Njogu & 2 others (Suing as the Chairman, Secretary and Treasurer on behalf of Nyayo Market Self Help Group Phase II) v Wanjala, & another (Suing as joint Administrators of the Estate of Javan Busolo Wanjala - Deceased) & 2 others (Environment & Land Case 112 of 2011) [2023] KEELC 17606 (KLR) (30 May 2023) (Judgment)

Neutral citation: [2023] KEELC 17606 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE 112 OF 2011

FO NYAGAKA, J

MAY 30, 2023

BETWEEN

LUCAS NGARARI NJOGU ..... 1ST PLAINTIFF

SAMSON OTIENO WASEKA ..... 2ND PLAINTIFF

JOSEPH WANJOHI WAWERU ..... 3RD PLAINTIFF

SUING AS THE CHAIRMAN, SECRETARY AND TREASURER ON BEHALF OF NYAYO MARKET SELF HELP GROUP PHASE II

AND

MELAP KISAKA WANJALA, SAMUEL JULIUS MUNIALO (SUING AS JOINT ADMINISTRATORS OF THE ESTATE OF JAVAN BUSOLO WANJALA - DECEASED) ..... 1ST DEFENDANT

JAMES KAMAU GITHOMI ..... 2ND DEFENDANT

THE LAND REGISTRAR (SUED THROUGH THE HON. ATTORNEY GENERAL) ..... 3RD DEFENDANT

JUDGMENT

The Pleadings

1. The Plaintiffs rely on their Plaint further amended on 02/08/2018 and filed on 13/08/2018 seeking the following reliefs:

    aa. A declaration that the Defendants are trespassers on the Plaintiffs' parcel of land number Kitale Municipality Block 12/32 and a permanent injunction do issue restraining the Defendants,

their servants, employees or agents from interfering with the Plaintiffs' quiet possession and occupation thereof.

aaa. A declaration that the 1st Defendant is a trespasser on the Plaintiffs' parcel of land number Kitale Municipality Block 12/32 and a permanent injunction do issue restraining the 1st Defendant, his servants, employees and/or agents from interfering with the Plaintiffs' quiet possession and occupation thereof.

aa. In the event that the suit property is found to belong to the 1st Defendant, an order for specific performance and/or damages for breach of contract do issue as against the 2nd Defendant.

ab. This Honorable Court be pleased to issue declaratory orders declaring that the Plaintiffs as the legal owners and proprietors of the parcel of land known as Kitale Municipality Block 12/32 measuring 1.70 Hectares and that the Certificate of Lease as issued by the 3rd Defendant on 25th July 2006 is proper.

c. Costs.

d. Interest.

2. The 1st Defendant entered appearance on 13/01/2012. He filed a Statement of Defence and Counterclaim amended on 14/03/2014 on 19/03/2014. He subsequently died on 31/05/2017. In his stead, the 1st Defendant's estate was represented by its Administrators namely Mellap Kisaka Wanjala and Samuel Julius Munialo. The 1st Defendant filed a further amended Defence and Counterclaim dated 26/03/2019 on 27/03/2019. He denied each and every allegation contained in the further amended Plaint praying that the Plaintiffs' suit be dismissed with costs. In the Counterclaim, the 1st Defendant prayed for judgement against the Plaintiffs as follows:

a. The plaintiffs' suit be dismissed.

b. A declaration that the 1st Defendant is the lawful proprietor of all that parcel of land known as L.R. No. 2116/394/17.

c. An order of permanent injunction restraining the Plaintiffs, by themselves, their agents, servants and/or employees from trespassing on to that parcel of land known as L.R. No. 2116/394/17.

d. General damages for trespass;

e. Costs of this suit.

3. The 2nd Defendant appointed a firm of Advocates to come on record on his behalf on 30/01/2015 while the 3rd Defendant entered appearance on 06/03/2019. He filed a Statement of Defence dated 04/02/2016 on that day. The 3rd Defendant filed its Statement of Defence dated 21/06/2019 on 26/09/2019 denying the claim as set out in the Plaint. It further averred that the lease granted to the 2nd Defendant was obtained by means of fraud and thus rejected as originating from its office. It prayed that the Plaintiffs' suit be dismissed with costs.

4. In response to the 1st and 3rd Defendant's Defence, the Plaintiffs filed Replies to Defence both dated 10/05/2021 on 11/05/2021. The Plaintiffs also filed a Defence to the 1st Defendant's Counterclaim. They denied the averments contained therein and reiterated the averments in their further amended Plaint. The 2nd Defendant denied the 3rd Defendant's Defence by filing a Reply dated 09/06/2021 and filed on 11/06/2021 and prayed that the same be dismissed.

The Hearing

5. At the hearing, a number of witnesses testified as noted below.

The Plaintiffs' Case

6. The present suit is in its nature a representative suit. It was filed pursuant to leave granted on 09/11/2011 in Kitale HCC MA No. 58 of 2011 which they produced as P.Exhibit 1 on behalf of the members of Nyayo Market Self Help Group Phase II by their chairman Lucas Ngarari Njogu PW1, secretary PW2 Samson Otieno Waseka and treasurer Joseph Wanjohi Waweru (hereinafter 'the officials'). PW3 Wilberforce Kwendo replaced Joseph Wanjohi Waweru in 2008 as the group's treasurer.

