



Chemutut v Walker & 5 others; Doshi & another (Third party) (Environment & Land Case 136 of 2018) [2023] KEELC 776 (KLR) (15 February 2023) (Judgment)

Neutral citation: [2023] KEELC 776 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 136 OF 2018
MAO ODENY, J
FEBRUARY 15, 2023**

BETWEEN

HON. JUSTICE CHARLES P. CHEMUTUT PLAINTIFF

AND

PETER WALKER 1ST DEFENDANT

MAUREEN JANET WALKER 2ND DEFENDANT

JACQUELINE JOSEPHINE WANJIKU 3RD DEFENDANT

MATABATU INVESTMENTS LIMITED 4TH DEFENDANT

NATIONAL LAND COMMISSION 5TH DEFENDANT

CHIEF LAND REGISTRAR 6TH DEFENDANT

AND

KETAN NAVINCHANDRA DOSHI THIRD PARTY

ATTORNEY GENERAL THIRD PARTY

JUDGMENT

1. By a Plaint dated June 28, 2018 and amended on September 24, 2018, the Plaintiff herein sued the defendants jointly and severally for the following orders: -
 - a. A declaration that the Plaintiff is entitled to exclusive and unimpeded right of possession and occupation of the suit property.
 - b. A declaration that any title documents held by the defendants if any were obtained fraudulently, illegally and as such null and void.



- c. A declaration that the Defendants whether by themselves or their servants or agents or otherwise howsoever, are wrongfully in occupation of the suit property and are accordingly, trespassers on the same.
- d. A declaration that the Defendants, whether by themselves or servants or agents or otherwise howsoever, are not entitled to enter or remain on the suit property.
- e. A permanent injunction restraining the Defendants, whether by themselves or servants or agents or otherwise howsoever, from entering, remaining on or continuing in occupation of the suit property.
- f. Vacant possession of the suit property.
- g. General damages for trespass.
- h. Costs of this suit together with interest thereon at such rate and for such period of time as this Honourable Court may deem fit to grant.

Brief background to the case

2. The Plaintiff's case is that he was at all material times the duly registered owner of the parcels of land identified as Plot Nos. MN/III/433, MN/III/434 and MN/III/435 all measuring in total 8.1 Acres. It was the Plaintiff's case that the suit property was allocated to him upon application to the Commissioner of Lands dated 3rd March 1992 and was registered in his favour upon payment of the requisite fees of Kshs. 441,000/-
3. The Plaintiff averred that since that time, there were neither people nor activities on the suit property until sometime around April 26, 2018 when he found out that the Defendants had wrongfully entered the suit property, placed a sign post and commenced subdivision despite the Plaintiff's demands to vacate.
4. The 1st and 2nd Defendants filed a joint amended statement of defence dated October 17, 2018 where they averred that they were at all material times the registered owners of Subdivision Nos. 9882(Orig. No. 4394/7)/III/MN, 9883(Orig. No. 4393/1)/III/MN, and 9884(Orig. No. 4393/2)/III/MN having purchased the same from the 1st Third Party herein as per a sale agreement dated May 12, 2006 and stated that their properties were not the same as the suit property.
5. Similarly, the 3rd and 4th Defendants filed a joint amended Defence and counterclaim dated October 31, 2018 where they stated that they hold valid titles of Plots MN/III/434 (Grant No. 55799) and MN/III/435 (Grant No. 55798) having been allocated by the Ministry of Lands in the year 2000 and deed plans issued in the year 2012. The Defendants further averred that they lodged a suit challenging the decision of the 5th Defendant dated October 8, 2015 revoking their title vide Malindi Petition No.2 of 2018 which was consolidated with the suit herein.
6. In addition, the Defendants averred that there was another application filed in Malindi ELC JR No. 3 of 2016 where the Plaintiff successfully sought an order of mandamus to enforce the decision dated October 8, 2015. That on October 31, 2017, the 3rd and 4th Defendants sought to have the orders in the Judicial Review application set aside where they argued that the 5th Defendant failed to apply the principles of fair administrative action and fair hearing for failure to summon them for a hearing prior to revoking the titles.



7. The Defendants averred that the 5th Defendant's decision of October 8, 2015 was unconstitutional as it had no jurisdiction to deal with the said land being private land and therefore the 3rd and 4th Defendants sought for prayers against the Plaintiff, 5th and 6th Defendants as follows:
 - a. A declaration be issued that the determination made by the 5th Defendant on October 8, 2015 in respect to Grants CR 55799(MN/III/434) and CR 55798 (MN/III/435) in favour of the Plaintiff was unconstitutional, null and void.
 - b. A declaration be issued that the 3rd and 4th Defendants having been affected adversely by the proceedings and determination in favour of the Plaintiff the 3rd and 4th Defendants in question to be personally served with the complaints lodged by the Plaintiff with the 5th Defendant and all notices of the proceedings and the 3rd and 4th Defendants were also entitled to respond and submit memorandum and submissions in opposition to the complaints and they had a right to participate fully in the proceedings, and non-observance of the foregoing rendered the proceedings by the 5th Defendant in question a nullity.
 - c. A declaration that an order of certiorari be issued to quash the entire proceedings investigations and determination issued by the 5th Defendant on October 8, 2015 in favour of the Plaintiff touching and revoking Grants CR 55799(MN/III/434) and CR 55798 (MN/III/435) respectively.
 - d. That an order of mandamus be issued compelling the 5th Defendant to undertake proper investigations and proceedings in respect of Grants CR 55799(MN/III/434) and CR 55798 (MN/III/435) where the 3rd and 4th Defendants shall finally participate till determination thereof.
 - e. That alternatively an order be issued that the 3rd and 4th Defendants are the bona fide owners of Certificate of Title Grant Nos. CR 55799(MN/III/434) and CR 55798 (MN/III/435) respectively and are entitled to quiet possession and enjoyment of the said titles.
 - f. That costs of this Amended Counter Claim be borne by the Plaintiff and the 5th Defendant.
8. The 1st Third Party filed a statement of defence, to the Third Party Notice filed by the 1st and 2nd Defendants, dated 1st February 2019 wherein he averred that any claims founded on his contract for sale of land with the 1st and 2nd Defendants is statute barred by virtue of Section 4 and 19 of the Limitation of Actions Act. He also challenged the jurisdiction of this court to entertain the monetary claim for a refund of Kshs. 7,500,000/-.
9. The 6th Defendant filed a statement of defence dated February 17, 2020 and contested all the averments made in the Amended Plaint and urged the court to dismiss the suit. In relation to the Amended Counterclaim, the 6th Defendant averred that it was improperly joined to those proceedings and denied the facts alleged in the counterclaim. The 6th Defendant, further stated that the plots claimed by the 3rd and 4th Defendants did not exist and that the issues raised by the said Defendants were res judicata having been determined in JR No. 3 of 2016 and urged the court to dismiss the amended counterclaim.
10. In relation to a Third Party Notice filed by the 1st Third Party, the 6th Defendant filed a defence on February 21, 2020 stating that the 1st Third Party has never owned the parcels MN/III/4393 and 4394 or the alleged subdivisions MN/III/4400 to MN/III/4407 or MN/III/9876 to MN/III/9884 or any other such former ownership as alleged by the 1st Third Party. The 6th Defendant further averred that if at all those plots ever existed, they were not available for allocation to the 1st Third Party. The



