Malonza & 2 others v Nairobi County, (formerly Nairobi City Council) & 2 others (Environment & Land Case 624 of 2013 & 277 of 2014 (Consolidated)) [2023] KEELC 16630 (KLR) (23 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16630 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 624 OF 2013 & 277 OF 2014 (CONSOLIDATED)

JO MBOYA, J

MARCH 23, 2023

BETWEEN

PETER MWENDWA MALONZA ..... 1ST PLAINTIFF

BENJAMIN NGANDI MUTHAMBI ..... 2ND PLAINTIFF

KENNETH MUNGAI NGIGI ..... 3RD PLAINTIFF

AND

NAIROBI COUNTY, (FORMERLY NAIROBI CITY COUNCIL) .... 1ST DEFENDANT

THE ATTORNEY GENERAL (BEING SUED ON BEHALF OF NATIONAL YOUTH SERVICE) ..... 2ND DEFENDANT

COMMISSIONER OF LANDS ..... 3RD DEFENDANT

JUDGMENT

1. Vide Plaint dated the 27th day of May 2013, the Plaintiffs herein approached the Honorable court seeking for the following reliefs;

    i. A Permanent Injunction restraining the 2nd Respondent (National Youth Service) either by itself or through its Officers, Servants, Agents and/or whomsoever acing on its behalf from evicting the Plaintiffs, taking possession, demolishing, developments, interfering and/or in any manner whatsoever dealing with plots numbers 20, 31 & 52, 47, Mathare North Light Industries as may violate the Plaintiffs' rights of Ownership.

    ii. A Declaration that the 1st Plaintiff is the Legal and Bona-fide owner of Plot number 20, 2nd Plaintiff Legal and Bona-fide owner of Plots numbers. 31, 52

and 3rd Plaintiff legal and bona-fide owner of plot number 47 all situate at Mathare North Light Industries, Nairobi.

iii. A Declaration to the effect that the intended Eviction by the 2nd Defendant against the Plaintiffs in respect of Plots number 20, 31, 52 & 47 is illegal, bad in law, void and the notice for such intended Eviction is a nullity.

iv. A Declaration and/or Judgment requiring the Commissioner of Lands to cancel and/or revoke title number L.R. 24901, in favor of the 1st Defendant to the extent of the said title overlapping on Plaintiffs plots numbers 20, 31, 57 and 47 and further the 1st Respondent and the Commissioner of Lands be directed to issue the Plaintiffs with land titles in respect of the said plots.

v. Alternatively, the Defendants be ordered to jointly and severally make compensation to the Plaintiffs for the current market values of the plots and developments thereon pegged on actual valuations at time of determination of the suit.

vi. Costs.

vii. Any such other relief the Honourable Court shall deem fit to grant.

2. Upon being served with the summons to enter appearance, the 1st Defendant duly entered appearance and filed a statement of defense dated the 11th March 2014 and in respect of which the 1st Defendant partially denied and disputed the Plaintiffs claim.

3. However, at the foot of paragraph 6 of the statement of Defense, same conceded and acknowledged that the Plaintiffs' herein are the Bona fide allottees of the suit properties.

4. On the other hand, the 2nd and 3rd Defendant entered appearance on the 10th July 2013 and thereafter filed a Statement of Defense on the 25th July 2013, and in respect of which the 2nd and 3rd Defendants vehemently opposed and disputed the Plaintiffs' claim.

5. Suffice it to point out that upon being served with the statement of defense by and on behalf of the 2nd and 3rd Defendants, the Plaintiffs' herein filed a Reply to Statement ofDdefense dated the 5th August 2013. For clarity, the Plaintiff herein reiterated the contents of the pPlaint.

6. Subsequently, the pleadings closed and the subject matter was thereafter confirmed ready/ripe for hearing.

Evidence By The Parties

a. Plaintiffs Case

7. The Plaintiffs' case gravitates and revolves around the evidence of one witness, namely, Peter Mwendwa Malonza, who testified as PW1.

8. It was the testimony of PW1 that he applied to be allocated a Plot within Mathare North Light Industries Area in the City of Nairobi and pursuant to the application for allotment of a plot, the City Council of Nairobi proceeded to and indeed allocated unto same Plot Number 20, Mathare North Light Industries, Nairobi.

9. In addition, the witness averred that upon being allocated Plot number 20, Mathare North Light Industries, Nairobi, same entered upon, took possession and thereafter commenced the development

of the named Plot. For clarity, the witness pointed out that same constructed and erected a Four- storey building, which is currently occupied by 34 families.

10. Furthermore, the witness testified that thereafter the City Council of Nairobi processed and executed an assignment in his favor, relating to and concerning the named plot.

11. Additionally, the witness testified that the named Plot, which was allocated unto him hitherto belonged to City Council of Nairobi and not otherwise. In this regard, the witness averred that the City Council of Nairobi was therefore seized and possessed of the requisite capacity to allocate and issue letters of allotment relating to the named plot.

12. On the other hand, the witness stated that upon being allocated the suit Plot same has remained in occupation and possession of the suit plot to date. However, the witness added that sometime in the year 2011, the 2nd Defendant herein issued a notice wherein same threatened to evict himself together with the other Plaintiffs. In this regard, the witness invited the Honourable court to take cognizance of an undated notice which was (sic) addressed to unnamed illegal occupants/squatters, allegedly occupying the 2nd Defendant's land.

13. Nevertheless, the witness contended that by the time the 2nd Defendant was purporting to lay a claim to the suit property as well as the other properties belonging to the 2nd and 3rd Plaintiffs, same had been in occupation of the suit property for more than 20 years.

14. At any rate, the witness further testified that the portion of land, which is now being claimed by the 2nd Defendant was allocated to more than 100 persons, most of whom have developed their plots, with Permanent/storey buildings.

15. It was the further testimony of the witness that though the 2nd Defendant currently holds a certificate of title over and in respect of the portions comprising of the suit Plots, the impugned Certificate of title was procured and obtained in the year 1999, long after the suit plots had been allocated to and developed by the rest of the Plaintiffs and himself.

16. Furthermore, the witness also averred that prior to and before the commissioner of lands proceeded to and purported to allocate the land comprising of the suit plots to the 2nd Defendant, it was evident and clear that the impugned plots were already developed with permanent structures.

17. In this regard, the witness testified that insofar as the land comprising of the suit Plots had already been alienated and allocated, the Commissioner of lands could not purport to allocate and/or alienate same to the 2nd Defendant, albeit without first rescinding and/or cancelling of the previous letter of allotment.

18. Be that as it may, it was the further testimony of the witness that the 2nd Defendant herein owned a separate and distinct parcel of land sitting in the neighborhood of the suit plots.

19. However, the Certificate of title now being waved by the 2nd Defendant was a subsequent acquisition which has amalgamated even the portions of land comprising of the suit plots.

20. Given the foregoing, the witness herein has averred that the manner in which the 2nd Defendant was allocated the portions of land comprising of the suit plots, was irregular and unlawful. In addition, the witness has averred that the impugned allocation was intended to deny and deprive the rest of the Plaintiffs and the witness their legitimate rights to and in respect of the suit plots, which same had fully developed.

21. Other than the foregoing, the witness herein alluded to his witness statement dated the November 26, 2019 and same sought to adopt and rely on the said witness statement. In this regard, the witness statement was adopted and constituted as the evidence in chief of the witness.

22. Furthermore, the witness herein also stated and averred that same had been mandated and authorized by the 2nd and 3rd Plaintiffs to appear and testify on their behalf, insofar as the factual and legal situation adverted to are substantially the same.

23. To this end, the witness referred to the witness statement of both the 2nd and 3rd Plaintiffs and thereafter caused same to be adopted as evidence on behalf of the named Plaintiffs.

24. Other than the foregoing, the witness herein alluded to the List and Bundle of documents dated the 26th November 2013, containing a total of 21 documents, which the witness sought to adopt and rely on. In this respect, the documents at the foot of the List dated the 26th November 2019, were duly admitted and produced as Plaintiffs exhibit P1 to P21 respectively.

25. On cross examination by counsel for the 1st Defendant, the witness herein averred and reiterated that same was duly and lawfully allocated plot number 20, Mathare Light Industries. In this regard, the witness pointed out that his letter of allotment is contained at page 18 of the Plaintiffs bundle.

26. Additionally, the witness testified that the letter of allotment indicated that the payments contained and reflected at the foot thereof were due and payable within 30 days from the date of the letter of allotment. In any event, the witness added that same duly and timeously paid the requisite amounts as stipulated vide the letter of allotment.

27. Other than the foregoing, the witness testified that subsequently, the City Council of Nairobi prepared and generated a Deed of assignment of the named plots. Furthermore, the witness stated that deed of assignment could not have been issued if the letter of allotment had been revoked.

