



REPUBLIC OF KENYA



Lowoton & another v Lorogoi & 4 others; Kamario & 3 others (Interested Parties) (Environment & Land Case 176 of 2016) [2025] KEELC 3181 (KLR) (25 March 2025) (Judgment)

Neutral citation: [2025] KEELC 3181 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 176 OF 2016
FO NYAGAKA, J
MARCH 25, 2025**

BETWEEN

NICODEMUS EMURON LOWOTON 1ST PLAINTIFF

NGAMIA CONSULTING COMPANY LIMITED 2ND PLAINTIFF

AND

CHARLES EJORO LOROGOI 1ST DEFENDANT

DAVID MERIMUG 2ND DEFENDANT

KANU TURKANA CENTRAL 3RD DEFENDANT

**MINISTRY OF LANDS, PHYSICAL PLANNING & HOUSING & URBAN
AREAS MANAGEMENT, TURKANA COUNTY 4TH DEFENDANT**

KENYA AFRICAN NATIONAL UNION 5TH DEFENDANT

AND

ENOCK KAMARIO INTERESTED PARTY

JOSEPH LONGOLE INTERESTED PARTY

LOKWATUBWA LOMODEI INTERESTED PARTY

IMMANUEL LOMUKINY INTERESTED PARTY

JUDGMENT

Introduction

1. The Plaintiffs commenced this suit against the Defendants vide a Plaint dated 13th December 2016 and amended in terms of the Amended Plaint dated 30th July 2018 and received in Court on 12th September 2018. They sought the following orders:



- a. A Permanent Injunction to issue restraining the Defendants, their agents, employees workers and/or any other person from entering, occupying, selling, leasing, encroaching, trespassing, fencing, sub-dividing, constructing and/or in any way dealing with the Plaintiff's quiet possession, use and enjoyment of the suit land and stop them from doing any acts that are inconsistent with the Plaintiffs' right as the legal and/or rightful owner of all that parcel of land known as Plot No 824 measuring 100 x 100.
 - b. An Eviction Order to issue as against the Defendants, their agents, servants and/or assigns jointly and severally to vacate and leave vacant possession of all that parcel of land known as Plot No 824 measuring 100 x 100.
 - c. A Declaration that the Plaintiffs are the legal owners of all that parcel of land, namely Plot No 824, measuring 100 x 100 and the surveyor's report filed in court dated 21/08/2017 be expunged or disregarded.
 - d. That an order to issue compelling the 4th and the 5th Defendants to issue a Certificate of lease in favour of the Plaintiff for the parcel of land namely Plot No 824 measuring 100 x 100.
 - e. Costs and Interests incidental to the suit.
2. The 1st, 2nd and 3rd Defendants filed their Amended Statement of Defence dated 5th October, 2018, wherein they denied the Plaintiffs' allegations.
 3. The 4th Defendant did not enter an Appearance or file his Statement of Defence despite service. The 5th Defendant filed its Amended Statement of Defence dated 26th September, 2018, by which it denied the Plaintiffs claim.
 4. The Interested Parties filed their Defence and Counterclaim dated 15th April, 2019.

Plaintiffs' Case (Amended Plaintiff)

5. The gist of the Plaintiff's claim as per the Amended Plaintiff dated 30th July 2018 was that the 1st Plaintiff described himself as a male adult of sound mind. Further, at paragraph 6 of the Plaintiffs alleged that the 1st Plaintiff was the proprietor and director of the 2nd Plaintiff. Also, that the 1st Plaintiff was the bona fide allottee and/or beneficial owner of all that parcel of land known as Plot No. 824 Crusade Ground (Lodwar Township), measuring 100 by 100 acres.
6. At paragraph 8A the plaintiffs claim that the 1st, 2nd and 3rd Defendants were the bona fide allottees of the neighboring plots, namely, Plot 456 adjacent to the plaintiff's parcel of land No. 824. At paragraph 9A, they aver that the 1st and 2nd Defendants, upon duping the Plaintiff that Plot No. 824 belonged to them, were paid Kshs. 550,000/= being facilitation fees for documentation. Further, at paragraph 10A they claimed that the 2nd Plaintiff, on 18th July 2012, upon being issued with the allotment letter, subsequently paid the requisite allotment fees of Kshs. 31,500/= in respect of the suit property. At paragraph 10B, they alleged that upon being issued with the letter of allotment 2nd Plaintiff paid the relevant land rates and continued to pay the same to the time of suit. At Paragraph 11A, they alleged that the 1st, 2nd and 3rd Defendants had, without any colour of right, encroached, trespassed onto, and intentionally disrupted the Plaintiffs' quiet possession and had started doing other acts inconsistent with the Plaintiffs' rights as the owners of the property. They described some of the activities as offloading materials onto the suit land and intending to start construction. They gave the particulars of trespass.
7. It is upon those abandoned that the two Plaintiffs sought the reliefs outlined above.



8. By their Amended Defence dated 5th October 2018 the 1st, 2nd and 3rd Defendants denied the contents of the Amended plaint. However, they admitted the descriptive parts thereof but denied that the powers donated by the 5th defendant to them included powers of sale of the 5th Defendant's property or assets. Further, they averred that if Plot No. 824 existed, then its position was not at the Crusade Ground (Lodwar Township).

