Solomon v Agalo & 3 others (Environment & Land Case 41 of 2016)
[2023] KEELC 16627 (KLR) (27 March 2023) (Judgment)

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REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE 41 OF 2016

FO NYAGAKA, J

MARCH 27, 2023

BETWEEN

PETER MURIUKI SOLOMON ..... PLAINTIFF

AND

PETER MIDIMO AGALO ..... 1ST DEFENDANT

LAND REGISTRAR TRANS-NZOIA COUNTY ..... 2ND DEFENDANT

THE NATIONAL LAND COMMISSION ..... 3RD DEFENDANT

THE ATTORNEY GENERAL ..... 4TH DEFENDANT

JUDGMENT

1. This judgment is on a claim arising from an alleged double allocation of a plot, which was designated by the defunct Municipal Council of Kitale as a Temporary Occupation Licence and by the Commissioner of Lands, then a department of the Ministry of Lands and Physical Planning and Settlement, the predecessor of the National Land Commission (NLC) as a plot for allotment. The NLC was finally sued in that behalf as the 3rd Defendant.

2. In like manner as, one often wishes a long-lasting problem to be offloaded with finality when opportunity arises, I have, with anxiety, take time to prepare this long judgment because, from the record and the evidence of the parties, the plot in issue herein have been a subject of four suits since 1994, namely, Kitale SPMCC No. 1855 of 1994, Kitale SPMCC No. 461 of 1995, SPMCC 96 of 1995 and Kitale HCC No. 84 of 2011(OS). Litigation over it must come to an end. Thus, in order to understand the claim well, it is important to set out both the pleadings and evidence in extensu.

THE PLEADINGS

3. By a Plaint dated 21/02/2016 and filed on 29/02/2016 the Plaintiff brought this suit against the 1st Defendant. He sought a number of reliefs against him. The 1st Defendant entered appearance and defence. Before the suit could be heard the Plaintiff moved the Court to amend the Paint. That was on 31/01/2017 vide an application of even date. On 08/11/2017 the Application was allowed by consent and on 20/11/2017 the Plaintiff filed Amended Plaint dated the same date.

4. Through the amendment, three more defendants were introduced into the suit. These were the Land Registrar Trans-Nzoia County as the 2nd Defendant, the National Land Commission as the 3rd and the Attorney-General as the 4th. In the Amended Plaint, the Plaintiff having set out the descriptions of the parties and their addresses of service averred as hereunder. That he was the owner of all that parcel of land comprised in LR. No. Kitale Municipality Block 6/72 which was initially known as LR. No. 2116/1264 Kitale Municipality or UNS. Commercial Plot - Kitale (Plot 'Y'). The plot was situate within Kitale Municipality of Trans-Nzoia County and was registered in the name of the 1st Defendant. That he had been in possession and occupation thereof since 1986 and extensively developed it. That some time in 1986 he, together with 9 other people, was given various Temporary Occupied Lands, elsewhere referred to as Temporary Occupation Licence (TOL) letters for spaces within the Kitale Municipality and were allowed to pay ground rent as TOL allottees.

5. He pleaded further that in or about 1993 he together with the other TOL holders applied to the Commissioner of Lands for ratification of their occupation as TOL allottees. That vide a letter dated 10/12/1993 the Commissioner of Lands wrote to the District Commissioner (DC) to confirm whether the site could be allotted to the TOL holders or they should be given alternative plots in order to pave way for the Plot Allocation Committee (PAC) allottees who had already acquired letters of allotment.

6. That on 6/01/1994 the DC recommended to the Commissioner of Lands that the ten (10) TOL applicants including the Plaintiff being on the site and had developed their plots be ratified for occupation of the ten (10) commercial plots. That on 7/07/1994 the Commissioner of Lands wrote a letter dated that the ownership of the ten (10) TOL holders be ratified, and alternative plots be given to the PAC allottees and a Part Development Plan (PDP) be prepared.

7. His further averment was that the 1st Defendant was one of the PAC allottees to given alternative plots as confirmed by the letter dated 23/02/1994 and their letters of allotment were revoked. After that the Plaintiff was issued with a letter of allotment to the suit land which was then known as UNS. Commercial Plot - Kitale (Plot 'Y'). He duly paid for and had since been residing and carrying out developments on it.

8. That the Defendant used dubious means to process a Grant to the suit land which became LR. 2116/1264 Kitale Municipality. On 28/07/1994, the Ministry requested the 1st Defendant to surrender the Grant to the Ministry of Lands for cancellation and allocation of the alternative plot. He did not. This prompted the Registrar of Titles to place a caveat against the title on 09/10/1994. This was communicated to him through a letter dated 01/11/1994. After that, on 05/08/1994 the Municipal Council of Kitale cautioned the 1st Defendant against carrying out any developments on the suit land.

9. That the Plaintiff filed Kitale SPMCC No. 461 of 1995 which was between himself and one David Kiongo Muturi and the 1st Defendant herein which was on a boundary dispute and a representative of the Commissioner of Lands, Rift Valley Region was called to testify in it about title No. LR.

2116/1264. The 1st Defendant also filed suit No. Kitale SPMCC No. 96 of 1995 seeking in it the eviction of the Plaintiff herein. The representative of the Commissioner of Lands testified in the previous suit that land parcel No. LR. No. 2116/1264 had been allotted to the Plaintiff and the 1st Defendant had been directed, vide a letter dated 28/07/1994, to surrender his title thereto for purposes of being given an alternative.

10. His further averment was that after he lost Kitale SPMCC No. 461 of 1995, the 1st Defendant wrote to the Kitale Municipal Council on 30/11/2000 asking it to evict the Plaintiff from the suit land. Again, on 19/12/2002 the 1st Defendant wrote to the Plaintiff's advocates about the unsuccessfulness of the Plaintiff in the said case, asking them to have him evicted from the land. He alleged, both letters by the 1st Defendant were forgeries designed to mislead authorities.

11. The Plaintiff averred further that Kitale SPMCC No. 461 of 1995 was not related to ownership of the suit land while the one which the 1st Defendant had filed as Kitale SPMCC No. 96 of 1995 was but it was yet to be determined. He then pleaded that he moved to Court for stay orders and the eviction was not carried out as a result. That after that the 1st Defendant illegally converted land parcel LR No. 2116/1264 to Kitale Municipality Block 6/72 while suit No. Kitale SPMCC No. 96 of 1995 was still pending and obtained a Certificate of Lease thereto on 28/06/2001.

12. The Plaintiff averred again that he visited the District Land Registrar, Kitale to know how the conversion was done yet a caveat was in place and the Land Registrar pointed to fraud having been committed. He informed him that the letter dated 22/06/2001 did not emanate from his office and that the signature thereon was a forgery. Upon that information the Plaintiff registered a caution on the title of the suit land while the 1st Defendant was advised to lodge an objection thereto but did not do so.

13. The Plaintiff alleged that the issuance of the Certificate of Lease to the Plaintiff was fraudulent, unprocedural and illegal and give the particulars allegedly committed by the 1st Defendant over the issuance of the certificate of lease to the suit land. These were:

    a. Proceeding with conversion of the title from LR. No. 2116/1264 to Kitale Municipality Block 6/72 while Kitale SPMCC No. 96 of 1995 was still pending.

    b. Obtaining the Certificate of Lease fraudulently knowing that the land belonged to the Plaintiff.

    c. Forging a letter dated 22/06/2001 purporting it to be written by the Commissioner of Lands.

    d. Failing to inform the District Land Registrar that he had been given an alternative plot to the suit land.

    e. Failing to inform the District Land Registrar that a caveat had been placed against LR. No. 2116/1264.

    f. Falsely claiming that LR. No. 2116/1264 belonged to him.

    g. Proceeding with conversion of LR. No. 2116/1264 to Kitale Municipality Block 6/72 when a caveat was registered against the title (NB: he repeated this particular two times consecutively as (h) and (i) in the Plaint).

    h. Fraudulently converting LR. No. 2116/1264 to obscure the track record of the subject title.

    i. Dealing with parcel No. LR. No. 2116/1264 while there was communication from the lands office that he does not do so.

14. The Plaintiff averred that in 2002 the 1st Defendant withdrew Kitale SPMCC No. 96 of 1995. He repeated that he had been on the suit land from 1986 which was the only one he owned and used for his and the family's livelihood and had been paying municipal rates over the subject.

15. The Plaintiff accused the Commissioner of Lands for not cancelling the title issued to the 1st Defendant despite acknowledging that the land was allocated to the Plaintiff. He prayed to be declared the lawful owner of land parcel No. Kitale Municipality Block 6/72 (whose descriptions from the initial time were given as above) and it be registered in his name. He prayed also for rectification of the Register by cancellation of the title issued to the 1st Defendant and a new one issued in his favour. Specifically, the Plaintiff prayed for the following reliefs:

    1. A declaration that the conversion of the suit land from LR 2116/1264 to LR. No. Kitale Municipality Block 6/72 and subsequent issuance of the certificate of lease to the 1st Defendant was unprocedural and illegal.

    2. A declaration that the Plaintiff is the rightful owner of plot No. LR. No. Kitale Municipality Block 6/72 (which was initially known as LR. 2116/1264 Kitale Municipality or UNS. Commercial plot - Kitale (ploy 'y')) situate in Kitale Municipality and therefore the Defendant's act of obtaining a title in respect of the said plot is fraudulent and unlawful.

    3. An order directing the 2nd and 3rd Defendants to cancel the Certificate of Lease issued to the 1st Defendant herein and remove the name of the 1st Defendant as the proprietor of the suit land being LR. No. Kitale Municipality Block 6/72 and to register the Plaintiff as the proprietor of the leasehold title in the said land (sic).

    4. Costs of this suit.

16. The 1st Defendant had filed a Defence prior to the filing of the Amended Plaint. When served with the Amended Plaint, he filed an Amended Defence and Counterclaim on 29/11/2017. It was dated the same date. In the pleading, he averred that he was a stranger to paragraphs 2A, 2B and 2C of the Amended Plaint. These were on the descriptions of the three parties added as Defendants. He denied that there was a property known as UNS. Commercial plot - Kitale (plot 'Y') situate within Kitale Municipality and put the Plaintiff to strict proof thereof. He denied paragraphs 4 - 15 of the Plaint, which have all been restated above, and invited the Plaintiff to proof them strictly.

17. The 1st Defendant averred that he was the first allottee from the Commissioner of Lands of a plot referred to as "Uns. Commercial Plot 'Y' - Kitale Municipality" which measured 0.07 Hectares. The plot was later surveyed to give rise to title Kitale Municipality Block 6/72 (formerly referred to as LR. No. 2116/1264). He averred, on without prejudice, that if the Plaintiff was allocated any plot on 22/07/1994 then it was a different one which measured 0.10 Hectares and the same was not attached with a plan number or Part Development Plan (PDP) and it had conditions on it, among others, that "The Government shall not accept any liability in the event of prior commitment or otherwise."

18. He pleaded that the Plaintiff's temporary occupation licence (TOL) by the defunct Kitale Municipal Council and subsequent purported issuance of a Letter of Allotment dated 22/07/1994 did not confer any proprietary interest upon the Plaintiff. He stated that he did not use any unlawful or fraudulent means to process and acquire title to the suit land and denied specifically all the particulars of fraud set out in the Amended Plaint, putting the Plaintiff to strict proof thereof. He contended that the conversion of land parcel LR. No. 2116/1264 - Kitale Municipality as it then was under the Registration of Titles Act to Kitale Municipality Block 6/72 being the new number under the

Registered *Land Act* was lawful and consented to by the allocating authority - the Commissioner of Lands.

19. The 1st Defendant averred further that the Commissioner of Lands had never filed suit to cancel or invalidate the allocation and issuance of the title deed to him on grounds of fraud, unlawfulness, illegality and or any other reason in law. He averred that he having been issued with the title deed to the plot on 27/04/1994 which was later converted to Kitale Municipality Block 6/72, the Plaintiff's claim over the land was time barred vide the *Limitation of Actions Act*.

20. The 1st Defendant also pleaded that the claims against the him and the 2nd and 3rd Defendants were time-barred. He averred that by 27/04/1994 when the Plaintiff was purportedly issued with a Letter of Allotment over plot Uns. Commercial Plot - Kitale (Plot "Y"), plot LR. No. 2116/1264 had already been surveyed and beaconed and titled. He pleaded he was under no obligation to surrender the title to the suit property he was lawfully allocated.

21. The 1st Defendant averred that suit number Kitale SPMCC No. 96 of 1995 was withdrawn on 17/06/2002 because the court it was filed in did not have jurisdiction on the subject. About the Plaintiff's claim, as pleaded in paragraphs 31A and 31B of the Amended Plaint, that the Commissioner of Lands should have cancelled the title issued to the 1st Defendant for reason of it having been allocated to the Plaintiff and the conversion of the title from LR. No. 2116/1264 - Kitale Municipality to Kitale Municipality Block 6/72, he denied them completely. He pleaded that the inclusion of the new parties in the suit was in contravention of the order of 09/11/2017 therefore incompetent, bad in law and an abuse of the process of the Court hence the parties be struck out.

22. After that he pleaded a Counterclaim in which he stated that he was the registered owner of plot No. Kitale Municipality Block 6/72 (formerly L.R. No. 2116/1364 – Kitale Municipality). He averred that he was issued with a Certificate of Title in April, 1994 and it was converted to the RLA (now repealed) on 28/06/2001. He averred that the Plaintiff was a trespasser and he, his agents, servants, employees and any other persons claiming through him ought to be evicted from his land. He averred that there was no suit pending between them save for Kitale HCC No. 84 of 2011 (OS) which was already withdrawn by the Plaintiff.

23. The 1st Defendant prayed for the Plaintiff's suit to be dismissed with costs and judgment to be entered for him against the Plaintiff as follows:

    a. THAT the Plaintiff, his agents, servants and or any other parties or persons claiming through him be evicted from Kitale Municipality Block 6/72 (formerly LR. No. 2116/1264 - Kitale Municipality.

    b. Costs of the Counterclaim be paid by the Plaintiff.

    c. Interest.