7. The said group was born in 2005 with an initial membership of 100 people as evidenced by list of members produced as P. Exhibit 9. Under its rubric objective, the Group was established as an investment group to buy, build and share properties amongst its members.

8. Desirous of meeting its objectives as outlined above herein, one (1) of its members Benard Mbugua introduced the 2nd Defendant to the group officials where PW1, PW2, their treasurer Joseph Wanjohi Waweru, their vice chair Daniel Ndolo and three (3) other members namely Nancy Wangari, Elisha Mwangi And Shadrack Wafula were present. The 2nd Defendant informed them that he was the proprietor of all that parcel of land namely Kitale Municipality Block 12/32 measuring 1.70 Hectares and wished to dispose it off. Its map was produced and marked as P.Exhibit 10. Part of the information on the map however cannot be seen.

9. PW1 and his vice chair conducted a search on the property and established that the parcel of land belonged to the 2nd Defendant. However, due to a fire outbreak in 2007, the certificate of official search was not adduced in evidence as it was lost in the flames. That matter was reported at the Police Station.

10. Having established that indeed the suit land belonged to the 2nd Defendant, negotiations on the consideration sum were conducted. It is the Plaintiffs cased that on 17/07/2006, the officials purchased all that property namely Kitale Municipality Block 12/32 measuring 1.70 Hectares from the 2nd Defendant, its allottee, at a consideration sum of Kshs. 3,400,000.00 on behalf of its members. The parties entered into a sale agreement on 17/06/2006 produced as P. Exhibit 4 where the official executed it on behalf of the group. During its execution, a photograph produced as P. Exhibit 6 was taken. PW3 attested as a witness.

11. The consideration sum was paid in two (2) installments as follows: the 1st installment of Kshs. 1,500,000.00 was paid via cheque No. 003419 on 17/07/2006 as evidence by P. Exhibit 5(b) while the balance of Kshs. 1,900,000.00 was paid via cheque No. 003432 on 25/07/2006 as evidence by P. Exhibit 5(a).

12. Upon completion of paying the purchase price, the Plaintiffs were given an allotment letter dated 22/12/1995 produced as P. Exhibit 2 by the 2nd Defendant. The Plaintiffs obtained a Certificate of Lease from the Government of Kenya on the suit land on 25/07/2006 produced as P. Exhibit 7. It showed that the 2nd Defendant was its previous owner since 01/01/1996. They took possession of the suit land as the registered proprietors. The Plaintiffs contended that they had since paid rates to the relevant Municipal Council as follows:

    i. 28/07/2008 paid Kshs. 40,800.00 receipt number 10268 produced as P. Exhibit 8(a).

    ii. 28/07/2008 paid Kshs. 5,000.00 receipt number 4455 produced as P. Exhibit 8(b).

iii. 28/07/2008 paid Kshs. 1,500.00 receipt number 4454.

iv. 28/07/2008 notice of assessment charging Kshs. 47,300.00 produced as P. Exhibit 8(c).

v. Rent Clearance Certificate dated 08/06/2011 and serial number 0847 produced as P. Exhibit 8(d).

All but (v) issued in the name of the 2nd Defendant.

13. The Plaintiffs thereafter demarcated and subdivided the suit land into several plots measuring 50 by 100 ft. to thirty two (32) of its members through ballot in 2006 according to PW1 and in 2010 according to PW2 without any objections. PW3 benefited from the subdivision by receiving two (2) plots numbered eight (8) and nineteen (19). The same was surveyed by one Timothy Ayieko and took place for a period of one (1) month. The map was produced after the subdivision of the suit land and marked as P. Exhibit 11. After the said process, members of the group stayed on the land for five (5) or six (6) years without any interference where they farmed.

14. Later on, 08/09/2011, the Plaintiffs discovered that the 1st Defendant, claimed ownership over the suit land. He then entered on the suit land and caused massive destruction by putting down the fence and harvesting the maize crop planted which were then roasted. Photographs of the destruction were produced and marked as P. Exhibit 12 (a)-(e). The 1st Defendant then erected a new fence and denied members access to their respective properties.

15. The Plaintiffs reported the matter to Kitale Police Station. PW1, PW2 and PW3 were later summoned at the C.I.D offices where they recorded their statements. The 1st Defendant, who was also summoned, furnished documents of title justifying that he was the legal proprietor of the suit land. Investigations thereafter commenced; feasibly what may have informed the officer commanding the said Police Station to write to the Divisional Agricultural Extension Officer to conduct an assessment of crop harvested and/or destroyed.

16. The assessment took place on 28/10/2011 after the harvest that occurred on 07/10/2011. They monetary value was assessed at Kshs. 92,400.00. The assessment was based on the plots harvested (8 in number), acreage per plot (50 by 100 ft.) and the area of plots 519.86m squared by eight (8) plots. The assessment further took into account the plant population for one (1) acre at 18,480 plants. The report, together with the forwarding letter, was produced and marked as P. Exhibit 13.

17. on 25/09/2019 the parties were ordered by my brother Justice Mwangi Njoroge to subject themselves for survey of the suit land as evidenced by the Order given on 25/09/2019 and issued on 15/10/20219 produced as P. Exhibit 14. The Plaintiffs paid Kshs. 10,000.00 for the survey and were issued a fee receipt No. 529795 marked as P. Exhibit 15. According to PW4 Protus Muindi the surveyor's findings embedded in his report dated 19/11/2019 produced as P. Exhibit 16, plot No. L.R. 2116/394/17 and Kitale Municipality Block 12/32 refer to the same plot registered under the repealed R.T.A and R.L.A regimes respectively.

