



**Chiuri v Mwaniki & 2 others (Environment & Land Case  
2204 of 2007) [2023] KEELC 18877 (KLR) (13 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18877 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 2204 OF 2007**

**LN MBUGUA, J  
JULY 13, 2023**

**BETWEEN**

**STEPHEN MURIUKI CHIURI ..... PLAINTIFF**

**AND**

**ALICE MWANIKI ..... 1<sup>ST</sup> DEFENDANT**

**JOHN KIAGO ..... 2<sup>ND</sup> DEFENDANT**

**THE NAIROBI CITY COUNCIL ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. This case has had a tumultuous history straddling about 17 years in the corridors of justice!, with the case being dismissed not ones, not twice but severally as seen in the proceedings of 26.1.2012, 20.1.2017, 8.11.2018 and 21.5.2020. The hearing of the case eventually took off on 22.11.2021 when the court declined to adjourn the case even though all advocates for the parties were bent on having the case adjourned.
2. The suit was commenced by a plaint dated 17.10.2007, where the plaintiff avers that on or about 26.11.1998, he bought a piece of land known as Plot No.R6 in LR No.71/ 5 situated at Kahawa West from Mawingo Munyeki Self Help Group which was in turn allotted the said land by the 3<sup>rd</sup> Defendant. He further avers that he erected a permanent house on the suit property where he has been staying since January 2000.
3. The Plaintiff also avers that the Defendants acting through their agents and in particular the 2<sup>nd</sup> Defendant have encroached upon and interfered with his possession and quiet enjoyment of the suit property.



4. He contends that any alleged subsequent allocation of part of plot No. R6 contained in LR No.71/5 to the 1<sup>st</sup> Defendant who in turn sold such a portion of land to the 2<sup>nd</sup> Defendant was done fraudulently. He therefore seeks the following orders;
  - i. A permanent injunction to be issued restraining the Defendants by themselves, agents, employees and/or servants and/or any other person claiming suit property under them from entering, trespassing, sub-dividing, selling, disposing or alienating all that piece of land known as Plot No.R6 contained in LR No.71/5.
  - ii. A declaration that the said Plot No.R6 being part of LR No.71/5 rightfully belongs to the Plaintiff.
  - iii. General damages for trespass.
  - iv. Costs of the suit.
  - v. Interest on iii) and iv) above at court rates.
  - vi. Any other or further relief that this Honourable Court may deem fit to grant.
5. The application is opposed by the 1<sup>st</sup> Defendant vide her statement of defence dated 7.10.2008 where she denies the allegations levelled against her by the Plaintiff and contends that on or about September 2001,the 3<sup>rd</sup> Defendant approved formal allocation of Plot No. R6 Kahawa West Phase II to her, that she paid ksh.7200/= stand premium and ksh.1,440/= ground rent.
6. Subsequently, she was issued with a beacon certificate duly signed by the 3<sup>rd</sup> Defendant's Land Surveyor and Chief Land surveyor. She then sold the property to the 2<sup>nd</sup> Defendant on 23.2.2004 and duly informed the 3<sup>rd</sup> Defendant.
7. The 1<sup>st</sup> Defendant also avers that her property is different from the property which the Plaintiff occupies, since at the time she was selling her vacant plot, the Plaintiff was already in occupation of his plot which is completely separate.
8. The 2<sup>nd</sup> defendant opposes the suit vide his statement of defence dated 12.11.2008 filed in court a day later. He denies the claims of the plaintiff and contends that he bought the suit land from the 1<sup>st</sup> defendant, which land is different from that of the plaintiff. He adds that after the sale, he took possession of the suit land and commenced developments thereon.
9. The statement of defence of the 3<sup>rd</sup> Defendant is undated but was filed on 23.10.2008. It admits that it allotted Plot No. R6 to Mawingo Munyeki Self Help Group. It also avers that the Plaintiff has no cause of action against it since there is no privity of contract between it and the Plaintiff.