24. The Attorney-General entered appearance on 13/03/2018 for the 2nd and 4th Defendants. It did not file any Defence. But, also, the Plaintiff did not apply for judgment to be entered against the two parties.

25. From the record, it appears that after the 1st Defendant filed his Amended Defence and Counterclaim the Plaintiff did not file a reply thereto. He relied on the Reply to Defence and Defence to Counterclaim which he filed on 06/04/2016. In it the Plaintiff denied the allegations by the 1st Defendant and then pleaded that the title to Kitale Municipality Block 6/72 (formerly LR. No. 2116/1264 - Kitale Municipality) was obtained by fraud. He particularized once more the illegality and fraud acts he pleaded in the Plaint and Amended Plaint. He then denied the allegation that he was a trespasser and put the 1st Defendant to strict proof thereof. Further, he pleaded that he was the

owner of the said plot or UNS. Commercial Plot- Kitale (Plot 'Y') situate within Kitale Municipality and that the prayer for his eviction and servants or employees and other persons claiming through him was not available to the 1st Defendant.

26. To the Reply to Defence and Counterclaim, the 1st Defendant once more filed a Reply to Defence to Counterclaim on 12/04/2016. In it he averred that he repeated all the contents of Defence and Counterclaim and joined issue with the Plaintiff's Defence to the Counterclaim. He specifically singled out paragraph 5 of the Defence to Counterclaim whose contents he denied and specifically denied the particulars of fraud and illegality levelled against him.

EVIDENCE

27. The suit proceeded to hearing for the first time on 30/06/2021. The Plaintiff testified as PW1. He did not adopt his written statement as his evidence in-chief. He testified that he was a furniture maker at Hekima Workshop at a building next Westgate Motors in Kitale Town. He was allotted the space by the defunct Kitale Municipal Council in April 1986. In support of the fact, he produced as P. Exhibit 1 a copy of a letter dated 28/04/1986. He testified further that he prayed to stay thereon permanently. His request was responded to by the Ministry of Lands vide a letter dated 10/09/1993 addressed to Hekima Workshop. The DC responded to the letter on 6/01/1994. He produced copies of both letters as P. Exhibit 2 and 3 respectively.

28. His further testimony was that he was allocated under a Temporary Occupation Licence (TOL) thereby becoming the occupier of Plot "Y". He stated that the 1st Defendant was not allocated under the TOL but the land under "Y". He testified that the 1st Defendant's allotment was under the Plot Allocation Committee (PAC) among eight (8) others.

29. His evidence was that the Commissioner of Lands, Nairobi directed that the PAC allottees be given alternative plots. He marked the copy of the letter dated 23/02/1994 as PMFI-4 to support that fact. Later, on 06/07/1994 there was an authorization that the Plaintiff and the other 9 TOL holders be given allotment letters. It was after that that on 22/07/1994 he was issued with an Allotment Letter and a PDP. The condition thereon was that he pays Kshs. 37,220/=. He accepted the offer by a letter dated 08/09/1994 and paid the entire sum on 22/09/1994. He produced as P.Exhibit 6(a)-(e) copies of the Letter of Allotment, PDP, Acceptance Letter, Invoice and Receipt.

30. From then onward he started paying land rates to the Municipal Council. The Council gave him a Clearance Certificate on 31/12/2013. He produced the original Certificate as P.Exhibit 7 and a receipt of further payment of rates for 2013/2015 and 2016, dated 12/08/2016 for Kshs. 22,680/= as P.Exhibit 8.

31. He testified that the dispute between the TOL allottees and the PAC ones was resolved through the PAC allottees being given alternative plots and a letter was addressed to the PAC allottees to that effect. He stated that the Commissioner of Lands wrote a letter dated 28/07/1994 that the 1st Defendant was erroneously issued title to the land the Plaintiff had already developed. He marked the letter as PMFI-9. Then the Commissioner of Lands wrote another letter to the Town Clerk on 05/8/1994 about the fact. He produced as P.Exhibit 10 a copy of the letter.

32. His further evidence was that the land was subsequently registered as LR. No. 2116/1264 - Kitale Municipality. After that a letter was written to the Registrar of Titles in Nairobi lodging a caveat on the land and later the Plaintiff carried out a search and found that a caveat had been placed on the title to the plot. He produced as P.Exhibit 11 and 12 the two respective letters dated 10/10/1994 and 1/11/1994. At that time, another letter was written on 22/09/1994 to the DC Trans Nzoia directing him to ensure

that the 1st Defendant surrendered the title to the Lands office Nairobi and that the District Physical Planning Officer to identify a new plot for the 1st Defendant. He produced the letter as P.Exhibit 13.

33. He later learnt that the land had been converted from LR. No. 2116/1264 - Kitale Municipality to Kitale Municipality Block 6/72 on 28/06/2001 and a Certificate of Lease issued to the 1st Defendant. He produced as P.Exhibit 14 a copy of the title.

34. The Plaintiff testified further that by the time the conversion was done, the caveat had not been removed. He reported to the Registrar of Titles who was surprised and promised to place a caution over the title. Then the dispute reached the National Land Commission (NLC) which asked the 1st Defendant to surrender his title for cancellation. He produced as P.Exhibit 15 copy of a letter by the NLC.

35. He stated that meanwhile the 1st Defendant sued him in Kitale SMCC No. 1855 of 1994 seeking that he be declared a trespasser but the 1st Defendant withdrew the case in 2001 and the 1st Defendant paid him Kshs. 21,000/- being costs of the suit. He produced a copy of the Notice of Withdrawal of the Suit as P.Exhibit 16.

36. It was PW1's evidence that all the PAC allottees were given notices that they would be issued with alternative plots. He marked as PMFI-17 (a)-(f) copies of Letters of Allotment of his 9 other colleagues in who had been issued with TOLs like him but on his part, he did not get any and he never got title to his Plot yet Tumaini Self-Help Group did. He also testified that one Monica W. Simiyu, who was one of his witnesses, got hers.

37. PW1 then marked PMFI-18 a copy of proceedings between the 1st Defendant as himself in Kitale SPMCC No. 96 of 1995 which he testified was over a boundary dispute which involved also one David Muturi Kiongo. With that he concluded his evidence in-Chief.

38. Upon cross-examination by the 1st Defendant's learned counsel, he stated that P.Exhibit 6(a) dated 22/07/1994 required him to comply within thirty (30) days to comply with the payment of the stand premium. He made the payment after two (2) months, that is to say, on 22/09/1994 as evidenced by P.Exhibit 6(e). He admitted that one other condition on the allotment was that Government would not be responsible if there was any earlier commitment. He admitted further that he had applied cello tape on the wordings on P.Exhibit 6(a) which were to the effect that the Grant (issued to 1st Defendant) was to be surrendered first. He stated that the wordings were written on the letter by the Lands Officer. He also admitted, upon further cross-examination, that he wrote P.Exhibit 6(c), the Letter of Acceptance, on 08/09/1994, way after the 30 days given were ended on 22/08/1994. While he testified that he was not given the letter the date it was dated, he admitted that he did not have any from the Commissioner of Lands extending the period of acceptance or payment. He then was led through the condition which was that "If acceptance and payment was not received within 30 days...." His evidence was that when he was doing that, he did not have any idea that the plot was already allocated to the 1st Defendant.

39. He stated that the approximate size of the plot as per P.Exhibit 6(a) was 0.10 Hectares. He had never gotten title to the land since the 1st Defendant filed a case in Eldoret. He admitted that he began occupation of the plot as a TOL holder; that the TOL had a condition that if anyone else was to be allocated the plot he (PW1) had given up possession without any compensation. He then admitted that his furniture business was not registered. Upon being shown PMFI-4 at page 2, he admitted that it contained a regret that titles has been issued to other persons. Also, upon being shown 1st DMFI-1 (a) and (b) being the copies of the Allotment Letter issued to the 1st Defendant and the PDP thereto, he stated that it was dated 05/11/1992 and measured 0.7 Ha. while the plot he claimed measured 0.10

Ha. He stated that he did not file any suit to cancel the title of the 1st Defendant and he was not aware whether the government had filed any.

40. He stated that the boundary dispute case and that of trespass which was filed by the 1st Defendant concerned the same suit land. Regarding the bundle he marked as PMFI-17 (a)-(f) he admitted that there was none addressed to the 1st Defendant. He then stated that it was the Town Clerk who wrote P.Exhibit 10 asking the 1st Defendant to refrain from doing any development on the suit land since he was not in possession. Again, he repeated that the Commissioner of Lands placed a caveat on the suit land and that as the time of testifying, there was a caution he (PW1) placed on the suit land title.

41. His evidence in cross-examination was that by the time he got allocated, the 1st Defendant had already gotten title to the suit land. He stated that Kitale SPMCC was filed by the Plaintiff but withdrawn and that he (PW1) had filed Originating Summons (O.S) No. 84 of 2011 but withdrew it and brought the instant suit.

42. When cross-examined by the learned State Counsel, he admitted that under the terms of the TOL as shown in P.Exhibit 1, the government could retake the suit land. He stated that he and the other TOL holders were given Letters of Allotment changing their occupation status. However, he did not produce any Minutes of the Municipal Council indicating that the allocations were to alter their status to something else. But he claimed he applied to be allocated the plot but did not bring the application to Court. When he was shown P.Exhibit 6(a) he stated that it did not show on whose behalf it was and did not have a Plan number. But upon being shown DMFI-1 he confirmed it had a Plan Number being No. 20089/XXIII.

43. His further testimony was that although he was unaware of the land having been already allotted when he got his documents, the lands officer made him aware of another allotment on the plot. He admitted that P.Exhibit 6(a) showed that by then title had been issued. He repeated that the 1st Defendant was directed to surrender his title and that he (PW1) had not filed a case for cancellation of his title. He admitted that all the allotments of the TOL allotted were done after the 1st Defendant's. Further that by the time the 1st Defendant was issued with his allotment PW1 had only a TOL. He admitted that the Government gave out proprietorship of the suit land when he (PW1) still had a TOL and that one of the terms of the TOL was that the government could do so to anyone else. He agreed then that nothing precluded the government from giving out the land as at 1992. He also admitted that it was the 1992 allocation that gave rise to the title and green card the to 1st Defendant.

44. On re-examination he testified that he could not comply with the 30 days' period. He stated that he received his allotment after the other TOL holders had received theirs but could not tell when. Upon being asked why he applied cello tape over the letter of allotment he explained that it was because it was tearing apart and not to conceal writings on it. He stated further that none of the writings were concealed and that they did not specify to whom the grant had been issued. He went on to say that the Commissioner of Lands confirmed that he (PW1) was the occupant of the suit land.

45. He testified further that the allotment for the 1st Defendant was given on 05/11/1992 and he too paid for the sum stated on 16/03/1993 which was after the 30 days' period. He testified further that DMFI-1 did not show which Minutes of the PAC were used for the allocation to the 1st Defendant. But he stated that attached to DMFI-1 was a PDP Reference No. 20089/XXIV which was different from that cited in the body of the letter (DMFI-1). He then discounted the grant issued to the 1st Defendant because contrary to DMFI-1 which was issued on 05/11/1992 it read that it was for a term of 99 years from 01/11/1992. He then stated that the Municipal Council was asked to cede its land so that the 1st Defendant could be given a plot.

46. The Plaintiff called PW2, one Monicah Wamaitha, on 14/10/2022. She adopted her written Witness Statement dated 16/06/2021. In the statement she stated that she had known the Plaintiff for over 20 years. Her written evidence was replicated by the oral testimony she gave hence it was as follows.

47. She testified that she was a business woman who resided in Veterinary area in Kitale and she knew the Plaintiff well. Her evidence was that they began doing business together at the Kitale Bus Park in 1999. Her business was on Kitale Municipality Block 6/146. She confirmed that DMFI-4 was a letter written by the then Clerk to Kitale Municipal Council on 23/02/1994 and her name was included thereon as No. 4. It was a TOL. She stated that John Simiyu who was her husband then was now dead.

48. About the suit land, she stated that it was owned by the Plaintiff who occupied it and ran a furniture business thereon. But on cross-examination by the 1st Defendant's learned counsel, she stated that she did not have any documents to link the name appearing on the PMFI-4 as Monicah W. Simiyu and as Monicah Wamaitha John on the Certificate of Lease she owned as being hers. She alluded to having a Certificate of Death of her husband but which she did not produce.

49. She stated further in cross-examination that before being given her title to the land which was 0.100 Hectares, she occupied it under a TOL dated 28/04/1986. She said it was similar to that of the Plaintiff. She stated that the terms thereon were that the occupants had agreed that one was to "accept to remove your temporary site within any one month notice should the land be required by Council, Government or any other person who gets allotment letter from the Commissioner of Lands, without any compensation." She then alleged that the TOL holders should have been given three months' notice and that the Government did not have the right to allocate any other person.

50. She stated that both the Plaintiff and the 1st Defendant had been having a number of cases in Court over the suit land. She then stated that the Plaintiff's plot was bigger than hers because it was at the end corner. She confirmed that she was given a Letter of Allotment in 1994. She had a title to Kitale Municipality Block 6/313 which was a subdivision of Kitale Municipality Block 6/146 into two parcels.

51. When cross-examined by the learned State Counsel for the 2nd and 4th Defendants, she stated that she was given a TOL over the parcel of land but had not carried it to court for evidence. She was then given an Allotment Letter issued by the Commissioner of Lands for which she was to pay and be issued with title. She stated that about 10 people were given TOLs and her subsequent letter of allotment was in the name of Monicah Wamaitha John. Upon receiving the allotment, she paid for it and was issued with the title, namely, Kitale Municipality Block6/146. She stated that she knew the Plaintiff but did not know that he had never been issued with a Letter of Allotment on his plot. She did not know also whether the 1st Defendant was not issued with a Letter of Allotment by the Commissioner of Lands.