28. Other than the foregoing, the witness stated that the area which was allocated unto the rest of the Plaintiffs and himself belonged to the City Council of Nairobi (now County Government of Nairobi).

29. Owing to the fact that the area comprising of the suit plots belonged to the City Council of Nairobi, (now defunct) the witness averred that the City council of Nairobi was therefore mandated and authorized to allocate the suit plots.

30. On cross examination by counsel for the 2nd and 3rd Defendants, the witness herein repeated and reiterated that same was duly allocated Plot Number 20 and that prior to the allocation, same had applied to be allocated the plot.

31. Additionally, the witness stated that after the plots in question was allocated unto same, he (witness) proceeded to and accepted the terms of the letter of allotment. However, the witness admitted that same did not produce the letter of acceptance before the Honourable court.

32. Whilst still under cross examination, the witness pointed out that same also paid the stand premium and the incidental payments within the 30-day period, contained and stipulated at the foot of the letter of allotment.

33. Nevertheless, the witness admitted that same has not placed before the Honourable court any evidence that the payment in question was made within the same timeline.

34. Furthermore, the witness added that the receipt in respect of the payment of the stand premium and the incidental payments, were surrendered to the City Council of Nairobi on request at the time of preparation of the Deed of assignment.

35. Other than the foregoing, the witness stated that upon being allocated the named plot, same proceeded to and developed same into residential apartments, which are currently occupied.

36. Besides, it was the further testimony of the witness that the rest of the Plaintiffs have also developed their plots with multiple Storey buildings and that the developments thereof were duly approved by the City Council of Nairobi (now the County Government of Nairobi).

37. On the other hand, it was the further testimony/evidence of the witness that later on the City Council of Nairobi prepared and engrossed the Deed of assignment, which same was to hold pending the issuance of the certificate of lease/title.

38. In addition, the witness also stated that the City Council of Nairobi has variously confirmed that the rest of the Plaintiffs and himself were duly allocated the suit plots.

39. In this regard, the witness pointed out to a Replying affidavit which was sworn on behalf of City Council of Nairobi and which was sworn on the 4th October 2011 by one P. T Odongo, Director, City Planning and wherein the named officer at paragraph 4 and 5 thereof, authenticated that the Plaintiffs were the lawful and legitimate allottees.

40. Besides, the witness further testified that the prior to the allotment of the suit plots to and in favor of the rest of the Plaintiffs and himself, the City Council of Nairobi prepared and generated a Part Development Plan, which confirms that the plots which were intended to be allocated were indeed available for allocation.

41. Other than the foregoing, the witness repeated his position in the course of his examination in chief and underscored that the rest of the Plaintiffs were also valid allottees/owners of their named plots.

42. Finally, the witness herein stated that the allocation of the portions of land comprising the suit plots to and in favor of the 2nd Defendant, was irregular, illegal and unlawful.

43. In any event, the witness further stated that the 2nd Defendant could not have been allocated the portion of land inclusive of the suit plots without the involvement and knowledge of the 1st Defendant.

44. With the foregoing testimony, the Plaintiffs' case was closed.

b. The 1st Defendant's Case

45. The 1st Defendant's case is anchored on the testimony and evidence of one witness, namely, Peter Ndungu Wanyoike, who testified as DW1.

46. For coherence, it was the testimony of the named witness that same is an employee of the City County Government of Nairobi. In any event, the witness added that hitherto he was an employee of the City Council of Nairobi.

47. Besides, it was the testimony of the witness that he is a land surveyor and thus same is knowledgeable of and conversant with issues pertaining to survey and allocation of plots by the City Council of Nairobi (now County Government of Nairobi).

48. As pertains to the subject matter, the witness pointed out that same had recorded a Witness statement dated the August 7, 2019 and which the witness sought to adopt and rely on in its entirety.

49. Pursuant to and at the request of the witness, the witness statement dated the 7th August 2019, was duly admitted and constituted as the Evidence in chief of the witness.

50. Additionally, the witness herein also alluded to and identified the List and Bundle of documents dated the September 25, 2019, containing four documents. In this regard, the witness sought to adopt and rely on the named documents.

51. Consequently and in the absence of any objection by the rest of the Parties, the documents at the foot of the List dated the September 25, 2019, were admitted as Exhibits D1 to D4, respectively.

52. On cross examination by counsel for the 2nd and 3rd Defendants, the witness stated and averred that same started working with the City Council of Nairobi in the year 1992. For clarity, the witness pointed out that he was employed as a Graduate surveyor.

53. Furthermore, the witness averred that same is knowledgeable of and conversant with the dispute beforehand. In this regard, the witness pointed out that the dispute is between the Plaintiffs on one hand and the 2nd Defendant, on the other hand.

54. Additionally, the witness averred that the suit plots were duly and lawfully allocated to the Plaintiffs by the City Council of Nairobi. In this regard, the witness added that the Plaintiffs are therefore the lawful allottees of the suit plots.

55. Whilst still under cross examination, the witness pointed out that same is conversant with the process pertaining to and concerning allocation of land by the City Council of Nairobi.

56. To this end, the witness clarified that prior to and before the City Council of Nairobi could allocate land, same were enjoined to generate a Part Development Plan, which would thereafter be escalated to the Town Planning Committee for deliberation and approval.

57. In addition, the witness pointed out that as pertains to the allocation of the suit plots, the City Council of Nairobi, Department of City Planning (now Urban Planning) duly prepared the requisite Part Development Plan and that same was escalated to the Planning Committee and theater the Part Development Plan was duly approved. In this regard, the witness alluded to exhibit D1, being the minutes of the Town Planning committee.

58. Furthermore, the witness referred to exhibit D3, which same averred to be the duly approved part development plan relating to the allocation and alienation of the suit plots.

59. Other than the foregoing, the witness testified that the land which is the subject dispute is separate and distinct from L.R No. 217/1 and 217/2. For clarity, the witness pointed out that the land under dispute is on the righthand side of the portion of land alluded to belong to the 2nd Defendant.

60. At any rate, the witness further testified that the portion of land which is marked as GL forms part and parcel of L.R No. 24901.

61. Other than the foregoing, the witness testified that the letter of allotment to and in favor of the Plaintiffs were issued by the City Council of Nairobi (now County Government of Nairobi).

62. Be that as it may, it was the further testimony of the witness that on or about the year 1999 a survey was carried out in the area which covered and included the portions comprising of the suit plots and the impugned survey culminated into the creation of L.R No. 24901, now registered in the name of the 2nd Defendant.

63. In any event, the witness stated that the impugned survey and the consequential issuance of certificate of title in favor of the 2nd Defendant frustrated the process of issuance of titles to and in favor of the Plaintiffs herein.

64. Furthermore, the witness stated that prior to the allocation of the suit plots to and in favor of the Plaintiffs, the City Council of Nairobi had delineated the suit plots and same were well marked on the ground.

65. Other than the foregoing, it was the testimony of the witness that prior to and before the survey by the City Council of Nairobi could be approved, it was discovered that Survey plan (FR No. 370/180), had been approved by the Director of Survey in the year 2000 and in favor of the 2nd Defendant.

66. Consequently, the witness testified that as a result of the approval of the Survey Plan in favor of the 2nd Defendant, it became difficult, to facilitate and progress the approval of the survey plan on behalf of the City Council of Nairobi.

67. On cross examination by counsel for the Plaintiffs, the witness herein pointed out that L.R No. 24901 was never in the existence at the time when the suit plots were identified, demarcated and thereafter allocated by the City Council of Nairobi.

68. Furthermore, the witness added that due process was followed by the City Council of Nairobi in allocating the suit plots to and in favor of the Plaintiffs herein.

69. Other than the foregoing, the witness further testified that by the year 1999 the land which was identified and occupied by National Youth Service (the 2nd Defendant) was well designed on the ground and was separate of the portions comprising of the suit plots.

70. In any event, the witness has averred that the land which was belonging to and occupied by the 2nd Defendant was delineated vide survey plan/FR No. 164/118, registered in the year 1983.

71. Additionally, the witness stated that the land in question, which belongs to the 2nd Defendant was L.R No. 217/1, 217/2 and 217/4, whose position on the ground was/is not in dispute.

72. On the other hand, it was the witness' further testimony that the current dispute arose as a result of the extension of the 2nd Defendant's land into the portions comprising of the suit plots, belonging to the Plaintiffs.

73. Furthermore, the witness pointed out that the 2nd Defendant could not have been allocated the portion encroaching onto and comprising of the suit plots without the concurrence and consent of the City Council of Nairobi.

74. On re-examination, the witness reiterated that the land that lawfully belonged to the 2nd Defendant was L.R No. 217/4, which is captured vide survey plan/FR No. 164/118.