6th Defendant added that the said plots neither occupied the same geographical position as the suit property nor were there different titles in respect of the same geographical location.

Plaintiff's Case

11. PW1 adopted his statement dated June 28, 2018 and one dated November 6, 2018; his reply to the Petition No.2 of 2018 dated April 27, 2018 and statement therein dated April 26, 2018; and a list of documents dated November 6, 2018 and produced them as PEXH 1-28.
12. PW1 testified that he applied to the Commissioner of Lands with one Mr. G.K Somba Kivalya for allocation of residential plots, and on May 9, 1992, the former President H.E. Daniel Arap Moi, approved and endorsed thereon and was subsequently allocated LR No. MN/III/432-435 measuring 10.79 acres vide letter of allotment dated June 5, 1992.
13. PW1 stated that he then paid the requisite fees vide receipt No.718456 for Kshs. 440,000 but was unable to develop the land immediately due to exigencies and demands of duty. It was PW1's testimony that after a period of time, he applied to be issued with a title deed but was informed by the Ministry of Lands, Housing and Urban Development that the relevant file was missing.
14. PW1 stated that when he conducted an official search at the Mombasa Land Registry he found that the 3rd and 4th Defendants herein together with other third parties had acquired title deeds for the same land that he had been allocated. Albert Tsuma Tonya was registered as the owner of LR No. MN/III/432; Mbaru Lewa Mbaru of LR No. MN/III/433; Jackline Josephine Wanjiru (3rd Defendant herein) of LR. No. MN/III/434; while Matabatu Investments Ltd (the 4th Defendant) was registered as the owner of LR No. MN/III/435 respectively.
15. PW1 testified that consequently on or about September 16, 2013, the Plaintiff filed a complaint with the National Land Commission the 5th Defendant herein, in which he complained that the suit property had been irregularly issued to the 3rd and 4th Defendant including other parties named above and upon receipt of the complaint, the 5th Defendant the National Land Commission wrote to the Parties and also issued notices in three daily newspapers dated August 4, 2014 in the Star newspaper page 8 , Standard newspaper page 34 and lastly, Daily Nation on August 5, 2014 at page 36, which were published inviting those with interest on the Parcels of land to appear before the Commission for hearing on August 28, 2014.
16. It was PW1's evidence that during the hearing by the 5th Defendant, he was the only one who, appeared on the said date and made representations on how he had acquired the land and subsequently a determination was rendered on October 8, 2015, whereby the Commission determined and directed that:-
 - a. Title registered as Grant Number CR 55781, 55782, 55798 and 55799 be revoked because they were issued to the 1st and 4th interested Parties unlawfully;
 - b. A Certificate of lease/title be issued to the Hon. Justice Charles P. Chemmutut, the Applicant; and
 - c. The Registrar of Titles Mombasa County be served with the Orders of the Commission for execution.
17. It was PW1's evidence that the 5th Defendant, the National Land Commission's determination and findings were subsequently published via a Kenya Gazette Notice No. 307 issued on January 22, 2016 and that despite the determination and Gazette Notice being brought to the attention of the Chief



Land Registrar the 6th Defendant herein), the Registrar had willfully and deliberately declined to implement the same thereby necessitating the Judicial Review Proceedings.

18. PW1 further stated that he filed Judicial Review Proceedings No. 3 of 2016 to compel the Chief Land Registrar as per the determination of the Commission for an Order of mandamus to revoke the grants of the subject parcels of land, expunge the same from the register and issue title documents for the said parcels of land in the name of the Plaintiff which orders were granted compelling the 6th Defendant accordingly.
19. PW1 stated that a decree was issued dated September 19, 2017 and that the findings and determination of the 5th Defendant, the National Land Commission as Gazetted vide Notice No. 307 of January 22, 2016 have neither been varied, revoked nor set aside by any of the parties herein.
20. It was PW1's further evidence that the 3rd and 4th Defendants made an application to set aside the ELC Misc. (JR) No. 3 of 2016 judgment but the same was dismissed and the same parties appealed against the said order to the Court of Appeal but the 3rd and the 4th Defendants withdrew their appeal from the Court of Appeal.
21. On cross-examination by Mr. Noorani, counsel for the 1st and 2nd Defendants, PW1 reaffirmed his evidence as above and stated that he did not sell his rights to Crockery & Utencils Ltd. That he wrote a letter to the Commissioner of Lands for consent to transfer which was declined.
22. On cross examination by Mr. Ananda, counsel for the 3rd and 4th Defendants, PW1 told the court that his one-time attempt to sell the land failed and that the titles issued to the 3rd and 4th Defendants were fraudulent. On further cross-examination by Mr. Munga for the 6th Defendant, PW1 testified that he did not write to the then Ministry of Lands requesting for an extension before making his payment.
23. On further cross examination by Ms Ongeso, PW1 stated that the names of Maureen and Walker did not appear in the Gazette Notice. On re-examination by Ms Chepkwony, PW1 stated that the 1st and 2nd Defendants' titles do not bear the same numbers as his.