52. She contended that the 1st Defendant could not be issued with a Letter of Allotment over the land because the Plaintiff had structures in the form of a workshop on the land. She based her reasoning on the fact of the Plaintiff having had a TOL on the land. She claimed she did not know if the TOL was on a temporary basis. She stated that she was not aware whether the government could repossess the land and allocate it to another person. She was surprised that the Plaintiff was issued with a Letter of Allotment when the land was already allocated to another person.

53. On re-examination she stated that the names on the TOL and allotment letter were hers. She repeated that title Kitale Municipality Block 6/146 and 313 were related in that No. 313 was a subdivision of No. 146. She ended her testimony that both she and the Plaintiff were issued with allotment letters.

54. PW3, one John Ndegwa Kamari who was resident of Trans Nzoia County stated that he was a pastor and knew the Plaintiff since 1986. He too adopted his witness statement dated 16/06/2021. His written testimony was echoed in the oral evidence which he gave as below.

55. Regarding PMFI-4 he stated that he was the 6th allottee on the TOL. He testified that he processed his documents until he received his title whose original he had in Court. He then testified that in relation to PMFI-4, he was aware that some people were given double allocations by the PAC. He was among them. On his plot the allottee by PAC was Anthony Kithiga. Their issue was finally resolved. It took place when they reported to the Lands office and the DC was sent to the ground to verify who was in occupation and the businesses they carried out on the plots. He did not find people on his plot. Later, a message was sent that those who were in occupation were to be allocated the plots and those of the PAC to be given alternatives.

56. He testified further that in relation to his plot. Peter Kithiga came to him and informed him that the plot initially allocated to Tumaini, that is to say, that for the witness (PW3), was his. He then took him to the alternative of his. He testified that all along the occupant of the suit land was Peter Muriuki, the Plaintiff hence the land was his.

57. On cross-examination by learned counsel for the 1st Defendant he admitted that he did not have any documents to show that he was entitled to testify on behalf of the Trustees of Tumaini Self-Help Group (SHG). He denied being related to the Plaintiff as a cousin. He admitted that the name of David Muturi Kiongo was among those of Tumaini Self-Help Group and it appeared on DMFI-9. He was the Chairman of Tumaini SHG. The said David Kiongo had a plot next to the suit land. He recalled that the Plaintiff sued the said David Kiongo over encroachment to the suit land but did not know how the case ended. He did not even know that the suit was Kitale SPMCC No. 461 of 1995. He did not know if the Court concluded therein that the Plaintiff did not know his plot number.

58. He stated that Tumaini SHG had first been issued with a TOL which had similar terms as those of other allottees. He stated that he was not aware that the government would reposes the plots without any compensation as an important term. But he agreed that all structures on the plots were to be temporary and that it was so because the government could re-allocate the land to anyone else and the final authority in the allocations was the Commissioner of Lands. He agreed that it was by God's grace that Tumaini SHG was allocated its.

59. He stated further that he was not aware whether the Plaintiff had sued the Commissioner of Lands. He was aware that both the Plaintiff and the 1st Defendant had a number of cases over the suit land. He stated that there were 10 allotment letters that were brought to them in 1994 but was not aware that the 1st Defendant was issued with his in 1992.

60. The witness then described the structures on the parcel of land as being of timber and bricks. He stated that the Plaintiff's plot was smaller than theirs in size.

61. When cross-examined by the State Counsel, he admitted that he did not have the reports to show that the DC visited the grounds to see who was in occupation but the report was done in 1994. He admitted that they (understood here to mean the 10 initial occupants of the plots referred to all the time) were on the plots by virtue of TOLs issued by the Municipal Council of Kitale. He described them as licences to carry out business on the plots. He stated that the licences were not ownership rights but only for doing business on the plots.

62. He testified that the intention of the allottees of the TOLs was to own the parcels of land but they all were informed by the Kitale Municipal Council that the plots were for businesses. He admitted that

the Municipal Council was not the owner of the plots but the Commissioner of Lands. He stated that he did not know immediately that if one wished to own the land he had to go to the Commissioner of Lands to get title. He stated that any payments on the TOLs were made to the Municipal Council.

63. He admitted that any conditions which gave rise to the ownership of the plots were in the letter of allotment issued by the Commissioner of Lands. He said all the 10 TOL holders were given Letters of Allotment but the Plaintiff's had an issue hence he was not given. Rather it was given to the Chairman, one Mr. David Kiongo. When he was shown P.Exhibit 6(a), the letter dated 22/07/1994, he admitted it was addressed to the Plaintiff while DMFI-1 was addressed to the 1st Defendant and it was dated 1/11/1992. He agreed that DMFI-1 was issued earlier in time. He also admitted that P.Exhibit 6(a) bore the condition that the government would not accept any liability if there was any prior commitment. He then confirmed that indeed the 1st Defendant was allocated the plot first and he could not know if the Plaintiff could claim anything from government.

64. When re-examined by the Plaintiff's counsel he stated that P.Exhibit 6(a) was given to the Plaintiff just as those that were given to other TOL allottees in 1994. He identified that the officer who signed the Letters of Allotment at the time on behalf of the Commissioner of Lands was one P. Amani (Mrs). He stated that the authority under which she wrote the letter. He also was shown DMFI-1 which he stated was issued by one Mr. Osodo on behalf of the Commissioner of Lands on the authority of the Minutes of the PAC Kitale District but there were none shown to him. He then stated DMFI-1 stated that there was to be an Acceptance Certificate but there was none to show that the 1st Defendant accepted the same.

65. Regarding PMFI-9, he stated that the 1st Defendant was not a party in the case but the case was in relation to a boundary dispute between the Plaintiff and one David Kiongo who had since passed away.

66. The Plaintiff called one Robert Simiyu, the Assistant Director, Land Administration in the Ministry of Lands and Physical Planning as PW4. He produced a number of documents that had been marked for identification when PW1 gave evidence. The first one was PMFI-4 that he produced as P.Exhibit 4 which was a letter dated 06/01/1994 written by the Commissioner of Lands which was to ratify the occupation and allocation of ten people who had TOLs in Kitale Municipality. The 2nd one was letter dated 23/02/1994 written by the same office to the Town Clerk of Kitale Municipal Council. It referred to P.Exhibit 4, asking the Clerk to comment on the letter that the DC had written about the 10 holders of the TOLs and PAC allottees. He produced it as P.Exhibit 5.

67. He produced as P.Exhibit 17 a letter dated 28/07/1994 which was addressed to the 1st Defendant by the Commissioner of Lands. It indicated the plot over which he had been issued with a grant, being LR. No. 2116/1264, was already occupied and developed by someone, named as Peter Muriuki. By the letter he requested the 1st Defendant to return the Grant to the office to facilitate issuance of an alternative plot to him. He testified further that when he did not surrender the Grant the government put a caution on the title, which to the date of testifying was subsisting. He interpreted the caveat to mean that the 1st Defendant was unlawfully holding the Grant issued to him.

68. Upon cross-examination he stated that regarding issuance of titles, the role of the Ministry of Lands was to process Grants or Leases and forward them to the Land Registrars for issuance of Certificates of Lease afterward. He admitted that the Ministry was the one that gave the 1st Defendant the title he held to that time and the Ministry had never filed suit to cancel the title.

69. PW4 then gave the procedure of cancellation of title that it does not involve the Court but only writes to the person to whom a Grant has been issued to surrender it. If he does not, the Ministry places a restriction on the Grant or title. After the restriction is put on the land, the aggrieved party can move

the Court for its removal. He stated the Ministry does not have the power to cancel any title. He testified that the Registrar who puts a caveat can remove it.

70. He then testified that the defunct Municipal Council issued allocations only on a temporal basis but the allocation authority lay with the Ministry of Lands. He admitted that it was the national government through the Commissioner of Lands that allocated the 1st Defendant the suit land. He then stated that P.Exhibit 4, 5 and 17 were all written in 1994 while DMFI-1(a) was done on 05/11/1992. He stated that DMFI-1(a) had a PDP attached to it. It was marked as DMFI-4(b). It showed that the plot had already been allocated as shown on the PDP and its size was approximately 0.07 Ha. To the allotment was issued a grant on 05/04/1994 in regard to plot number LR. No. 2116/1264. He testified that the plot was later converted to the RLA land regime. It was done after the 1st Defendant surrendered the initial Grant and issued with a Certificate of Lease.

71. When he was referred to P.Exhibit 5 he stated that the Commissioner of Lands wrote thereon that he was unable to proceed because there was no identification of alternatives that was made and having in mind that some of the plots were already surveyed and titles thereto issued. He said that the addressee seems not to have written any comments back to the Commissioner of Lands. He then stated that P.Exhibit 17 showed that the 1st Defendant was to be allocated an alternative plot but he was not allocated any. He stated that the reason for that was that the 1st Defendant did not meet the condition of allocation of an alternative plot, which condition was the surrender of the initial Grant first. He stated that it was the reason the Registrar of Titles placed a caution on the Grant issued to the 1st Defendant. He then stated that the conversion from the RTA to RLA regime was done in June 2001 while the caution was in place. He could not tell why that happened. He read mischief in that conversion process and letter of 2001. This was because the caution was still in place.

72. When cross-examined by the state counsel, he stated that persons who were given TOLs were given only 9 months period renewable. He stated further that TOLs could only be made permanent by issuance of Letters of Allotment. He repeated that P.Exhibit 4 was a TOL and the ratification was done by issuance of a Letter of Allotment.

73. He gave the size of the plot as 0.0755 Ha upon which a Letter of Allotment was issued on 22/07/1994 to the Plaintiff stating that the property was 0.10 Ha of an unsurveyed plot. After the survey the size was confirmed as 0.0755 Ha.

74. He testified that for the Commissioner of Lands to issue a letter of allotment he had to receive a recommendation from the DC who was the Chairman of the PAC. The Commissioner used only the list given to him by the DC. His evidence was that the presence of a Letter of Allotment depended on the issuance of a PDP. He then referred to P.Exhibit 5 which was a List of 10 persons of whom the Plaintiff was one who were said to be TOL holders. In the List was also another list of PAC allottees of whom the 1st Defendant was one.

75. He then stated that the Plaintiff's name was ratified by the Commissioner since he was already on the ground and that the 1st Defendant was not. He reiterated that the Ministry does not have power to cancel titles of individuals. He stated that the Ministry was aware that cases had been filed in respect of the suit land herein, one being Kitale SPMCC No. 96 of 1995 but it was withdrawn. He then stated that the file he had in possession contained documents only in relation to the RTA regime on the suit land and that there was a possibility of another file in the office, which contained the conversion to RLA documentation.

76. At that point he was stood down, in the interest of justice, to avail the complete records over the suit land. When he was recalled, he confirmed that indeed there were two files in the Ministry of

Lands over the same parcel of land. He had both in Court. One was No. 146958 in respect of the 1st Defendant (Peter Midimo Agalo) and the other was No. 160247 in respect of the Plaintiff (Peter Muriuki Solomon). He confirmed that the one in respect of the 1st Defendant was opened earlier, in 1992, than that for the Plaintiff, in 1994. He confirmed that a file would be opened in the Ministry following the issuance of a Letter of Allotment. It was then he confirmed that in respect to the suit land, both the Plaintiff and the 1st Defendant were issued with Letters of Allotment, the Plaintiff's being in 1994 and the 1st Defendant's in 1992.

77. He then testified that the first allotment was issued without a ground report, which confirms whether or not the ground is vacant, having been prepared by the District Land Officer. He stated that it was a requirement that it be so before an Allotment Letter was issued. He then stated that if an allotment letter was issued and it turned out that the ground was occupied, then the letter of allotment was to be recalled and the allottee given an alternative land. When that happens the letter of allotment is invalid.

78. He then testified that when the Commissioner realized that the allotment letter had been issued he placed a caveat on the title issued to the 1st Defendant. He copied the caveat to the Permanent Secretary in the Ministry of Lands and the DC Kitale. The District Physical Planner was to identify an alternative plot for the 1st Defendant. His evidence was that the 1st Defendant was informed of the intent vide a letter dated 29/06/1998 which was copied to the District Physical Planner, the District Lands Officer Ktiale and the 1st Defendant.

79. His evidence was that the letter required the 1st Defendant to get in touch with the Commissioner of Lands' office but there was no evidence that he did so. It was then that a caveat was placed on the 1st Defendant's title and the Commissioner waited for him to surrender the title he held but he did not. He stated that all the while the Plaintiff had a TOL but was in actual possession. His evidence was that the Plaintiff was on the ground on TOL terms. He then stated that anyone on the ground was always given priority whenever allocations were made hence the necessity of a ground report. He then produced the certified copies of the two filed as P.Exhibit 18(a) in respect of Peter Muriuki Solomon and P.Exhibit 18(b) in respect of Peter Midimo Agalo.

80. On cross-examination by learned counsel for the 1st Defendant he too admitted that that the Letter of Allotment bore the clause that government could not accept liability in the event of an earlier commitment. He acknowledged that the allotment of the 1st Defendant was accompanied by a PDP and its approximate size was 0.70 Ha and when it was surveyed it was found to be 0.755 Ha which was not wrong. He stated that the Plaintiff's Letter of Allotment, P.Exhibit 18(a) too had a PDP and measured 0.10 Ha but it was not surveyed. He acknowledged that the two approximate sizes of the plots are different. His further evidence was that when the 1st Defendant was issued with the Allotment there was no land available to any other person for the same size. He admitted that the Plaintiff's Letter of Allotment was not copied to the 1st Defendant who was the affected party.

81. PW4 did not have any evidence that the letter of 29/06/1998 was ever sent to the 1st Defendant. He did not have a certificate of posting in the file but he stated that it was posted to P. O. Box 1374, Kitale. About the requirement of the need to prepare a ground report, he stated that it was only administrative and no specific law of policy existed that must be done. He alluded only to internal memos on the same but did not have even a copy of it.