### **The Evidence**

10. The Plaintiff Stephen Muriuki Chiuri called 3 witnesses, and he testified as PW1. He adopted his witness statement dated 17.11.2017 as his evidence. He produced 18 documents contained at page 11-41 of his bundle dated 31.7.2019 as P. Exhibit 1-18.
11. Pw1 contends that on 26.11.1998, he purchased a parcel of land known as Plot No. R6 from Mawingo Munyeki Self Help group, which was hived from LR 71/5 Kahawa West and a sale agreement was executed. It provided that the seller would execute a special Power of Attorney which was duly executed on 26.11.1998 in favour of the buyer granting the buyer power to transfer the parcel to himself or to any other person that the buyer would appoint.



12. PW1 further states that he was issued with a beacon certificate on 21.5.1996 by the 3<sup>rd</sup> Defendant. He adds that on 20.5.1997, Mawingo Munyeki Self Help Group paid ksh.13, 160/= to the 3<sup>rd</sup> Defendant as surveyor fees to facilitate the surveying of the suit plot.
13. He states that in 1999, after obtaining the relevant clearances from the 3<sup>rd</sup> Defendant and his building plans having been approved, he built a permanent house in the suit parcel and thereafter moved in with his family in the year 2000 where he lives to date and he pays annual ground rent to the government every year.
14. He states that in the year 2007, the 2<sup>nd</sup> Defendant trespassed into his property and assaulted his wife claiming that the suit parcel was his. He also destroyed his fence and deposited building materials despite the 3<sup>rd</sup> Defendant having issued him with a notice requiring him to stop the construction and encroachment.
15. He also states that in October 2007, the Director of City Planning issued a written confirmation that the suit parcel is still registered in the name of Mawingo Munyeki Self Help Group and was awaiting issuance of title.
16. Upon cross examination, PW1 stated that the 1<sup>st</sup> Defendant is the one who sold the suit plot to the 2<sup>nd</sup> Defendant who disturbs him. He stated that his plot is R6 which is part of block 71/5 and which he was shown as per P. Exhibit 5 which is the beacon certificate issued on 15.2.2007. He further stated that he paid for survey as per the receipt dated 21.5.1996.
17. He stated that as per P. Exhibit 9 which is a proposed site location plan, his name is there and his plot can be identified as R6 between R5 and R7 and measures 40 by 80 feet.
18. When referred to P. Exhibit 10, which is Town Planning Committee Minutes, he stated that it does show that the 2<sup>nd</sup> Defendant's plans were cancelled. Referred to P. Exhibit 11, he stated that it is dated 12.6.2007 and that he cannot recall what he was paying for but it makes reference to is R6/71/5.
19. He also stated that they have tried to transfer the suit plot from Mawingo for 7 years but they kept on being told to wait. Referred to a receipt dated 18.10.2007 issued to Mawingo Munyeki Self Help Group by the 3<sup>rd</sup> Defendant, he stated that the same has writings of one Oscar at the bottom whom he knows as he was the keeper of records of Block 71/5 and that his writings indicate that the plot is okay as shown on PDP.
20. Referred to a letter dated 9.3.2006 referenced, he stated that the document talks of disputes in R5, R6 and R7.
21. He reiterated that he has built his house on his land; the house stands on half of the suit plot R6 on 20 feet, while on the other piece, there is a sewer line and stores. He added that the 2<sup>nd</sup> Defendant has nothing there.
22. Upon re-examination, PW1 stated that P. Exhibit 10 shows that the Director of City Planning recommended that the PDP generated by the 2<sup>nd</sup> Re-Planning be cancelled, therefore all 2<sup>nd</sup> allotments including the one to the 1<sup>st</sup> Defendant were cancelled. He also stated that the Chief Land Surveyor did a memo and it is the one which issued the enforcement notice directed to the 2<sup>nd</sup> Defendant to stop construction.
23. PW2, one Nancy Wagaturi Muriuki adopted her witness statement dated 17.11.2018 as her evidence, where she introduced herself as the wife of the plaintiff. She gave an account of how on 10.10.2007, the 2<sup>nd</sup> Defendant accompanied by his servants/agents stormed into the suit premises and removed the