1st -3rd Defendants' Defence

9. They denied ever acting for and on behalf of the 3rd Defendant or purported to act as owners or vendors of Plot Nos. 824 and 456 as alleged in paragraph 7A of the Amended Plaint.
10. Further, they averred that they were bona fide allottees of Plot No. 456 but denied the existence of Plot No. 824 or its location as being adjacent to Plot No. 456. They claimed that if Plot No. 824 existed through allotment, then the papers held by the plaintiffs were obtained by fraud.
11. They denied any further receipt of money from the plaintiffs as facilitation fees for documentation. They added that they were not authorized agents of the 4th Defendant, hence could not document plots within Turkana County. Again, they denied ever receiving the sum of Kenyan shillings 550,000/= from the plaintiffs for facilitation fees. They also denied being employees of the national government or county government in the Ministry of Lands, Physical Planning, Housing and Urban Management of Turkana County.
12. In response to paragraphs 9A and 10A of the Amended Plaint, they averred that the 1st Plaintiff had been their tenant at KANU Turkana Central Building from the year 2007 up to 19th January, 2016, whereas he operated a business in the name of Macrobyte Computer Systems and Stationers. Further, as at 24th November 2015, the said Plaintiff owed them rent arrears in the sum of Kenya Shillings 355,000/=. They added that if payments were made by the said party, they were towards clearing the rent arrears, and that the 1st Plaintiff was issued with receipts whenever he made payments thereto. They denied ever receiving the sum of Kenya Shillings 400,000/= as part payment for the execution of any sale agreement. It was their claim that the sum of Kenya Shillings 150,000/= allegedly paid to them was for payment of rent arrears, and the 1st Plaintiff was issued with a receipt indicating that purpose.
13. Further, that due to the non-payment of rent arrears by the 1st plaintiff, the 1st and 2nd Defendants, acting on behalf of the 3rd Defendant, instructed the firm of Mongeri and Company Advocates, who in turn instructed M/S FEMFA Auctioneers to levy distress on the 1st plaintiff. They did so by the letter dated 24th November 2015. The 1st Plaintiff's properties were proclaimed on 18th January 2016. When they were auctioned, they could not clear the rent areas. By the time the 1st Plaintiff was evicted from the premises, he owed a sum of Kenya Shillings 205,000/=.
14. They claimed further, the documents relied on by the Plaintiff to prove ownership of the property in issue were inconsistent with the pleadings. Further, the Plaintiffs were using fraudulent means to allocate themselves Plot No. 456 Lodwar Township belonging to the 1st, 2nd and 3rd Defendants by falsely generating Plot No. 824 in Lodwar town. They added that the activities of the plaintiffs amounted to trespassing onto the 1st, 2nd and 3rd Defendants' parcel of land. The Plaintiffs wanted to forcefully allocate themselves that parcel of land. They give particulars of the Plaintiff's fraud on the alleged parcel. They denied the contents of paragraphs 14 (a) to (e) of the Plaint. It was their contention that the plaintiffs were using ill intention to dispossess them of part of Plot No. 456 measuring 100 feet by 100 feet in Lodwar Town.



15. They contended in their claim that they could not file in any court, a fake report indicating the physical position of Plot No. 824 and 456 because they were not officers of the Physical Planning of the County. They denied the reliefs sought and prayed for the dismissal of the plaintiffs' suit.

The 5th Defendant's Defence

16. The 5th Defendant denied the Plaintiffs' Claim that it owned parcel No. 824, Crusade Grounds in Lodwar Town. It averred that it was aware that the 1st – 3rd Defendants occupied the 5th Defendant's property No. 456, Lodwar Town. It admitted that the 1st and 2nd Defendants were its officials of the Turkana Branch but denied that the said officials had the capacity to act as the vendors of any properties belonging to the 5th Defendant unless the said powers were expressly granted by the Party's National Executive Committee. Further, it averred that it authorized the 1st and 2nd Defendants as its Turkana Branch officials to let out its properties and utilize the proceeds of the rent for the purposes of running the affairs of the Branch. But it did not authorize the said individuals to sell any of its properties. It denied paragraphs 8A, 9A, 10A, 10B, 10C, 10D, 11A and 12 for the Amended Plaintiff.
17. It pleaded that the Plaintiffs claim that they were duped by the 1st and 2nd Plaintiffs claiming that Plot No 824 belonged to the 3rd Defendant, denying the claim and went on to say that if the 1st and 2nd Defendants ever acted in the manner alleged, then they did so in their individual capacities and not with the aid of the 3rd Defendant as a branch of the 5th defendant. Again, they denied payment of any consideration over the alleged sale of the property in issue, otherwise, the proceeds should have been deposited in the 5th Defendant's National Office account. In any event, only the National Executive Committee could authorize any sale of its properties. They denied the credibility of the Report filed in court on 21st August 2017 by the Chief Physical Planner and Land Administrator, Central and Surveyor.
18. Further, they denied any vacant possession of the property in issue being given by the Plaintiffs, as there was no agreement between it and the Plaintiffs. Regarding the depositing of building materials on the suit property by the Plaintiffs, it pleaded that that was without lawful authority by it and amounted to trespass. It denied any claim by the Plaintiffs of the party being evicted from the property. Further, they could not issue a Certificate of Lease to the Plaintiffs who were not lawful owners of the suit property.

Interested Parties Statement of Defence and Counterclaim

19. The four Interested Parties filed their Statement of Defence and Counterclaim dated 1st April 2019 on 25th April 2019. They admitted the descriptive parts of the Amended Plaintiff. They argued that the 3rd Defendant was the legal and bona fide allottee of Plot No. 456 located at Crusade Grounds within Lodwar Town. Further, that Plot Nos. 456 and 824 were in the records of the 4th Defendant.
20. It was their claim that 3rd Defendant had never authorized the 1st and 2nd Defendants to act as their agents in respect of the sale of Plot No. 456, and neither were the said Defendants allottees of parcel No. 456. They added that the 1st and 2nd Defendants were only branch officials of the 3rd and 5th Defendants hence, they did not acquire any proprietary rights by virtue of being officials of the 3rd Defendant. They denied the contents of paragraphs 9A, 10A, 10B, 10C, 10D and 11A of the Amended Plaintiff.
21. At paragraph 7 of the Defence they averred that the Plaintiffs was in possession of Plot No. 824 which was separate from Plot No. 456. They denied the allegations of trespass by the Plaintiffs on the part of the 3rd Defendant.