82. Regarding giving of an alternative plot to the 1st Defendant, he testified that the allottee was not given. His explanation was that the allottee did not comply with surrendering the Grant he had. He acknowledged that the Government received all the payments due on the allotment to the 1st

Defendant. He then confirmed that the stand premiums for the plot allocated to the 1st Defendant was Kshs. 14,000/= and that of the Plaintiff Kshs. 30,000/= and these depended on the sizes of the plots.

83. In re-examination he stated that when allotments given, an individual in occupation cannot be bypassed. He stated that since there was no ground report by the time the 1st Defendant was issued with his Allotment the Ministry could not tell who was physically on the ground. He then stated that as for the case of Muriuki, the Plaintiff, there was a ground report by way of a letter. Finally, he stated that if the 1st Defendant surrendered the Certificate of Lease, he still could be given an alternative.

84. After the close of the Plaintiff's case, the 1st Defendant gave evidence as DW1. He stated that he was a resident of Trans Nzoia County and a welder who did engineering works. He adopted his witness statement which he wrote on 29/11/2017 as his evidence in-chief. In his written statement he stated that he was the legal owner of plot No. Kitale Municipality Block 6/72 which was formerly, LR. 2116/1264 - Kitale Municipality. It was allocated to him on 05/11/1992 and to it was attached a PDP which described the site as Uns. Commercial plot Y - Kitale Municipality measuring about 0.07 Ha. He paid for it Kshs. 17,260/= as required in the allotment and on 27/07/1994 issued with a Grant being I.R. 62102/1 under the RTA. It was later converted to Kitale Municipality Block 6/72. He asked the Plaintiff who had no proprietary interest on the suit land be evicted therefrom and his claim be dismissed with costs.

85. He also produced in evidence to support his case the copies of the documents which he had filed with the List of Documents on 29/11/2017. They were D.Exhibit 1-10, on which he testified respectively as hereunder.

86. D.Exhibit 1(a) was the letter of allotment dated 05/11/1992 which was given to him by the Commissioner of Lands. It was in relation to UNS. Commercial Plot Y - Kitale Municipality for which he was supposed to pay a premium of Kshs. 17,260/= and he did so on 16/03/1993. To it was attached a PDP in respect of the Plot. He produced both the PDP and the receipt of payment as D.Exhibit 1(b) and (c) respectively.

87. The 1st Defendant testified that he paid ground rent of Kshs. 1275/= on 3/03/1994 and of Kshs. 1390/= on 27/04/1994. He produced receipts thereof as D.Exhibit 1(d) and (e) respectively. He testified that the government did not refuse to accept the payments he made on account that they were late or that he did not own the plot. He was then issued with a Grant for the plot which became LR. No. 2116/1264 – Kitale Municipality whose size upon survey being made was 0.0755 Ha. He stated that the grant, a copy of which he produced as D.Exhibit 2, was issued on 05/04/1994. Later, he received a copy of a letter dated 22/06/2001, produced as D. Exhibit 3, addressed to the District Land Registrar Kitale that the Grant was being converted to the RLA regime. The land was being converted to plot No. Kitale Municipality Block 6/72. He returned the Grant to the District Land Registrar so as to be issued with the new title. When he did so, the Registrar did not object or argue that the Grant was unlawfully obtained.

88. DW1 testified further that he was given a Lease on 28/06/2001, it was sealed and signed by the Land Registrar. He showed the original to Court and asked, and was permitted, to produce a certified copy of the Lease as D.Exhibit 4. He testified further that at one time he sued the Plaintiff in Kitale SPMCC No. 96 of 1995. He sought therein the eviction of the Plaintiff but withdrew the case for want of jurisdiction. He produced the Notice of Withdrawal of the Suit as D.Exhibit 5. He stated that he had occupied the plot since the time of allocation. He had built a temporary structure thereon where he keeps his tools of trade. He stated that he gave occupation of the plot to Mr. David Muturi Kiongo to be using it as a garage and selling of scrap metals.

89. He testified further that the Plaintiff had a plot next to his. When David Muturi went into possession of his (1st Defendant's) plot, the Plaintiff sued him for trespass in Kitale SPMCC No. 461 of 1995, claiming that he had encroached onto his plot. Later David Kiongo died. His evidence was that the trial Court decided the suit on 26/11/2000 that the plot belonged to DW1, even though he was not a party to the suit. He produced the judgment of the Court therein as D.Exhibit 6. He claimed that the trespass was onto land parcel No. LR. 2116/1264 which was the plot the DW1 was allocated in 1994 as shown by D.Exhibit 2.

90. He went further to testify that the Court then found that the Plaintiff's plot was 0.10 Ha while that of the 1st Defendant was 0.07 Ha and the two were different. His evidence was that the Court found further that the Plaintiff did not have proper documents of ownership of the plot.

91. His further testimony was that by the time of testifying he had made payments of rates as required and he was issued with a Clearance Certificate on 03/09/2015. He produced it as D.Exhibit 7. He stated that by the time the Plaintiff was issued with the Allotment Letter produced as P.Exhibit 6(a) he already had the grant, D.Exhibit 2, for his plot, it having been issued on 05/04/1994. He stated that by that time the Government could not give out the plot to any other person. He then testified about the stand premium for his plot as being Kshs. 17,260/= while that of the Plaintiff was Kshs. 37220/=.

92. He testified that he obtained his title lawfully, having been allocated the same through the recommendation of the PAC, and that the Ministry of Lands had never sued him for cancellation of the title to the plot. He stated that contrary to the evidence of PW4 he did not receive any letter that he be allocated an alternative plot. He testified that had he received it he could have agreed to move to another plot.

93. He then testified that in his Counterclaim, which he prayed that it be allowed, he wanted the Plaintiff evicted from his plot. He did not want to use unlawful means to remove the Plaintiff from the plot. He prayed for the dismissal of the Plaintiff's claim.

94. On being cross-examined by the Plaintiff's counsel the 1st Defendant stated that D.Exhibit 1(a) showed a condition that he had to formally accept the allotment. He stated that having paid the stand premium on it, he accepted. He stated that the other condition was that he was to pay the premium within 30 days yet he paid five months later as shown by D.Exhibit 1(c). He stated further that the annual rent due on the plot was Kshs. 2800/= but he paid Kshs. 1275/= which was less. He again stated that the annual rent due was Kshs. 3020/=.

95. He admitted that entry No. 2 of the Grant issued to him showed that there was a caveat placed on it on 19/10/1994 by the Registrar of Titles under Section 65(1)(f) of the RTA. He admitted that he sued the Plaintiff in Kitale SPMCC No. 96 of 1995 for eviction but still by that time his (1st Defendant's) materials were on the site. He stated that he deposited them in 1994 and by then the Plaintiff was on the site. He admitted that by the time of allocation of the land he found the Plaintiff on the ground. About the judgment produced as D.Exhibit 6 he stated that the Court did not declare that the land was his. He then stated that in this matter the counterclaim was filed on 21/03/2016 which was about 15 years after title was issued.

96. Regarding the Clearance Certificate he was issued with, it was in respect of LR. 2116/1264 - Kitale Municipality and not Kitale Municipality Block 6/72. About D.Exhibit 5 which was the Notice of Withdrawal of Kitale SPMCC No. 96 of 1995, he stated that it did not indicate that he withdrew it because the Court did not have jurisdiction.

97. His further testimony was that he deposited materials on the site as soon as he was allocated the plot but the Plaintiff was on the plot at the time. Thereafter, he leased it to David Kiongo. He stated that at the time of testifying he had a residential plot away from town where he was staying on. He repeated that the Plaintiff was given his letter to be on the land on a temporary basis. The allotment issuance was done due to a ground report which showed that he was on the ground. He stated that all communication from Nairobi on the plot was done through the District Land Registrar. The caveat that was placed by the Land Registrar was still on the parcel of land. He stated that he was not issued with a Lease Agreement before issuance of his Certificate of Lease because the RTA regime did not provide for that.

98. Upon re-examination he stated that the Certificate of Lease which was issued after the Grant was surrendered did not show that there was a restriction or caution on the land. He repeated that the preparation of a ground report was not a condition precedent for the issuance of a Letter of Allotment otherwise it should have been indicated on it. He stated that there was no document showing that any report was actually given. He then stated that there was Kitale HC 84 of 2011 (OS) in which he had filed a Replying Affidavit and put in a Counterclaim. Then on 03/03/2016 the Plaintiff's then lawyers made an application to stop the proceedings in that file so that the Plaintiff would filed proper pleadings. He then stated that the Originating Summons matter was withdrawn and then the current suit instituted and he had to file the Counterclaim herein. He repeated that he had materials and a structure on the plot and it was the one Mr. Muturi Kiongo was using as a garage and scrap metal store. All the Defence parties closed their cases, with the 2nd and 4th Defendant applying to rely on the evidence of PW4.

SUBMISSIONS

99. At the close of both the Plaintiff and Defence cases the parties were directed to file written submissions. The Plaintiff filed his dated 9/11/2022 the same date. The 1st Defendant filed his on 23/11/2022 on 24/11/2022. The Plaintiff summarized the acts of filing the Plaint, Defence and Counterclaim and the amended pleadings, and the restated the reliefs sought in the Amended Plaint. He then summed it that he was allocated the land in 1993 under a TOL because he had been in occupation since 1986. He submitted also that the 1st Defendant too was allocated the same land under the PAC process. Further, he stated that a dispute arose as to whether it was the TOL allottees or the PAC ones who were to be ratified as the proper allottees, and by a letter dated 06/01/1994 it was recommended that the TOL allottees were the ones to be allocated the plots and that the PAC allottees were to be given alternative plots. His further submission was that the 1st Defendant was required to surrender his title in order to be given alternative land but he refused. He stated that PW4 affirmed the notices being issued to the 1st Defendant and that the notices stated that he had been erroneously issued with an allocation of a plot already occupied.

100. He repeated PW4's evidence that by the time the 1st Defendant was issued with the allocation on the plot, a ground report had not been prepared and as such the allocation was erroneous. He stated that PW2 and PW3 confirmed that they were allottees under the TOL arrangement and were finally allocated their plots which they got leased over and that the Plaintiff had been in occupation of the suit land since 1986 and the PAC allottees were to be given alternative plots.

101. He then submitted that the 1st Defendant admitted that at the time of being allocated the land the Plaintiff was already on the ground and that he paid for the allotment after 30 days had expired. He stated the 1st Defendant stated that a caveat had been placed on the land as entry No. 2 and was never discharged before he was issued with the certificate of lease. He then listed four (4) issues the Court was to consider. These were, who between the plaintiff and the 1st Defendant was the lawful allottee

of the suit property; whether there was fraud leading to the issuance of the Grant to the 1st Defendant and Certificate of Lease in respect of Kitale Municipality Block 6/72; whether the Ground Report is a pre-requisite to issuance of an Allotment Letter and who was in possession of the suit property and who to pay costs.

102. Regarding the first issue, he submitted that from the totality of the evidence the Plaintiff was the lawful allottee of the suit land since he was in occupation since 1986. He gave the summaries of the issues between David Kiongo and the case between the 1st Defendant and the Plaintiff. Up to the time the 1st Defendant was required to surrender the Certificate of Lease but did not. He then submitted that at the time of allocation to the Plaintiff was the land was still available to him for alienation since he was in possession and the 1st Defendant never fulfilled the conditions attached to the allocation for late payment of the premium after 30 days were ended. He relied on the Court of Appeal case of Ashmi Investment Limited vs Riakina Limited & Another (Civil Appeal 384 of 2019) [2021] KECA 184 (KLR) (19 November 2021) (Judgment). Neutral citation KECA 184 (KLR) which held that where there was a case of double allocation in respect of the same plot, the offer remained open and acceptance only took effect upon fulfilment payment in full of the requisite fees.

103. Regarding the second issue about fraud leading to issuance of the Grant to the 1st Defendant, he submitted that PW4 admitted that there was an error in the issuance of the allotment to the 1st Defendant and it was done without following due process because a ground report was supposed to be prepared first. He submitted that without it, it was a fraudulent scheme involved which was to hide the truth. Again, he submitted that there having been a pending case, namely, Kitale SPMCC No. 96 of 1995 before a Court of competent jurisdiction, the doctrine of lis pendens precluded the 1st Defendant from converting LR. No. 2116/1264 -Kitale Municipality to Kitale Municipality Block 6/72. He relied on the same authority above. Additionally, he submitted that the conversion of the property from LR. No. 2116/1264 - Kitale Municipality to Kitale Municipality Block 6/72 while there're was a caveat and a pending case was a clear demonstration of fraud.

104. On the third issue the Plaintiff submitted that the preparation of a ground report before the issuance of a Letter of Allotment was issued and as to who was in possession was mandatory in every case of allotment. He submitted that in the instant case, it was not done before the 1st Defendant was issued with the letter of allotment hence not an error but fraud. He reiterated his evidence that he was in occupation since 1986 and that the 1st Defendant too admitted to that fact. He then submitted that failure to do so rendered the allotment to the 1st Defendant void.

105. Lastly, he submitted that the costs should follow the event hence the 1st Defendant to pay costs of the suit. He did not submit at all on the issue of the counterclaim by the 1st Defendant.

106. On his part, the 1st Defendant submitted by beginning that the Plaintiff was on the disputed land pursuant to a TOL, produced in evidence as P.Exhibit 1, issued by the defunct Municipal Council of Kitale on 28/04/1986. He repeated the term on the TOL that if the Municipal Council or Government or an allottee from the Commissioner required the plot the holder of the TOL would surrender the same without any compensation. He repeated the evidence of the parties that it was the Commissioner of Lands who had the final authority to allocate government land.

107. The 1st Defendant summed it that he was listed as beneficiary or allottee of the suit land by the PAC of Trans Nzoia after which he was given an Allotment Letter, produced as D.Exhibit 1(a), dated 05/11/1992 for un-surveyed Commercial plot "Y" - Kitale Municipality, measuring approximately 0.07 Ha. He submitted further that immediately that was done, then it extinguished the Plaintiff's TOL forthwith since issuance of an allotment to any other person was one of the conditions of P.Exhibit 1 of 28/04/1986.