18. PW4 explained that for a title to be issued under the R.L.A regime, it needed to undergo a conversion process first from the R.T.A regime to the R.L.A regime. PW4's understanding was that a property could only vest one (1) title. As such, the subsistence of two (2) titles over the same plot could only be explained by the Land Registrar. His conclusion on ownership thus was left to the court since PW4 could not authenticate which of the titles furnished by the parties was genuine. As to occupation, PW4 established that it was the 1st Defendant since there were no erected buildings on the suit premises but Boma grass.

19. PW4 also attached a conversion table to his report dated 27/03/1992 showing that L.R. 2116/394/17 ceased to exist. It was replaced by Kitale Municipality Block 12/32 following the conversion process.

20. The Plaintiffs lamented that they have suffered for over a decade. They thus urged this court to grant the reliefs sought in their Plaint.

The 1st and 3rd Defendants' Case

21. The 1st Defendant passed away on 31/05/2017. Following his death, his estate was represented by its Administrators Samuel Julius Munialo the deceased's surviving nephew DW1 I.D No. 8331657 produced and marked as D. Exhibit 1 and Melap Kisaka Wanjala the deceased's widow. The Grant of Letters of Administration was produced and marked as D. Exhibit 2.

22. The 1st Defendant's case was that on 28/04/1972, the Commissioner of Lands Nairobi advertised for plots within Kitale Municipality for allotment vide Kenya Gazette Notice No. 1244 marked as D. Exhibit 3. They included inter alia plot No. L.R. No. 2116/394. The deceased 1st Defendant applied twice on 05/05/1972 and 22/05/1972 as evidence by the application forms produced as D. Exhibit 4(a) and D. Exhibit 4(b). He thereafter remitted Kshs. 3.00 on 10/05/1972, Kshs. 1,000.00 on 07/08/1972 and Kshs. 3,740.35 on 17/01/1973, receipts produced and marked as D. Exhibit 5(c), D. Exhibit 5(a) and D. Exhibit 5(b) respectively in fulfillment of the stipulated terms and condition of the allotment letter dated 22/11/1972 and produced as D. Exhibit 6.

23. According to the allotment letter, the 1st Defendant had paid a total sum of Kshs. 1,000.00 as at the date of the letter and was left with a balance of Kshs. 3,740.35. Although advised that the offer would automatically lapse if the sums due were not paid within thirty (30) days, the 1st Defendant was issued with a Grant I.R. No. 29494 measuring 1.747 Ha produced as D. Exhibit 7 over L.R. No. 2116/394 for a term of ninety nine (99) years commencing 01/09/1972; a culmination of his fulfilment of the obligations encapsulated in the allotment letter. He did not build on the suit land; against the special terms and conditions.

24. The 1st Defendant occupied the suit land by farming and continued to do so without any interferences. He paid all Government levies, rates and rents. He produced a receipt dated 22/12/2010 from National Bank Limited being payment of land rent in the sum of Kshs. 19,900.00, invoice dated 21/12/2010 from the Ministry of Lands indicating the sums due at Kshs. 16,297.20, invoice dated 22/12/2010 from the Ministry of Lands indicating the sum due as a negative balance of Kshs. 3,603.00 and land rent payment slip dated 22/12/2010 for payment of the sum of Kshs. 20,000.00 all in respect to L.R. No. 2116/394/Section 17 marked as D. Exhibit 8(a), D. Exhibit 8(b) and D. Exhibit 8(c) respectively.

25. However, sometime in August 2011, the 1st Defendant discovered that the Plaintiffs demarcated the suit land into smaller plots claiming ownership of. On the strength of his lawyers advise, the 1st Defendant ejected the Plaintiffs from the plot. The Plaintiffs in turn, sought the intervention of the police officers at Kitale where they were all summoned at the C.I.D offices.

26. In proving ownership, the 1st Defendant submitted the Kenya Gazette, the allotment letter, the Grant No. 29494 and land rents invoice over counter (up to 31/12/2014). On the other hand, the Plaintiffs produced an allotment letter, certificate of lease (both in respect to Kitale Municipality Block 12/32) and letter by Land Registrar to the Commissioner of Lands requesting for particulars of that title since there was no such parcel file in their records.

27. On the strength of those documents, the 1st Defendant contended that the Plaintiffs were satisfied that the property belonged to the 1st Defendant. He was advised to negotiate with the Plaintiffs and dispose of any portion of the suit land if he so wished. To his surprise however, the Plaintiff's filed the present

suit laying claim as to its ownership yet a certificate of official search dated 07/09/2020 produced as DExh.9 revealed that the property belonged to the 1st Defendant.

28. The 1st Defendant also called the Land Registrar Trans Nzoia County NELSON OTIENO ODHIAMBO DW2 to the witness stand. His evidence was that no records existed over parcel No. Kitale Municipality Block 12/32 as claimed by the Plaintiffs. That much as it was on the ground, there was no documentation available in support of its existence. When shown P. Exhibit 7, DW2 testified that it was not authentic since it was not in their database. As a matter of fact, the same had been flagged for being fake. For this reason, DW2 concluded that purported ownership of the same amounted to a fraudulent scheme. He advanced that since no copy of search was adduced, the Plaintiffs never conducted a search on the suit land. He could further not ascertain if the 1st Defendant applied for a Grant.