75. Additionally, the witness pointed out that the said parcel of land, namely, L.R No. 217/4 comprises of 6.892 Ha.

76. Other than the foregoing, the witness also clarified that the portion of land comprising of the suit plots and which belongs to the City Council of Nairobi measured 4.37 Ha.

77. Furthermore, the witness added that the City Council of Nairobi legally allocated the lands herewith to the Plaintiffs as well as the other allottees.

c. 2nd and 3rd Defendants' Case:

78. The 2nd and 3rd Defendant's case revolves around the testimony of two witnesses, namely, Joseph Ng'ang'a and Charles Kipkurui Ng'etich, who testified as Dw2 and DW3, respectively.

79. For coherence, DW2 was Joseph Ng'ang'a and same averred that he is an Employee of the 2nd Defendant herein.

80. Furthermore, the witness also stated that same is a Land surveyor and therefore conversant with issues and facts relating to survey.

81. On the other hand, the witness confirmed that same had recorded a witness statement dated the 15th July 2019, pertaining to and concerning the subject matter. In this regard, the witness sought to adopt and rely on the named witness statement.

82. Pursuant to and at the instance of the witness, the witness statement dated the 15th July 2019, was duly admitted and constituted as the Evidence in chief of the witness.

83. Furthermore, the witness alluded to and stated that the 2nd and 3rd Defendants had filed various List and Bundle of documents. Firstly, the witness alluded to the list and bundle of documents dated the 6th February 2020.

84. As pertains to the List and Bundle of documents dated the 6th February 2020, the witness pointed out that same comprised of 183 pages and thereafter sought to have the named documents produced as Exhibits before the Honourable court. In this regard, the named documents were duly produced and marked as exhibit D5.

85. Secondly, the witness alluded to the List and Bundle of document dated the 16th July 2019 and same sought to produce the named documents as further exhibits on behalf of the 2nd Defendant.

86. For completeness, the named documents at the foot of the List and Bundle of Documents dated the 16th July 2021, were produced and admitted as exhibit D6.

87. Additionally, the witness identified and alluded to the list and bundle of documents dated the 7th December 2021 and same similarly sought to have the named documents produced as exhibits. For clarity, the named documents were thereafter produced as exhibit D7.

88. On cross examination by counsel for the 1st Defendant, the witness herein stated that the portion of land which is under dispute comprises of 2.7 Ha.

89. Furthermore, the witness added that by the time the impugned portion measuring 2.7 Ha was being allocated to the 2nd Defendant, the said portion was partly developed and was comprising of permanent buildings.

90. On the other hand, the witness averred that by the time the 2nd Defendant was applying to be allocated the portion of land in question the said portion comprised of developments. For clarity, the witness added that the nature of developments were alluded to and captured in the Letter by the Director of Physical Planning.

91. Be that as it may, the witness pointed out that the land in question belongs to and is the property of the 2nd Defendant.

92. On cross examination by counsel for the Plaintiffs, the witness pointed out that the 2nd Defendant applied to be allocated the disputed portion of land around the year 1999 and thereafter the 2nd Defendant was issued with a letter of allotment on the 3rd March 1999.

93. In this regard, the witness pointed out that the letter of allotment is before the Honourable court. However, the witness admitted that the letter of allotment which is before the court is incomplete and missing the 2nd page bearing the signature portion.

94. Furthermore, the witness proceeded and stated that the Letter of allotment alluded to shows that the area which was being allocated measures 10.6 Ha. Nevertheless, the witness added that the portion which was being allocated is inclusive of the area under dispute.

95. On the other hand, the witness admitted that the letter of allotment shows that the allocation was being made on behalf of the County Council of Nairobi.

96. However, it was the further testimony of the witness that the named letter of allotment also contained a Disclaimer at the foot thereof.

97. Notwithstanding the foregoing, the witness admitted and acknowledged that even though the 2nd Defendant accepted the letter allotment, the portion which was being allocated contained permanent structures which did not belong to the 2nd Defendant.

98. On Examination by the Honourable court, the witness herein stated that the letter of allotment which was issued to and in favor of the 2nd Defendant showed that the allotment was being made on behalf of the City Council of Nairobi.

99. However, the witness admitted that the letter of allotment had no authority and concurrence of the City Council of Nairobi. In this regard, the witness admitted that the letter did not carry the authority number on its face.

100. Additionally, the witness also conceded that at the time when the 2nd Defendant applied to be allocated the disputed portion of land, same was duly developed by some people.

101. Nevertheless, it was the further testimony that despite the fact that the disputed portion had been developed, neither the 2nd Defendant nor himself endeavored to authenticate the identity of the developers.

102. Furthermore, the witness acknowledged that the developments which were standing on the disputed portion of land were permanent in nature.

103. Finally, the witness also admitted that even as at the time of applying to be allocated the impugned portion of land, the Director of Physical Planning indicated and signified that the portion which was being applied for was indeed under occupation by Third Parties.

104. The second witness who testified on behalf of the 2nd and 3rd Defendants was one Charles Kipkirui Ng'etich who described himself as the Deputy Chief Land rRgistrar, in the Ministry of Land, Public Works, Housing and Urban Developments.

105. In addition, it was the testimony of the witness that by virtue of his office, same is conversant with and knowledgeable of matters pertaining to land registration.

106. Furthermore, it was the testimony of the witness herein that in respect of the subject matter, same recorded a witness statement dated the 6th December 2021. In this regard, the witness implored the Honourable court to adopt and admit the named witness statement as his evidence in chief.

107. Pursuant to and at the request of the witness, the statement dated the 6th December 2021 was duly admitted and constituted as the Evidence in chief of the witness.

108. Other than the foregoing, the witness also alluded to a List and Bundle of documents filed on behalf of the 2nd and 3rd Defendants. However, the witness stated that the list in question was undated.

109. Nevertheless and for purposes of identification, the witness stated that the impugned list and bundle of documents was filed in court on the 6th February 2020. In this regard, the documents at the foot of the named list were produced and admitted as exhibit D8.

110. Secondly, the witness also alluded to the List and Bundle of documents dated the 7th December 2021 and same sought to produce the named documents thereunder. In this regard, the documents at the foot of the List dated the 7th December 2021 were produced and admitted as exhibits D9.

111. On cross examination by counsel for the 1st Defendant, the witness herein stated that L.R No. 217/1 and 217/2 were compulsory acquired by the Government of Kenya.

112. Furthermore, the witness stated that L.R No. 217/1 measured 2.7 Ha. However, the witness pointed out that same was unable to authenticate the acreage of L.R No.217/2.

113. Whilst still under cross examination, the witness now changed tune and stated that it is L.R No 217/2 which measures 2.7 Ha and not L.R No. 217/1.

114. Additionally, the witness clarified that it is L.R No. 217/2 which was compulsory acquired by the Government for purposes of National Youth Service and in this regard, the witness alluded to the gazette notice number 872 of 20th March 1981.

115. Furthermore, the witness added that the named gazette notice showed that the purpose of compulsory acquisition of L.R No. 217/2 was for Mathare Valley North Site and Service Scheme.

116. It was the further evidence of the witness that the impugned gazette notice neither alludes to nor refers to National Youth Service.

117. Other than the foregoing, the witness admitted that prior to the allocation of the disputed portion of land to the 2nd Defendant, the Director of Physical Planning generated a letter which showed that the subject portion of land which the 2nd Defendant sought to be allocated was developed and under occupation of third parties.

118. Whilst under further cross examination, the witness clarified that the portion of land which was the subject of the proposed extension was neither L.R No. 217/1 nor 217/2.

119. In addition, the witness pointed out that the portion which was the subject of extension was a different portion of land and not the land which had hitherto been compulsory acquired. For coherence, it was the further testimony of the witness that the portion of land that was being proposed for National Youth Service is outside the land that was compulsorily acquired.

120. Other than the foregoing, the witness added that same did not have any evidence to show that the proposed portion for extension was ever compulsorily acquired.

121. Furthermore, the witness added that same could not tell or confirm whether L.R No. 218/14 formed part National Youth Service land. In any event, the witness added that same does not know whether the portion of land which was allocated to the Plaintiffs' fall within L.R No. 218/14 or otherwise.

122. On the other hand, the witness testified that the Certificate of title in favor of the 2nd Defendant herein was issued after the entire area had been re-surveyed culminating into the amalgamation of the land which was proposed for extension and the previous parcel of land, namely, L.R No. 217/1 and 217/2.

123. On cross examination by the Plaintiff, the witness herein testified that same has never been to the suit property and hence same is not conversant with the portion/parcel of land being occupied by the Plaintiffs.

124. In addition, it was the further testimony of the witness that even the letter from the Commissioner of lands, which directed the preparation of the PDP confirmed that the proposed land for allocation was under third party occupation.