108. He submitted further that after the allotment of 05/11/1992 which was produced as D.Exhibit 1 (a) he paid the requisite sum of Kshs. 17,260/=. On the other hand, on 22/07/1994, the Plaintiff was issued with an allotment letter, produced as P.Exhibit 6(a) for Plot 'Y" measuring approximately 0.10 Ha and paid for it a sum of Kshs. 37,220/=. He submitted that the letter plot "Y" was bigger in size and definitely different from the 1st Defendant's. He then stated that this was not a case of double allocation but a mistaken identity or error on the part of the allocating authority.

109. He then submitted that after he (1st Defendant) was given the Letter of Allotment and paid the stand premium as shown vide D.Exhibit 1(b), (c) and (d) without any objection, after the 30 days on the allotment were ended, the Commissioner of Lands waived the right to raise the issue of payment out of time. Further, the indeed after the payment the Commissioner of Lands issued the 1st Defendant with a Grant on 5/04/1994 as shown vide D.Exhibit 6. He submitted further that by the time the Plaintiff was given the Allotment on 22/07/1994, produced as P.Exhibit 6(a), the 1st Defendant had already been issued with a Grant on LR. No. 2116/1264. He submitted that the latter Allotment Letter did not attach in rem to any land as there was no parcel of land upon which it could. This was because the Government had already alienated the land to the 1st Defendant. He relied on the Eldoret Court of Appeal case of Philemon Wambia vs Gaitano Mukofu & 2 Others [2019] eKLR.

110. His submission was that on both Allotment Letters of the Plaintiff and the 1st Defendant there was no condition of the need to first prepare a Ground Report on the status of the plot before issuance. He castigated the evidence of PW4 on that issue as a mere word of mouth and submitted that if it was a Government policy as such it should have been included as a condition on the Letters of Allotment. To him, moreover, PW4 did not produce any independent documentary support of the evidence on that.

111. He submitted that the Grant issued to the 1st Defendant on 05/04/1994 under Section 23 of the Registered *Land Act* (RTA) Chapter 281 of the Laws of Kenya could not be overridden by the Letter of Allotment to the Plaintiff, issued on 22/07/1994 and produced as P.Exhibit 6(a) nor by the TOL produced as P.Exhibit 1. He relied on the Nairobi Court of Appeal case of Satrya Investment Ltd vs J. K. Mbogua [2013] eKLR.

112. The 1st Defendant submitted further that following the procedures in law, through a letter dated 22/06/2001 he surrendered the RTA Grant to the Registrar of Titles and was issued with the Certificate of Lease being Kitale Municipality Block 6/72 under the Registered *Land Act* (RLA). He produced the Certificate of Lease as D.Exhibit 4. He submitted that the same was converted without any objection by the Commissioner of Lands and that if the Commissioner of Lands had any issues with the earlier title issued in 1994 that was the time he had the opportunity to cancel it. He then submitted that by converting the title to the Lease the Commissioner of Lands waived any claims or allegations he had against the 1st Defendant and he was therefore estopped in law from alleging to the contrary.

113. He submitted that in any event the 1st Defendant's Allotment and title were first in time and they were secured without any fraud or misrepresentation. Further, that the Certificate was not illegally acquired nor was it unprocedurally acquired. And there was no misrepresentation. He then submitted that PW4 admitted that the 1st Defendant was a lawful allottee of the suit property and he produced the entire office file thereto as held by the Commissioner of Lands as P.Exhibit 18(b).

114. On the issue of first in time, he relied on the Kericho ELC Case of ELC Appeal No. E001 of 2020 Joseph Bor vs Tabutany C. Chebusit [2021] eKLR. In the matter it was held that in such a case as that where the Commissioner of Lands admitted that he issued two titles in respect of the same property and both on the face appeared issued regularly, then the first in time had to prevail.

115. He then submitted that the 1st Defendant had never been shown an alternative plot as alleged by PW4 and was never served with any letter requesting him to go and be shown an alternative land. He then submitted that he was a bona fide allottee of plot "Y" measuring on 0.07 Ha which when it was surveyed measured 0.0755 Ha as per the Grant and Certificate of Lease produced as D.Exhibit 3 and 4 respectively, yet the plaintiff was purportedly allocated a Commercial plot "Y" measuring approximately 0.100 Ha which has never been beaconed to date.

116. He submitted that he did not commit any illegality in the conversion, nor did he do it with any malice. He then submitted that the caveat placed on the land by the Registrar of Titles was due to the error on issuance of allocations and he had no alternative land to offer but no fraud or illegality hence he did not pursue it after that and proceeded to issue the lease to the 1st Defendant on 28/06/2001.

117. On the Counterclaim, he submitted that he had proved it since his evidence showed that the allocation of the suit plot was above board and not by misrepresentation, illegality, fraud or acquisition through a corrupt scheme. He prayed that it be allowed with costs and the Plaintiff's suit be dismissed with costs.

ANALYSIS AND DETERMINATION

118. I have considered the pleadings, the evidence and the law herein. I have also taken into account the submissions on record. First, it was submitted that the Plaintiff did not comply with the order of 09/11/2017 regarding the amendment of the Plaint. I noted that the application for amendment of the Plaint was allowed by consent on 08/11/2017. The Plaintiff was given 14 days to amend the Plaint. He filed it on 20/11/2017 which was within the period leave was for.

119. After the Amended Plaint was filed, the record is silent on whether or not the 3rd Defendant was served with it. It neither entered appearance nor did the Plaintiff file any Affidavit of Service to evidence service on it or request for the matter to proceed by way of formal proof against it. This Court thus takes it that the Plaintiff abandoned his case against the said party. Regarding the 2nd and 4th Defendant's status in the case, after they entering appearance, they never filed a defence. But the Plaintiff never requested for judgment to entered against them as per the participation.

120. I am of the view that the following issues lie for determination:

    a. Whether plot number UNS. Commercial plot Y - Kitale Municipality allocated on 05/11/1992 was the same as UNS. Commercial plot - Kitale (plot - 'Y') allocated on 22/07/1994;

    b. Whether the Plaintiff or the 1st Defendant was properly/legally allocated plot number UNS. Commercial plot Y - Kitale Municipality or UNS. Commercial plot - Kitale (plot - 'Y') respectively;

    c. Whether the conversion of plot number LR 2116/1264 - Kitale Municipality to Kitale Municipality Block 6/72 was fraudulent, unprocedural or irregular

    d. Whether the conversion of LR 2116/1264 - Kitale Municipality to Kitale Municipality Block 6/72 had any effect on the proprietorship of the original allotment (of 05/11/1994) or its resultant grant

    e. Whether the Plaintiff or the 1st Defendant proved his case or Counterclaim respectively on a preponderance of evidence

    f. Final Disposition.

121. This Court begins which the determination of the first issue because the finding thereon will determine whether or not a dispute in the nature of an alleged double allocation exists between the Plaintiff and the 1st Defendant. If there is none, then the suit and counterclaim herein would be misconceived and untenable.

Whether plot number UNS. Commercial plot Y - Kitale Municipality allocated on 05/11/1992 was the same as UNS. Commercial plot - Kitale (plot - 'Y') allocated on 22/07/1994

122. The genesis of the dispute herein is the act of the Commissioner of Lands, the predecessor of the National Land Commission (NLC), of issuing two Letters of Allotment, dated 05/11/1992 and 22/07/1994 to the 1st Defendant and Plaintiff respectively. It is important to note that after the promulgation of the 2010 Constitution the new land laws were enacted pursuant to Articles 67 and 68 thereof and the functions of the Commissioner of Lands were transferred to the NLC and its officers vide the *Land Registration Act*, Act No. 3 of 2012. It was pursuant to that the Plaintiff sued the 3rd Defendant.

123. The first Letter of Allotment, produced by the 1st Defendant as D.Exhibit 1(a) was issued on 05/11/1992 was in favour of the 1st Defendant. It was in respect of "UNS. Commercial Plot 'Y' – Kitale Municipality" whose approximate size was given as 0.07 Ha. It was for a term of 99 years from 01/11/1992. Attached to it was a Plan, produced as D.Exhibit 1(b), referenced in D.Exhibit 1(a) as 20089/XXIII. On the Plan it was indicated that it was dated 29/10/1992 and superseded a Drawing dated 27/07/92. The plot designated as 'Y' was a corner one which was marked as such and was bordered by one marked as X in a set of ten (10) plots marked as A, B, C, D, E, F, V, W and X. The stand premium payable on it was Kshs. 17,260/=, which was finally paid in 13/03/1993.

124. The Second Allotment Letter was almost similar to the first one in all fours. Produced by the Plaintiff as P.Exhibit 1(a), it was issued on 22/07/1994 was in favour of him. It was referenced 8946/IX/ and in respect of "UNS. Commercial Plot - Kitale (Plot 'Y') whose approximate size was given as 0.10 Ha. It was for a term of 99 years from 01/07/1994. Attached to it was the same Plan as that of the earlier Letter of Allotment, produced as P.Exhibit 1(b) but was produced by the Plaintiff as P.Exhibit 6(b). The difference between the latter letter of allotment as compared with previous one and the attached copies of the Plan [P.Exhibit 6(b) or D.Exhibit 1(b)] was that the latter did not contain the referenced number of the Plan. But on the Plaint, it was indicated that it was dated 29/10/1992 and superseded a Drawing dated 27/7/1992. The plot designated as 'Y' was a corner one which was marked as such and was bordered by one marked as X in a set of ten (10) plots marked as A, B, C, D, E, F, V, W and X. The stand premium for the plot was Kshs. 37,220/= which was finally paid on 22/09/1994.

125. In their evidence in-chief and cross-examination both the Plaintiff and the 1st Defendant lay claim to the same plot and position of the same on the ground. In addition, PW4, the Assistant Director of Land Administration in the Ministry of Lands Headquarters testified on the alleged 'two plots'. He stated that they referred to one and the same plot except that by error the Commissioner of Lands opened two files over the same plot. In any event he produced as P.Exhibit 4 a letter dated 23/02/1994 written by the Commissioner of Lands regarding the TOL holders to whom the plots had been given earlier on that bases and PAC allottees. It referred to the same plots, such as one labelled 'Y' of which the Plaintiff held a TOL and the 1st Defendant was an allottee through the PAC. He stated that the procedure in dealing with alienation of land in the office was that once it was to be allocated, a file would be opened with a Letter of Allotment. He then produced as P.Exhibit 18(a) and P.Exhibit 18(b) file numbers 160247 and 146958 respectively, being in regard to the allocation for Peter Muriuki Solomon and Peter Midimo Agalo. Each file was opened beginning with the Letters of Allotment dated 22/07/1994 and 05/11/1992 as Folio No. 1.

126. Although the plot descriptions of the allocations to the Plaintiff and 1st Defendant were named slightly differently and with their sizes also differing and the stand premiums payable thereto different, they referred to the same PDP attached to both. The shape, location and designation of the plot marked as 'Y' on the Plan was the same on the map. Given the evidence of PW4 about the plot being the same save that files were opened separately for each allottee, this Court finds that the plot the Commissioner set to allocate to both the Plaintiff and 1st Defendant though on different dates was one and the same, and for purposes of determining further issues on it this Court shall refer to it as Plot-'Y'.

127. PW4 could not explain why the Commissioner of Lands could issue two Allotment Letters to two different persons on different dates and open two different files over the same plot.

Whether the Plaintiff or the 1st Defendant was properly/ legally allocated plot number UNS. Commercial plot Y - Kitale Municipality or UNS. Commercial plot - Kitale (plot - 'Y') respectively

128. The issue as to who of the two parties herein being the Plaintiff and the 1st Defendant was the legal allottee of Plot-'Y' is to be determined based on evidence revolving around two main facts, namely, the time of allocation and the manner of acceptance of the allocation. Starting with the Plaintiff's allocation, PW1 testified that he first got to settle on the plot on 28/04/1986 through a TOL of that date following the decision of the Municipal Council of Kitale vide Minute No. TP/94/86 as indicated at paragraph 1. He produced the letter as P.Exhibit 1. He began doing furniture business thereon in the name of Hekima Furniture. One of the conditions attached to the TOL was that the occupation was on a temporal basis hence the occupant was not supposed to erect or put up permanent structures on the plot. The condition stipulated at paragraph 3 thereof was that "... your said business will be held on condition that you accept to remove your Temporary site within any one month notice should the land be required by Council, Government or any other person who gets allotment letter from the Commissioner of Lands, without any compensation." Thus, the Plaintiff understood that his occupation of the plot was temporary and was not in any way to give proprietary rights whether by being a first occupant or subsequent.

129. This was his evidence and that of PW2, PW3 and even PW4. PW2 and PW3 testified that PW1 was the lawful owner of the plot, having been given it on TOL terms, built on it and been on it for long. In my view this evidence when compared with the terms of permission of occupation under the TOL do not hold water. Moreover, according to PW1 and PW4 the Commissioner of Lands was the only officer who had the final authority regarding allocations or alienation of government land.

130. Although PW2 testified that the occupants were to be given three months' notice, it is not borne by any document, particularly the TOL. And even if that would have been the period to be given, it is this Court's view that the structures put up on the ground were to be temporary and would not give the occupant priority over the Council, Government or any allottee of the Commissioner of Lands on the plot.

131. The Plaintiff testified that it was his intention to own the plot permanently. Well, the Court finds that to be a good intention. But intent cannot override the process of acquisition of the plot and cause the Plaintiff to insist on circumventing the law, if it turns out that the law does not favour his actions and intent.

132. PW4 endeavored to convince the Court that the allotment issued to the 1st Defendant, that is to say, D.Exhibit 1(a), was not valid. He testified that without a ground report being made and in case there is another occupant on a ground than the allottee, the Letter of Allotment is cancelled. This Court analyzes that evidence of the prism of pleadings and their import in a case.