29. DW2 testified that the survey department in the normal conduct of their business, issues a Registry Index Map (R.I.M) to their offices before generation of a title. He could not establish how the survey fees were collected since that parcel did not exist. That the R.I.M produced by PW4 was never furnished to them for processing of title. Furthermore, conversion can only take place in Nairobi. He added that L.R. 2116/394/17 is in reference to the suit land and ownership does not change on conversion unless the owner effects transfer.

30. The 1st Defendant also called DW3 ROBERT SIMIYU Assistant Director Land and Administration in the Ministry of Lands and Physical Planning based in Nairobi to the stand. He produced his summons to attend court and give evidence and marked D. Exhibit 10. He presented certified copies of the documents in the original file No. 86078 in respect to L.R. No. 2116/394/17 Kitale Municipality marked as D. Exhibit 11.

31. According to DW3, the title in respect to the suit land was issued in favor of the 1st Defendant. That ownership has never changed to date. The title was issued on 04/03/1978 under the R.T.A regime. As such, it is not true that the parcel was converted to Kitale Municipality Block 12/32.

32. Conversion of title, he explained, is under the preserve of the Director of Surveyor. Its process could be initiated by either the Government suo motto or the proprietor. The surveyor then prepares a R.I.M and conversion area list giving the acreage and the block parcel numbers without the proprietor's name. This process only takes place in the Head office (Nairobi) and not in the regional offices.

33. These documents are then surrendered to the Director Land Administration. Copies are forwarded to the District Surveyor. The Director Land Administrator then writes to the person in possession of the R.T.A title informing them of the conversion and then requests them to surrender the original R.T.A title for issuance to an R.L.A title.

34. Thereafter the Director Lands Administration prepares a lease in the original proprietor's name and forwards it to the District Land Registrar for registration after registration of the surrender. The R.T.A title is then surrendered to the Chief Land Registrar Nairobi.

35. Having said that, DW3 testified that no conversion took place in respect to the suit land. That there were no such records in the file produced. Any such claim was thus fraudulent. However, he testified that conversion table attached to P. Exhibit 16 complied with the conversion process from L.R. No. 2116/394 to Kitale Municipality Block 12/32 but the property namely L.R. No. 2116/394/17 is registered in the name of the 1st Defendant. He maintained that since the 1st Defendant complied with the letter of allotment by making payments in spite of not having erected shops and/or a residential building, he was allotted the suit land.

36. DW3 explained that regarding non-compliance with special conditions, after the lapse of fourteen (14) days, the modus operandi compelled the institution to demand the allottee to make good the terms within twenty one (21) days indicating a cancellation if the terms are not met. Failure to abide necessitated writing a demand letter to withdraw the offer. In this instance, the allotment letter to the 1st Defendant was never withdrawn. It remained valid since it was never withdrawn or canceled irrespective of the fact that no building were erected on the land in terms of the special conditions.

37. The 1st Defendant maintained that he was the lawful proprietor. He urged this court to dismiss the Plaint and allow his Counterclaim.

The 2nd Defendant's Case

38. The 2nd Defendant James Kamau Githiomi DW4 testified on 28/07/2022. He relied on his witness statements dated 04/02/2016 and 09/06/2021. The 2nd Defendant's Statement of Defence denied that the title bestowed upon him was obtained by means of fraud. Had this been the case, he advanced, he would have been charged in a criminal court. He denied that Kitale Municipality Block 12/32 and L.R. No. 2116/394/17 were one and the same plot.

39. His evidence was that he was the allottee of all that parcel of land namely Kitale Municipality Block 12/32 measuring 1.70 Ha pursuant to a letter of allotment dated 22/12/1995. He then sold the suit land to the Plaintiffs after a search conducted verified that he was the proprietor. His testimony was that he obtained the title document from Nairobi after due process had taken place.

40. The parties subsequently entered into an agreement dated 17/07/2006 which was produced as P. Exhibit 4. The Plaintiffs took possession and ownership shortly thereafter. He assisted the Plaintiffs in fencing the suit land.

41. DW4 later discovered that the 1st Defendant, a stranger to him, claimed ownership. He maintained that he has never had any dealings with parcel No. 2116/394/17. He has never been investigated or summoned to record a statement.

42. DW4 elaborated that he discovered the land when he was working for it. He had obtained a temporary license to plough for several years. He applied for proprietorship later when he established that it was free of any encumbrance. He was adamant that the land existed as established on the map and the survey department. He prayed that the 1st Defendant's Counterclaim be dismissed and that the Plaint be allowed since the Plaintiffs are the lawful proprietors.

Submissions

43. At the close of evidence, parties elected to file and serve written submissions that were extensively elaborate. The Plaintiffs' submissions dated 04/10/2022 were filed on 12/10/2022. The 1st Defendant filed his submissions dated 05/12/2022 on 06/12/2022, the 2nd Defendant filed his submissions dated 21/10/2022 on 24/10/2022 while the 3rd Respondent filed its submissions dated 21/11/2022 on 24/11/2022.

Analysis and Disposition

44. I have carefully considered the pleadings, examined the evidence and scrutinized the involute submissions relied on by the parties herein. I have also analyzed the law applicable to establish that the following issues fall for determination:

    i. What is the nature of an allotment letter?

ii. Who is the proprietor of the suit land?

iii. The effect of the 2nd Defendant's failure to file his statement of Defence

iv. What orders are to issue?