125. Other than the foregoing, the witness also admitted and acknowledged that the impugned letter of allotment in favor of the 2nd Defendant was stated to have been issued on behalf of the County Council of Nairobi.

126. On re-examination, the witness herein testified that the letter of allotment which was issued in favor of the 2nd Defendant was executed by the Commissioner of lands.

127. Furthermore, the witness also admits that the Commissioner of lands acknowledged and confirmed that the land which was proposed for extension on behalf of the 2nd Defendant was under third party occupation.

128. Other than the foregoing, the witness also testified that the portion of land was being acquired for purposes of Mathare North Site and Service Scheme.

129. Finally, the witness pointed out that a portion of the land in dispute was compulsorily acquired by the Government for purposes of Mathare North Site and Service Scheme. In any event, the witness added that the purposes of acquisition was never changed to National Youth Service.

130. With the foregoing testimony, the 2nd and 3rd Defendants' case was duly closed.

Submissions by the Parties

a. Plaintiffs' submissions

131. The Plaintiffs' herein filed written submission dated the 22nd November 2022 and in respect of which same raised, highlighted and amplified three issues for consideration and ultimate determination by the Honourable court.

132. Firstly, learned counsel for the Plaintiffs' submitted that the suit plots were lawfully and legally alienated/allocated by the City Council of Nairobi to and in favor of the Plaintiffs herein. In this regard, learned counsel invited the Honourable court to take cognizance of the various letters of allotment tendered and produced in evidence.

133. In addition, learned counsel for the Plaintiffs' further submitted that prior to the allocation of the suit plots, the impugned parcel of land belonged to the City Council of Nairobi, who thus had the requisite authority and mandate to allocate same to the Plaintiffs and the rest of the allottees.

134. Secondly, learned counsel for the Plaintiffs has submitted that by the time the Commissioner of lands was purporting to allocate and or alienate the disputed portion of land to the 2nd Defendant herein, the land in question was already alienated and was thus incapable of being re-alienated, without the cancelation of the earlier letters of allotments.

135. In the premises, learned counsel submitted that the purported allocation of the portion of land comprising of the suit plots was therefore illegal and unlawful, for all intents and purposes.

136. Thirdly, learned counsel submitted that the portion of land which comprises of the proposed extension of National Youth Service Engineering College, was never part of the land which was hitherto compulsorily acquired by the National Government for Mathare Velley North Site and Service Scheme.

137. In this regard, the counsel contended that the land in question was outside the portion which was compulsorily acquired.

138. Additionally, learned counsel has submitted that the portion of land which comprised of the extension of the National Youth Service Engineering College, could not have been allocated by the Commissioner of Land, either in the manner purported or otherwise albeit without the authority/concurrence of the City Council of Nairobi.

139. In support of the foregoing submissions, learned counsel for the Plaintiffs has cited and quoted various decisions including *Ethics and Ant-Corruption Commission versus Joseph Oroko Ong'era & Another* (2020)eKLR, *Commissioner of Lands & Another versus Coastal Aquaculture Ltd* (1997)eKLR, Adan Abdirahani Hassan & 2 Others v Registrar of Titles, Ministry of Lands & 2 Others (2013)eKLR and Ethics and Anti-Corruption Commission v Lima Ltd & 2 Others (2019)eKLR, respectively.

140. Finally, learned counsel for the Plaintiffs has thereafter contended that the Plaintiffs have proved their case beyond (sic) reasonable doubt and hence implored the Honourable court to allow the relief sought at the foot of the plaint in question.

b. The 1st Defendant's Submissions

141. The 1st Defendant has filed written submission dated the 6th January 2023 and in respect of which same has raised, highlighted and amplified three issues for consideration by the Honourable court.

142. First and foremost, learned counsel for the 1st Defendant has submitted that the land comprising of the suit plots lawfully belonged to and formed part of the trust land under the supervision of the City Council of Nairobi (now County Government of Nairobi). In this regard, that the City Council of Nairobi, (now defunct) was legally mandated to allocate to and in favor of the Plaintiffs herein.

143. In the premises, learned counsel added that the Plaintiffs were lawfully and legally allocated the suit plots.

144. Secondly, learned counsel for the 1st Defendant has submitted that to the extent that the portion of land comprising of the suit plots belonged to the City County of Nairobi, now defunct, the Commissioner of Lands, could not purport to allocate and/or alienate the portion of land in question without the concurrence and authority of the City Council of Nairobi.

145. Furthermore, learned counsel has added that the impugned letter of allotment which was generated and issued by the Commissioner of land show that the allocation was being done on behalf of the City Council of Nairobi.

146. Nevertheless, counsel has added that despite the letter of allotment showing that same was being done on behalf of the City Council of Nairobi, no authority was ever procured and/or obtained from the City Council of Nairobi (now defunct).

147. Owing to the fact that such no authority was ever procured from the City council of Nairobi, learned counsel thus contends that the allocation of the impugned/ disputed portion of land (comprising of the extension in favor of the 2nd Defendant) was therefore illegal.

148. To this end, learned counsel for the 1st Defendant has cited and quoted the decision in the case of Harrison Mwangi Nyota versus Naivasha Municipal Council & 20 Others (2019)eKLR, where the Honourable court underscored that the alienation of trust land by the Commissioner of Land on behalf of the Council could only be undertaken with the concurrence/consent of the relevant local authority.

149. Thirdly, learned counsel has submitted that the disputed portion of land, which falls outside L.R No. 217/1 and 217/2 (which were the subject of compulsory acquisition) was never compulsorily acquired.

150. In any event, learned counsel has contended that prior to and or before compulsory acquisition could be undertaken, it behooved the commissioner of land to comply with the provisions of the Land Acquisition Act, now repealed, which was not the case in respect of the disputed portion of land.

151. In the premises, counsel for the 1st Defendant has therefore submitted that the contention that the disputed portion of land was compulsorily acquired for and on behalf of the 2nd Defendant, is not only misleading but erroneous.

152. As pertains to the process of compulsory acquisition, learned counsel for the 1st Defendant has cited and relied on the case of Attorney General versus Zinj Ltd (Petition no. 1 of 2020) (2021) KESC 23 (KLR) (Judgment), where the Supreme Court of Kenya considered the processes to be complied with and or undertaken prior to compulsory acquisition.

153. Finally, learned counsel for the 1st Defendant has implored the Honourable court to find and hold that the suit plots lawfully belong to the Plaintiffs. In this regard, the 1st Defendant has duly supported the Plaintiffs case as pertains to ownership of the plots in question.

c.C2nd And 3rd Defendants' Case:

154. The 2nd and 3rd Defendants filed written submission dated the 13th December 2022 and in respect of which same has isolated and amplified five issues for consideration by the Honourable court.

155. Firstly, learned counsel for the 2nd and 3rd Defendants has submitted that the suit land comprised of two portions of land, namely, L.R No. 217/2 and 7878/1, which were compulsorily acquired by the Commissioner of Lands, albeit on behalf of Mathare Valley North Site and Service Scheme.

156. In this regard, counsel has invited the attention of the court to gazette notices number 872 and 873, respectively.

157. Furthermore, learned counsel has further submitted that even though the two named portions of land (details in terms of the preceding paragraph) were acquired for Mathare Valley North Site and Service Scheme, same were latter on surveyed, planned and registered in the name of the 2nd Defendant.

158. Premised on the foregoing, learned counsel for the 2nd and 3rd Defendants has therefore submitted that the suit land which is currently known as L.R No. 24901 lawfully belongs to and is the property of the 2nd Defendant.

159. Owing to the foregoing, the counsel for the 2nd and 3RD Defendants has further submitted that to the extent that the suit land was compulsorily acquired for public purposes same could not thereafter be surrendered for alienation and allocation for private use or at all.

160. Owing to the foregoing, counsel has therefore submitted that the suit land, could therefore not be legally and/or lawfully allocated to the Plaintiff either in the manner contended or at all.

161. Secondly, learned counsel for the 2nd and 3rd Defendants has submitted and contended that the disputed portion of land, which constitutes the portion forming the extension of the National Youth Service Land did not belong to the 1st Defendant herein.

162. Furthermore, learned counsel has contended that the disputed portion, which was subsequently amalgamated with the previous portions, were owned and registered in the name of the 2nd Defendant, comprised of land that previously been alienated and registered in the name of a private entity. In this

regard, learned counsel added that the said portion could therefore not comprise of trust land in any manner whatsoever.

163. Thirdly, learned counsel submitted that the 1st Defendant herein neither owned the disputed portion of land and hence same could not purport to allocate and or alienate the disputed portion of land to and in favor of the Plaintiffs herein, either in the manner alleged or at all.