1st and 2nd Defendant's Case

24. DW1 Maureen Janet Walker adopted her written statement dated September 19, 2019 as her evidence in chief and produced the list of documents dated July 9, 2019 as Dex No. 1 to 11
25. DW1 stated that they are the registered owners of subdivision Nos. 9882(Org. No. 4394/7), 9883(Org. No. 4393/1) and 9884(Org. No. 4393/2) vide a sale agreement dated May 12, 2006 entered into between the 1st and 2nd Defendants and 1st Third Party.
26. It was her testimony that the 1st third party was issued with grant Nos. C.R 37127 and C.R 37128 by the President of Kenya but never produced any letter of allotment of government land or any application for allotment.
27. On cross-examination by Ms. Ongeso, counsel for the 1st Third Party, DW1 stated that she purchased the suit property from the 1st Third Party in 2006 upon conducting due diligence of the same. That there was no one residing on the suit property when she took possession and that no one has tried to evict her until the year 2018 when she received the demand letter not to interfere with the property.
28. On cross- examination by Ms. Chepkwony counsel for the Plaintiff, she stated that the searches were conducted after she had purchased the suit property and further confirmed that there was no letter of allotment given to them by the seller (1st Third Party) or any filed in Court and urged the court find that the 1st third party is liable to compensate them should their title be found to be fraudulent.



3rd Defendant's Case

29. DW 2 Jacqueline Josephine Wanjiku equally adopted her statement dated October 30, 2018 and produced as DEXH 1-21 the documents in her lists of documents dated 16th and October 31, 2018. DW2 claimed ownership of the suit land by virtue of a letter of allotment issued to her on June 22, 2000 for plot number MN/III/434 where she paid the requisite fees of Kshs. 106,416 on March 9, 2012 and produced a certificate of title.
30. DW2 stated that the 5th Defendant did not accord her opportunity to be heard before making the determination of October 8, 2015 and prays that the said decision be quashed. She further stated that the Plaintiff's letter of allotment had already lapsed when she was allocated the land.
31. On cross-examination by Mr. Noorani, the witness testified that her own allotment letter was issued on June 22, 2000 and paid for it on March 9, 2012. On further cross-examination by Ms. Chepkwony, DW2 testified that her claim was only over Plot 434 and that she did not have the letter of application to be allotted the suit land
32. The 4th Defendant neither called any witness to testify nor adduce any evidence in support of their case hence they closed their case.

1st third party's case

33. DW1 David Kahindi Samson, a retired Area chief, testified in favour of the 1st Third Party and stated that that he witnessed an agreement between the 1st Third Party and some squatters who were compensated for the crops to enable them vacate the suit parcels. He stated that the negotiations were successful and the squatters moved out of the suit land
34. DW2 Wilson Kibichi, an employee at the Ministry of Lands and Physical Planning, office of the Director of Survey, testified that the three survey plans FR No. 88/179, 224/79 and 566/20 indicate that all fall on the same geographical location. He explained that in instances where subdivision is done, the original survey plan is returned and a new one prepared. In this case, he explained, the original plan was 88/179 prepared in 1959 which was followed by Plan 224/79 done in July 1998 and finally 566/20 done in June 2014. He added that MN/III/432 -435 appear on FR No. 88/179.
35. DW2 further testified that the deed plan for MN/III/4393 and MN/III/4394 were Nos 219312 and 219313 respectively and on cross-examination by Mr. Ananda, the witness stated that a letter of offer would normally expire once the conditions thereon were not met within time. He added that after the re survey was done, the Nos. 432-435 ceased to exist.
36. On cross examination by Ms Chepkwony, DW2 stated that there was no law prohibiting more than one parcel in the same letter of allotment and that the Plaintiff's letter of allotment was issued on 5th June 1992.
37. DW3 1st third party Ketan Doshi adopted his witness statement together with his list of documents dated 1st February 2019 and stated that he was joined as a 3rd party by the 1st and 2nd Defendants who purchased the suit land vide an agreement dated May 12, 2006.
38. It was DW3's evidence that the conditions for sale were clear and thus the 1st and 2nd Defendants have no claim against him. He further stated that he was not a party to the proceedings at Nation Land Commission and that he does not know the Plaintiff who has not sued him.



39. On cross examination by Ms Chepkwony, DW3 stated that the titles that he transferred to the 1st and 2nd Defendants were subdivisions and that he did not produce a letter of allotment for the mother title. DW 3 also stated that he was not aware of any further rectifications as the rectifications that were done were for subdivisions.
40. On re-examination by Mr. Karega DW3 stated that the rectification was done by a licensed Surveyor and deed plans were issued.

6th defendant's case

41. DW4 Samuel Kariuki Mwangi, the Mombasa Land Registrar, testified that the title documents for MN/III/4393 and 4394 were registered as a grant on December 23, 2003 and assigned Title Nos. CR 37127 and CR37128 respectively in the name of Ketan Doshi.
42. DW4 stated that they were subsequently sub-divided 4393 producing MN/III/4400 and MN/III/4401 under Title No. 38037 and 38038 respectively whereby 4394 produced MN/III/4402 and MN/III/4407 under Title No. 38031 and 38036.
43. According to DW4, the parcel Nos. 432 to 435 were registered as new grants by the office of the Commissioner of Lands and that the Mombasa Land Registry received the said grants through a forwarding letter dated March 13, 2012, for registration and collection by the allottees. The parcels were then registered as separate titles Nos. 55782, 55781, 55799 and 55798 respectively each measuring 1.089Ha and 433- 435 in the Plaintiff's name.
44. It was DW4's testimony that on October 16, 2017
45. DW4 added that following the decree issued in Malindi JR No, 3 of 2016, they issued gazette notices to all affected parties (3rd and 4th Defendants) to surrender their titles and that 4393 and 4394 were not affected by the decree so they did not issue notices to the owners.
46. On cross examination DW4 stated that cancellation and registration of the Plaintiff as an owner was done within the law pursuant to a directive of the court.

Plaintiff's Submissions

47. Counsel for the Plaintiff identified seven issues for determination as follows: -
 - a. Whether once an allotment letter is issued and the allottee meets the conditions therein, the land is still for reallocation.
 - b. Whether the 1st and 2nd Defendants are innocent purchasers for value
 - c. Whether an alienated and surveyed land is available for reallocation and resurvey to other 3rd parties and whether the title gets extinguished after resurvey.
 - d. Whether the 5th Defendant had jurisdiction to hear and determine the complaint by Plaintiff.
 - e. Whether the 5th Defendant accorded the 3rd and 4th Defendants fair administrative action and hearing.
 - f. Whether Judicial Review orders of remedies can be granted in a plaint or counterclaim.
 - g. Whether the Plaintiff is entitled to the reliefs sought in the amended plaint.