133. Pleadings form the main stay of any claim or defence of a party. Thus, a party cannot be heard to lead evidence that departs from his pleadings. It is instructive in this case that the Plaintiff did not plead any illegality, fraud or irregularity in the acquisition of plot LR No. 2116/1264-Kitale Municipality and also the earlier acquisition of the allotment to him on 05/11/1992 that gave rise to the said title. He only pleaded that the 1st Defendant was allocated the same plot he had been occupying and which he too was subsequently allocated. It means, apart from claiming double allocation of Plot-Y, the allocation to the Plaintiff was proper flawless hence also, the registration of Plot-Y as LR. No. 2116/1264 – Kitale Municipality was procedural and legal. Since a party is bound by his pleadings, as was stated in Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR, any evidence by him contradicting his pleadings does not hold any water. In the case, the Court of Appeal cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

> "…..it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded……
>
> …In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

134. Additionally, the Supreme Court of Kenya in Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR held as follows: -

> "In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings……'"

135. Regarding the evidence of PW4 that the allotment to the 1st Defendant was invalid for reason that it was issued before a ground report was made, and that if there was someone in occupation he/she would not be bypassed when an allotment is to be issued, it is noteworthy that he stated in cross-examination that the requirement for a ground report to be done before allotment is made is only a matter of policy handled by the office by way of internal memos. He stated that it was not a legal requirement to carry out such. He stated that if someone was on the ground the allottee may be given an alternative plot.

136. With due respect to PW4, this Court found the witness misleading and untruthful to the Court on this fact. First, he stated that it was not a legal requirement to do so. Thus, in my view, failure to do a ground report cannot invalidate an allotment. In any event, his evidence flies past the condition of TOL holders' letters', for instance, as shown in P.Exhibit 1, conditions which they, including the Plaintiff, accepted to abide by. It is clear in the condition that the Plaintiff and the other TOL holders were temporal occupants. That is why the condition was he was "to remove…(his)…Temporary site within any one month notice should the land be required by Council, Government or any other person who gets allotment letter from the Commissioner of Lands, without any compensation."

137. Further the Plaintiff was, under the conditions in the letter, not to erect any permanent structures on the plot. If he did so as he purported to imply, he did so contrary to the conditions of the TOL and the law. And if he could not be removed from the land following a lawful allocation then it would be discriminatory and amount to illegally acquiring public land by mere occupation. If the evidence by PW4 that any occupant found on the plot would not be bypassed and has to be given priority in allocation was to be taken to hold water and be validated by this Court agreeing to it, it would encourage grabbers and other people to squat on public land (or even private) and use that as a way of insisting on being allotted the land or be issued with titles by the private property holders. It would be a sad day for this country for that to be. That cannot be permitted.

138. Thus, this Court now turns to analyzing the evidence on how the Plaintiff claims to be the lawful allottee. Although the Plaintiff did not produced evidence of an Application for allotment of Plot-'Y' to him, P. Exhibit 2 shows that on 10/12/1993 the Commissioner of Lands wrote to the District Commissioner of Trans Nzoia that the ten (10) TOL holders whose plots were identified as "Kitale Municipality Temporary Occupation C.10 plots", had written to his office requesting for ratification of their TOLs since they were on the site. On 06/01/1994 the DC wrote to the Commissioner of Lands as evidenced by P.Exhibit 3 indicating that he had no objection to the ratification hence the Commissioner would proceed. On 23/02/1994 the Commissioner of Lands wrote back to the District Commissioner, as a follow up of his letter of 10/12/1993 (P.Exhibit 2), that he could not proceed with the ratification of some TOL holders' plots because there was a possible problem in that there were TOL holders' plots over which the PAC had allocated other applicants. He stated in the letter that he could not do so since there was no identification of alternative sites.

139. The Plaintiff testified further that the Commissioner of Lands authorized the issuance of Letters of Allotment on 06/07/1994 through a letter of even date which he marked as PMFI-5. The letter was eventually produced by PW4 as P.Exhibit 5. After that, on 22/07/1994 he was issued with a Letter of Allotment which he produced as P.Exhibit 6(a) together with the attached PDP produced as P.Exhibit 6(b). He also testified that he accepted the offer on 8/09/1994 vide a handwritten letter of the same date. He produced it as P.Exhibit 6(c). The Ministry of Lands invoiced him on the same date vide a document Ref: 148876/VI/10. He produced the original of it as P.Exhibit 6(d). He made the requisite payment through cheque No. 029334 for the stand premium on 22/09/1994 vide a receipt No. D 02610 for the sum of Kshs. 37,220/= a carbon copy of which he produced as P.Exhibit 6(e).

140. It is not known how the Commissioner of Lands got to decide that he/she would now go against the firm information and decision made and communicated vide the letter dated 10/12/1993, produced as P.Exhibit 2, that he/she would not proceed with the allocations to the TOL holder as there were no alternative plots for the PAC allottees given the same plots. In any event P.Exhibit 3, dated 06/01/1994, which the Plaintiff relied on as a confirmation for ratification of his occupation was suspicious as to that confirmation because on the face of it, individual No. 10 named as "Hekima Workshop" bears an unexplained asterisk at the beginning and appears to have had other writings after the name but they were covered with a paper or other item when the photocopying was made. Further, page 2 of P.Exhibit 4, dated 23/02/1994 reads that the Commissioner of Lands was "unable to proceed since no identification of possible alternatives was made and having in mind that some of the plots have already been surveyed and titles issued." When that note was compared with the position as it obtained in P.Exhibit 18(b) and the evidence of PW4, it is clear that one of the plots on which survey was already done and titles issued was Plot-Y for which the title number was LR. 2116/1264 issued in favour of the 1st Defendant. It was PW's evidence that no alternative site was ever found which the 1st Defendant would be given.

141. Additionally, by the Commissioner of Lands purporting to give priority on the allocation of the plot to the Plaintiff over the 1st Defendant yet the condition of issuance of the TOL letters, as per P.Exhibit 1 was that the occupants were on the plots on a temporary basis and that allotment would be given to any person, it was wrong, discriminatory and contrary to equality as provided under Section 82 of the repealed Constitution and rules of competitive allocation of public resources. Nevertheless, the allotment was purported to be issued and accepted, as evidenced by documents marked as P.Exhibit 6(a), (c) and (e).

142. Moreover, for the Commissioner of Lands to purport, through P.Exhibit 17, the letter dated 27/07/1994, to withdraw a grant issued pursuant to an acceptance of an allotment, an act which already sealed a contract it, was acting contrary to the law of contract. It bears to remind the parties herein that once an offer is accepted in accordance with the terms thereof a contract is formed and cannot be cancelled without attendant consequences, that is to say, without a breach occurring. In any event, a title in the name of a Grant had already been issued to the 1st Defendant. The Commissioner of Lands had no powers to withdraw or cancel a title, whether lawfully or unlawfully or unprocedurally issued: only the Court had and still retains that jurisdiction. In any event the evidence of PW4 was clear that the Ministry of Lands or the Commissioner did not have authority to cancel title, and that he/she could not cancel a Letter of Allotment. In this case the Commissioner of Lands could not do so. Hence, this Court is of the view that the letter of the Commissioner of Lands dated 28/07/1994 was of no legal effect. That being the case, the Commissioner of Lands had no legal authority to re-allocate land that was no longer public land. It goes without saying, and as is noted in the next paragraphs below, that the Plaintiff did not have anything in form of land on LR. 2116/1264 or the former Uns. Commercial Plot-Y - Kitale Municipality to accept. Perhaps that is why he on Folio No. 47 of P.Exhibit 18(b), the letter dated 16/09/1998, as follows, "(1) Make a minute to col for instructions. But in my view the person with a lease should not be affect. That is the person with L/A should look for alternative plot." Dated 17/09/1998. And on 19/08/1994 the office wrote, in part, "The L/A to Muriuki was issued on the understanding that Agalo will surrender the title as the site is occupied by Muriuki. But since he has not surrendered the same up to date, that means he is still retaining the title there is little we can do."

143. It should be clear also that since Plot-Y was already surveyed and a title already issued, then as DW1's evidence and submissions were, no such a plot as was described on the Letter of Allotment dated 22/07/1994 existed to be allocated hence P.Exhibit 6(a) was null and void.

144. As for the 1st Defendant, although he did not produce an application for allotment, he testified that he was allocated Plot-'Y' on 05/11/1992 which he produced as D.Exhibit 1. To it was attached a PDP which described the site or plot. Its size was approximately 0.07 Ha. He paid for it Kshs. 17,260/= as required in the allotment and on 27/07/1994. He evidenced the payment by an original receipt issued on 18/03/1993 for the stated sum of which it was indicated on the receipt that he paid vide cheque No. 004091. He stated that on 3/03/1994 he paid a sum of Kshs. 1275/= and on 27/04/1994 a sum of Kshs. 1390/= for ground rent, He produced receipts in support thereto as P.Exhibit 1(d) and (e). His further evidence was that upon making the first two payments, he was issued under the RTA with a Grant, being I.R. 62102/1 as shown on it, which was dated by the Commissioner of Lands as 05/04/1994. The Court notes that on the face of the Grant, produced as D.Exhibit 2, it was for a term of 99 years, with effect from 1/11/1992. It was the same period as that on the Letter of Allotment, being P.Exhibit 1(a). It bore the description of the plot in issue as LR. No. 2116/1264, measuring 0.0755 Ha.

145. He stated that he accepted the offer out of time but paid for it as the Commissioner of Lands wanted through the Letter of Allotment. In explaining that his acceptance of the offer was valid, he stated that even though he paid for the letter after the 30 days that it required on page 2 thereof, the Commissioner of Lands waived the claim of the delay in payment hence it was estopped from raising that issue. He

stated further that the Ministry of Lands had not sued him for cancellation of the Certificate of Lease issued to him.

146. The Plaintiff, in re-examination, raised doubt as to whether the 1st Defendant ever accepted the offer of the allotment. He stated, on one hand, that by virtue of the 1st Defendant having paid for the allotment way after the period of 30 days given as a condition were over, the acceptance was not valid. But on the other hand, he testified that he accepted the offer of the Letter of Allotment dated 22/07/1994, P.Exhibit 6(a), on 8/09/1994. He admitted in cross-examination that the acceptance was on 22/09/1994 which was after expiry of the 30 days. The Court finds that it was sixty (60) days after the offer was made.

147. This Court cannot understand how, if indeed the Plaintiff's evidence on the 1st Defendant's acceptance of the Allotment as invalid was genuine and adduced to bring out truth, his acceptance could stand. It is selective of the Plaintiff to paint his acceptance as good and clean while castigating that of the 1st Defendant. Be that as it may, the rules of offer and acceptance in the law of contract applied herein.

148. In the law of contract, an offer made to a specific person, not to the whole world or a particular group or set of society, remains valid and open until it is either accepted, withdrawn, cancelled, rejected, the time it was to last lapses or the condition precedent in it is fulfilled or fails or is frustrated (by the occurrence of circumstances beyond the control of the parties thereto). Once it lapses, it cannot be accepted, that is to say, it does not exist and the offeree cannot purport to accept it since it does not in existence. But an offer, once it lapses, can be revived by the offeror, in which case it may be available with the conditions attached to it.

149. Acceptance takes place when the offer is received and given ascent in the manner and with the conditions stated in it. If the offeror purported to accept the offer by attaching conditions thereto, it cancels the offer because the act of the offeree is a counter-offer. A counter-offer cancels the initial offer. Instead it is the offeree who in turn makes an offer who the original offeror may or may not accept. If he accepts it, then a contract will be formed in the new terms of the counter-offer. The Court finds that in the case of the 1st Defendant, when he decided to accept the Letter of Allotment, he knew that he was out of time, went to the Commissioner of Lands offices, negotiated for the offer to be given to him again, it was given to him but at a higher sum, which was Kshs. 18,260/= of which he accepted in writing on 16/03/1993, and upon him presenting the Letter of Acceptance and money for payment, the Commissioner of Lands decided to waive the 'penalty' for the later payment and instructed the accountant, "accept payment as per the L/A", he paid the newly offered sum the same date and was given a go ahead on 23/03/1993 to carry out the survey, and on 16/06/1993 was invoiced for it and paid the same date. All this is evidence in P.Exhibit 18(a).

150. Again, and in any event, an acceptance may be express or implied but in the event that happens it has to be in the manner the offer stipulated acceptance to be. When it is implied, it means the conduct of the parties is what is analyzed. In Brogden v Metropolitan Railway Co [1877] 2 App Cas 666, the Court implied from the conduct of the Defendant in taking and making use of the coal delivered by the Plaintiff, without any objection or change, that it had accepted the clause that was inserted on the contract delivered to the office earlier about the change therein.

151. In Dickinson v Dodds [1876] 2 Ch D 463, his Lordship James L.J. stated as follows:

> " It appears to me that there is neither principle nor authority for the proposition that there must be an express and actual withdrawal of the offer, or what is called a retractation. It must, to constitute a contract, appear that the two minds were at one, at the same moment

of time, that is, that there was an offer continuing up to the time of the acceptance. If there was not such a continuing offer, then the acceptance comes to nothing."

152. In the instant case, PW4 testified that the Commissioner of Lands made two offers by way of two Letters of Allotment, the first one being on 05/11/1992 and the second on 22/07/1994. They were to the 1st Defendant and the Plaintiff respectively. The evidence by both the Plaintiff and 1st Defendant shows that the offers, assuming that both were valid, lapsed because each contained a clause to the effect that payment of the stand premium was to be made within 30 days of the date of issuance.

153. But in Benja Properties Limited -v- Syedna Mohammed Burhannudin Sahed & 4 others [2015] eKLR, the Court of Appeal stated that an allotment of an interest in land is a transaction in rem attaching to and running with a specific parcel of land. Therefore, in the view of this Court, once it is found, as this Court has done when analyzing the first issue above, that the two letters related to one and the same plot, referred to herein as Plot-Y, then once acceptance of the first or second Letter of Allotment thereof was made, there was no land available for the other Letter of Allotment to attach to in rem hence it is a mere piece of paper with no proprietary value in it.

