has to be an acceptance of an offer on the same terms of the offer and such acceptance must be unconditional, unequivocal and absolute, accompanied by consideration.”
118. The debate pertaining to whether or not a letter of allotment whose terms have not been complied with and or adhered to, survives the expiry of the stipulated timelines was addressed, highlighted, elaborated and settled by the Supreme Court of Kenya being the Apex Court, in the case of *Torino Enterprises*



Limited v Attorney General (Petition 5 (E006) of 2022) [2023] KESC 79 (KLR) (22 September 2023) (Judgment).

“ [58]So, can an Allotment Letter pass good title? It is settled law that an Allotment Letter is incapable of conferring interest in land, being nothing more than an offer, awaiting the fulfilment of conditions stipulated therein...”

119. By dint of the provisions of Article 163(7) of *the Constitution* 2010, which provisions underscores the doctrine of stare decisis, the decisions of the Supreme Court of Kenya being the apex court are binding on all the other courts save for the Supreme Court itself.
120. Arising from the provisions of Article 163(7) (supra), this court does not have to undertake a calibration between the two-conflicting decisions the Court of Appeal in the case of Cabin Crew Investments Limited v Kenya Medical Training College & 4 others (Civil Appeal 441 of 2019) [2021] KECA 49 (KLR) (23 September 2021) (Judgment) and Waterfront Holdings Limited v Kandie & 2 others (Civil Appeal 88 of 2019) [2023] KECA 1223 (KLR) (6 October 2023) (Judgment) respectively.
121. Pertinently, the position as pertains to the fate of a Letter of allotment whose terms have not been complied with is now settled to the effect that such Letter of allotment is rendered otiose.
122. Notably, once the terms of a letter of allotment are not complied within the stipulated timelines, like in the instant case by the 1st and 2nd Defendants, the same lapses and becomes extinct. Subsequently, the allottee cannot purport to act on the basis of a dead letter of allotment.
123. The evidence on record also demonstrates that whereas the Plaintiff availed evidence of formal application for allocation by his late mother, approval of the request, issuance of the letters of allotment dated 1st July 1998, compliance with the conditions of the letters of allotment being acceptance and payment of allotment fees within 30 days and the subsequent execution of informal transfer of the allocation to him, the 1st and 2nd Defendants on their part only placed before the Court an alleged letter of allotment dated 5th June, 1997 for one of the suit properties, being L.R No. 14718 and never tendered in evidence the letter of allotment for the property L.R No. 14717.
124. To my mind, the letter of allotment which was issued to and in favor of the 2nd Defendant herein lapsed and thus became extinct and hence same could not underpin and or anchor any interest on the suit parcels.
125. In view of the foregoing, it is the finding of this Court that the Plaintiff herein is the lawful and bonafide owner of L.R No. 14717, IR Number 168924 and L.R No. 14718, IR Number 168923.

Issue number ii Whether the 1st and 2nd Defendants have proved particulars of fraud as pleaded against the Plaintiff and the 3rd Defendant.

126. The 1st and 2nd Defendants pleaded and alleged that the Plaintiff obtained the suit parcels fraudulently and that the entire suit was fraudulent.
127. Whether there was fraud or not needs production of evidence. Fraud is defined under the Black’s Law Dictionary 10th Edition as “A knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment”. To decipher that there was fraud it is important that knowledge of the existence of fraud be established on the part of the 2nd Defendant. How then



can fraud be proved? The Court of Appeal in Mombasa Civ Appeal No. 312 of 2012 Emfil Limited v Registrar of Titles Mombasa & 2 others [2014] eKLR held;

“Allegations of fraud are allegations of a serious nature normally required to be strictly pleaded and proved on a higher standard than the ordinary standard of balance of probabilities”. (emphasis added)

Similarly, the Court of Appeal decision in the case of John Kamunya & another v John Nginyi Muchiri & 3 others [2015] eKLR held that:

“we find that the law is clear as put by Mr. Karanja that matters of “fraud” must be strictly and specifically pleaded before these can be interrogated by a court of law. Alternatively, even though not pleaded, these may be raised in the cause of the trial, evidence tendered on them, submission made on them and then left for the court to determine.

128. It is the burden of the person who makes such allegations to present cogent and believable evidence of the same. Indeed, given the seriousness of charges of such character that border on criminality, the standard of proof is necessarily higher than the usual civil standard of a preponderance of probabilities. The standard does not, however, reach the criminal law standard of proof beyond reasonable doubt. It is proof to a level just below beyond reasonable doubt but must, in my estimation, reach the level of assured and confident proof. See Magutu Electrical Services Ltd vs Miriam Nyawira Ngure & Anor [2019] eKLR.
129. During trial the evidence adduced by DW5 confirmed that the Plaintiff was lawfully allotted and acquired suit parcel No. 14717 and 14718. The evidence of Wilfred Muchai. DW3 confirmed that the title documents at page 33 of the 3rd defendants bundle of documents is in the name of the Plaintiff and is accompanied by a duly verified deed plan and there is no evidence that the said title is fake. the 1st and 2nd Defendants despite alleging fraud on the part of the Plaintiff, failed to tender any evidence to contradict the title documents held by the Plaintiff. The 1st and 2nd Defendants did not also produce any investigation report that has found anyone culpable of fraud on the part of the Plaintiff and the 3rd Defendant as proof of the said allegations.
130. Upon analyzing the evidence that was tendered herein it is the finding of this court that the particulars of fraud as pleaded by the 1st and 2nd Defendants as against the Plaintiff and the 3rd Defendant have not been proven to the satisfaction of this court.