22. They raised a Counterclaim in which averred that despite several demands from time to time by the 1st Interested Party requiring the 4th Defendant to stop illegal dealings by the 1st and 2nd Defendants over Plot No. 456, the 4th Defendant's employees had conspired with their 1st and 2nd Defendants and carved out part of Plot No. 456, and created a plot referred to as the neighboring plot and began to sell it to innocent 3rd parties. They gave the particulars of the trespass of the 1st and 2nd Defendants. They prayed for the consolidation of Plot No. 456, Lodwar Town, with the neighboring plot. They also prayed for mesne profits, an order of injunction against the 1st and 2nd Defendants or their servants and agents, or anyone claiming through them over Plot No. 456, and costs of the suit (sic).

Evidence

The Plaintiffs'

23. Nichodemus Emuron Lowoton, the 1st Plaintiff, testified as PW1. He adopted his amended Written Witness Statement dated 30th August, 2017, as his evidence in-chief. He testified that he was an accountant by profession, working for N.S.S.F, Lodwar and a businessman. It was his testimony that the 2nd Plaintiff was incorporated on 26th July, 2012. He produced as P. Exhibit 1 the certificate of incorporation. He also produced as P. Exhibit 2 the C.R. 12. He added that the 1st Defendant was the Chairman of the 3rd Defendant while the 2nd Defendant was its Secretary. He testified that he was allocated Plot No. 824, Lodwar town on 18th July, 2012. He was issued with an allotment letter. He produced the original allotment as P. Exhibit 3. He testified that the procedure was that he was to pay to the Ministry of Lands Kshs. 1000/= being the application fees and thereafter fill a form. He added that one was then required to pay land rates. He paid the land rates, thus complying with the requirements. He testified that he was issued with an allotment letter and a beacon certificate in the form of a survey map by the then District Surveyor. He produced the original Certificate as P. Exhibit 4. He also produced as P. Exhibit 5 the original letter dated 24th July, 2012 from Mark Oyoo. He testified that he also paid the land rates. He produced the original receipts for up to 2019 as P. Exhibit 6(a), (b) and (c).
24. It was his testimony that he took possession, fenced, and constructed some rental houses there. He produced copies of the photos. In 2016, 1st and 2nd Defendants were disturbing him and he reported it to the Ministry of Lands. They were summoned through the letter dated 21st September, 2016 which confirmed that Plot No. 824 was allocated to him. He produced the letter as P. Exhibit 7.
25. The 1st and 2nd Defendants, upon getting the allocation letter, duped him over the processing of documents. They asked for a facilitation fee to enable the production of the title. The first withdrawal was Kshs.300,000/= in cash which he gave the 1st Defendant. The 1st Defendant was a former mayor of Lodwar Municipal Council. He testified further that later the 1st Defendant came with a group of councilors for whom he withdrew Kshs.50,000/= twice. He saw no progress in processing the transaction. He told them to acknowledge receipt of the money they were asking for further but they refused.
26. On the first amount, he was not issued a receipt. He testified that in 2015, he gave them a cheque and they withdrew Kshs.150,000/=. He produced as P. Exhibit 8, a bank statement confirming that he paid Kshs.300,000/= to the 3rd Defendant on 15th December, 2014.
27. PW1 testified further that the dispute was never resolved and they decided to file suit. He denied the claim by the Defendants that the plot did not exist. He testified that the same was a stand-alone plot adjacent to plot 456 and separated by a footpath. He testified that they had different allotment letters



- and numbers. It was his testimony that he was a tenant under another company called Macrobyte and he was operating a cyber in a house, not a plot.
28. Upon being shown the tenancy agreement dated 22nd December, 2011, he testified that the Defendants had no capacity to know that plot 824, the suit property herein, existed. He added that on plot 456, he had rented a house. He further testified that the report filed in court on 21st August, 2017, about the land was malicious. He added that it was prepared by Davies Munialo, Leonard Kisite and John Mutemi, confirming that they were not aware of the suit property.
29. PW1 stated further that Leonard Kisite was one of the authors who, in another document, confirmed that the plot existed. He testified that attached to the report was a PDP dated 27th September, 2011. He added that the Director of Physical Planning or the Minister had neither dated nor signed it, yet it was made under the Physical Planning Act. He testified that it had a reference to TCG/LPP/2/014/07 being a computer-generated document. He added that a PDP had to be published in a daily newspaper, but the same was not. The one in court was not registered, and it had no number. He testified that the 2nd Defendant was present when he gave the money. He and the 2nd Defendant were friends then. He added, the documents produced were from the Turkana County Ministry of Lands.
30. He later learnt that the Interested Parties were elected officials of KANU Turkana with the 1st Interested Party as the current interim chairman, the 3rd Interested Party - a member and the 4th Interested Party - the current organizing secretary. He testified that he was not certain whether the 1st and 2nd Defendants still held office. He testified that he was in possession of the land and that the 1st and 2nd Defendants were no longer interfering.
31. Upon cross-examination by learned counsel Mr. Ondabu for the Defendants, PW1 confirmed that he acquired the plot in 2012 from the Ministry of Lands. He added that at the time it was known as Lodwar Municipal Council. He stated that the County Government came into operation in 2013. He first applied and was allotted and after which the plot was surveyed on 24th July, 2012. He obtained the allotment letter on 18th July, 2012, as evidenced from the survey map. He confirmed that before going to survey, he had the allotment letter. He further confirmed that the Municipal Council never gave him a copy of the application for allotment. Upon being referred to P. Exhibit 4, he confirmed that it was stamped on 24th July, 2012 by Mr. Mark Oyoo the then District Surveyor. He was referred to the bottom, where he read verbatim;
- “Plot has been demarcated by the District Surveyor on 16/4/1999”.
32. He stated that there was no inconsistency in his cadastral map, as there were 3 plots. He confirmed that the surveyor signed only on his plot. He stated that he first paid the rates on 18th July, 2012. He confirmed that the receipt was issued in Sarah Nakeseo’s name, the 2nd director in the 2nd Defendant(sic). He stated that in 2015 he paid rates in his own name.
33. PW1 stated that his company had 3 directors including James Omondi. He stated that they agreed as directors to file the instant suit. He admitted that he had not produced any authority from the company to sue on its behalf. He stated that the 1st and 2nd Defendants were former officials of the 3rd Defendant. He stated that he relied on the letter indicating that there were other officials in the 3rd Defendant’s office.
34. PW1 was referred to paragraph 7A of the plaint about which he stated that they were named as the officials and agents of the 3rd Defendant. He further stated that at the time they were the officials while commencing the case. He added that he was a tenant, among others in Plot No. 456. He confirmed that there was a rent dispute between him and the 1st, 2nd and 3rd Defendants while he operated under