- fence made of iron sheets. Then the Son of the 2<sup>nd</sup> defendant attacked her with kicks and blows causing her to fall on a sharp wood where she sustained injuries and was rescued by neighbours and members of the public. Subsequently, She reported the assault and trespass at Kiamumbi Police Station under O.B dated 10.10.2007 and she was issued with a P3 form.
24. She states that the suit property belongs to her husband and that they have built a permanent house and live on the suit premises but the Defendants have illegally encroached on the same.
  25. Upon cross-examination, PW2 stated that the Plaintiff has an allotment letter and not title and that the said allotment letter is issued to Mawingo Munyeki, which was allotted by the 3<sup>rd</sup> Defendant. She further stated that the Plaintiff was also issued with a beacon certificate after survey was done. She added that they started staying on the suit plot on 30<sup>th</sup> or 31<sup>st</sup> December 1999 and on 1.1.2000, they were fully on the suit plot.
  26. Upon re-examination, PW2 stated that though the plot has double allocation, there are minutes cancelling the 2<sup>nd</sup> allotment, thus the final allottee was Mawingo Munyeki who sold the suit plot to the Plaintiff.
  27. PW3, one Moses Murere Macharia adopted his witness statement dated 17.11.2017 as his evidence, where he introduced himself as the Chairman of Mawingo Munyeki Self Help Group, which was a welfare association. The group was allocated Plot No. R6 in LR No.71 /5 situated in Kahawa West by the Nairobi City Council vide a letter of allotment dated 21.5.1996 and that they were issued with the beacon certificate dated 21.5.1996 after they paid the requisite charges.
  28. Subsequently, they sold the plot to the Plaintiff vide a sale agreement dated 26.11.1998 and they granted him a Special Power of Attorney in relation to the said plot which they have never sold to anyone else.
  29. He also states that following the encroachment of the suit premises by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, they wrote to the Nairobi City Council on 15.6.1996 complaining of the same on behalf of the Plaintiff. He adds that the 3<sup>rd</sup> Defendant has on several occasions confirmed that the parcel is still registered in the name of Mawingo Munyeki Self Help Group.
  30. Upon cross-examination, PW3 stated that he does not know the 1<sup>st</sup> Defendant and though he hears there was double allocation of the suit plot, they sold the same to the Plaintiff. He further stated that they don't have title or certificate of lease. They gave the Plaintiff a special Power of Attorney signed by 3 signatories of the group. They did so because the suit plot was for the group, since the transfer was not to be done immediately and the donee of the Power of Attorney had the mandate to proceed with the transfer even if members of Mawingo group were absent.
  31. When referred to the letter dated 9.3.2006 addressed to director City Planning and signed by a representative of Mawingo, he indicated that there was double allocation but he cannot remember who wrote the said letter. He further stated that members of Mawingo Self Help Group were employees of City council and he does not know if they had access to City Council records.
  32. Referred to the memo dated 9.3.2006 from Chief Land Surveyor, he stated that it shows that there were allocation disputes, but by year 2006, the Plaintiff owned the suit plot.
  33. PW3 also stated that while the allotment letter indicated that they were to pay premiums within 30 days, they did not do so, they effected payments on 20.5.1997, about 1 year after the allotment was issued.