45. I shall now determine the dispute in the manner set out above herein as hereunder:

i. What is the nature of an allotment letter?

46. In sanitizing their acquisition process of the suit land, the Plaintiffs and the 1st Defendant both relied on separate letters of allotment. The Plaintiffs relied on that issued in favor of the 2nd Defendant dated 22/12/1995 which was produced and marked as P. Exhibit 2 in respect to Kitale Municipality Block 12/32 measuring 1.70 Hectares. Conversely, the 1st Defendant impressed this court with an allotment letter produced and marked as D. Exhibit 6 dated 22/11/1972 to establish that he was and remains the proprietor of the suit land namely L.R. No. 2116/394/17.

47. It is trite law that an allotment letter is in its nature an invitation to treat and does not in itself confer proprietary rights. It does not exclusively entitle the allottee that it is a title in respect to the land in question. It is upon acceptance and fulfillment of the conditions that an allotment letter confers absolute right of ownership and in the circumstances cannot be offered to someone else. In *Mbau Saw Mills Ltd v Attorney General for and on behalf of the Commissioner of Lands) & 2 Others* [2014] eKLR, the court held:

> "I have considered the evidence on record and the submission of the parties and do find that a letter of allotment was issued to Mr. Joseph K. Mugambi on 21/10/1971 with a condition to accept the offer within 30 days. He did not do so and thereafter the offer lapsed 30 days after it was made in accordance with the allotment letter. Having failed to accept the offer as stipulated in the letter of allotment Mr. J.K. Mugambi did not acquire interest in the unsurveyed lorry depot and therefore had no interest to transfer to the plaintiff. This court holds that a letter of allotment does not confer any property rights to a person unless there is acceptance and payment of the stand premium and ground rent. In the letter dated 17/6/1988 which was written about 17 years after the allotment letter was issued, the Commissioner of Lands confirmed that the plot was allocated to Joseph M. Mugambi in 1971 for lorry depot. However, the plot had neither been paid for nor an acceptance of the offer in the allotment letter made. The implication of this letter was that the allottee had not complied with the terms of the allotment letter and therefore the offer had lapsed. The offer having lapsed, the allottee Mr. Joseph M. Mugambi did not have any interest to transfer to the plaintiff and therefore all transactions between the allottee and the plaintiff were a nullity in law."

48. Odunga, J. (as he then was) in *Republic v City Council of Nairobi & 3 Others* [2014] eKLR, had this to say about land that has already been allotted:

> "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 unless it is challenged by the allotting authority or is acquired through fraud, mistake or misrepresentation or that the allotment was out rightly illegal or it was against public interest. In other words, where land has been allocated, the same land cannot be reallocated unless the first allocation is validly and lawfully cancelled."

49. From the above authorities and the conduct of allottors and allottees generally, it appears that it is not a hard and fast rule that all conditions of the letter of allotment are fulfilled. Remember, the allotment letter is an invitation to treat. It is then the allottee who offers to abide by the conditions embedded therein. If the allottor accepts the offer in the manner of paying the requisite fees and/or any other indicators, the rights of ownership are conferred as first in time. To that end, it can only be revoked by way of a valid and lawful cancellation if the allottor is unsatisfied with the allottee's offer. This brings me to my next issue for determination.

ii. Who is the proprietor of the suit land?

50. Before establishing the proprietor of the suit land, it is instructive to note that pursuant to this court's directions on 25/09/2019, PW4, the District Surveyor, established that plot No. L.R. 2116/394/17 (as defined by the 1st Defendant) and Kitale Municipality Block 12/32 (as defined by the Plaintiff) refer to the same plot registered under the repealed R.T.A and R.L.A regimes respectively. Although establishing that the 1st Defendant was in occupancy, he could not ascertain who amongst the Plaintiffs and the 1st Defendant was the lawful proprietor of the suit land.

51. PW4 also attached a conversion table to his report dated 27/03/1992 showing that L.R. 2116/394/17 ceased to exist. It was replaced by Kitale Municipality Block 12/32 following the conversion process. I will revert to this issue of conversion in a short while.

52. The Plaintiffs purchased the suit land from the 2nd Defendant who supported their claim by and large. Their evidence was that they identified all that parcel of land namely Kitale Municipality Block 12/32 measuring 1.70 Hectares as belonging to the 2nd Defendant.

53. It is that letter of allotment issued to the 2nd Defendant on 22/12/1995 that the Plaintiffs are relying on to testify that the ultimate acquisition of its title was lawful and procedural. I have carefully looked at the said letter of allotment and I made the following observations; firstly, the letter of allotment was subject to the provisions of the Government Lands Act with a title being issued under the Registration of Titles Act.

54. Looking at the title name, I find that it was in fact one showing that it was a title issued under the Registered *Land Act* and not the Registration of Titles Act. It is the same one that appeared in the Plaintiffs' title document issued in their favor on 25/07/2016. This begs the question; when did conversion take place since a property could only acquire a Registered *Land Act* title upon a conversion process from the Registration of Titles Act? Suffice to add that the terms of allotment were that a title would be issued under the Registration of Titles Act.

55. Secondly, the letter of allotment speaks of special conditions which are attached. However, the letter of allotment produced by the Plaintiff bears no such attachment. It is therefore incomplete since no special conditions and terms were furnished for the benefit of this court. How then would the court have established the terms and condition set out and whether complied with where it was furnished with an incomplete document?