154. It is worth noting here that a Letter of Allotment does not constitute title to property in land. It is only an offer to the allottee to accept or not. That is why it has conditions attached to it that must be honoured for it to be the basis of alienation of land by government to the allottee. In Stephen Mburu & 4 Others -v- Comat Merchants Ltd & Anor [2012] eKLR by Kimondo, J correctly stated:

> " ... from a legal standpoint, a letter of allotment is not a title to property. It is a transient and [is] often a right or offer to take property".

155. On the part of the Plaintiff he purported to accept his on 8/09/1994 and pay on 22/09/1994, as evidenced by P.Exhibit 6(d) and 6(e). He did not adduce evidence that after the lapse of the offer, after the end of 30 days without acceptance, the Commissioner of Lands revived the offer to him. Even a careful analysis of the evidence of PW4 which included P.Exhibit 18(a) did not show anywhere that apart from the Plaintiff's letter, P.Exhibit 6(c), and the payment he made on 22/09/1994, that the Commissioner of Lands revived the offer before acceptance.

156. Thus, this Court finds that the offer having lapsed on 22/08/1994 the Plaintiff had nothing to accept. His acceptance amounted to nothing, irrespective of whether he paid money or not. Payment of the money could not revive the offer, unless there was express or implied evidence of revival of the offer before acceptance was made. In terms of P.Exhibit 6(c), the Plaintiff wrote the acceptance stating, "This is action on your letter Ref. 8946/IX/ dated 22 July 1994 which I did not get in time, I do hereby accept the conditions and payments contained in it", Clearly, he accepted the offer before it was revived, and as per the above authorities, the offer did not exist at the time.

157. In regard to the Commissioner of Lands' offer to the 1st Defendant, it lapsed on 16/03/1993 when the offer made on 05/12/1994 to the 1st Defendant was accepted. Actually, the offer lapsed effectively when the land was alienated to the 1st Defendant, and a grant issued to him. In the persuasive case of Gitwany Investment Limited -v- Tajmal Limited & 2 others, (2006) eKLR, Lenaola, J. (as he then was) correctly stated:

> " .... the title given to Gitwany in the first instance and which I have held to be absolute and indefeasible as regards the suit land is the earlier grant and in the words of the Court of Appeal in Wreck Motors Enterprises vs. commissioner of Lands, C.A. No. 71/1997 (unreported)" – is the "grant [that] takes priority. The land is alienated already." This

decision was gain upheld in Faraj Maharus vs. J.B. Martin glass Industries and 3 others C.A 130/2003 (unreported)."

158. Whether the 1st Defendant's acceptance of the offer was valid or not can only be analyzed from the circumstances the issuance of D.Exhibit 1(a) to him and his acceptance thereof, being the letter dated 16/03/1993 contained in P.Exhibit 18(b). DW1 testified orally that he accepted the offer. He did not produce any written document to show that step. Without it, his case stood at a more precarious position than that of the Plaintiff. But the Plaintiff's third witness, PW4, produced P.Exhibit 18(b) which changed the 1st Defendant's evidence diametrically.

159. The Court had occasion to carefully study the file produced by the said PW4, evidencing the purported allotment of Plot-'Y' to the 1st Defendant herein. It had a lot of information about how and the steps the Commissioner of Lands took in his endeavor to allocate Plot-'Y' to the point of issuance of title. In regard to the Plaintiff's testimony that the 1st Defendant did not accept the Letter of aAllotment, P.Exhibit 18(b) contained documentary evidence that dislodged it.

160. In P.Exhibit 18(b), being file number 146958, it was shown that indeed the file was opened with the Letter of Allotment to Peter Midimo Agalo being filed as Folio 1. As stated before, although the 1st Defendant did not produce documentary evidence that he accepted the offer, the second folio (Folio 2) in P.Exhibit 18(a) had a handwritten acceptance dated 16/03/1994. Its contents reveal that a lot more happened after the lapse of the offer contained in the Letter of Allotment. And in contrast with the Plaintiff's acceptance, dated 08/09/1994 produced by him as P.Exhibit 6(c), which was to the effect that "This is action on your letter Ref: 8946 dated 22 July, 1994 which I did not get in time, I do hereby accept the conditions and payments contained in it", the 1st Defendant's (Folio 2) pointed to a negotiated late payment and which was accepted within that time of end of negotiations. It was dated 16/03/1993. It read as follows, "I have agreed with sum of money Kshs. 18,260/= to cover the Plot Ref- 20089/XXIV Commercial plot 'Y' - Kitale Municipality." Immediately below the words was a phrase signed the same date by the office as follows, "accept payment as per L/A."

161. This Courts finds that after the 1st Defendant's offer lapsed, he went to the Commissioner of Lands' office on 16/03/1993 or thereabout and negotiated for revival of the offer. The revival was made to him on condition that he paid a sum of Kshs. 1,040/= higher than the initial one offered to him at Kshs. 17,220/=. From the handwritten note on the Letter of Acceptance, it seems the Commissioner of Lands decided to reduce the sum again by confirming in writing, "accepted payment as per the L/A" which payment was the exact sum as offered in the Letter of Allotment. This Court finds then that from the conduct of the parties in this transaction, the offer lapsed, it was revived, accepted and payment made was required. When the Commissioner of Lands accepted the "acceptance" by that acknowledgement and receipt of payment, the allotment was complete and the land was therefore fully alienated to the 1st Defendant. Plot-Y ceased to be available for allotment again.

162. In Re-Examination, the Plaintiff testified that the Plan attached to the Letter of Allotment, then DMFI-1 and now D.Exhibit 1, bore the number 20089/XXIV which was different from the one noted on the said allotment, which was 20089/XXIII. This Court examined the Plan attached to D.Exhibit 1. It did bear the number the Plaintiff wanted the Court to believe to be. The Court further compared the said Plan with the Plan attached with the Plaintiff's own Letter of Allotment, P.Exhibit 6(a). The Plans were exactly the same in every respect from what they were to supersede to the date of approval. Therefore, the Plaintiff could not rightfully claim that Plan to be different. In any event it was his purported Letter of Allotment, P.Exhibit 6(a) that raised even more questions than answers because it actually did not make reference to any Plan, but purported to attach the Plan which was attached so as to comply with the law.

163. This Court finds that the number 20089/XXIV on the Letter of Allotment, D.Exhibit 1, was a Reference Number just as the Number 8946/IV which was on his purported Letter of Allotment, P.Exhibit 6. The number 20089/XXIII was the Plan Number, but it was indicated as such on D.Exhibit 1. Thus, also, when the 1st Defendant accepted the terms and conditions on the Letter of Allotment issued to him on 05/11/1992 by making reference to number 20089/XXIV he was being specific as to which Letter of Allotment he was accepting.

164. As is clear from P.Exhibit 18(b), after the acceptance and payment of the stand premium as evidenced by D.Exhibit 1(c), on 23/03/1993, a week after, the Commissioner of Lands authorized a survey to be done (see Folio 7). It was done by 16/06/1993 and given the RTA number LR. No. 2116/1264 (see Folios 8 and 9).

165. From the said P.Exhibit 18(b), at Folio 11, it is clear that on the 24/06/1993, the Commissioner gave written permission in form of "Instructions to Prepare a New Lease Under RLA", in favour of Peter Midimo Agalo in respect of the plot now known as title No. 2116/1264 from 1/11/1992 whose stand premium was Kshs. 14,000/= and annual rent was Kshs. 2,800/= revisable after 10 years.

166. It appears that as per Folio 15, on 19/08/1993 instructions were given to a Mr. Osodo in the Commissioner of Lands office to write to the District Commissioner to prepare a ground report. A letter dated the same date, lying as Folio 16, was issued to the Lands Officer, Kitale to do so. The said Lands Officer, visited the ground and wrote a letter dated 20/08/1993 (see Folio 18) that "I have visited the ground and found that there are two temporary structures made of iron sheet walling and timber respectively. I recommend that Mr. Peter Midimo Agalo be given the title deed while the owners of the temporary structures will be considered for alternative sites." Four days later, on 24/08/1993, the Town Clerk, Kitale Municipality wrote to the Commissioner of Lands (see Folio 17) referring to the letter by the District Lands Officer. He stated, "This Office Concur with the District Lands Officer's views that the owners of the temporary structure be considered for alternative sites."

167. From the evidence analyzed above, I find that the 1st Defendant was the person who was properly allocated plot-'Y' because he was given the Letter of Allocation, D.Exhibit 1(a) earlier than the Plaintiff, that time being on 05/11/1992. He accepted the offer on 16/03/1993, after a negotiation for late payment after the 30 days stipulated in the Letter of Allotment, and the acceptance was "accepted as per the L/A" on the same date and he paid for the sum required for the allocation as indicated on the Letter of Allotment. The sum was accepted and Commissioner of Lands then instructed the Director of Survey to conduct a survey of the plot. The Director did so and gave the plot a new number, being LR. No. 2116/1264 whose exact measurements were indicated after the survey was complete. After that a Grant was issued to the 1st Defendant on 05/04/1994 after several procedural checks in the office of the Commissioner of Lands as evidenced through Folios 19-28 of P.Exhibit 18(b).

168. On the issue of ownership of the plot by the 1st Defendant, learned counsel submitted that the grant issued to on 05/04/1994 could not be overridden by the Plaintiff's TOL (P.Exhibit 1). He relied on Section 23(1) of the RTA (repealed). He relied on the Court of Appeal case of Satrya Investment Ltd. v J.K. Mbogua (2013) eKLR. This Court agrees with the 1st Defendant that the Grant issued to him, was not only issued pursuant to a document (D.Exhibit 1) issued as the first in time but was a valid title pursuant to Section 23(1) of the RTA (now repealed). The title takes precedence over the purported Letter of Allocation [P.Exhibit 6(a)[and the TOL (P.Exhibit 1). As was stated by the Court

of Appeal in Faraj Maharus (Administrator of the Estate of Khadija Rajab Suleiman) vs. J. B. Martin Glass Industries & 3 Others, Mombasa Court of Appeal Civil Appeal No. 130 of 2003,

> " The temporary occupation license issued in 1926 could not oust the certificate of title granted under the Registration of Titles Act. The appellant does not possess title under the Act. It is indeed settled law in Kenya that a temporary occupation license to occupy Government land is not sufficient to create or transfer title to the grantee or his personal representative."

169. Additionally, in Satrya Investments Limited v J. K. Mbugua [2013] eKLR, the Court of Appeal held:-

> " The learned judge overlooked the fact that the City Council of Nairobi never held any title to the suit property which it could validly allocate or transfer to the respondent, and even if it had any title, at most what it had given the respondent was a temporary occupation licence which could not override the appellant's title under the Registration of Titles Act. A breach of the law cannot entitle or give an advantage to an individual. To deprive a person of his title must be done in accordance with law and procedure."

170. First, this Court finds that the 1st Defendant followed the procedures of having the public land alienated to him through the PAC which gave him the signification to both him and the Commissioner of Lands. Second, by accepting and complying with the conditions on the Letter of Allocation, the land that was public was properly turned into his private property. He even was issued with a Grant under the then RTA land regime. Thus, by the time of fulfilment of the conditions on the Letter of Allotment, Plot-'Y' ceased to be land which the Commissioner would allocate any other individual. It finds further, therefore, that when the Commissioner of Lands purported to allocate the Plaintiff the same plot (Plot-'Y') on 22/07/1994, it was not available for re-allocation. As a fact, the plot known as Uns. Commercial Plot - Kitale (Plot - 'Y') previous to the date of the latter allocation and referred in the said as allocation ceased to exist, as such, when the Director of Survey conducted a survey of Plot-'Y' and gave a new number thereto as LR. No. 2116/1264. Further, therefore, the Plaintiff had no plot or property to accept in the Letter of Allotment dated 22/07/1994. There was no proper allotment made to him by the Commissioner of Lands.

Whether the conversion of plot number LR 2116/1264 - Kitale Municipality to Kitale Municipality Block 6/72 was fraudulent, unprocedural or irregular

171. The Plaintiff took issue with the conversion of the suit land from the RTA regime to the RLA regime. It is noteworthy that when the allotment to the 1st Defendant was completed, a Grant, D.Exhibit 2 was issued to him. It bore the Grant Number as I.R. 62102 in respect of LR. No. 2116/1264 - Kitale Municipality. It is this Court's view that by the time this took place the proprietary interest or ownership of the suit land was in the name of Peter Midimo Agalo, the 1st Defendant.

172. The Plaintiff testified that the conversion of the suit land from LR. No. 2116/1264 - Kitale Municipality to Kitale Municipality Block 6/72 was unprocedural, fraudulent and improper, meant to conceal the tracking of the suit land from the initial description. He testified that it was done while there was a caveat placed by the Registrar of Titles on the title to date. Again, that it was done while Kitale SPMCC No 96 of 1995 was still pending hence submitted that the doctrine of lis pendens forbade the transaction. He prayed for cancellation of the registration of the new or converted title known as Kitale Municipality Block 6/72.

173. This Court noted above that from P.Exhibit 18(b), on 24/04/1993 the Commissioner of Lands recommended, on his own motion that the title be converted from the RTA to RLA land regime (see

Folio 11). This was way before the caveat was placed on the title by the Registrar of Titles, one E. N. Gicheha, on 1/11/1994. This appears at Folio 34. From the same P.Exhibit 18(b), at Folio 36, a Mr. Anyira wrote on 29/11/2000 to the "SLO" on behalf of an officer whose designation was "SPRO" that LR. No. 2116/1264 after conversion to RLA becomes Block 6/72, see file Cover". At Folio 37 a Mr. Oludo wrote on behalf of the Commissioner of Lands that the case Civil Suit No. 461 of 1995 on L.R. No. 2116/1264 (now Block 6/72) was concluded and the owners of the Plot to take vacant possession. Also submitted that it was number as he testified that the allotment was later converted to Kitale Municipality Block 6/72.