34. Upon re-examination, PW3 stated that the beacon certificate is dated 21.5.1996 but the date of issuance was 2007. He further stated that no law prohibits members of Mawingo Self Hep Group to work at City Council. That since they gave the Plaintiff a Power of Attorney, he had the mandate to pay rates. He added that the letter of 9.3.2006 relates to when disputes started but they had no knowledge of how those disputes arose.
35. Pw3 concluded by saying that the suit land is 71/5 Plot No. R6 and that there is no other land known as such.
36. The case of the 1<sup>st</sup> Defendant was advanced by ALICE MWANIKI, herself, testifying as DW1. She adopted her witness statement dated 4.10.2021 as her evidence in chief. She produced 6 items in her bundle of documents dated 4.10.2021 as D. Exhibit 1-6.
37. Dw1 avers that on 21.9.2001, the 3<sup>rd</sup> Defendant approved the formal allocation of Plot No. R6 Kahawa Phase II to her. She paid stand premium of kshs.7,200/= and ground rent of ksh.1440/=. Thereafter, the 3<sup>rd</sup> Defendant brought a surveyor who accompanied her to Kawaha West & showed her the beacons defining the said plot. She was then issued a beacon certificate by the 3<sup>rd</sup> Defendant duly signed by the land surveyor and the Chief Land Surveyor.
38. She states that as the legal owner of Plot No. R6 Kahawa West Phase II, she decided to sell the plot on or about 23.2.2004 to the 2<sup>nd</sup> Defendant for ksh.250,000/= and that she duly notified the 3<sup>rd</sup> Defendant of the sale and requested it to transfer the plot to the 2<sup>nd</sup> Defendant.
39. Further and for purposes of facilitating the transfer of plot No. R6 Kahawa Phase II to the 2<sup>nd</sup> Defendant, she requested the 3<sup>rd</sup> Defendant to survey the plot and paid ksh.15,000/= survey fees. She adds that prior to the sale of the plot, she enjoyed quiet possession and encountered no problems regarding ownership of the said property.
40. Upon cross-examination, DW1 stated that the suit plot was not occupied when she took possession and that she did not build there. She is not aware of a gazette notice revoking her allocation. After selling the land, the 2<sup>nd</sup> defendant occupied the same from 2004-2007.
41. The case of the 2<sup>nd</sup> Defendant was advanced by John Kiago, himself testifying as DW2. He adopted his undated witness statement as his evidence. He avers that he purchased Plot No. R6 Kahawa West Phase II from the 1<sup>st</sup> Defendant for ksh.250,000/=. Subsequently, the 1<sup>st</sup> Defendant issued him with all receipts, allotment letter and she also notified the 3<sup>rd</sup> Defendant of the sale and requested it to survey the plot after she had paid survey fees.
42. He then took possession of the subject parcel and Commenced construction and has been paying ground rent as required by the law.
43. He contends that he is an innocent purchaser. That in 2016, he noticed the construction of a perimeter wall on the suit property whereupon inquiry, he was informed that it was the Plaintiff who commenced the construction. He adds that prior to purchasing the suit property, the 1<sup>st</sup> Defendant had informed him that she had enjoyed quiet possession and the land had no issues in regard to previous ownership or any pending application.
44. Upon cross-examination, DW2 stated that he purchased plot R6 from the 1<sup>st</sup> Defendant in 2004 but, the 1<sup>st</sup> Defendant went abroad for her daughter's graduation and came back at the end of year 2006. That is when they did the transfer. By then, the beacon certificate was in 1<sup>st</sup> defendant's her name, of which the plot size indicated there in was 20 by 10 metres.



45. He stated that the land was not occupied when he bought it and upto now, it is not occupied. The Plaintiff recently fenced it after demolishing the perimeter fence that he had put up. He reiterated that he has not entered the Plaintiff's plot no. R6 for LR 71/5.
46. Upon re-examination, DW2 stated that the plot was recently fenced with a stone wall and there is a wooden structure inside.
47. The 3<sup>rd</sup> Defendant did not call any witness.