56. It appears that from the facts as delineated by the Plaintiffs, the 2nd Defendant acquired title on 01/01/1996, a whooping nine (9) days after the letter of allotment was written. Aside from the fact that there were no proof of payments of the sum sought from the Government, there was no explanation as to how the property was purchased and converted to the R.L.A regime within nine (9) days.

57. DW3 an Assistant Director Land and Administration in the Ministry of Lands and Physical Planning based in Nairobi elaborately explained the process of conversion. In his uncontroverted expert evidence, DW3 exposited that conversion of title commences with the initiation of the process by the

Government or the proprietor of the suit land. Thereafter, the Director of Surveys prepares a R.I.M and conversion area list giving the acreage and the block parcel numbers without the proprietor's name. This process only takes place in the Head office (Nairobi) and not in the regional offices.

58. Thereafter, the documents are surrendered to the Director Land Administrator. Copies are forwarded to the District Surveyor. The Director Land Administrator then writes to the person in possession of the R.T.A title informing them of the conversion and requests them to surrender the original R.T.A title for issuance of a new R.L.A title.

59. The Director Lands Administrator then prepares a lease in the original proprietor's name and forwards it to the District Land Registrar for registration after registration of the surrender. The R.T.A title is then surrendered to the Chief Land Registrar Nairobi.

60. In assessing the probative value of the evidence of DW3, I am guided by pronouncement of the Court of Appeal, in *Kimatu Mbuvi T/A Kimatu Mbuvi & Bros v Augustine Munyao Kioko* Civil Appeal No. 203 of 2001 [2007] 1 EA 139 that had this to say about expert opinion/evidence:

> " Like other sciences, medicine is not an exact science and that is why expert medical opinion is no different from other expert opinions and such opinions are not binding on the Court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a Court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so."

61. DW3's expert evidence was explicitly detailed evincing the conversion process. He established how the conversion process takes place, the relevant offices and the parties involved and each role every player takes in achieving a comprehensive conversion process. Coupled with the fact that his expert evidence was not challenged by another expert, I am of the view that the process of conversion as explained by DW3 was cogent, credible and reliable and created a solid foundation on the conversion process.

62. From that evidence, there can be no unimaginable view how that purported conversion process could take nine (9) days for the same to conclude. For those reasons, I concur with DW3 to find that no conversion took place in respect to the suit land. It is also instructive to note that the 2nd Defendant denied that the property in question was originally L.R. No 2116/394/17.

63. Thirdly, the Plaintiffs failed to establish how the 2nd Defendant acquired the suit land. Why do I say so? While we are aware that a letter of allotment was issued in his favor on 22/12/1995, as stated earlier in this judgment, the same could not confer rights until conditions had been fulfilled. I am unable to establish that based on the fact that the 2nd Defendant did not furnish receipts in support of proof of payment. All we have is the title which we have already established could not have been issued in the absence of a punctilious conversion process which even we were overzealous could not take nine (9) days in completion.

64. The Plaintiffs testified that they conducted a search. The same revealed that the suit land belonged to the 2nd Defendant. However, no search results were produced. In that stead, they testified that a fire broke out in 2007 out of which the search certificate was burned. It was their evidence that they reported the matter to the police station and relied on PMFI3 in support of the report; a document that remained unmarked for identification.

65. The Court of Appeal in *Kenneth Nyaga Mwige v Austin Kiguta & 2 Others* [2015] eKLR held as follows on documents not marked for identification:

> " Guided by the decisions cited above, a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness. In not objecting to the marking of a document for identification, a party cannot be said to be accepting admissibility and proof of the contents of the document. Admissibility and proof of a document are to be determined at the time of production of the document as an exhibit and not at the point of marking it for identification. Until a document marked for identification is formally produced, it is of very little, if any, evidential value.
>
> In the instant case, we are of the view that the failure or omission by the respondent to formally produce the documents marked for identification being MFI 1, MFI 2 and MFI 3 is fatal to the respondents' case. The documents did not become exhibits before the trial court; they had simply been marked for identification and they have no evidential weight. The record shows that the trial court relied on the document "MFI 2" that was marked for identification in its analysis of the evidence and determination of the dispute before the court. We are persuaded by the dicta in the Nigerian case of Michael Hausa vs. The State (1994) 7-8 SCNJ 144 that a document marked for identification is not part of the evidence that a trial court can use in making its decision.

66. Since the said report was not marked for identification, it is my finding that it could not be relied upon as the evidence thus amounted to hearsay. For that reason, I find that no positive action was taken by the Plaintiffs in ascertaining ownership of the suit land. In the circumstances, I am not satisfied to hold that the Plaintiffs indeed conducted a search or in the alternative, took any action to obtain the lost search once it was lost by fire. In any event, what stopped them from conducting a historical search and producing the same before this court?

67. In proving ownership, the Plaintiffs further relied on the receipts from the Municipal Council issued in the name of the 2nd Defendant. Although they testified that they were payments in respect to rates, I make the following observations: on P. Exhibit 8(a), the same is a Rates Clearance Certificate valid in 2011 in respect to plot No. 2116/21 on Block 12; marked as P. Exhibit 8(b) was issued as a site value rate receipt in respect to plot No. 2116/21 on block 12. marked as P. Exhibit 8(b). It was referenced 4455 and indicated that it was in payment of change of name from T. Kamau to the Plaintiffs' self-help group; P.Exhibit 8(b) referenced 4454 was in payment of an application and clearance; P. Exhibit 8(c) was a notice of assessment on the site value rates in respect to plot No. 2116/21 on block 12.