164. In addition, learned counsel for the 2nd and 3rd Defendants has submitted that to the extent that the disputed portions of lands had hitherto been compulsorily acquired for public use, same could not therefore be converted to and alienated for private purposes.

165. In this respect, learned counsel for the 2nd and 3rd Defendants has cited and relied on various decisions inter-alia, Niaz Mohamed versus The Commissioner of Lands & 4 Others (1996)eKLR, Kenya national Highways Authority versus Salien Masud Mughal & 5 Others (2017)eKLR and Republic v Registrar of Lands in Kilifi Ex-parte Daniel Ricci, Malindi HC JR No. 6 of 2013 (2013)eKLR.

166. Fourthly, learned counsel for the 2nd and 3rd Defendants has further submitted that the Plaintiffs herein neither complied with nor adhered to the terms and conditions that were stated and contained in the body of the letter of allotment.

167. In this regard, learned counsel contended that having not complied with the terms contained at the foot of the named letters of allotments, the Plaintiffs herein therefore did not acquire and/or accrue any legitimate rights and interests over the suit properties.

168. To this end, learned counsel cited and relied on various decisions inter-alia Joseph Kamau Muhoro versus The Attorney General (2021)eKLR, Dr, Syedna Muhamed Burhanudin Sahersuseb & 2 Others v Benja properties and 2 Others (2007)eKLR, respectively.

169. Fifthly, the counsel for the 2nd and 3rd Defendants has further submitted that the suit property, namely, L.R No. 24901 was lawfully and legally allocated to and in favor of the 2nd Defendant.

170. In this regard, learned counsel for the 2nd and 3rd Defendants has invoked and relied upon the part development plan, which was prepared by the Director of Physical planning and thereafter escalated to the Commissioner of Land, for purposes of approval and necessary action.

171. In the premises, learned counsel has therefore submitted that insofar as the suit property, namely L.R No. 24901 had been lawfully and duly allocated to the 2nd Defendant, the land in question ceased to be available for allocation/alienation to the Plaintiffs herein or at all.

172. To support the foregoing submission, learned counsel for the 2ned and 3rd Defendants has cited and relied on the decision in the case of Benja Properties Ltd versus S S Syedna Mohamed Burhanudin Saeb & Others (2007)eKLR.

173. Finally, learned counsel for the 2nd and 3rd Defendants has submitted that the 2nd Defendant herein has proved and established that same has lawful and legitimate right to and in respect of the suit property.

174. In the circumstances, learned counsel has therefore implored the Honourable court to find and hold that the 2nd Defendant's counterclaim has been proved and thus same ought to be allowed.

175. In a nutshell, it is the 2nd and 3rd Defendants submissions that the Plaintiffs suit ought to be dismissed with costs to the 2nd and 3rd Defendants.

ISSUES FOR DETERMINATION

176. Having reviewed the Plaint dated the 27th May 2013, together with the various documents filed therewith and having taken into account the Statement of Defense filed on behalf of the Defendants and upon considering the oral testimonies rendered by the various Parties; and finally having duly considered the written submissions filed on behalf of the various Parties, the following issues do arise and are thus germane for determination;

    i. Whether the suit Property, or better still, the entirety of the suit Property, L.R No. 24901, was Compulsorily acquired for and on behalf of the 2nd Defendant.

    ii. Whether the Disputed portions of Land, out of which the suit Plots were created/delineated from belonged to the 1st Defendant and if so, whether the 1st Defendant had capacity to allocate the suit plots.

    iii. Whether the Portions of the suit Property and in particular, the portion comprising of the extension which was allocated to the 2nd Defendant vide Letter of allotment dated the 3rd March 1999 was (sic) available for allocation or at all.

    iv. What Reliefs ought to be granted.

ANALYSIS AND DETERMINATION

Issue Number 1

Whether the suit Property, or better still, the entirety of the suit Property, L.R No. 24901 was compulsorily acquired for and on behalf of the 2nd Defendant.

177. Following the filing and lodgment of the instant suit, the Defendants and in particular the 2nd and 3rd Defendants filed a statement of defense dated the 8th of July 2013 and in respect of which same contended that the suit property herein, namely L.R No. 24901 (I.R No. 85278) had been compulsorily acquired by the Government of the Republic of Kenya for and on behalf of the 2nd Defendant herein.

178. Furthermore, the 2nd and 3rd Defendants contend that to the extent that the suit property had hitherto been compulsorily acquired for public purpose/use, same could not be converted and thereafter be alienated for private purposes/use.

179. In any event, it was the 2nd and 3rd Defendants' position that the entirety of the suit property, namely, L.R no. 24901, was lawfully allocated and thereafter vested in the 2nd Defendant.

180. On the other hand, the 1st Defendant herein took the position that the disputed portion of the suit property, comprising of the land which was described as the extension of the National Youth Service Engineering college, was land which lawfully belongs to same and not otherwise.

181. Given the parallel and contradictory position taken by the 1st Defendant on one hand and the 2nd and 3rd Defendant on the other hand, it is therefore imperative to interrogate the claim that the entire suit property, namely, L.R No. 24901, had hitherto been compulsorily acquired for and on behalf of the 2nd Defendant.

182. Additionally, it is important to note that it is the 2nd and 3rd Defendants, who are contending that the suit property was compulsorily acquired. Consequently and in this premises, the burden of proving

and/or establishing that the entire suit property was compulsorily acquired for the 2nd Defendant lies at the door step of the 2nd and 3rd Defendants.

183. Having made the foregoing statements, it is now appropriate to revert to and take cognizance of the totality of the evidence that was tendered by and on behalf of the 2nd and 3rd Defendants to vindicate the contention that the suit property had been compulsorily acquired for the 2nd Defendant.

184. In this respect, the evidence of DW3 is imperative. For clarity, same testified as hereunder;

> " The suit land before allocation to National Youth Service was previously part of L.R No. 217/2. Furthermore, from the documents available at the land registry the suit property, previously known as L.R No. 217/1 and 217/2 were owned by Bhimji Ramji".

185. Other than the foregoing, DW3 the Deputy Chief Land Registrar further added that upon the acquisition of L.R No. 217/1 and 217/2, respectively, the previous owners were duly paid the requisite compensation and thereafter the government issued notice of taking of possession of the named plots.

186. Consequently, it was the testimony of DW3 that the entire of the suit land, which at times is referred to as 217/1 and 217/2, was compulsorily acquired for and on behalf of the 2nd Defendant herein.

187. Nevertheless, during cross examination, DW3 made various albeit puzzling statements, whose contents are however critical and important in determining whether the entire of the suit property had (sic) been compulsorily acquired for what purpose.

188. For coherence, DW3 stated as hereunder whilst under cross examination by counsel for the 1st Defendant;

> " L.R No. 217/1 and L.R No. 217/2 were compulsorily acquired by the Government of Kenya. That L.R No. 217/1 measured 2.7 Ha. I now wish to say that it is L.R 217/2 which measures 2.7 Ha and not L.R 217/1. L.R No. 217/2 was acquired by the Government for purposes of National Youth Service. For clarity, the acquisition was at the foot of the gazette notice number 872 of 20th March 1981.

189. Whilst still under further cross examination, the witness stated as hereunder;

> " The part development plan relates to various of lands. I can see that it includes L.R 217/2 and 217/4. However, after L.R No. 217/2, there is a proposed extension for National Youth Service Engineering. The portion in respect of the proposed extension is neither L.R No. 217/1 or 217/2".

190. Additionally, DW3 continued and stated as hereunder;

> " I wish to confirm that the portion in question must be another land. I can also see another portion and the same relates to Mathare Sheme. I can state that the portion the was being proposed for National Youth Service was outside the land that was compulsorily acquired".

191. Other than the foregoing excerpts, DW3 further stated as hereunder;

> " I don't have any evidence to show that the proposed extension was compulsorily acquired. I agree that same may relate to a separate land".

192. From the testimony of the Deputy Chief Land Registrar (DW3), it is evident and apparent that what was compulsorily acquired by the Government of Kenya was L,R Mo 217/1 and 217/2, respectively.

193. Furthermore, it was the testimony of the named witness that the two titles, namely, L.R No 217/1 and 217/2, were in any event acquired for Mathare North Site and Service Scheme. For clarity, the witness pointed out that there was no acquisition for the 2nd Defendant herein.

194. To this end, it is imperative to reproduce further excerpts of the testimony by the witness whilst under cross examination by counsel for the 1st Defendant.

195. For completeness the witness stated as hereunder;

> " The notice shows that the acquisition of Mathare North Service Scheme
>
> .....The Government was to acquire the land for purposes of Mathare North Site and Service Scheme.
>
> .....The purpose of acquisition was never converted or changed to National Youth Service.