### **Submissions**

48. The Plaintiff's submissions are dated 6.2.2023, where they address the following issues;
  - a. Whether the suit land Plot No. R6 in Parcel LR No. 71/5 belongs to the Plaintiff.
  - b. Who is to bear costs of this suit?
49. It was submitted that with Mawingo Munyeki Self Help Group having satisfied and complied with the terms of the letter of allotment, the suit property ceased to be available for allocation and /or re-allocation to anyone else including the 1<sup>st</sup> Defendant. He relies on the case of Republic v City Council of Nairobi & 3 others [2014] eKLR as well as the case of Ali Gadaffi & another v Francis Muhia Mutungu & 2 others [2017] eKLR.
50. The Plaintiff also submits that re-allocation of the suit plot to the 1<sup>st</sup> Defendant was illegal and unlawful thus the Town Planning Committee sitting on 16.7.2003 decided that the same should be cancelled.
51. It was further submitted that the 2<sup>nd</sup> Defendant was not a truthful witness in stating that he had built on the suit land and that it is the Plaintiff who had interfered with his occupation. It was averred that there was an enforcement notice directing him (2<sup>nd</sup> defendant) to stop construction and remove his boundary wall. He relies on the case of Joel Munyoki Munene v Agnes Kagure Kariuki & 2 others [2017] eKLR to buttress the point that this was a case of illegal allocation and not double allocation.
52. The plaintiff relies on the provisions of Section 27 of the [Civil Procedure Act](#) on the issue of costs.
53. The submissions of the 1<sup>st</sup> defendant are dated 2.3.2023 where they address the following issues;
  - a. Whether the Plot R6 Kahawa West Phase II is the same as Plot No. R6 part of LR No. 71/5.
  - b. Who are the respective owners of Plot No. Plot R6 Kahawa West Phase II and Plot No. R6 part of LR No. 71/5 if at all they are 2 plots?
  - c. Whether the Plaintiff deserves the award of reliefs sought
  - d. Who should bear costs of this suit?.
54. On the 1<sup>st</sup> issue, the 1<sup>st</sup> Defendant submits that the allotment letters issued to her and the one of the Plaintiff relate to separate properties. She points out that the allotment letter issued to the plaintiff on 21.5.1996 is for Plot No. R6 part of LR No. 71/5 which measures 0.018ha. In contrast, the allotment letter issued to her is in respect of Plot No. Plot R6 Kahawa West Phase II which measures 0.002 ha. Thus the plots in question are distinct from each other.
55. On the 2<sup>nd</sup> issue, the 1<sup>st</sup> Defendant relies on the case of Caroline Awinja Ochieng & Another v Jane Anne Mbithe Giatu & 2 others [2015] eKLR as well as the case of Matende & Another v Ogendo Civil Appeal 509 of 2019[2022] KECA 124 (KLR) to submit that she went beyond her duty to prove to this court how she acquired the suit plot and demonstrated further that the property was free from