- “Macrobyte” on Plot No. 456. He admitted that he was not a party to that suit. He confirmed that he heard about rent for the first time in 2016. He stated that Kshs.150,000/= was the facilitation fee to process title. He added that the 1st Defendant was the immediate former mayor and ought to be conversant with land matters. He stated that allocation was purely a Lands Ministry task. He paid Kshs.300,000/= on 18th July, 2012 while the second payment was on 15th December, 2014. He confirmed that his allotment letter was dated 18th July, 2012.
35. Upon being referred to the Cadastral Map, P. Exhibit 4, he admitted that he did not see a number plot 824 on the map. He was further referred to P. Exhibit 5 and he confirmed that it did not have a plot number.
36. Upon cross-examination by learned Arusei for the Interested Parties, PW1 stated that plot 824 was his property; he has been in possession since 2012 to date. He stated that the Defendant claimed the land in 2016. He added that he was not aware of any relationship between plot 824 and Plot No. 456. Upon being referred to the PDP dated 27th September, 2011 from the Defendants’ List of which he stated that it was not valid since it had not been signed by the Director of Physical Planning. Further, he stated that it had been forged. He added that according to the Reference “T.C.G.” it meant Turkana County Government which came into force after the 2013 election. He stated that it should have been the Municipal Council of Turkana. He further stated that the document was not complete.
37. Upon re-examination, he stated that he was allotted by the Municipal Council of Lodwar in 2012. He further stated that there was no relationship between plot 824 and 456 but that they were just adjacent to one another. He stated that KANU had houses in Plot No. 256 which it rented out. He further stated that plot 824 was allocated to the 2nd Plaintiff. He added that he was its director. He stated that Microbite was a different company. He stated that the plot belonged to KANU and that on the PDP, the middle plot belonged to him while the third one was a petrol station. He went on to state that the Defendant’s PDP was fake. He confirmed that a gazette notice was required for a period of 60 days before demarcation. He further confirmed that the Minister must approve a PDP and that it had to have a number. He stated that the County Government was not in place by 2011.
38. That marked the close of the Plaintiffs’ case.

1st -3rd Defendants’ Evidence

39. On behalf of the 1st – 3rd Defendants, David Merimug the 2nd Defendant testified as DW1 where his witness statement dated 5th October, 2018 was adopted as his evidence in chief. It was his testimony that he had the authority to give evidence on behalf of the 1st and 3rd Defendants. He testified that he was the secretary of the 3rd Defendant and that his duties were to keep minutes, office files and the buildings. He testified that he kept the 3rd Defendant’s documents of Turkana office. He testified that the KANU office in Turkana County was built on the plot owned by the party. He added that the plot number was 456 Lodwar town and issued on 2nd July, 2009. He produced the allotment letter dated 2nd July, 2009 as D. Exhibit 1. He testified that the plot had a Part Development Plan (PDP) dated 27th September, 2011. He produced it as D. Exhibit 2.
40. He further testified that the court had directed the County Surveyor to visit the parcels of land and do a report. He produced the order dated 20th July, 2017 as D. Exhibit 3. He also produced the surveyor’s report dated 21st August, 2017 as D. Exhibit 4. He denied receiving monies from the 1st Plaintiff. It was his testimony that before the 1st Plaintiff filed the case in court, he was a tenant of KANU premises. He testified that he used to run a business called Microbite System Computer Stationer from 2008 to 19th January, 2016. He added that by that time, he had not paid all the rent and the arrears were



- KShs. 205,000/= . He testified that they did demand letter through the Advocate and when he failed to pay, they instructed Fema Auctioneers who wrote to him a demand notice. He added that the 1st Plaintiff was issued with a proclamation dated 18th January, 2016 which he produced as D. Exhibit 5. He testified that the 1st to 3rd Defendants 1-3 have not encroached or trespassed onto Plot No. 824. He added that KANU plot was No. 456. He further testified that there was a plot owner of parcel No. 824 who encroached onto their plot.
41. Upon cross-examination by the Plaintiffs' counsel, DW1 stated that he has been the KANU Turkana County Branch Secretary for about seven years. He confirmed that KANU office was allocated the land in 2nd July, 2009. He admitted that he was not in office by then. He stated that Plot No. 456 belonged to KANU and that he was not aware of the existence of Plot No. 824. He was referred to P. Exhibit 3 where he stated that he did not know the 2nd Plaintiff. He added that he did not know the location of Plot No. 824. He referred to the PDP - D. Exhibit 2 issued on 27th September, 2011 by the Lands office.
42. Further, that the County Governments were established in 2013 and that by 2011 the body in charge was the County Council. He stated that it was not signed at the approval or even dated. He added that the neighboring plot to that of KANU in the PDP indicated does not exist. He also stated that on the ground, the KANU plot/property stretched all the way to the road junction. DW1 further stated that there was no property between the KANU one and the road junction. He stated that the surveyor's report confirmed that Plot No. 824 did not exist. He stated that the court noted that the report by the committee was curious where it referred to P. Exhibit 7 written by Leonard Kisike. He added that the court noted that the letter stated that the 1st Plaintiff had been allocated plot 824.
43. It existed elsewhere if any. He added that Microbite Computers was running its business in their plot as a tenant. He stated that the 2nd Plaintiff was not their tenant. He denied any encroachment or that KANU plot was neighboring to 824. He was referred to the particulars of fraud in the Plaint where he denied any plan and added that Microbite Computers Systems moved away and owed them rent to date.
44. Upon cross-examination by Arusei for the interested parties, DW1 stated that he was elected as secretary in 2010. He stated that the measurements were 52M x 16.5M x 49M x 35M. He added that he only saw on the measurements on the map. He stated that the neighboring plot to 456 was Francis Ewuoton. He was referred to D. Exhibit 2, where he confirmed that, according to the Map PDP there was a write-up as a "neighbouring plot". He confirmed that there were three plots. He went on to state that the neighboring plot had a petrol station. He admitted that at the time the PDP was made on 27th October, 2011, he was the secretary to KANU. He denied requesting the Lands office to make the PDP. He confirmed that he was not aware if the PDP was approved or gazetted. He denied that there was trespass onto the KANU plot apart from the container, which was placed onto Plot No. 456. He added that according to P. Exhibit 3, the owner of Plot No. 824 was allocated on 18th December, 2012 and marked as the 2nd Plaintiff.
45. Upon re-examination, he stated that the PDP showed the name of one K. Mutua who was the Planner. He stated that it was signed and dated 27th September, 2011. He admitted that he was not a survey expert.
46. That marked the close of the 1st - 3rd Defendants' case.