174. The record does not bear out that the caveat placed on the Grant issued to the 1st Defendant was ever removed before the conversion of the title from the RTA Grant to the RLA Certificate of Lease was made, although the process began way before the caveat was placed. This Court finds that indeed the conversion took place by the actions of and steps taken by the office of the Commissioner of Lands on its own motion as seen from Folios 11 and 37. It was not at the fault or instigation of the 1st Defendant even though he had written earlier to the office to remove it but a comment at the bottom of the letter dated 10/06/1998 indicates but the request was declined.

175. In my view, to the extent that the conversion was done while a caveat existed on the title or grant, it was irregular and or unprocedural but not fraudulent. It was not fraudulent in the sense that, from the record of P.Exhibit 18(b), it was started before the caveat was placed on the Grant and was part of the lawful process effected by the Commissioner of Lands. This is evidenced by the internal communications found in P.Exhibit 18(b). For instance, after the dismissal of the Plaintiff's case No. 461 of 1995, the judgment was given to the Commissioner of Lands and filed as Folio 35.

176. Upon that being done, an officer, one Oludo, by designation "SLO" inquired about the new survey number under the RLA. On 29/11/2000, another officer, one Anyira, by designation "SPRO" indicated "LR. 2116/1264 after conversion to RLA becomes Block 6/72, see file cover" as seen at Folio 36. After that, on 30/11/2000, the Commissioner of Lands wrote to the DC Kitale and Town Clerk Kitale Municipality to ensure the 1st Defendant and David Kiongo be given vacant possession of their plots (see Folio 37). It appears further that after the Plaintiff's application dated 20/02/2001 in Kitale SPMCC No. 96 of 1995 was dismissed on 27/03/2001 and the order served on the Commissioner of Lands, the SLO (Mr. Oludo) made remark on the order to the attention of the "RLS" as follows, "LR. 2116/1264 was converted to RLA now Block 6/72 but Deed File is still held here. Please assist the owner so that he may get his Certificate of Lease in Kitale."

177. Upon those remarks, one J. N. Osoro wrote on 22/06/2001 on behalf of the Commissioner of Lands to the District Land Registrar, Kitale to finalise the conversion and issue the Certificate of Lease (see Folio 89) whose copy was produced by DW1 as D.Exhibit 3. Thus, also contrary to the evidence of the Plaintiff that the letter dated 22/06/2001 was a forgery, this Court confirmed that it was part of D.Exhibit 18(b) and emanated from the Commissioner of Lands' office (see Folio 89).

178. But in so far as the conversion of LR. No. 2116/1264 to Kitale Municipality Block 6/72 was made following a payment accepted on 27/04/2001 [see Folio 81 of P.Exhibit 18(b)] and the Certificate of Lease issued on 28/06/2001 during the pendency of Kitale SPMCC No. 96 of 1995 which was withdrawn in 2002, it against the doctrine of lis pendens.

Whether the conversion of LR 2116/1264 - Kitale Municipality to Kitale Municipality Block 6/72 had any effect on the proprietorship of the original allotment (of 05/11/1992) or its resultant grant

179. I have found above the 1st Defendant was properly allocated Plot-'Y'. The Plaintiff was not. The 1st Defendant having become the rightful owner of Plot-'Y' through a lawful process, and having lawfully acquired in his name the Grant, produced as D.Exhibit 2, the conversion of the proprietorship instrument from the Grant, known as IR. No. 62102 for LR. No. 2116/1264 - Kitale Municipality, though not procedurally or irregularly done did no alter the proprietary interests of either the Plaintiff or the 1st Defendant. The Court has found that the allotment to the 1st Defendant was proper and it gave rise to a lawfully issued grant IR. 62102/1 and LR. No. 2116/1264.

180. It is this court's considered view that since the procedural step of placing a caveat on Plot-Y was because the 1st Defendant did not surrender the Grant for cancellation but actually later surrendered it for conversion and given that it does not change the 1st Defendant's status as the rightful allottee of Plot-Y and his registration of the Grant issued to him under the RTA after survey of the plot was conducted, such an irregularity should not have led to cancellation of his Certificate of Lease. However, since it was irregular as it was effected against an existing caveat and also against the doctrine of lis pendens, this Court's hands are tied: the issuance of the Certificate of Lease upon conversion from RTA to RLA regime must be declared illegal.

181. However, the finding above does not declare the Letter of Allotment and the Grant cancelled. Those were lawfully given and registered in the name of the 1st Defendant and shall remain to be so. Only the conversion is declared unprocedural and illegal. The 1st Defendant is and remains the lawful allottee of the plot and he can proceed from there to process his Certificate of Lease afresh, following the right procedure.

182. While the observation of this Court in this and the next two paragraphs does not in any way affect the finding of the Court as above, as a way of advice it must be borne in mind by the parties herein that it is important that procedures in regard to processing of titles are important and must be followed. They can be costly, as seen hereinabove, and even fatal. It is not logical that the Commissioner of Lands would proceed with the conversion of the title from the RTA land regime to the RLA one when he knew well that there was a caveat lodged by the Registrar of Titles that was subsisting. Be that as it may, although in the body it stated that it was lodged pursuant to Section 65(1)(f) this Court finds that on the face of the Caveat dated 1/11/1994, it was done pursuant to Section 57(3) of the Registration of Titles Act. Section 57 provides for caveats lodged by persons other than the Registrar of Titles. Pursuant to Section 57(2), that document ought to have been in Form P of the First Schedule.

183. The document in the file, P.Exhibit 18(b), was not in Form P, it was not under oath of the person, Elizabeth N. Gicheha, who purported to lodge it nor was it a complete. Further, there is no evidence that the procedure in Section 57(3) was followed. Additionally, that which was in the file was a one-page document purporting to be a registration of a caveat but it was only addressed to the 1st Defendant and indicating, registered but there was no evidence of registration as Section 57(3) provides, for instance, by noting a memorandum having a date and hour of receipt.

184. It is important that any public office and officer tasked with doing a certain act follows both the procedure and the law in doing it. Short of that which is done cannot be considered to be the act. But for purposes of this decision, since equity treats as done that which ought to be done, this Court has taken it that the document filed by the Registrar of Titles was one designed to and did achieve the purpose of placement of a caveat on plot number LR. 2116/1264. That is why the observation herein

above has not affected the decision of the Court to declare the conversion from the above title to Kitale Municipality Block 6/72 as unprocedural.

Whether the Plaintiff or the 1st Defendant proved his case or Counterclaim respectively on a preponderance of evidence

185. Section 107(1) of the *Evidence Act* provides "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." Apart from, but in addition to, the issues discussed above, the Plaintiff averred that in relation to Plot-'Y', the 1st Defendant committed a number of fraudulent, unprocedural or illegal activities. He particularized fraud at paragraph 28 of the Amended Plaint. In essence, his claim was that the 1st Defendant committed fraud in the form of the acts particularized. No particular of illegality or unprocedurality was levelled against the 1st Defendant.

186. Turning to the particulars of fraud, in regard to the allegation that the 1st Defendant proceeded with the conversion of the title from LR. No. 2116/1264 to Kitale Municipality Block 6/72 while Kitale SPMCC No. 96 of 1995 was still pending, this Court finds that Kitale SPMCC No. 96 of 1995 was withdrawn on 17/06/2002 while the conversion of the Grant to a Certificate of Lease was done on 28/06/2001. Thus, indeed it occurred during the pendency of the suit referenced to.

187. The Plaintiff submitted that by virtue of the pendency of the suit as found above when the conversion of the title instrument herein was made, the doctrine of lis pendens prohibited the step hence the action was unprocedural. Lis pendens is the jurisdiction or power acquired by a court over property when a matter has been filed before it and is still pending. In such a case, save with leave of the Court, no dealing or action should be taken on the property or subject until the matter gets concluded.

188. In the case of KN ASWATHNARAYANA SETTY (D) TR. LRS. & ORS VS STATE OF KARNATAKA & ORS. ON 2 DECEMBER, 2013. SPECIAL LEAVE PETITION (C) NO.22311 OF 2012 CONSOLIDATED WITH SLP (C) NOS.22307-22309 OF 2012, the Supreme Court of India stated that

> "The doctrine of lis pendens is based on legal maxim 'ut lite pendente nihil innovetur' (During a litigation nothing new should be introduced). The principle of 'lis pendens' is in accordance with the equity, good conscience or justice because they rest upon an equitable and just foundation that it will be impossible to bring an action or suit to a successful termination if alienations are permitted to prevail."

189. Indeed, it was irregular for the conversion of the title to be done during the pendency of the suit but that of itself does not constitute fraud. Two points flow from the Plaintiff's pleading, evidence and submission on this act of irregularity. One, Kitale SPMCC 96 of 1995 which was between the Plaintiff and 1st Defendant was filed in a Court of competent jurisdiction, and indeed it was. Second, the suit having been filed in 1995 and withdrawn in 2002, and since the 1st Defendant was the owner of Plot-Y from 16/03/1993 when he accepted and fulfilled the condition on the Letter of Allotment, time for recovery of the land from the Plaintiff stopped running all that period. Further, since the Plaintiff filed Kitale HCC No of 2011 (OS) and the 1st Respondent filed a counterclaim in it, and the Plaintiff withdrew the suit on 03/03/2016 yet the 1st Respondent had filed a counterclaim in it. Indeed, in Kitale HCC No 84 of 2011 (OS), the 1st Defendant filed a Replying Affidavit and Counterclaim on 18/10/2011. In those circumstances Limitation of Actions period of a maximum of 12 years for recovery of land would not be an issue.

190. On the allegation that the 1st Defendant fraudulently obtained the Certificate of Lease while knowing that the land belonged to the Plaintiff, this Court is of the view that the allegation is unmerited because the Court has made a finding that the land was properly allocated to the 1st Defendant. About the particular that the 1st Defendant failed to inform the District Land Registrar that he had been given an alternative plot to the suit land, it is the finding of the Court that the Plaintiff did not prove that he was given alternative land. On the contrary, PW4 confirmed, and from the evidence adduced, for instance, as P.Exhibit 18(a) and 18(b), no alternative land was ever found by the then Municipal Council of Kitale or its successor, the County Government. About failing to inform the District Land Registrar that a caveat had been placed against LR. No. 2116/1264, it is the finding of this Court that the Plaintiff did not provide evidence of the failure or that it was the duty of the 1st Defendant to notify the said office.

191. On the allegation that the 1st Defendant falsely claimed that LR. No. 2116/1264 belonged to him, this Court is of the view that a claim cannot constitute a fraudulent act: it is not an act but a view or believe. Again, the evidence above shows that the 1st Defendant had reason to belief and it was so, that the suit land belonged to him.

192. About the allegation that the 1st Defendant forged a letter dated 22/06/2001 purporting it to be written by the Commissioner of Lands, the Court has found that D.Exhibit 3 was written by the Commissioner of Lands' office and a copy left in the file, P.Exhibit 18(b) as Folio No. 89.

193. Proceeding with conversion of LR. No. 2116/1264 to Kitale Municipality Block 6/72 when a caveat was registered against the title (NB: he repeated this particular two times consecutively as (h) and (i) in the Plaint), this Court found it as much: that there was a caveat registered as the time of conversion hence unprocedural but not fraudulent.

194. About converting LR. No. 2116/1264 to obscure the track record of the subject title, this Court found the allegation without any basis: the file was intact and correspondence at every state was clearly noted down. Therefore, there was nothing obscured.

195. About dealing with parcel No. LR. No. 2116/1264 while there was communication from the lands office that the 1st Defendant does not do so, this Court is of the view that this allegation is similar to the one above.

196. In regard to the 1st Defendant, through his written statement, oral and documentary evidence he laid the basis for his Counterclaim. Most of it was supported by the oral evidence of PW4 but was fully complemented by the documentary evidence he gave in form of P.Exhibit 18(b), as found above. The 1st Defendant was legally allotted and accepted the allotment on Plot-Y. He paid for it, was issued with a Grant for which he paid, it was processed after a survey of the plot was carried out. The Court has found out that to that extent and that point of registration, he was and is the lawful owner of Plot No. LR. No. 2116/1264 - Kitale Municipality. In sum, the 1st Defendant's evidence proved that the Plaintiff has no colour of right being on the land. He is therefore entitled to the relief sought in the Counterclaim in its entirety.

Final Disposition

197. The Plaintiff Claim succeeds only in prayer (a) to the extent that there is a declaration that the conversion of plot LR. No. 2116/1264 - Kitale Municipality to Kitale Municipality Block 6/72 was unprocedural. Prayer (b) of the Amended Plaint cannot succeed because the conversion of the title as stated in the previous line has been found unprocedural and the Certificate of Lease issued pursuant thereto is to be cancelled. While the Plaintiff prayed for cancellation of Block 6/72 he did for a

declaration that was the owner. It is not logical to claim what is cancelled: either the title was valid but not registered properly in the name of 1st defendant or it was illegally converted hence not to be in existence at all. In any event the Court found that the Plaintiff was not the lawful allottee of Plot-Y and neither could he be the rightful owner of the Grant issued subsequent thereto as LR. No. 2116/1264 - Kitale Municipality. Prayer (c) of the Amended Plaint succeeds only in part, that is to say, to the extent that the Land Registrar of Trans Nzoia County is directed to cancel only the Certificate of Lease issued to the 1st Defendant.

198. In the final analysis, I enter judgment as follows:

a. A declaration be and is hereby issued that the only conversion of Plot Number LR. 2116/1264 - Kitale Municipality to Kitale Municipality Block 6/72 and subsequent issuance of the Certificate of Lease to the 1st Defendant was unprocedural.

b. An order be and is hereby issued to the 2nd Defendant to cancel the Certificate of Lease issue to the 1st Defendant.

c. The Plaintiff's suit succeeds in part while the rest of the reliefs are dismissed with costs of the entire suit being to the 1st Defendant. Judgment is entered for the 1st Defendant on the Counterclaim against the Plaintiff as prayed.

199. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 27TH DAY OF MARCH, 2023.

HON. DR. *IUR* FRED NYAGAKA

JUDGE, ELC, KITALE