196. In my humble view, two issues do arise and which are worthy of mention and short address. Firstly, there is no gainsaying that the only parcel of land which were compulsorily acquired were L.R No. 217/1 and 217/2 and not otherwise.

197. In addition, it is also worthy to note that the two pieces of land which were hitherto compulsorily acquired were ultimately placed under the custody and care of National Youth Service and same are well delineated on the ground and duly captured in the part development plan. For clarity, the portion that was hitherto compulsorily acquired is denoted and clearly, termed as: the Existing National Youth Service engineering college .

198. Secondly, even though the land that was hitherto compulsorily acquired and which comprises of the existing National Youth Service Engineering College, was never acquired for the 2nd Defendant, same was converted in favor of the 2nd Defendant, contrary to the initial purpose and intendment thereof.

199. Nevertheless, I must underscore that the instant suit does not seek to interrogate, the purpose for which L.R No. 217/1 and 217/2 were acquired for. In any event, this Honourable court is also not keen to interrogate whether land hitherto acquired for a particular purpose, can be converted to another purpose without due process.

200. To the contrary, this Honourable court is called upon to interrogate and authenticate whether the portion comprising of the proposed extension of National Youth Service Engineering College (which is otherwise referred to as the disputed portion) was part of what was compulsorily acquired.

201. To be able to answer the foregoing question, one needs to look no further than the testimony that was placed before the Honourable court by the Deputy Chief Land Registrar.

202. For the avoidance of doubt, it was the testimony of the Deputy Chief Land Registrar that the portion comprising of the proposed extension of National Youth Service Engineering College, did not form part of the land which had been compulsorily acquired.

203. To paraphrase the testimony of the Deputy Chief Land Registrar, same stated and underscored that the portion which was proposed for extension was outside the land that had been compulsorily acquired. In any event, the witness added that the said portion was part of a different land.

204. In my considered view, even though the 2nd and 3rd Defendants had propagated a position that the entirety of the suit property was compulsorily acquired for the 2nd Defendant herein. However, the evidence on record paints a different and contradictory picture all together.

205. In view of the foregoing, there is no gainsaying that the 2nd and 3rd Defendants have therefore failed to tender and or place before the Honourable court credible evidence to show that the portion of land comprising of the proposed extension, which ultimately amalgamated the portion comprising of the suit plots, as having been compulsorily acquired.

206. On the contrary, the clear evidence, shows that the disputed portions, which the 2nd Defendant applied for in the year 1999, was never compulsorily acquired. In any event, if same had been compulsorily acquired, then same ought to have formed part of the existing National Youth Service Engineering College, which is separate and distinct from the disputed portion of land.

207. Finally, it is my humble view that the burden of proving the claim under reference, namely, that the entire of the Suit Property was Compulsorily acquired, laid on the shoulders of the 2nd and 3rd Defendants.

208. In this regard, it is appropriate to recall and reiterate the holding of the supreme court in the case of R*aila Amolo Odinga & Another versus IEBC & Others* (2017)eKLR, where the Supreme Court of Kenya stated as hereunder;

> (131) Thus a petitioner who seeks the nullification of an election on account of non-conformity with the law or on the basis of irregularities must adduce cogent and credible evidence to prove those grounds[49] "to the satisfaction of the court."[50] That is fixed at the onset of the trial and unless circumstances change, it remains unchanged.[51] In this case therefore, it is common ground that it is the petitioners who bear the burden of proving to the required standard that, on account of non-conformity with the law or on the basis of commission of irregularities which affected the result of this election, the 3rd respondent's election as President of Kenya should be nullified.
>
> (132) Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and "remains constant throughout a trial[52] with the plaintiff, however, "depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting"[53] and "its position at any time is determined by answering the question as to who would lose if no further evidence were introduced."[54]
>
> (133) It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce 'factual' evidence to prove his/her allegations of breach, then the burden shifts and it behoves the respondent to adduce evidence to prove compliance with the law. We shall revert to the issue of the shifting of the burden of proof later in this judgment.

209. Furthermore, the question of who bares the burden of proof as pertains to particular incidences/ instances was also re-visited by the Supreme Court in the case of Dr, *Samson Gwer & Others versus Kenya Medical Research Institute* (2020)eKLR, where the court stated and held as hereunder;

> (49) Section 108 of the *Evidence Act* provides that, "the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;" and Section 109 of the Act declares that, "the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."
>
> [50] This Court in Raila Odinga & Others v. Independent Electoral & Boundaries Commission & Others, Petition No. 5 of 2013, restated the basic rule on the shifting of the evidential burden, in these terms:
>
> "...a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden...."
>
> (51) In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the Court, in discharge of the evidential burden establishing their treatment at the hands of 1st respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1st respondent to prove the contrary. In the light of the turn of events at both of the Superior Courts below, it is clear to us that, by no means, did the burden of proof shift to 1st respondent.

210. To surmise, I find and hold that the 2nd and 3rd Defendants have neither established nor demonstrated that the disputed portion of land, which comprises of the proposed extension of National Youth Service Engineering College, was ever compulsorily acquired.

Issue Number 2

Whether the disputed portions of Land, out of which the suit Plots were created/delineated from, belonged to the 1st Defendant and if so, whether the 1st Defendant had capacity to allocate the suit plots.

211. From the onset, the 1st Defendant herein contended and maintained that the disputed portion of land, out of which the suit plots were created, belonged unto her.

212. In this regard, the 1st Defendant herein has filed various documents including the Replying affidavit by one P. T Odongo, Director City Planning, sworn on the 4th October 2011, wherein same underscored that the suit property now described as L.R No. 24901, lawfully belonged to the 1st Defendant.

213. Despite the position by the 1st Defendant, the 2nd and 3rd Defendants maintained that the disputed portion was compulsorily acquired and for a designated purpose. In this regard, the 2nd and 3rd Defendants have disputed the claim by the 1st Defendant herein.

214. Nevertheless, even though the 2nd and 3rd Defendants contend that the disputed portion never belonged to the 1st Defendant, it is worthy to recall that when the 2nd Defendant herein applied to be allocated the area termed as the proposed extension of National Youth Service Engineering College, the Commissioner of Land (sic) issued a letter of allotment allegedly on behalf of the 1st Defendant.

215. For the avoidance of doubt, the impugned letter of allotment which was issued to the 2nd Defendant and dated the 3rd March 1999 signified that the allotment was being done on behalf of the County Council of Nairobi.

216. Furthermore, the fact that the letter of allotment was (sic) being issued on behalf of the City Council of Nairobi was underscored and spoken to by both DW2 and DW3, respectively.

217. To this end, it is imperative to reproduce a segment of the evidence of DW2 during cross examination by counsel for the Plaintiffs.

218. For clarity, DW2 stated as hereunder;

> "The letter of allotment was in respect of 10.6 Ha. The allocation was inclusive of the arear that is in contention. The letter of allotment shows that the allocation was being done/made on behalf of the City Council of Nairobi.
>
> I can see a disclaimer at the foot of the letter of allotment. The letter of allotment was accepted even though there was a disclaimer.

219. Other than the responses supplied by DW2 whilst under cross examination by counsel for the Plaintiffs, it is also worthy to recall that the same witness made the following remarks whilst under Examination by the court as hereunder;

> " The letter of allotment herein shows that the allotment as made on behalf of the County Council. It however, doesn't say which was the relevant County Council on whose behalf the land was allocated and alienated. I can see that there is somewhere it shows that there was need for authority to allocate land. However, no authority number has been shown on the letter of allotment.

220. Moving forward, DW3 also spoke to the same issue and same stated as hereunder;

> "The letter of allotment is said to have been done on behalf of the County Council of Nairobi. There is also a caveat at the foot of the letter of allotment".

221. It is common ground that the disputed portion of land lawfully belonged to the 1st Defendant. For clarity, it is only upon acknowledging that the land belonged to the 1st Defendant that the commissioner would then proceed to (sic) a letter of allotment on behalf of the said County Council.

222. Premised on the foregoing, I come to the conclusion that there is abundant and credible evidence to show that the disputed portion of land, which the commissioner of land purported to allocate to the 2nd Defendant lawfully belonged to the 1st Defendant.

223. In any event, the commissioner of land and by extension the 2nd and 3rd Defendants cannot anchor their case on the basis of the letter of allotment and at the same time, be heard to say that the land which was the subject of allotment did not belong to the 1st Defendant.

224. Clearly, if the land did not belong to the 1st Defendant in the 1st instance, then why would the Commissioner of land (now defunct) purport to be alienating on behalf.

225. In my humble view, the fact that the Commissioner of Land, now defunct, was purporting to alienate the land on behalf of the City council denotes and confirms that the commissioner of land knew that the land in question had a known owner, namely, the City Council of Nairobi, now defunct.