Interested Parties' Evidence

47. Enock Kamario the 1st Interested Party had his written witness statement dated 15th April, 2019, adopted as his evidence in-chief. He testified that he was the current chair of the KANU Turkana



- Branch, the 2nd Interested Party was a member of KANU and the 4th Interested Party was a Youth Leader of KANU Turkana Branch and later became the secretary. He stated that the 2nd and 4th interested parties had given him the authority to testify on their behalf. He had the 4th interested party's witness statement dated 15th April, 2019, adopted as evidence in chief. He produced his letter of appointment dated 15th January, 2018 as 1st IP Exhibit 1. He testified that he was a member of KANU since 1992 and from 2005, he became a Chairman of Lomeyan Location and in 2007 the vice chair of Turkana Central.
48. He testified that in 2007, plot 456 had a section divided into 3 parts, one part was undeveloped, the middle one had a wall with two offices and the 3rd part was a section that had been rental houses for businesses. He stated that later, one Maurice Elotoo rented a space on the undeveloped part to set up a garage. He added that he had been given the consent by the executive officer vide the letter dated 23rd June, 2009. He testified that he was issued with the lease after which he paid Kshs. 24000/= for the permissions. He produced the letter dated 23rd June, 2009 and the receipt of payment dated 19th April, 2012 as IP Exhibit 2(a) and (b). He testified that he set up the garage but the business did not do well after which the KANU officials leased the part to another tenant by name Francis Edonga trading as Kare.
49. He testified that Francis was present to date where he runs a petrol station. He testified that he was paying Kshs.8,000/= as rent. He also testified that at the time of leasing the 1st Defendant was the chairperson and the 2nd Defendant was the secretary. It was his testimony that they ceased to be officials on 31st December, 2017. That is when he was elected Chairman.
50. The KANU Branch was surprised that permanent structures were being built by Kare. He went on to testify that in 2014, upon inquiry, the 1st and 2nd Defendants' declined to disclose the reason. He added that plots 456 and 824 were not the same and that 824 was not a part of 456. The witness was referred to D Exh 2, where he testified that the said PDP did not show the proper plot for KANU. He testified that it was supposed to be described as divided into two parts to show as a "neighboring plot" so as to form the three KANU plots. He testified that at the point of the neighboring plot, that was where the petrol station was located.
51. He stated that as per the PDP, it showed that plot 824 was supposed to be between the plot shown as Francis and KANU plot. He testified that as the KANU Chairman, he wrote a letter dated 19th January, 2028 to the Ministry which he produced as 1st IP Exhibit 3 that the plot had been excised from the KANU plot. He testified that he never complained about plot 824 being part of KANU plot. He denied that plot 824 was part of the KANU plot. He testified that the PDP was not signed. It was his testimony that the 1st and 2nd Defendants hived off the KANU plot and leased it to a 3rd party to claim it and left the claim to 824. He urged the court to order the plot labelled as "neighboring plot" be given back to KANU.
52. Upon cross-examination by the Plaintiff's counsel, he confirmed that plot 456 belonged to KANU and that plot 824 belonged to the 2nd Plaintiff. He further confirmed that each party had their own allotment letters and that there was no complaint that the 2nd Plaintiff had interfered with KANU plot. He stated that the "neighboring plot" was part of the KANU plot. He also confirmed that the 1st Plaintiff was a tenant who ran a business known as Microbite Computer Systems and Stationery. He denied the claim that 824 was hived off from plot 456 to be A and B.
53. Upon cross-examination by Ondabu, he stated that he was KANU Chairman on 31st December, 2017. He added that from that time, they never occupied the office. He added that they made an application in Lodwar court in 2018 to be issued with a break-in order but the same was dismissed. He stated that



since then, the 1st and 2nd Defendants have remained in office. He denied being given any documents for plot 456 and added that he only had a letter confirming that the KANU plot had been leased to someone else. He was referred to IP's Exh 2 (b) which was a receipt of rent payment, where he stated that he was the Vice Chair while Francis Ndume was the treasurer. He admitted that before being enjoined as interested parties, he had not filed a case claiming that the "neighboring plot" be part of KANU. He also admitted that there was an ongoing case between himself and the 2nd Defendant in Lodwar. He stated that he was not certain who has the files of KANU Turkana branch.

54. Upon re-examination, he stated that they did not file for Turkana Central. He added that he was the chairperson of Turkana County Branch and that the 1st Defendant was illegally in office. He stated that when he was doing the handover of office, the officials instigated a case. He clarified to the court that when he wrote a letter to the Ministry, they failed to respond and that the complaint was still pending to date.
55. That marked the close of the interested parties' case.