48. On the first issue on whether once a letter of allotment is issued and the allottee meets the conditions the land is still available for reallocation, counsel submitted that the suit property was unalienated government land as per Section 2 of the [Government Land Act](#) since there was no lease or allotment issued prior to the letter of allotment issued to the Plaintiff on June 5, 1992.
49. Ms Chepkwony submitted that once the government accepted the Plaintiff's payment on May 20, 1997, the suit property became unavailable for allocation to the 3rd and 4th Defendants in June 2000 and relied on the case of Rukaya Ali Mohamed v David Gikonyo Nambacha and another, Kisumu HCCC No. 9 of 2004 where the court held that once an allotment letter is issued and the allottee meets the conditions therein, the land in question is no longer available for allotment since a letter of allotment confers absolute right of ownership or proprietorship unless it is challenged by the allotting authority or is acquired through fraud mistake or misrepresentation.
50. It was counsel's submission that there was no evidence that the Plaintiff's allotment letter was cancelled and further submitted that where there are equal entities, the first in time must prevail and relied on the case of [Gitwany Investment Limited v Tajmal Limited and 2 others](#) [2006] eKLR cited in [Benja Properties Limited v Syedna Mohamed Burbannudin Sabed and 4 others](#) [2015] eKLR.
51. Counsel also submitted on the indefeasibility of title and the establishment of the root of a title and relied on the cases of [Munyu Maina v Hiram Gatbiha Maina](#) [2013] eKLR and [Daudi Kiptugen v Commissioner of Lands & 4 Others](#) [2015] eKLR and urged the court to find that the defendant's titles were acquired fraudulently.
52. On the issue whether the 1st and 2nd Defendants are innocent Purchasers, counsel submitted that they could not be protected by the doctrine as it cannot be used to sanitize a title that is null and void ab initio. Further that they were all along aware that the titles had challenges and on several occasions surrendered their titles for rectification as the 1st Third Party had no good title to transfer in the first place.
53. Ms Chepkwony submitted that the fact that the title was subdivided did not change anything and all the downstream transactions being based on a title that is null and void, carry no proprietary interest, and are themselves also null and void.
54. Counsel further submitted that the resurvey done in 1997 and issuance of grant and title without letters of allotment to the 1st Third Party was illegal, fraudulent and an abuse of office and that 1st and 2nd Defendants' title does not appear in the National Land Commission list of properties and where the suit property is situated. Counsel relied on the cases of [Chemey Investment Limited v AG and 2 others](#) [2018] eKLR and [Munyu Maina v Hiram Gatbiha Maina](#) [2013] eKLR.
55. On the issue whether an alienated and surveyed land is available for reallocation and resurvey to other third parties and whether the title get extinguished after resurvey, counsel submitted that from the survey report produced in court, the Plaintiff's plots Nos. MN/111/432, MN/111/433, MN/111/434 AND MN/111/435 measuring a total Acres Eight Decimal one (10.79) were surveyed and authenticated in 1959 vide survey plan marked Folio number 88; register number 179(f/r 88/179).
56. According to counsel the 1st and 2nd Defendants suit properties being MN/III/4393 and 4394 were surveyed and authenticated in 1998 through survey plan marked Folio number 224: Register Number 179 ("F/R 224/179). The suit properties survey plan marked Folio Number 566: Register Number 20 ("F/R 566/20), hence from the report and land records it is clear that the 1st and 2nd Defendant plots never existed in 1997 as the same were registered in 2004 at land office.



57. On the issue whether the 5th Defendant had jurisdiction to hear and determine the Plaintiff's complaint, counsel relied on Articles 67 (1), (3), 68 (c), (v), of the Constitution of Kenya, and Section 14 of the *National Land Commission Act*, 2012, and submitted that the 5th Defendant was well within its mandate to consider the Plaintiff's claim having in mind that the suit property was initially government land.
58. Counsel relied on the cases of *Republic v Land Registrar Mombasa and 2 others, ex-parte Bhangra Limited* [2012] eKLR, and *Republic v National Land Commission and Another, Ex-parte Muktar Saman Olow* [2015] eKLR to buttress the position that the 5th Defendant can only fulfil this mandate by probing the process under which public land was converted to private land and that it would defeat the purpose of the Constitution to imagine that unlawfully and irregularly acquired land once registered as private property is no longer within the reach of the National Land Commission.
59. Counsel further submitted that gazette notices were issued by the National Land Commission for hearing of the Plaintiff's claim as envisaged under Section 14 (3) and (8) of the *NLC Act* and Article 47 (1) and (2) of the *Constitution of Kenya* hence the 3rd and 4th Defendants cannot say they were not accorded fair administrative action and hearing.
60. It was Ms Chepkwony's submission that the 3rd and 4th Defendant's prayers for certiorari and mandamus could only be granted through judicial review and not in a counterclaim as they did. It was counsel's submission that Section 7 of the *Fair Administrative Action Act* is clear that a party aggrieved by an administrative action or decision could challenge the act by way of judicial review. Counsel urged the court to find the prayers sought in the amended plaint are justified and merited.

1st and 2nd Defendants' submissions

61. Counsel submitted that the Plaintiff's case is based on a letter of allotment yet the courts have numerously held that such a letter is not proof of title, and relied on the case of *Royal Tulia Estates Limited v Kilifi County Land Registrar and 6 Others* [2022] KEELC 4772 (KLR). Counsel added that failure to meet the conditions set out in the letter of allotment on time, the Commissioner of Lands was at liberty to re allocate the suit property and cited the case of *Kasamu and Musembi v Nyagoto* [2022] eKLR.
62. Counsel further submitted that the jurisdiction of the 5th Defendant did not extend to review or revalidation of letters of allotment and submitted that reference to 'disposition' under section 14 of the NLC Act does not include letters of allotment. Counsel therefore stated that the 5th Defendant does not have any authority to direct issuance of a new grant or title.
63. In relation to their claim against the 5th and 6th Defendants, counsel urged the court to award the 1st and 2nd Defendants indemnity as stipulated under Section 81 of the *Land Registration Act*, 2012 and as was awarded in the case of *Antonie Kubundo Murunga v AG and 3 others* [2017] eKLR should their titles be found not to be valid. Counsel further submitted that should the court arrive at that finding, the 1st Third Party be compelled to refund the purchase price together with interest as it was held in the case of *Naivas Ltd v NSSF Board of Trustees* [2022] KEELC 2852 KLR.

3rd and 4th Defendants' submissions

64. Counsel for the 3rd and 4th Defendants, relied on Article 162(1) (2) of the Constitution together with Section 13 of the Environment and Land Court Act and submitted that the Court has jurisdiction to grant prerogative orders, declaratory orders and costs as prayed for by the 3rd and 4th Defendants in the



Amended Petition No. 2 of 2018 (now Amended Counter Claim) which was consolidated with this claim and therefore it is not true as claimed by counsel for the Plaintiffs.