226. Consequently and in the premises, the 2nd and 3rd defendants herein, who were the beneficiaries of the impugned letter of allotment dated the 3rd March 1999, cannot now be heard to approbate and reprobate at the same time.

227. Having addressed the question of whether the disputed portion belonged to the 1st Defendant in the first instance, it is now appropriate to venture forward and discern whether the commissioner of land, now defunct, could have alienated the disputed portion of land on behalf of the 1st Defendant, albeit without her authority, consent and concurrence.

228. In my humble view, though the commissioner of land had the authority to alienate trust lands, under the Trust Lands Act (now repelled), such allocation/alienation could only be done with the concurrence and authority of the relevant local authority/council.

229. To my mind, the council/local authority under whose jurisdiction the impugned parcel of portions of land fell (in this case, City Council of Nairobi) would be called upon to issue a letter of no objection or otherwise.

230. To underscore the role that would be played by the Council/Local Authority, under whose jurisdiction of the impugned land was situated, it is worthy to take cognizance of the holding in the case of *Harrison Mwangi Nyota versus Naivasha Municipal Council & 20 Others* (2019)eKLR, where the court held as hereunder;

> It seems that even if the 1st defendant issued the letters dated 1/12/1992, it was mere advisory to the Commissioner of Lands. The allotment of the land had to be ratified by the Commissioner for Lands. It is obvious even from the communication between the Municipal Council and the Office of the Commissioner of Lands that the Council played an important role in identifying what land was available for purposes of alienation.

231. In short, I come to the conclusion that the commissioner of lands, now defunct, could not have allocated and alienated the land in question on behalf of the 1st Defendant, albeit without obtaining the concurrence and consent of the 1st Defendant, in the first place.

232. Additionally, to the extent that the disputed portion of land has now been confirmed to belong to the 1st Defendant, the consequential question that now arises is whether the 1st Defendant had the capacity to issue the letters of allotment to and in favor of the Plaintiffs.

233. Before answering the question posed in the preceding paragraph, it is worthy to recall that the 1st Defendant herein summoned and called one witness, namely, Peter Ndungu Wanyoike, who testified for and on behalf of the 1st Defendant.

234. In the course of his cross examination by counsel for the 2nd and 3rd Defendants, DW1 stated as hereunder;

> "Nairobi City Council allocated the parcel of land/suit plots to the Plaintiffs. I am aware about the process of allocation of land by the City Council of Nairobi, now defunct. The first process in allocation of land by the City Council of Nairobi was that the land in question must be first identified and thereafter a part development plan would be prepared. The part development plan would thereafter be submitted before the town planning committee for approval before the land allocation process can proceed.

> In respect of the suit plots, the town planning committee was responsible for the approval. I wish to add that there were minutes relating to the approval and same have been produced before the court.
>
> From the minutes of the town plan committee, a part development plan was duly approved. I confirm that the part development plan is dated April 1991.
>
> .....the letters of allotment were issued by the City council of Nairobi.

235. From the testimony of DW1, who was extensively cross examined by counsel for the 2nd and 3rd Defendants, it is evident that the suit plots were lawfully and duly allocated to the Plaintiffs by the City Council of Nairobi.

236. In view of the foregoing, I come to the conclusion that sufficient, credible and cogent evidence has been placed before the Honourable court to confirm and authenticate that the disputed portion of land, (which is separate from land which was hitherto compulsory acquired) lawfully belonged to the 1st Defendant.

237. On the other hand, I must also underscore that I have arrived at a conclusion that the Plaintiffs herein were lawfully allocated and thereafter issued with the requisite letters of allotment.

ISSUE NUMBER 3

Whether the portion of the suit Property and in particular the portion comprising of the extension which was allocated to the 2nd Defendant vide letter of allotment dated the 3rd March 1999 was (sic) available for allocation or at all.

238. It is common ground that the Plaintiffs herein were allocated various plots falling on and comprising of the portion of land which was ultimately termed as the proposed extension for NYS Engineering College.

239. Suffice it to point out that the Plaintiffs herein were allocated the impugned plots in 1994 and thereafter same entered upon and took possession of the named plots.

240. It is not lost on the Honourable court that the 1st Plaintiff herein testified that upon being allocated the named plots, that is plot number 20, Mathare Light Industries, same entered upon, took possession and thereafter erected thereon a four-story building.

241. Furthermore, the 1st Plaintiff added that the named storey building was concluded and that same has been on the named plot for more than 20 years to date.

242. On the part of the 2nd and 3rd Plaintiffs, it was pointed out that same bought their respective plots from the previous allottees. In any event, after purchasing/acquiring their plots, the 2nd and 3rd Plaintiffs are also stated to have been erected and constructed storey buildings thereon.

243. First forward, on or about the year 1998, the 2nd Defendant herein developed an interests over the disputed portion of land and thereafter applied to the Commissioner of Land, which was termed as the proposed extension National Youth Service Engineering College. In this regard, same thereafter sought to be issued with a letter of allotment.

244. Upon receipt of the request by the 2nd Defendant to be issued with a letter of allotment, the Commissioner of Land directed the Director of Physical Planning to prepare a Part Development Plan as pertains to the proposed extension.

245. Pursuant to and in line with the request by the commissioner of land, the Director of physical planning indeed visited the disputed portion of land with a view to delineating the found position and in readiness to generate a part development plan.

246. However, during the course of visitation to the named site, the Director of Physical Planning established and gathered that the proposed area was indeed under Third party occupation. For clarity, the Director of Physical planning intimated as much to the commissioner of lands.

247. Despite the intimation by the Director of Physical Planning that the proposed land was under third party occupation, the commissioner of land insisted that a Part Development Plan be prepared over the disputed portion of land.

248. In any event, the fact that the disputed portion of land was under third party occupation was indeed known to the 2nd Defendant, despite their insistence to be allocated the land.

249. To this end, it is appropriate to recall the testimony of DW2 (Joseph Ng'ang'a) who testified on behalf of the 2nd Defendant.

250. For coherence same stated as hereunder;

> " By the time of allocation of the disputed portion of land, same was partly developed. There were persons in occupation thereof. I do confirm that by the time of our application, the land in question has some developments.
>
> .....the is a letter from the department of physical planning and it confirms that the land was partly developed. I wish to add that the land was already developed.

251. Whilst under further cross examination by counsel for the Plaintiff, Dw2 stated as hereunder;

> " There were permanent structures on the land at the time of the allotment of the land to National youth Service. The permanent structures did not belong to National Youth Service.

252. From the testimony of DW2, there is no gainsaying that the 2nd Defendant was indeed applying to be allocated land, which same knew had already been allocated and was substantially developed by third parties.

253. Clearly, it behooved the 2nd Defendant to authenticate and determine the legitimacy of the third-party occupation over the disputed portion of land, before applying to be allocated the disputed portion of land.

254. However, what becomes apparent is that the 2nd Defendant did not care whether the land had third parties or the nature of the third-party claims. To her, what mattered was her desire to be allocated the disputed portion of land, which bordered the shared common boundary with the existing portion of land belonging to her.

255. To my mind, by the time the 2nd Defendant applied to be allocated the disputed portion of land (which lies outside L.R No. 217/1 and 217/2), the disputed portion of land was no longer available for alienation.

256. In this regard, it is worthy to reiterate the holding of the Court of Appeal in the case of *Benja Properties Limited versus Syedna Mohammed Burhannudin Sahed & 4 others* [2015] eKLR, where the Court of Appeal held as hereunder;

> 25. In arriving at our decision, we note that an interest in land cannot be allotted, alienated or transferred when the specific parcel of land allotted is not in existence. Allotment of an interest in land is a transaction in rem attaching to and running with a specific parcel of land. In the instant case, the allotment by the Commissioner of Land to the original allottees did not attach in rem to any land since there was no parcel upon which the allotment could attach. What the 5th respondent, the appellant and the original allottees did was to engage in paper transactions without a parcel of land upon which any interest in land would attach and vest – it was paper transactions without any parcel of land as its substratum.

257. Furthermore, it is imperative to underscore that once a particular portion of land has been allocated and/or alienated, same ceases to exist for further allocation or re-allocation, unless the previous letter of allotment is cancelled, revoked and/or rescinded.

258. To this end, I share the sentiments/holding of the court in the case of *Rukaya Ali Mohamed –vs- David Gikonyo Nambachia & another* Kisumu HCCA.9/2004 Warsame Judge held that,

> "once allotment letter is issued and the allottee meets the conditions therein, the land in question is no longer available for allotment since a letter of allotment confers absolute right of ownership or proprietorship unless it is challenged by the allotting authority or is acquired through fraud, mistake or misrepresentation or that the allotment was out rightly illegal or it was against public interest".