68. With those narrations on the receipts bearing no congruence, I am not quick to hold that the payments were in respect to rates for the year 2008. In any event, if the property had already been transferred to the Plaintiffs on 25/07/2006, what was the business of the 2nd Defendant in remitting rates to the suit property yet it did not belong to him?

69. The Plaintiffs relied on the certificate of lease issued in their favor on 25/07/2006 to fortify that Section 26 of the *Land Registration Act* protected their registered interests since the document of title was conclusive proof of ownership. Section 26 of the Act provides as follows:

> " The Certificate of Title issued by the Registrar upon registration ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner... and the title of that proprietor shall not be subject to challenge except:

a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or

b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme."

1. As such, a document of title will not be upheld as conclusive proof of ownership if it was obtained in the manner set out in Section 26 of the Act. In the present case, not only was I not convinced that the conversion process took place and if it so do, was unprocedural, I further find the Plaintiffs' lackadaisical manner in obtaining a search certificate for the benefit of this court as to allude to a corrupt scheme with the 2nd Defendant. There was no proper procedure followed and I find that the title document was illegally obtained where the Plaintiffs and the 2nd Defendant colluded with each other to obtain title.

2. Furthermore, I also observe that in settling the purported consideration sum, the second installment of the sum of Kshs. 1,900,000.00 was paid via cheque No. 003432 on 25/07/2006 the very same day the title was processes in the Plaintiffs favor! It cannot certainly be denied that collusion in a corrupt scheme was brewing between the Plaintiffs and the 2nd Defendant.

3. It is clear and beyond any form peradventure that the 2nd Defendant could not pass what he did not have. The initial process was a nullity and the acquisition of the property therein must also suffer its fate. As was held in the case of *Macfoy vs. United Africa Co. Ltd* [1961] 3 All E.R. 1169: "If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

4. The Plaintiffs have not further demonstrated that they fell under the exceptions to the nemo dat quod non habet rule. For these reasons, I find that the said parcel of land does not belong to the Plaintiffs as alleged.

5. Turning to the evidence of the 1st Defendant, it was testified that on 28/04/1972, the Commissioner of Lands Nairobi advertised for plots within Kitale Municipality for allotment vide Kenya Gazette Notice No. 1244. They included inter alia plot No. L.R. No. 2116/394. The deceased 1st Defendant acceded to this call and applied on 05/05/1972 and 22/05/1972. He thereafter remitted Kshs. 3.00 on 10/05/1972, Kshs. 1,000.00 on 07/08/1972 and Kshs. 3,740.35 on 17/01/1973, receipts produced and marked as D. Exhibit 5(c), D. Exhibit 5(a) and D. Exhibit 5(b) respectively in fulfillment of the stipulated terms and condition of the allotment letter dated 22/11/1972.

6. According to the allotment letter, the 1st Defendant had paid a total sum of Kshs. 1,000.00 as at the date of the letter and was left with a balance of Kshs. 3,740.35. Although advised that the offer would automatically lapse if the sums due were not paid within thirty (30) days, the 1st Defendant was issued with a Grant I.R. No. 29494 measuring 1.747 Ha produced as D.Exhibit 7 over L.R. No. 2116/394 for a term of ninety nine (99) years commencing 01/09/1972; a culmination of his fulfilment of the obligations encapsulated in the allotment letter. He did not build on the suit land; against the special terms and conditions.

7. The 1st Defendant occupied the suit land by farming and continued to do so without any interferences. He paid all Government levies, rates and rents. He produced a receipt dated

22/12/2010 from National Bank Limited being payment of land rent in the sum of Kshs. 19,900.00, invoice dated 21/12/2010 from the Ministry of Lands indicating the sums due at Kshs. 16,297.20, invoice dated 22/12/2010 from the Ministry of Lands indicating the sum due as a negative balance of Kshs. 3,603.00 and land rent payment slip dated 22/12/2010 for payment of Kshs. 20,000.00 all in respect to L.R. No. 2116/394/Section 17.

8. He further conducted a search on 07/09/2020 revealing that the property belonged to him. His evidence was corroborated by DW2, the Land Registrar Trans Nzoia County Nelson Otieno Odhiambo DW2 as well as DW3.

9. DW2 was emphatic that no records existed over parcel No. Kitale Municipality Block 12/32. In fact, he found the title produced by the Plaintiffs as spurious it was not in their database. His conclusion, together with that of DW3, was that it was obtained by means of fraud.

10. Importantly, he added that L.R. 2116/394/17 is in reference to the suit land and ownership does not change on conversion unless the owner effects transfer. Corroborating his evidence, DW3 testified that title No L.R. 2116/394/17 was issued in favor of the 1st Defendant on 04/03/1978 under the R.T.A regime. That ownership has never changed to date. He maintained that no conversion has ever taken place on the suit land namely L.R. 2116/394/17.

11. Based on the above evidence that was sequentially provided, I find that the 1st Defendant indeed obtained the suit land which I do hold is namely L.R. 2116/394/17 and not Kitale Municipality Block 12/32 by way of allotment letter. The 1st Defendant satisfied the conditions as set out by the allottor and it was for this reason that he was issued with a Grant under the Registration of Title Act as explained in his allotment letter.