65. Counsel submitted that the 3rd and 4th Defendants have never been party to the decision made by the 5th Defendant and that the 3rd and 4th Defendants have approached this Court as their Constitutional rights were violated by the 5th Defendant and they were victims of unfair administrative action and not having been granted a fair hearing by the 5th Defendant hence the suit is not res judicata.
66. It was counsel's submissions that the purported publication of the hearing notices in the local newspaper by the 5th Defendant was not proper service since the 3rd and 4th Defendant's postal addresses were indicated on the certificates of grant sought to be revoked. Counsel argued that as a result, his clients' rights under Article 50(1) and 47 (1) and (2) were infringed.
67. Like the 1st and 2nd Defendants, counsel argued that the 5th Defendant did not have jurisdiction to revoke their titles for reason that its mandate under Article 67 (2) (e) of the Constitution was only to recommend appropriate redress.

1ST 3RD Party's Submissions

68. Counsel submitted that the 1st and 2nd Defendant's claim against the 1st Third Party was time barred as envisaged under section 4 (1) and 19 of the Limitation of Actions Act and as it was held in the case of *Hilton v Sultan S. Team Laundry* [1946] 1KB 61,81.
69. Counsel relied on the case of *Dr. Joseph N.K Arap Ng'ok v Moiyo Ole Kiewua and 4 others*, Civil Appeal No. 60 of 1997 UR, and argued that title to allotted property only comes into existence after issuance of a letter of allotment, meeting the conditions stated therein and actual issuance of title documents. That the Plaintiff did not meet the conditions in the letter of offer hence the same lapsed.
70. Counsel further submitted that the Plaintiff's title ceased to exist in 1998 when a re-survey was done, as a result, the proceedings before the 5th Defendant were based on non-existent titles making the decision therein void and in turn the order in JR No. 3 of 2016. Counsel relied on the case of *Macfoy v United African Co. Ltd* [1961] ALLER 1169.
71. Counsel argued that no evidence was placed to prove fraud on the part of the 1st Third Party as is required in claims of such nature and relied on the case of *Jacob Nyakwa Ojwang v Nathwalal Narishidas Gbelani and 5 others* [2021] eKLR, and Section 107-109 of the Evidence Act. Counsel added that in any event, the Plaintiff did not seek any remedy against the 1st Third Party.

6th and 2nd Third Party's Submissions

72. Counsel identified three issues for determination namely, whether the letter of allotment dated 5th June 1992 conferred proprietary interest to the Plaintiff, whether the 1st third Party acquired good title.
73. On the first issue, counsel argued that by virtue of Section 9 and 72 of the then Government Lands Act, the Plaintiff's allotment letter had long expired when he made payment of the stand premium and that acceptance of payment does not operate as a waiver to strict timelines as those imposed in the letter of allotment.
74. Counsel relied on Section 80 of the Government Lands Act and the case of *Dickson Ngigi Ngugi v Commissioner of Lands* [2019] eKLR.



75. On the second issue as to whether the 1st Third Party acquired good title, counsel submitted that from the evidence of Wilson Kibichi, the surveyor, the Plaintiff's process of allocation was irregular for want of compliance and cited the case of *Munyu Maina v Hiram Gathiba Maina* [2013] eKLR.
76. Counsel therefore submitted that the 1st Third Party has demonstrated how he acquired his title which was legitimate and that the Plaintiff had failed to prove his case to the required standard hence undeserving of the reliefs sought.

Analysis And Determination.

77. I have considered the pleadings, the evidence and submissions by counsel and find that the following issues arise for determination-
- a. Whether the suit parcels of land were available for allocation to the plaintiff
 - b. Whether upon allocation of the suit parcels of land to the plaintiff, the same were available for reallocation to the 3rd and 4th Defendants.
 - c. Whether the 1st Third Party had a good title to pass to the 1st and 2nd defendants
 - d. Whether the 1st and 2nd defendants are innocent purchasers for value.
 - e. Whether the 5th Defendant had jurisdiction to hear and determine the plaintiff's complaint
 - f. Whether the issues raised by the 3rd and 4th Defendant in the Amended Counterclaim and in the Petition No. 2 of 2018 are merited.
 - g. Who is the rightful owner of the suit property?
78. On the issue whether the suit parcels of land were available for allocation, the Plaintiff gave a detailed chronology and process of how he made an application to the Commissioner of Lands with one Mr. G.K Somba Kivalya for allocation of residential plots, and on May 9, 1992, the former President H.E. Daniel Arap Moi, approved, endorsed thereon and was subsequently allocated LR No. MN/III/432-435 measuring 10.79 acres vide letter of allotment dated 5th June 1992.
79. It is also on record that the Plaintiff paid the requisite fees vide receipt No.718456 for Kshs. 440,000 and later applied to be issued with a title deed but was informed by the Ministry of Lands, Housing and Urban Development that the relevant file was missing and when he conducted an official search he found out that the 3rd and 4th Defendants had acquired title deeds of the suit parcels of land.
80. It is not disputed that the suit property was originally unalienated government land and by dint of Section 2 and 3 of the *Government Land Act*, Cap 280, (now repealed), and Section 3 of the *Physical Planning Act*, Cap 286, the power to alienate unalienated Government land was vested in the President and such powers were also delegated to the Commissioner of Lands in limited circumstances outlined in the Government Land Act.

section 3 of the Physical Planning Act provides;

“unalienated Government land” means Government land which is not for the time being leased to any person, or in respect of which the Commissioner of Lands has not issued any letter of allotment or reservation.”



Section 2 of the *Government Lands Act*;

“unalienated Government land” means Government land which is not for the time being leased to any other person, or in respect of which the Commissioner has not issued any letter of allotment”

Section 3 of the Government Lands Act reads;

- “3. The President, in addition to, but without limiting, any other right, power or authority vested in him under this Act, may—
- (a)* subject to any other written law, make grants or dispositions of any estates, interests or rights in or over unalienated government land;”

Section 7 of the *Government Lands Act* provides that;

“The Commissioner or an officer of the Lands Department may, subject to any general or special directions from the President, execute for and on behalf of the President any conveyance, lease or license of or for the occupation of Government lands, and do any act or thing, exercise any power and give any order or direction and sign or give any document, which may be done, exercised, given or signed by the President under this Act:

Provided that nothing in this section shall be deemed to authorize the Commissioner or such officer to exercise any of the powers conferred upon the President by sections 3, 12, 20 and 128.”