Submissions

56. Counsel for the Plaintiff filed his submissions dated 27th October, 2022 where he gave a summary of the case and identified seven issues for determination. The first to fourth issues were whether the Plaintiffs are legal and/or bona fide allottees of all that parcel of land known as Plot No 824 (Crusade ground) Lodwar town measuring 100 by 100, whether plot 824 and plot 456 exists as per the records held at the 4th Defendant's registry, the veracity of the surveyor's report dated 21st July, 2017 pursuant to the court order and the veracity of the PDP. It was his submission that the 1st Plaintiff was issued with an allotment letter dated 18th July, 2012 in the 2nd Plaintiff's name. He submits that the receipts of payment for the purchase price and rate payments was produced as evidence. He further submits that the 1st Plaintiff has been in occupation since 2012.
57. He added that from the Land Dispute meeting between the Plaintiff and Defendant on 21st September, 2016, it was clear that plot 456 belonged to KANU while plot 824 belonged to the 2nd Plaintiff. He submits that the letter by the land administrator confirmed that plot 824 existed in their records. He argues that the report dated 21st July, 2017, was biased and not based on what was in the land registry. He submits that the same ought to be expunged. He also submits that the PDP for the KANU office plot 456 made in 2011 was also biased since it was not published as per the requirements of the Physical Land Use Planning Act 2019. He relied on Sections 6 and 14 of the said Act which provides for the procedure in preparation of a PDP. It was his submission that it fell short of the required threshold for an authentic PDP.
58. The fifth issue was whether the Defendants and Interested parties have controverted and/or rebutted the Plaintiffs' claim. Counsel submits in the negative and submits that the 1st to 2nd Defendants were unable to answer on the veracity of the PDP and that the interested parties' defence and counterclaim were in support of the Plaintiffs' claim.
59. The sixth issue was whether the Plaintiffs are deserving of the prayers sought. He submits in the affirmative and relies on the cases of Kenya Power & Lighting Co. Limited v Sheriff Molana Habib [2018] eKLR and Jacob Ernest Ambala Odondi v Violet Shikuku [2021] eKLR.
60. On the final issue, it was counsel's submission that the Plaintiffs have proved their case on a balance of probabilities are ought to be awarded costs of the suit.
61. Counsel for the 1st, 2nd and 3rd Defendants on the other hand filed his submission dated 7th November, 2022, where he gave a background of the case and identified two issues for determination. The first



issue was whether Plot No. 824 exists and belongs to the Plaintiffs. Have the Plaintiffs proved on a balance of probability the physical position of the plot? He submits in the negative and argues that the documents produced in support of the 1st Plaintiff's case had a lot of contradictions. He submits that the said documents were the allotment letter dated 18th July, 2012 vis a vis the 2nd Plaintiff's certificate of incorporation dated 26th July, 2021, the cadastral survey which he confirmed had no plot number. He added that the alleged purchase price in the amended plaint vis-à-vis the testimony was inconsistent.

62. It was counsel's submission that the interested parties' case did not in any way support the Plaintiffs' case. He further submits that if the Plaintiff disputed the report by the land administrator and physical planner, they had an option of having the court summon its maker and cross-examine as required. He submits that the report was merited. It was his submission that if at all Plot No 824 existed, then the Plaintiffs were not certain of its exact location and they ought to seek assistance from the Ministry of Lands. In conclusion, he urged the court to dismiss the Plaintiffs' case with costs.

Analysis and Determination

63. This court has carefully considered the pleadings, evidence on record and submissions and is of the view that the sole issue for determination is whether the Plaintiffs have the locus standi to institute the instant suit. After that, it needs to consider briefly whether the Plaintiff's claim is merited, and lastly as to who to bear the costs of the suit and counterclaim.
64. This Court wishes to determine the issue of capacity by looking at the two Plaintiffs' cases distinctly.
65. This Court is of the learned humble view that parties are bound by their pleadings. They cannot be permitted to trudge outside of the same at any one given time.
66. In the instant matter, the Plaintiff pleaded that the 2nd Defendant was allocated 100 x 100 acres in Lodwar Town. This Court compared the pleading with the Plaintiffs' own evidence, P. Exhibit 3. A parcel of that size in not in existence.
67. In the Amended Plaint dated 30th July 2018, filed on 12th September 2018, the 1st Plaintiff was described as a male adult of sound mind. At paragraph 6 of the Plaintiffs' alleged that the 1st Plaintiff was the proprietor and director of the 2nd Plaintiff and (he) was the bona fide allottee and/or beneficial owner of all that parcel of land known as Plot No. 824 Crusade Ground (Lodwar Township) measuring 100 by 100 acres. At paragraph 8A the plaintiffs claim that the 1st, 2nd and 3rd Defendants were the bona fide allottees of the neighboring plots, namely, Plot 456 adjacent to the plaintiff's parcel of land No. 824. At paragraph 9A they aver that the 1st and 2nd Defendants, upon duping the Plaintiff that Plot No. 824 belonged to them were paid Kshs. 550,000/= being facilitation fees for documentation.
68. Further, at paragraph 10A they claimed that the 2nd Plaintiff on 18th July 2012 upon being issued with the allotment letter, subsequently paid the requisite allotment fees of Kshs. 31500/= in respect of the suit property. At paragraph 10B they alleged upon being issued with the letter of allotment 2nd Plaintiff paid the relevant land rates and continued to pay the same to the time of suit.
69. Upon those claims that the two Plaintiffs sought the reliefs outlined above.



70. I have considered the evidence by the plaintiffs. First, it is important to note that parties are bound by their pleadings. They cannot move away from their pleadings. In *Daniel Otieno Migore v South Nyanza Sugar Co. Ltd* [2018] eKLR, Justice A. C. Mrima stated as doth:

“It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must align with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of *Independent Electoral and Boundaries Commission & Anor. vs. Stephen Mutinda Mule & 3 others* (2014) eKLR which 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 (settled) 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.”

71. Therefore, it was incumbent on the Plaintiffs, particularly the 1st to prove that he was the bona fide owner of parcel No. 824 situated in Lodwar Town. He testified as PW1. He produced P. Exhibits 1, 2 and 3 to prove ownership of the plot. They were a copy of a Certificate of Incorporation issued on 26th July 2012 to Ngamia Consulting Co. (K) Limited, a copy of the Form CR12 showing the directors of the Company, and an original Replacement of a letter of allotment, respectively.