- encumbrances at the time of allocation. She also points out that the Plaintiff did not lead any evidence implicating her of any wrong doing.
56. On the 3<sup>rd</sup> issue, the 1<sup>st</sup> Defendant submits that the burden of proof was not discharged by the plaintiff as required under Section 107 of the *Evidence Act*, thus his claim should be dismissed with costs. She relies on the case of Mbuthia Macharia v Annah Mutua Ndwiga & Another [[2017] eKLR.
57. The submissions of the 2<sup>nd</sup> defendant are dated 26.5.2023 where they raise the following issues;
- a. Whether the 2<sup>nd</sup> Defendant is in occupation of the Plaintiff's property.
  - b. Whether the allocation of the parcel of land to the 1<sup>st</sup> defendant is lawful.
  - c. Who should bear costs of this suit?
58. On the 1<sup>st</sup> issue, the 2<sup>nd</sup> Defendant submits that he purchased his plot from the 1<sup>st</sup> Defendant who was formally approved to be allocated the subject parcel of land by the 3<sup>rd</sup> Defendant, and took possession as an innocent purchaser as defined in the case of Katende v Haridar & Company Limited[2008] 2E.A 173 as quoted in Weston Gitonga & 10 other v Peter Rugu Gikanga & another[2017] eKLR.
59. On the 2<sup>nd</sup> issue, it was submitted that the 3<sup>rd</sup> Defendant approved the formal allocation of plot No. R6 of Kahawa West Phase II to the 1<sup>st</sup> Defendant. He points out that the Town Planning Committee sitting on 16.7.2003 did not specifically mention the cancellation in the minutes and no formal communication was issued on the same to the 2<sup>nd</sup> Defendant by way of any official gazette notice. He also relies on the case of Madison Insurance Company Limited v Augustine Kamanda Gitau [2020] eKLR to submit that there is no cause of action raised against him.
60. He urges the court to refer this matter to the 3<sup>rd</sup> Defendant's department of Physical Planning and to make a boundary distinction between Plot R6 Kahawa West Phase II and Plot No. R6 part of LR No. 71/5.
61. The submissions of the 3<sup>rd</sup> defendant are dated 26.5.2023 where they address the following issues;
- a. Whether the Plaintiff acquired a valid title in respect of the suit property.
  - b. Whether the Plaintiff is entitled to any of the orders sought in his plaint dated 17.10.2007.
62. On the 1<sup>st</sup> issue, it was submitted that they have never allocated the suit plot to the Plaintiff, nor issued him with title, thus he is not entitled to protection of the law under Section 26(1) of the *Land Registration Act*.
63. It was also submitted that the Plaintiff in total disregard of Section 30(1) of the Physical Planning Act, erected a permanent house on the suit plot.
64. On the 2<sup>nd</sup> issue, the 3<sup>rd</sup> Defendant submits that the Plaintiff failed to prove fraud to the standards required. It relies on the case of Dennis Noel Mukhulo Ochwada & Another v Elizabeth Murungari Njoroge & Another [2018] eKLR as well as the case of Vijay Morjaria v Nansiingh Madhusingh Darbar & Another [2000] eKLR.

### **Determination**

65. I find that the issues falling for determination are;
- a. Whether Plot No. R6 part of LR No. 71/5 is the same as Plot No. R6-Kahawa West Phase II.
  - b. Who owns the above mentioned plot(s).



- c. Who should bear costs of the suit.
66. It is pertinent to note that none of the parties have titles to the parcels of land they are claiming. In the case of *Danson Kimani Gacina & another v Embakasi Ranching Company Ltd* [2014] eKLR, the court had this to say in relation to such claims;
- “The law on unregistered land, unlike on registered land, is slightly unclear. Proof of ownership in the case of the former is found in documentary evidence which lead to the root of title. There must be shown an unbroken chain of documents showing the true owner. Once proof of ownership is tendered then the holder of the documents is entitled to the protection of the law. There is no doubt that such proof will be on a balance of probabilities but the court must be left in no doubt that the holder of the documents proved is the one entitled to the property”.
67. The burden of proof however falls upon the party alleging a fact. The provisions of Section 107 (1) of the *Evidence Act* stipulates that:
- “Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.”
68. In *Samson S. Maitai & another V. African Safari Club Limited & Another* [2010] eKLR, the court had this to say in relation to proof.
- “Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute.
69. There are 2 allotment letters herein describing separate plots.
- The court is therefore faced with the question as to whether both allotment letters refer to the same parcel of land and whether it is the parcel in contention. The Plaintiff claims ownership of Plot No. R6 part of LR No. 71/5 Kahawa West. His claim is pegged on an allotment letter issued on 21.5.1996 to Mawingo Munyeki Self Help Group who in turn sold it to him on 26.11.1998.
70. PW3, the chairman of Mawingo Munyeki Self Help Group confirmed the sale that was in writing as exhibited by P. Exhibit 6, a sale agreement dated 26.11.1998. He also led evidence that Mawingo Munyeki Self Help Group complied with the terms of the allotment letter dated 21.5.1996. The 3<sup>rd</sup> Defendant also pleaded that it allotted the plot to Mawingo Munyeki Self Help Group, which position is reiterated by P. Exhibit 17 which is the 3<sup>rd</sup> Defendants letter dated 1.10.2007 indicating that the Plot R6 Part of LR 71/5 Kahawa West was allocated to Mawingo Munyeki Self Help Group.
71. On the other hand, the 2<sup>nd</sup> Defendant’s claim is pegged on an allotment letter issued on 21.9.2001 to the 1<sup>st</sup> Defendant for allocation of Plot No. R6-Kahawa West Phase II. He claims that he purchased it from Dw1 vide a sale agreement dated 23.2.2004 which position was confirmed by DW1 in evidence. PW1, 2 and 3’s evidence point to the fact that both allotment letters in contention refers to the same plot in contrast to DW1 and DW2’S insinuation that there are 2 plots in contention.
72. Further, Plaintiff Exhibit 16 which is an enforcement notice issued to the 2<sup>nd</sup> Defendant by the 3<sup>rd</sup> Defendant on 22.5.2007 refers to Plot R No. 6 part of LR No.71/5 Kahawa West. The 2<sup>nd</sup> defendant has not categorically denied having received such an enforcement notice.