81. From the documentary and oral evidence adduced, it is not in dispute that the Plaintiff applied for allocation of land and was subsequently allocated by issuance of an allotment letter by the Commissioner of Lands. This is proof that the land was available for alienation.
82. The issuance of an allotment letter serves as an offer which has conditions which have to be complied with to enable the allottee move to the next step of issuance of a certificate of title. The Court of Appeal in *Joseph N.K. Arap Ng'ok v Moiyo Ole Keiwua & 4 others* [1997] eKLR, held that:
- “What is not shown is the date on which H.E. the President approved the application for consideration for allocation of the suit property. Mr. Otieno-Kajwang who appeared for the applicant argued that the approval by H.E. the President amounted to his client obtaining the title to the suit property. This argument, of course, cannot stand. It is trite that such title to landed property can only come into existence after issuance of letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of title document pursuant to provisions in the Act under which the property is held.”
83. An allottee must comply with the conditions set in the allotment letter and in this case the Plaintiff complied by paying the requisite stand premium but when he went to process the title he found that the 3rd and 4th Defendants had been issued with title deeds. The Plaintiff was the first to be allotted the suit land on 5th June 1992 and no one else had been granted this land. This shows that the land was available for alienation by the Commissioner of Lands.
84. The 3rd and 4th Defendants claimed to have been allotted the suit land vide an allotment letter dated 22nd June 2000 and paid the requisite fees of Kshs 106, 416 on March 9, 2012. This shows that the land



was allocated twice for the same property which had been allotted to the Plaintiff in 1992. The issue is whether once land has been alienated, it is still available for reallocation.

85. In the case of *Republic v City Council of Nairobi & 3 Others* (2014) eKLR the court held that:
- “Once allotment letter is issued and the allottee meets the conditions therein, the land in question is no longer available for allotment since a letter of allotment confers absolute right of ownership or proprietorship unless it is challenged by the allotting authority or is acquired through fraud mistake or misrepresentation or that the allotment was out rightly illegal or it was against public interest. In other words, where land has been allocated, the same land cannot be reallocated unless the first allocation is validly and lawfully cancelled.”
86. Upon the Plaintiff complying with the terms and conditions of the allotment, the allotment letter conferred proprietary interest in the suit properties. There was no evidence that the allotment letter was cancelled by the allotting authority and further there was no proof that the suit properties were acquired irregularly, by fraud or by misrepresentation by the Plaintiff.
87. This was why when the Plaintiff filed a complaint with the 5th Respondent, the Commission did its investigation and found that the suit land belonged to the plaintiff. Further that the plaintiff filed a JR No 3 of 3 of 2016 which compelled the Land Registrar to comply with the Commissions’ orders and register the Plaintiff as an owner of the suit parcels of land which was done.
88. It should be noted that the 3rd and 4th Defendants filed list of documents but did not produce a copy of the application for allocation and allotment letter while the Plaintiff filed both documents. The 3rd and 4th Defendants filed a copy of the title and rates payment receipts, and a copy of stand premium receipts.
89. In a dispute where there are two claimants with title to the same suit of land, waving a title document alone is not enough, we must go to the root of the title and the process how the title was procured.
90. In the case of *Daudi Kiptugen –v- Commissioner of Lands & 4 Others* [2015] eKLR the court stated that: -
- “...the acquisition of title cannot be construed only in the end result; the process of acquisition is material. It follows that if a document of title was not acquired through a proper process, the title itself cannot be a good title. If this were not the position then all one would need to do is to manufacture a Lease or a Certificate of title at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein.”
91. The Plaintiff gave a chronology of the steps he went through to acquire his title with documentary evidence to boot. There were some missing steps in the 3rd and 4th Defendant’s allotment and that is why there were missing records of the allotment letter, and the application for allotment. This allotment was done after 8 years and there was no evidence that the Plaintiff’s allotment had been lawfully and validly cancelled to enable reallocation as was held in the *Republic versus City Council of Nairobi & 3 Others* (supra). I also note that the 3rd, 4th Defendants and 1st Third Party herein had been issued with allotment letters in 2000 and 2003 respectively when the suit land was not available for allocation. This answers the 2nd issue whether the suit land was available for reallocation which is in the negative.
92. On the issue whether the 1st Third Party had a good title to pass to the 1st and 2nd Defendants, we have to answer whether the suit properties the Plaintiff, the 1st and 2nd Defendants are claiming are the same.



93. DW2 Wilson Kibichi, an employee at the Ministry of Lands and Physical Planning, office of the Director of Survey, testified that the three survey plans FR No. 88/179, 224/79 and 566/20 indicate that all the parcels fall on the same geographical location. It is further on record that when the Plaintiff went to the suit land he found out that the 1st and 2nd Defendants had placed a sign post thereon. The evidence of DW 2 was uncontroverted.
94. It was the 1st Third party's evidence that he was allocated the suit parcels of land in 2003 and got a title and later entered into a sale agreement dated 12th May 2006 with the 1st and 2nd Defendants for a consideration of Kshs 7.5Million.
95. There was no dispute that the 1st and 2nd Defendants purchased the suit land from the 1st Third Party who in turn averred that the land original numbers MN/III/4393 and 4394 were allocated to him by the government through an allotment letter which he did not produce. The 1st Third party was evasive on answering the question on application letter for allotment and the subsequent issuance of an allotment letter. On cross examination he confirmed that he neither had an application for allocation nor an allotment letter.
96. The 2nd Defendant also told the court that she was not shown the allotment letter by the 1st third party. It is trite as earlier stated that when there are title documents in respect of the same parcel of land or any other title where there is an ownership dispute we must go back to the root of the title and the process of acquisition.
97. The 1st Third party does not deny that he subdivided the suit parcels of land and sold to third parties including the 1st and 2nd Defendants, what he claims is that the conditions agreement with the parties were clear hence they do not have a claim against him. He also stated that the 1st and 2nd Defendants' claim is time barred.
98. The 1st and 2nd Third Parties were joined in the suit by the 1st and 2nd Defendant claiming indemnity from the 1st third party for a refund of the purchase price plus interest and costs in case the court determines that the 1st third Party did not have a good title to pass.
99. DW4 Samuel Kariuki Mwangi, the Mombasa Land Registrar, testified that the title documents for MN/III/4393 and 4394 were registered as a grant on 23rd December 2003 and assigned Title Nos. CR 37127 and CR37128 respectively in the name of Ketan Doshi which were subsequently sub-divided 4393 producing MN/III/4400 and MN/III/4401 under Title No. 38037 and 38038 respectively whereby 4394 produced MN/III/4402 and MN/III/4407 under Title No. 38031 and 38036.
100. DW4 further told the court that parcel Nos. 432 to 435 were registered as new grants by the office of the Commissioner of Lands and that the Mombasa Land Registry received the said grants through a forwarding letter dated 13th March 2012, for registration and collection by the allottees. The parcels were then registered as separate titles Nos. 55782, 55781, 55799 and 55798 respectively each measuring 1.089Ha and 433- 435 in the Plaintiff's name.
101. It was DW4's testimony that on 16th October 2017 the land registry received a decree dated 19th September 2017 issued in Malindi ELC JR No. 3 of 2016 compelling the Land Registrar to expunge the record in parcel Nos 432 to 435 and be registered in the name of Justice Charles Chemuttut which was complied with. This decree has not been set aside hence it is still in force.
102. The 1st third party did not prove that he had acquired a good title to pass to the 1st and 2nd Defendants as he was not able to ascertain the root of the title through application and allocation of the suit land.