259. In view of the foregoing observation, it is my finding and holding that by the time the commissioner of land was purporting to allocate and issue the impugned letter of allotment dated the March 3, 1999, in favor of the 2nd Defendant, the disputed portion of land (proposed extension NYS Engineering College) was no longer available.

260. Consequently and in the premises, even though the commissioner of land purported to issue a letter of allotment, albeit without the concurrence of the 1st Defendant, the impugned letter of allotment did not attach to any existing land or at all.

261. As a result of the foregoing, my answer to issue number three herein is to the effect that the impugned letter of allotment, relating to the disputed portion of land was merely a piece of paper incapable of vesting in the 2nd Defendant any legal rights to and in respect of the disputed portion comprising of the suit plots.

Issue Number 4

What Reliefs ought to be granted.

262. The Plaintiffs herein have placed before the Honourable court various, albeit numerous reliefs, which same seek to be granted.

263. First and foremost, the Plaintiffs have sought declaration that same are the lawful and legitimate owners of the plots, whose details have been captured and alluded to at the foot of the Plaint.

264. Additionally, the Plaintiffs have also sought for an order to compel the commissioner of land (now defunct) to cancel and/or revoke the 2nd Defendant's title relating to L.R No. 24901 and to exclude therefrom the portion of land which overlapped onto the suit plots.

265. Besides, the Plaintiffs have also sought for an order of Permanent injunction, directed against the 2nd Defendant and seeking to bar the 2nd Defendant from interfering with their (Plaintiffs) occupation, possession and use of the suit plots.

266. I must point out that whilst dealing with the 2nd and 3rd issues herein, I have pronounced myself on the question that the Plaintiffs were lawfully and duly allocated the suit plots by the 1st Defendant herein.

267. To the extent that the Plaintiffs were lawfully and duly allocated the suit plots, same acquired lawful and legitimate rights thereto. Consequently, it behooves the Honourable court to protect and vindicate the Plaintiffs rights to the suit plots.

268. In view of the forgoing, I am indisposed to find and hold that the Plaintiffs herein have duly established and proved their entitlement to and in respect of the suit plots.

269. Other than the foregoing, the 2nd Defendant has also contended that same is the lawful and legitimate owner of the suit property, namely, L.R No. 24901. In this regard, the 2nd Defendant has therefore sought for orders to confirm her ownership to and in respect of the suit property.

270. However, in respect of the claim by the 2nd Defendant, I wish to make two observations. Firstly, the certificate of title which was issued to the 2nd Defendant and which constitutes an amalgamation of what was hitherto L.R No. 217/1 and 217/2 plus the disputed portion of land, was irregularly and illegally procured and issued.

271. Clearly, there is no gainsaying that the 2nd Defendant knew and were aware of the third-party rights over and in respect of the portion titled proposed extension of NYS Engineering College.

272. Nevertheless, the 2nd Defendant in collusion and connivance with the commissioner of lands caused the existing NYS Land to be re-surveyed and be amalgamated with the disputed portion of land.

273. The impugned actions by and on behalf of the 2nd Defendant were intentional and deliberate and same were calculated to defraud the Plaintiffs and other allottees of their rightful plots, which stood developed at the time of the purported issuance of certificate of title to the 2nd Defendant.

274. In my humble view, the 2nd Defendant cannot wave the certificate of title in respect of L.R No. 24901, comprising of the original NYS Engineering College land and the disputed portion, which was amalgamated thereunder as a result of (sic) the re-survey in favor of the 2nd Defendant.

275. Without belaboring the point, the 2nd Defendant have not justified the validity of the title to the suit property, namely L.R No 24901 (other than the original parcels L.R No. 217/1 and L.R No. 217/2) which initially belonged to the 2nd Defendant.

276. To this end, the decision in the case of *Maina versus Hiram Gathiha Maina* [2013] eKLR, where the Court of Appeal held as hereunder;

> " We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on

the register. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant's testimony. We find that a trust exists in relation to the suit property."

277. The second issue that is also worthy of mention is the contention by and on behalf of the 2nd Defendant that same filed a Counter-claim in respect of the instant matter.

278. In my humble view, the 2nd and 3rd Defendants only filed a Statement of Defense dated the 8th July 2013, albeit filed in court on the 25th July 2013 and not otherwise.

279. For the umpteenth time, I beg to underscore that no counter-claim was ever filed or mounted on behalf of the 2nd Defendant, as erroneously posited and alluded to in the submissions filed by the Principal litigation counsel.

280. In a nutshell, this Honourable court has no Counter-claim by and on behalf of the 2nd Defendant to warrant (sic) the making of any declaratory order or granting of a Permanent injunction, either in the manner sought or at all.

281. At any rate, it must have become apparent that I hold the view that the 2nd Defendant does not legitimately hold a certificate of title over the portion of the suit property comprising/consisting of the area outside L.R No's 217/1 and 217/2, which were compulsorily acquired and handed over to the 2nd Defendant.

Final Disposition

282. Having evaluated and analyzed the various perspectives, which were highlighted and amplified in the body of the Judgment, I come to the conclusion that the Plaintiffs' herein have tendered and adduced cogent evidence to vindicate their entitlement to the suit plots.

283. Consequently and in the premises, I am minded to enter Judgment in favor of the Plaintiffs as hereunder;

i. A Declaration be and is hereby issued that the 1st Plaintiff is the legal and bona-fide owner of Plot number 20, 2nd Plaintiff legal and bona-fide owner of plots numbers. 31, 52 and 3rd Plaintiff legal and bona-fide owner of plot number 47 all situate at Mathare North Light Industries, Nairobi.

ii. A Declaration be and is hereby issued to the effect that the intended Eviction by the 2nd Defendant against the Plaintiffs in respect of plots number 20, 31, 52 & 47 is illegal, bad in law, void and the notice for such intended eviction is a nullity.

iii. The Chief Land Registrar, be and is hereby ordered and/or directed to cancel, revoke and/or nullify the title in respect of L.R No. 24901, which encompasses the original L.R No's 217/1 and 217/2, together with the portion of land which fell outside the named parcels of land herein.

iv. The Director of Physical Planning and the Director of survey, jointly and/or severally be and are hereby directed to undertake the re-planning and re-survey of L.R No. 24901, with a view to excising the disputed portion better (referred to as the proposed extension of NYS Engineering College), being the land comprising of the suit plots belonging to the Plaintiffs.

v. Upon the re-planning and re-survey, the Chief land Registrar to issue the requisite certificate of title to the 2nd Defendant, albeit relating to the portion of land comprising of what is better described in the Part Development Plan number as the existing NYS Engineering College.

vi. On the other hand, the Chief land Registrar, in liaison and consultation with the 1st Defendant, as well as the National Land commission do facilitate the registration of the suit plots to and in favor of the Plaintiffs and thereafter to issue the Plaintiffs with the requisite certificate of titles/certificate of lease.

vii. The Plaintiffs' herein shall meet, pay and/or settle the requisite charges to facilitate the survey, subdivision and ultimate transfer and registration of the suit plots to and in their respective names.

viii. An order of Permanent Injunction be and is hereby issued restraining the 2nd Respondent (National Youth Service) either by itself or through its Officers, Servants, Agents and/or whomsoever acing on its behalf from evicting the Plaintiffs, taking possession, demolishing, developments, interfering and/or in any manner whatsoever dealing with plots numbers 20, 31 & 52, 47, Mathare North Light Industries as may violate the Plaintiffs' rights of ownership.

ix. Costs of the suit be and are hereby awarded to the Plaintiffs and same to be agreed upon or taxed by the Deputy Registrar of the Honourable Court.

284. For good measure, what was purported to be a counterclaim on behalf of the 2nd Defendant (but which I have found not to constitute a counterclaim), be and is hereby dismissed.

285. Before penning off from the Judgment herein, there is one incidental issue that requires to be mentioned, for whatever its worth. For clarity, the issue pertains to the inability of both the County Government of Nairobi and the National Government, represented by the Honourable Attorney General to address and deal with issues, which colored the subject dispute.

286. Clearly, had the 1st and 3rd Defendants put their minds to the dispute beforehand and taken cognizance of the provisions or article 189 of *the Constitution*, 2010, no doubt, the dispute herein, would not have reached this far.

287. Be that as it may, having entertained the proceedings beforehand, the Honourable Court was enjoined to render itself and make a determination. In this regard, I have been obligated to make the pronouncement, (details in terms of the preceding paragraph).

288. In a nutshell, Judgment is hereby entered in favour of the Plaintiffs as indicated elsewhere hereinbefore.

289. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD .... DAY OF .....MARCH....., 2023

OGUTTU MBOYA

JUDGE

In the presence of:

Benson – court assistant.

Mr. Maithya for the Plaintiffs.

Ms. Matunda for the 1st Defendants.

Mr. Motari for the 2nd and 3rd Defendants.