12. The Plaintiffs and 2nd Defendant together opined that since the 1st Defendant failed to fulfill the timeless set out in the allotment letter, his offer automatically lapsed. However, as I have earlier found in this judgment, the allotment letter is an invitation to treat. It only reserves protection of rights once obligations have been met and accepted. Furthermore, it could only be revoked by way of a valid and lawful cancellation process.

13. Although the 1st Defendant failed to erect shops and/or a residential building, DW3 explained that regarding non-compliance with special conditions, after the lapse of fourteen (14) days, the modus operandi compelled the institution to demand the allottee to make good the terms within twenty one (21) days indicating a cancellation if the terms are not met. Failure to abide necessitated writing a demand letter to withdraw the offer.

14. In this instance, the allotment letter to the 1st Defendant was never withdrawn. It remained valid since it was never withdrawn or canceled irrespective of the fact that no building were erected on the land in terms of the special conditions. Additionally, on conducting a search on 07/09/2020, it was revealed that the said property remains registered in the 2nd Defendant's name.

15. It is for the above reasons that I find that the suit property namely L.R. 2116/394/17 and not Kitale Municipality Block 12/32 belongs to the 1st Defendant. I also find that the conversion process to Kitale Municipality Block 12/32 was illegal and unlawful as is therefore null and void. For these reasons, I am persuaded to hold that the 1st Defendant holds a valid title in respect to the suit land.

iii What orders are to issue?

85. I have already found that the Plaintiffs are not the lawful registered owners of the suit land. Based on the evidence adduced, I find that the Plaintiffs have failed to establish that on a balance of probabilities that their claim was merited. They are therefore not entitled to any of the reliefs sought.

86. On the other hand, I have been persuaded by the evidence of the 1st Defendant to conclude that he is the registered proprietor of the suit land. The same vests in his estate following his unfortunate death. The 1st Defendant inter alia, sought general damages for trespass.

87. Section 3 (1) of the *Trespass Act* provides as follows:

> " Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence."

88. It was the Plaintiffs case that members of the Nyayo Market Self Help Group Phase II entered on the suit land and started planting maize. The same was subsequently destroyed by the 1st Defendant when he discovered that the Plaintiffs had trespassed on the suit land. The 1st Defendant confirmed that he evicted the Plaintiffs from the suit land when he discovered that they had gained ingress upon the suit land without his permission.

89. I wish to state that I do not by any means find that the destruction of the maize crops was the solution. What the 1st Defendant ought to have done was to report the incident of trespass to the nearest police station seek injunctive relief without resorting to extremisms. Having said that, the suit land belongs to the 1st Defendant. The Plaintiffs gained access to the suit land without any color of right. By definition of trespass per statute, the 1st Defendant is entitled to general damages for trespass.

90. In assessing the general damages, the 1st Defendant submitted that he was entitled to the sum of Kshs. 300,000.00. The court in *Philip Aluchi v Crispinus Ngayo* [2014] eKLR established the following principles in assessing the measure of damages:

> " The plaintiff is entitled to General Damages for trespass. The issue which arises is as to what is the measure of such Damage. It has been held that the measure of Damages for trespass is the difference in the value of the Plaintiff's property immediately after the trespass or the costs of restoration, whichever is less ..."

91. In the present case, the 1st Defendant gave a ballpark figure without establishing justification in line with the principles set out in assessing damages. This thus raises difficulties in assessing damages. In *Willesden Investments Limited vs. Kenya Hotel Properties Limited* NBI H.C.C. No. 367 of 2000 the court stated that;

> " There is no mathematical or scientific formula in these types of cases and that the guiding factors are the circumstances in each case."

92. Taking into account the unlawful entry by the Plaintiffs on the suit land and the ploughing thereof and planting of maize thereon, and the subsequent destruction by the 1st Defendant of the crop which was on the ground as reported by PW4's (which evidence was undisputed), I find that the 1st Defendant's actions militate against the amount payable to him for the claim of trespass. I would have assessed the general damages payable at Kshs. 210,000/= but since to grant a sum as though he did nothing would encourage lawlessness to flourish in our society I think and do find that I should not. This Court should

not encourage lawlessness. Therefore, I exercise my discretion and award a peppercorn sum of Kshs. 20,000.00 as general damages for trespass.

Orders and Disposition

93. My orders and disposition are as follows:

    i. A declaration be and is hereby made that the 1st Defendant is the lawful proprietor of all that parcel of land, the suit land namely L.R. No. 2116/394/17.

    ii. A permanent injunction be and is hereby issued restraining the Plaintiffs, by themselves, their agents, servants and/or employees from trespassing on to that parcel of land known as L.R. No. 2116/394/17.

    iii. The 1st Defendant is awarded Kshs. 20,000.00 as general damages for trespass.

    iv. The Plaintiff's suit is dismissed with costs to the 1st and 3rd Defendants.

    v. The 1st Defendant who is the Plaintiff in the Counterclaim shall have costs of his Counterclaim which shall be met by the Plaintiff and 2nd Defendant.

    vi. Interest on (c), (d) and (e) above is awarded and shall be assessed from the date of judgment until payment in full.

94. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 30TH DAY OF MAY, 2023.

HON. DR.IUR FRED NYAGAKA

JUDGE, ELC KITALE

JUDGMENT IN KITALE ELC NO. 112 OF 2011 - D.O.D. - 30/05/2023	0