It follows that the 1st Third party's title was unprocedurally obtained as there was already an allocation to the Plaintiff which was valid and has been confirmed by the court in the JR application.

103. The issuance of a grant to the 1st Third Party was therefore null and void ab initio and ineffectual to confer any right, interest or title upon the 1st Third Party. The net result is that all downstream transactions emanating therefrom are null and void as the 1st Third Party did not have a good title to pass.
104. The only remedy is to indemnify the 1st and 2nd Defendants with a refund of the purchase price and interest at court rates. At the time the 1st Third party was purportedly allocated the land, the same was not available for alienation. How did the 1st Third party get allocated land that already had an owner?
105. Counsel for the 1st Third party submitted that the Plaintiff did not seek any remedy against the 1st Third party, the Plaintiff did not sue the third party and the title suggests. The Third parties were joined in the case by the 1st and 2nd Defendants to indemnify them and purchasers who paid him money for the purchase of the suit land.
106. The Plaintiff could not sue the 1st third party as he is not a registered owner of the parcels having subdivided and sold the parcels to other 3rd parties including the 1sts and 2nd defendant who have titles and that is why they were sued as such
107. On whether the 1st and 2nd Defendants are innocent purchasers for value, the Court of Appeal stated in *Weston Gitonga & 10 others -v- Peter Rugu Gikanga & another* [2017] eKLR as follows:

“Black’s law Dictionary 8th Edition defines “bona fide purchaser” as:“ One who buys something for value without notice of another’s claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller’s title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.”

In the Ugandan case of *Katende v. Haridar & Company Limited* [2008] 2 E.A.173 it was held: -

“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, ... (he) must prove that:

- a) he holds a certificate of title;
- b) he purchased the property in good faith;
- c) he had no knowledge of the fraud;
- d) he purchased for valuable consideration;
- e) the vendors had apparent valid title;
- f) he purchased without notice of any fraud;
- g) he was not party to any fraud.

A bona fide purchaser of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner.”



108. Flowing from the above definition it has been established that the 1st Third Party had no good valid title to transfer in the first place and as earlier stated that the 1st and 2nd Defendant's remedy lies with the Third party for compensation or indemnity for refund of the purchase price paid. The 1st Third Party did not dispute that he entered into a sale agreement with the 1st and 2nd Defendants as claimed but his only argument was that any claims emanating from that agreement dated 12th May 2006, were time barred by virtue of Section 4 and 19 of the [Limitation of Actions Act](#).
109. According to the 1st Third Party, time started to run in 2006 when they signed the sale agreement. Section 26 of the [Limitation of Actions Act](#) provides that time will not begin to run until a party has discovered the fraud or mistake. That section reads;
- Extension of limitation period in case of fraud or mistake
- Where, in the case of an action for which a period of limitation is prescribed, either—
- a. the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or
 - b. the right of action is concealed by the fraud of any such person as aforesaid; or
 - c. the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:
- Provided that this section does not enable an action to be brought to recover, or enforce any mortgage upon, or set aside any transaction affecting, any property which—
- i. in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or
 - ii. in the case of mistake, has been purchased for valuable consideration, after the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.
110. It is therefore evident that the 1st and 2nd Defendants could only have discovered the mistake or anomaly of the 1st Third Party's title when this suit was filed in 2018. In the circumstances, I find that the Defendant's claim for indemnity against the 1st Third Party is justified.
111. On the issue whether the 5th Defendant had jurisdiction to hear and determine the Plaintiff's claim, the 3rd and 4th Defendants want this court to find that the decision issued by the 5th Defendant on 8th October 2015 was unconstitutional, null and void for failure to notify them of the complaint filed by the Plaintiff and hearing notices therein. I have perused the judgment delivered by Olola J in JR No.3 of 2016 and note that the 3rd and 4th Defendants were interested parties therein although they failed to participate.
112. The main issue in the Judgment raised by the Chief Land Registrar was that the interested parties therein were not given any audience before the National Land Commission, hence the refusal to effect the decision of 8th October 2015. Olola J consequently observed;
- “ ... It is apparent from the submissions placed before me that the respondent is of the view that the 5th Interested Party did not grant the 1st to 3rd Interested parties a fair hearing at all since the notice published in the dailies only referred to the 4th Interested party hence her refusal to effect the directive of the 5th Interested party. As it were, the 1st to 4th interested



parties did not appear herein and this court can only speculate as to the position they hold on the matters raised in this application.”

113. The advertisement and notices issued show that the interested parties therein were properly and sufficiently notified of the complaint and hearing before the National Land Commission. When a notice is given over your suit land to be adjudicated upon, do you view it and fold your arms and wait for the outcome or act and present yourself at the table where the discussions about your land are taking place. What other notice did the interested parties require to be issued apart from advertisement and gazette notices which cover the whole country. I find that the gazette notices were issued by the National Land Commission for hearing of the Plaintiff’s claim as envisaged under Section 14 (3) and (8) of the NLC Act and Article 47 (1) and (2) of the Constitution of Kenya as such the 3rd and 4th Defendants cannot be heard to say that they were not accorded fair administrative action and hearing.
114. The 5th Defendant had the mandate under Articles 67 (1), (3), 68 (c), (v), of the *Constitution of Kenya*, and Section 14 of the *National Land Commission Act*, 2012, to consider the Plaintiff’s claim having in mind that the suit property was initially government land.
115. The 5th Defendant can fulfil this mandate by probing the process under which public land was converted to private land and where land has been irregularly acquired or allocated as was held in the case *Republic v Land Registrar Mombasa and 2 others, ex-parte Bhangra Limited* [2012] eKLR, where the court held that:

It is common ground, I think that the Land Registrar has no power either under the Constitution or the Registered Land Act (now repealed) to revoke title. A string of decisions have restated this rather uncontested position of the law. That power has until recently rested exclusively with the Court. From 2nd May 2012, when the *National Land Commission Act* commenced, power to review grants, or dispositions of public land was given to the National Land Commission.