Issue number iii Whether the 1st and 2nd Defendants counterclaim has been proven to the required standard and or is merited.

131. It is worth noting that a counterclaim just like any other suit ought to be proved to the required standard. In respect to the 1st and 2nd Defendants’ counterclaim, it is evident that during trial, the 1st and 2nd Defendants failed to prove that the Plaintiff’s title was issued illegally. They also failed to prove fraud on the part of the Plaintiff and they also failed to produce any allotment letter issued in respect to L.R No. 14717.
132. The 3rd Defendant’s witness, DW5 tendered evidence confirming that the title and interest held by the Plaintiff over the suit properties originated from the Ministry of Lands pursuant to a lawful allocation to the late Tabitha, additionally DW5 noted that the purported letter of allotment for L.R No. 14718 held by the 1st and 2nd Defendants could not have originated from the offices of the 3rd Defendant given that the reference number of the letter of allotment, 178034/4, hugely differed from the reference number, 51776/XIV on the alienation file for the properties located at Embakasi hence is irregular.



133. In the instant case, this court having expressed itself on the earlier issues and having found that the Plaintiff is the bonafide and legitimate owner of the suit parcels arrives at the conclusion that the 1st and 2nd Defendants counterclaim is unmerited and the reliefs sought in the said counterclaim are not for granting.

Issue number iv What are the appropriate reliefs that ought to be granted herein.

134. It is imperative to note and recall that both the Plaintiff and the 1st and 2nd Defendants herein have sought for reliefs touching on and concerning ownership of the suit properties. The Plaintiff herein has laid and placed before Court credible, plausible and cogent evidence and documents demonstrating the manner in which he acquired the suit properties herein.

135. In respect to the prayer of permanent Injunction that was sought, it is worth noting that a permanent injunction fully determines the right of the parties before the court and is normally meant to perpetually restrain the commission of an act by the Defendants in order for the rights of the Plaintiff to be protected. To the extent that the Plaintiff has ably demonstrated his entitlement to the suit properties. The Plaintiff is deserving of the said relief and this court shall proceed to grant the same. To the extent that the Plaintiff has established and proved his case as pertains to ownership of the suit properties, there is no gainsaying that the Plaintiff is entitled to the assorted reliefs sought for and enumerated at the foot of the Plaint beforehand.

136. The Court having addressed itself on the earlier issues and having found that the Plaintiff is the bonafide owner of the suit parcels, it cannot be gainsaid that the Plaintiff herein has proved his case to the required standard and is entitled to the said reliefs.

137. Consequently, and in view of the foregoing, this Court concludes that even though the Plaintiff herein has duly proved and established his claim to and in respect of the suit property, he is thus entitled to the requisite protection of the law in the manner highlighted vide the decision in the case of Mohansons (Kenya) Limited v Registrar of Titles & 2 others [2017] eKLR.

138. In respect to costs, the costs are at a discretion of the court. As a general rule costs follow the event unless the Court for good reason orders otherwise. In the present case, the Plaintiff having succeeded in his claim is entitled to costs of the suit and counterclaim which shall be paid by the 1st and 2nd Defendants.

Final orders

139. In conclusion, based on the totality of the evidence tendered herein, the Plaintiff has been able to prove his case against the Defendants to the required standard and this Court proceeds to enter judgment in favour of the Plaintiff as follows: -

- a. The 1st and 2nd Defendants' counterclaim dated 11th September 2021 is hereby dismissed.
- b. A declaration be and is hereby issued that the Plaintiff lawfully acquired the properties known as L.R No 14717, IR No. 168924 and L.R No. 14718, IR No. 168923 and his registration as the proprietor therefore is legal.
- c. A declaration be and is hereby issued that the Plaintiff is entitled to ownership and possession of the properties known as L.R No. 14717, IR No. 168924 and L.R No. 14718, IR No. 168923 to the exclusion of the Defendants herein.
- d. A permanent injunction be and is hereby issued restraining the Defendants either by themselves, their agents or servants or otherwise howsoever from interfering with the Plaintiff's



quiet and peaceful occupation of the suit properties known as. L.R No. 14717, IR No. 168924 and L.R No. 14718, IR No. 168923.

- e. A permanent injunction be and is hereby issued against the Defendants prohibiting whether by themselves, their agents or servants from entering upon, remaining on, transferring, occupying, leasing charging, assigning or interfering with the Plaintiff's quiet possession of the suit properties known as L.R No. 14717, IR No. 168924 and L.R No. 14718, IR No. 168923 within 60 days from today and in default an eviction order do issue and which order should be enforced by the Officer Commanding Station, Industrial Area Police Station or any other nearest Police Station.
- f. The Plaintiff shall have the costs of the suit and counterclaim.

DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI THIS 6TH DECEMBER 2024

E. K. WABWOTO

JUDGE

In the presence of:

Mr. Ndegwa h/b for Mr. Rapando for the Plaintiff.

Mr. Mwenda h/b for Dr. Kamau Kuria S.C for the 1st and 2nd Defendants.

Mr. Motari for the 3rd Defendant.

Court Assistant: - Mary Ngoira.