73. Further, it is apparent that skirmishes did break out at the suit premises when the 2<sup>nd</sup> defendant commenced the take over of that land, of which pw2 has given a detailed account of the scuffle. If the plots were separate and distinct, the parties would surely not have had a confrontation on the suit premises.
74. To this end, I find that the suit plot(s) being identified as Plot No. R6 part of LR No. 71/5 and Plot No. R6-Kahawa West Phase II is one and the same plot.
75. There is no doubt that the allocating authority for the disputed plot is the 3<sup>rd</sup> defendant. There was however no evidence to indicate that the 3<sup>rd</sup> Defendant's allocation of Plot R No. 6 part of LR No. 71/5 to Mawingo Munyeki Self Help Group was ever cancelled by the allotting authority. It follows that the suit plot was not available for allocation to the 1<sup>st</sup> Defendant.
76. In *Rukaya Ali Mohamed v David Gikonyo Nambacha & Another Kisumu HCCA No. 9 of 2004* cited in *Republic v City Council of Nairobi & 3 others [2014] eKLR*, the Court stated that;
- “Once allotment letter is issued and the allottee meets the conditions therein, the land in question is no longer available for allotment since a letter of allotment confers absolute right of ownership or proprietorship unless it is challenged by the allotting authority or is acquired through fraud mistake or misrepresentation or that the allotment was out rightly illegal or it was against public interest. In other words, where land has been allocated, the same land cannot be reallocated unless the first allocation is validly and lawfully cancelled.”
77. From the evidence given by the plaintiff and his wife, pw2, it is clear that the 2<sup>nd</sup> defendant had embarked on taking over the suit premises through sheer brute force. I also find that the 2<sup>nd</sup> defendant was mute on the enforcement notice issued to him availed as p exh 16. The reasons indicated therein are; “illegal construction of boundary wall and encroachment of adjacent plots”. When these pieces of evidence are woven together, it becomes apparent that the 2<sup>nd</sup> defendant was aware of his unlawful actions.
78. I therefore find that the suit Plot No. R6 part of LR No. 71/5 belongs to the plaintiff and that the 2<sup>nd</sup> defendant was well aware of this situation.
79. In the final analysis, I find that plaintiff's claim is merited. The same is allowed in the following terms;
- a. An order is hereby issued declaring that the plaintiff is the lawful owner of parcel No. R6 being part of LR No. 71/5.
  - b. A permanent injunction is hereby issued restraining the Defendants by themselves, agents, employees and/or servants and/or any other person claiming the suit property under them from trespassing or in any other way, dealing with Plot No. R6 contained in LR No. 71/5.
  - c. The 2<sup>nd</sup> defendant is condemned to pay the costs and interest thereof of this suit to the plaintiff, the same to be calculated from the time of filing this suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13<sup>TH</sup> DAY OF JULY 2023 THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**

**In the presence of:-**

M/s Mugo for Plaintiff



Kiptum for 1<sup>st</sup> Defendant

Lenkidi holding brief for Kimani for 2<sup>nd</sup> Defendant

Court Assistant: Eddel