72. Further, PW1 testified that he was one of the directors of the 2nd Defendant. He stated that he paid a sum of Kshs. 550,000/= as facilitation fee in total to the 1st and 2nd Defendants. His evidence was unclear as to whether he paid for and on behalf of the company or for himself as a person.

73. It is trite law that a company is a separate entity from its members, including directors. Directors acting in their personal capacity cannot carry out acts that bind the company. Similarly, a company's actions cannot bind individual members in their private capacity as individuals. A company's actions bind the company alone, and the entity acts through the Board of Directors or the shareholders acting corporately. This concept was stated in the seminal case of *Salomon vs. Salomon* [1897] AC 78 wherein the Court held that:-

“The company is at law a different person and altogether from the subscribers to the memorandum and though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers and the same hands receive the profits, the company is not in law the agent of the subscribers or trustees for them nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act”.



74. Similarly, the same position was taken in *Victor Mabachi & Another vs. Nurturn Bates Ltd*, Civil Appeal No. 247 of 2005 [2013] eKLR, where the Court held that, a company
- “...as a body corporate, is a persona juridica, with separate independent identity in law, distinct from its shareholders, directors and agents unless there are factors warranting a lifting of the veil.
75. Given the above position in law, the circumstances of this case, as pleaded by the Plaintiff and brought out in the evidence of the Plaintiffs, are that the 2nd Plaintiff was alleged to have been allocated Plot No. 824.
76. I have carefully considered P. Exhibit 1. It shows that the 2nd Plaintiff is a duly incorporated company. It was incorporated on 26th July 2012. P. Exhibit 2 shows the directors of the 2nd Plaintiff. One of them is the 1st Plaintiff. P. Exhibit 3 shows that the allocation of Plot No. 824, if it were to be taken to exist, was made to the 2nd Plaintiff. The allocation was made on 18th July 2012.
77. In my humble view, from P. Exhibit 3, it is clear that the allocation was made to the 2nd Plaintiff. But the million-dollar question is, could a non-existent entity be allocated or own the land plot? The simple and straight answer is “No”. Thus, when the allocation was made, it was made to an imaginary or non-existent juristic person. To that extent, it was irregular, null and void. In any event, there is no evidence that such an entity ever made an application for allocation of the plot. It could not anyway since it was non-existent.
78. What is more puzzling is that P. Exhibit 3, which is a “Plot Allotment Letter” No. 1177, signed by the Town Clerk in July of 2012, is handwritten at the top “Replacement?” While it is not countersigned to authenticate the inscription, it is clear to me that if it were a Replacement of an earlier letter of allotment, there ought to have been a certified copy of that which was being replaced in order to confirm that indeed the sale existed. Additionally, if it was a Replacement, it means that the 2nd Plaintiff was allocated the plot much earlier than 18th July, 2012. But that worsens things because it means that the allocation was irregular since it was to me a non-existent company. It does not require rocket science to observe and find that there were some fraudulent activities regarding records being made about Plot 824 in the 4th Defendant’s offices, as was averred by the Interested Parties. The Court cannot countenance such. The records about Plot No. 824 stand cancelled for that matter.
79. I find the evidence of the witness of 1st – 3rd Defendants and that of the Interested Parties credible. While the Interested Parties’ witness stated that Plot No. 824 belonged to the 2nd Plaintiff, he added that it was carved with the collusion of the 1st and 2nd Plaintiffs and the officials of the 4th Defendant from the plot allocated to KANU, the 5th Defendant. I am convinced as much. Thus, the records at the 4th Defendant’s offices need to be verified to confirm whether indeed those regarding Plot No. 456 was allegedly were originally, were tampered with to create Plot No. 824. Even if they were not and it is found that the plot existed elsewhere separately, I have found out that it was never allocated to the 1st Plaintiff, and its allocation to the 2nd Plaintiff was irregular and cannot stand.
80. But as I pen off from the point above regarding the Interested Parties’ evidence, it is important to mention that the Plaintiffs moved this court to expunge the evidence of the Interested Parties. This Court has determined the issue in a separate application it has ruled on. Thus, the evidence remains intact on the record.
81. Be that as it may, the Court found that the two documents were not public documents. Furthermore, they were certified by an Advocate and not the maker. The certification was irregular, and therefore,



the authenticity of the documents cannot be vouched. Documents, if they must be certified as true copies of originals, ought to be certified by comparing the originals or copies held by the makers with the copies being certified hence, the need to do so only by the makers or as may be authorized by the law. This Court discards the evidence in the two documents, namely the Interested Parties' Exhibits 2(a) and (b).

82. Regarding the 1st Plaintiff's claim about ownership of the Plot No. 824, PW1 produced the three Exhibits PExhs. 1, 2 and 3, as stated above. I have noted that PExh 3 was an allocation to a non-existent entity. It was not to the 1st Plaintiff. Thus, Exhibit No. 2 shows that the 1st Plaintiff was only one of three directors of the 2nd Plaintiff.
83. I have stated that a member or director of a company is not one and the same as the company. Each has a separate existence. When PExh. 2 is compared with PExh. 5 which is a letter dated 27th July 2012, it is clear that the letter purports to state that the owner of the plot measuring 0.0402 Ha. is Nicodemus E. Lowoton, the 1st Plaintiff. The Plaintiff has not produced any letter of allocation to him as an individual. The reference to him as the owner by the Surveyor does not make him an owner of Plot No. 824. In any event, it is inconceivable that a parcel of land which had already been 'allocated' to the 2nd Plaintiff would turn again to be allocated to the 1st Plaintiff or another person at the same time. Furthermore, I have looked at P. Exhibits 6(a)-(d), they refer to payments made by the 2nd Defendant to the Turkana County Government. However, as stated earlier, the said company did not exist at the time of allocation.
84. Given that the 2nd Plaintiff is distinct from the members, the 1st Plaintiff and the 2nd are separate entities that act differently and in different spheres. Further, it means that the 1st Plaintiff's actions in his individual capacity, and without any backing of resolutions of the 2nd Defendant, cannot be taken to be attributed to the 2nd Defendant. Therefore, any actions done by the 1st Plaintiff cannot be attached to or be found to be in favour of the actions of the 2nd Defendant.
85. Having found that the two plaintiffs were separate entities and the actions of one do not bind the other, it is clear that the claim by the 1st Defendant fails. There's no reasonable cause of action pleaded and proved against the Defendants by the 1st Plaintiff. I would and do hereby dismiss his case. It also goes without saying that whatever the 1st Plaintiff did in furtherance of the 2nd Plaintiff without the resolutions or authority of the said party is ultra vires, null and void. They cannot form the basis of the claim by the 2nd Defendant against the Defendants or even the Interested Party.
86. I now remain with the case of the 2nd Plaintiff. I have found that the said party brought the instant suit without any resolution of the 2nd Plaintiff. This makes the suit fatally defective.
87. Regarding the 2nd Plaintiff, it is this court's view that Locus standi is the cornerstone of any case, and before a party files a case, he or she must be certain that they are clothed with the requisite capacity to sue and be sued. In the case of Law Society of Kenya v Commissioner of Lands and Others, Nakuru High Court, Civil Case No. 464 of 2000 it was held that:

“If a party has no locus standi, then the said party cannot bring a suit to court. The issue of locus standi goes to the root of any suit and the said issue of locus standi is a point of law which is capable of disposing of a matter preliminarily.”

88. In the case of Saraf Ltd vs Augusto Ardum [2016] eKLR , the Court of Appeal held that:-

“A limited liability company is a legal person with capacity to sue and be sued (see Solomon & Solomon [1897] AC 22 (H.L)). Because it has no blood and tissue, a limited liability



company acts through its Board of Directors. The directors are invested with management and superintend of its affairs and may lawfully exercise all its powers subject to the articles of association and to the law. It has always been the law that directors are the persons who have the authority to act for the company”.

89. Further, in the case of *Amin Akberali Manji & 2 others V Altaf Abdulrasul Dadani & another* [2015] KECA 356 (KLR), the court discussed at length the issue of locus in relation to a limited liability company. It held as follows:

“..... The centuries-old case of *Salomon vs. Salomon Company Limited* [1895-99] All ER 33 laid that principle to rest. There is also no argument that the proper plaintiff in any proceedings or action in respect of a wrong done to the company is the company itself. Again, that was established over 160 years ago in *Foss vs. Harbottle* [1843] 67 ER 189 (the Foss case), popularly referred to in company law as “the rule in *Foss v. Harbottle*” (the rule). The rule was restated by Jenkins L. J. in the case of *Edwards vs. Halliwell* [1950] All ER 1064 as follows:-

“ The rule in *Foss-v-Harbottle*, as I understand it, comes to no more than this. First, the proper Plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is prima facie the company or the association of persons itself. Secondly, where the alleged wrong is a transaction which might be made binding on the company or association and on all its members by a simple majority of the members, no individual member of the company is allowed to maintain an action in respect of that matter for the simple reason that if a mere majority of the members of the company or association is in favour of what has been done, then cadit quaestio; or if the simple majority challenges the transaction, there is no valid reason why the company should not sue.”

In essence the rule established two principles. The first is the “proper plaintiff principle” and the second is “the majority principle”. Through the former, a wrong done to the company may be vindicated by the company alone. On the second principle, if the alleged wrong can be confirmed or ratified by a simple majority then a shareholder is barred from bringing an action. The principal effect in the rule is to bar actions by minority shareholders.

This Court and others in this country have indeed cited and followed the Foss case and others which came after it, as good law. The cases of *Rai and Others vs. Rai and Others* [2002] 2 EA 537 and *Grace Wanjiru Munyinyi & Another vs. Gedion Waweru Githunguri & 5 others* [2011] eKLR were cited before us to confirm that the rule in Foss case still stands in Kenya. In a recent case, *Arthi Highway Developers Ltd vs. Westend Butchery Ltd & 6 Others* Civil appeal No. 246 of 2013 this Court followed the summing up of the rule by Lord Denning M.R in *Moir vs. Wallerstainer* [1975] 1 All ER 849 at pg 857, thus:-

“It is a fundamental principle of our law that a company is a legal person with its own corporate identity, separate from the directors or shareholders and with its own property rights and interests to which alone it is entitled. If it is defrauded by a wrongdoer, the company itself is the one person to sue for the damage. (Emphasis mine by underlining). Such is the rule in *Foss V. Harbottle* [1843] 2 Hane 461. The rule is easy enough to apply when the company is defrauded by outsiders. The company itself is the only one who can sue. Likewise, when it



is defrauded by insiders of the minor kind, once again the company is the only person who can sue.”

90. From the above authorities, it is trite law that a company can sue or be sued in its own name with the sanction of its board of directors or by a resolution in a general or special meeting. In the present case, it was PW1’s testimony that the suit property was allotted to the 2nd Plaintiff. This is evident from the plot allotment No. 117 reference number PA/1/4/92 (P. Exh 3). PW1 also produced PW2’s Certificate of Incorporation and the CR12 (P. Exh 1 and 2 respectively). It is thus evident that the 2nd Plaintiff is a company incorporated under the Companies Act. On cross-examination, PW1 admitted that he did not have any authority from the company to sue on its behalf. It therefore goes without saying that the 1st Plaintiff was not authorized by the 2nd Plaintiff to act on its behalf. I find that the 1st Plaintiff instituted this suit in his own capacity but on behalf of the 2nd Plaintiff, which had the right to do so. For that reason, he lacked the locus standi to institute the suit.
91. Consequently, this suit is hereby dismissed with costs. The Interested Party’s Counterclaim is also dismissed, but each party to bear own costs.
92. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED VIA THE TEAMS PLATFORM THIS 25TH DAY OF MARCH 2025.

HON. DR. IUR F. NYAGAKA

JUDGE

In the presence of:

1. Mr. Omboto Advocate acting alongside MS. Kosgei Advocate for Plaintiffs.
2. Ondabu Advocate for the 1st – 3rd Defendants
3. Otieno Advocate for the 5th Defendant