Section 14 of the Act makes provisions on how that power is to be exercised.

(c)

(d) So in respect to public land the Court shares this authority with the National Land Commission.

116. Having found that the 5th Defendant had the mandate to deal with the Plaintiff’s complaint, it follows that this matter was determined by a Judicial Review that compelled the Chief Land Registrar to implement the findings of the National Land Commission.
117. The issue whether the amended counterclaim by the 3rd and 4th Defendants has merit; this was an issue dealt with in the judgment delivered by Olola J on 19th September 2017 which has neither been reviewed or appealed against. It should be noted that the Interested parties filed an appeal which they later withdrew and filed the current petition challenging the decision of the 5th Defendant. There can be no parallel proceedings seeking for remedies which have already been determined.
118. Counsel submitted that the 3rd and 4th Defendants have never been party to the decision made by the 5th Defendant. That the 3rd and 4th Defendants have approached this Court as their Constitutional rights were violated by the 5th Defendant and they were victims of unfair administrative action and not having been granted a fair hearing by the 5th Defendant hence the suit is not res judicata.



119. This suit was consolidated with the Petition filed by the 3rd and 4th Defendants, the court has determined that the 5th Defendant had the mandate to hear the Plaintiff's complaint and that is why the court confirmed those orders and compelled the Chief Land Registrar to implement.
120. The 3rd and 4th Defendants should have filed their own judicial review to complain about the decision of the 5th Respondent as to why their titles were cancelled and not through this Petition. They had delayed and many processes took place which were ratified by the court.
121. The court in exercising its judicial review jurisdiction is not concerned with reviewing the merits or otherwise of a decision by a public body, in respect of which the application is made, but the decision making process itself.
122. In the case of *Nation Media Group Limited -vs- Cradle - The Children's Foundation suing through Geoffrey Magonya* NBI Civil Appeal No.149 of 2013 (CA), the court held that the purpose of judicial review is to determine whether the applicant was accorded fair treatment by the concerned public body and that it is not within the remit of the court to substitute its own opinion with that of the public entity charged by law to decide the matter in question.
123. The court in Judicial Review concerned with the decision making process and not the substantive issue of declaration of rights. The court in the circumstances could only look at whether the National Land Commission followed due process vide the Judicial Review mechanism if the 3rd and 4th Defendants had pursued that line.
124. The court cannot act as a Court of Appeal and go to the merits of the case in a Judicial Review as was held in the case of *Municipal Council of Mombasa -vs- Republic & Umoja Consultants Ltd* [2002] e KLR. Even though the 3rd and 4th Defendants did not file a Judicial review, what they want the court to determine is like sitting on appeal of the orders that were granted in JR 3 of 2018. I find that the counterclaim lacks merit and is dismissed with costs.
125. The law is that, the Certificate of Title issued by the Registrar upon registration 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 and the title of that proprietor shall not be subject to challenge except on the ground of fraud or misrepresentation to which the person is proved to be a party or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme- Section 26(1) (a) and (b) of the *Land Registration Act, 2012*.
126. In the case of *Chemei Investments Limited -v- The Attorney General & Others* Nairobi Petition No. 94 of 2005 at para. 64 it was held:

“The Constitution protects a higher value, that of integrity and the rule of law. These values cannot be side stepped by imposing legal blinders based on indefeasibility. I therefore adopt the sentiments of the court in the case of Milan Kumar Shah & 2 Others vs. City Council of Nairobi & Another (supra) where the Court stated as follows, “We hold that the registration of title to land is absolute and indefeasible to the extent, firstly, that the creation of such title was in accordance with the applicable law and secondly, where it is demonstrated to a degree higher than the balance of probability that such registration was procured through persons or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law and the public interest.”



127. The Plaintiff was issued with an allotment letter on 5th June 1992 upon application for such allotment which the Defendants did not dispute. In the foregoing, I find that the Plaintiff has proved his case on a balance of probabilities.
128. The Plaintiff further testified that when he went to the suit land he found that people had trespassed the suit land. It is trite that trespass is actionable per se but in this particular case who can be held liable to pay damages and each of the parties is struggling to have a piece of the parcel of land. The 1st and 2nd Defendants are also looking for indemnity from the 1st Third Party, the 3rd and 4th Defendants are not on the suit land.
129. This is a case that has been before the National Land Commission and in court for Judicial Review and now the consolidation with the 3rd and 4th Defendants Petition. Litigation must come to an end at some point.
130. Section 80 of the [Land Registration Act](#), 2012 gives this Court power to order for cancellation of title. That provision reads;
- 80.
- (1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.
 - (2). The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.
131. I have considered the consolidated pleadings, the evidence and submissions by counsel and therefore make the following specific orders
- a. A declaration is hereby issued that the Plaintiff is entitled to exclusive and unimpeded right of possession and occupation of the suit property.
 - b. A declaration is hereby issued that any title documents held by the Defendants if any were obtained fraudulently, illegally and as such null and void.
 - c. A declaration is hereby issued that the Defendants whether by themselves or their servants or agents or otherwise howsoever, are wrongfully in occupation of the suit property and are accordingly, trespassers on the same.
 - d. A declaration is hereby issued that the Defendants, whether by themselves or servants or agents or otherwise howsoever, are not entitled to enter or remain on the suit property.
 - e. A permanent injunction is hereby issued restraining the Defendants, whether by themselves or servants or agents or otherwise howsoever, from entering, remaining on or continuing in occupation of the suit property.
 - f. Defendants to give vacant possession of the suit property within 30 days' failure to which eviction to issue.
 - g. Costs of this suit together with interest thereon.



- h. An order directing the Land Registrar to cancel the defendants' titles to the suit land or any that emanated from the suit parcels of land.
- i. An order that the 1st Third party indemnifies the 1st and 2nd Defendants by refunding the purchase price of Kshs. 7,500,000/ together with interest at court rates from the time of filing the Third Party Notice with costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 15TH DAY OF FEBRUARY 2023.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

