



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO.110 OF 1998

HARISON MWANGI NYOTA.....PLAINTIFF

V E R S U S

NAIVASHA MUNICIPAL COUNCIL

EDDY KAMAU

CHRISTOPHER M. KAMAU

MARGARET WANJIRU and 17 OTHER.....DEFENDANTS

J U D G M E N T

The plaintiff, **Harrison Mwangi Nyota**, by a plaint dated 30/3/1998 filed this suit against the defendants, **Naivasha Municipal Council, Eddy Kamau, Christopher M. Kamau and Margaret Wanjiru** (1st to 4th defendants) seeking an order of:

(a) Permanent injunction to issue against the 1st defendant by itself, its agents and servants restraining it from allocating the plaintiff's parcel of land title No.Naivasha/Municipality Block 5/235 to the 2nd, 3rd and 4th defendants or any other person and in any way from interfering with the plaintiff's quiet possession of the said parcel of land.

(b) An order for permanent injunction against the 2nd to 4th defendants jointly and severally by themselves or their agents/servants, restraining them from entering, remaining and or in any way interfering with the plaintiff's quiet possession of parcel of land Naivasha/Municipality Block 5/235.

(c) An order of directing the 2nd, 3rd and 4th defendants to remove all the fencing and or building materials that they have put on the plaintiff's parcel of land known as Naivasha/Municipality Block 5/235.

(d) Costs of the suit.

The defendants filed their defences on 4/5/1998, with the 2nd to 4th defendants filing a joint defence. The court granted leave to join the other defendants to the suit together with the Commissioner of Lands.

On 22/2/1999, the plaintiff applied to have the defendants' defences struck out which application, was heard on 6/10/1999 and the court allowed the application in its ruling of 12/11/1999. That order resulted in the eviction of the defendants from the suit land. The defendants appealed the said order under CA.301/2000 and on 27/2/2014, the appeal was allowed with the result that the defences were reinstated. The defendants applied to amend their defences and the amended defence was filed on 29/1/1999 in which they claimed entitlement to the same land and more defendants were joined to the suit bringing the total to 21 defendants.

In the counterclaim, the defendants sought the following orders:

1. A declaration that the issuance of leasehold title No.Naivasha/Municipality Block 5/295 by the 1st defendant to the 2nd defendant was a nullity;

2. A declaration that the plaintiffs are the legal owners of the suit land and a perpetual injunction to restrain the plaintiffs defendant enjoyment of the same;

3. Damages and costs.

The plaintiff was represented by **P.K. Njuguna Advocate**.

The 1st defendant was initially represented by Wangari & Njuguna Advocates who were later replaced by Rodi Orege & Co. Advocates while the firm of Mirugi Kariuki represented by Mr. Kahiga appeared for the 2nd to 21st defendants.

The plaintiff testified alone in support of his case while the 1st defendant called two witnesses, DW1 Samuel Watumu Karanja, its employee and DW12 Dominic Likalamu who worked for Survey Department in Nakuru. The 2nd to 21st defendants called a total of 11 witnesses.

The plaintiff's case:

The plaintiff testified that he applied to the Commissioner of Lands for allotment of land vide the letter dated 14/7/1992 and on 10/11/1994, he was allotted the land vide allotment letter Ref.158/96/15, un-surveyed residential plot measuring 1.4534 HA; that he paid Kshs.102,000/= on 25/12/1994 (page.5 of plaintiff's documents) 1; that the land was surveyed and the land was changed to be known as Naivasha Block 5/235 as per PDP plan. P.Ex.No.6.

He was issued with a beacon certificate.

On 3/2/1995 (P.Ex.No.7), a dispute arose with the 1st defendant who wanted to allocate the land to other people but the Commissioner of Lands did not allow the 1st defendant. The plaintiff referred to the Communication of Lands they had between the 1st defendant and the Commissioner of Lands; that the letter of 21/4/1995 directed the Town Clerk to allocate to the plaintiff two plots elsewhere but the Town Clerk did not comply because the plaintiff had sued the council for allowing people into his plot but the case was dismissed by the court; that the Commissioner of Lands wrote to the Town Clerk again asking to know the alternative plots allocated to the plaintiff; that the clerk replied vide letter dated 19/12/1995 indicating that another plot had been identified (P.Ex.13); that the plot that was identified was too small and a second plot was found as per letter of 2/1/96 (P.Ex.16); that he sold the plot and applied for subdivision into three plots which was done. He gave it to Word of Faith Church who declined to leave the plot but instead requested to be allocated a plot (Ex.17); that the Commissioner of Lands requested the District Commissioner Nakuru to allocate the church another plot but the DO replied that the church and the plaintiff should not be removed from the plot because the land was subdivided P.Ex.19; the Commissioner of Lands then asked the Lands Officer to look for land measuring 1.45 Ha (Ex.20) which had been found; that the land officer Nakuru replied by his letter of 7/11/1997 stating that the council had allocated land without due process and they should look for alternative land for the defendants; that the land was indeed found and given to the 20 people as indicated in the sketch plan dated 5/4/2011; that it is then that he applied for subdivision, it was done and he sold part of the land. He was issued with a lease (Ex.27); that when asked about the subdivision, the Town Clerk agreed with the subdivision vide his letter dated 3/3/1998, insisting that the land had been allocated to 20 people; that the Commissioner of Lands reinstated the land to him and issued a lease and allowed him to proceed with subdivision and copied the letter to the Town Clerk, Director of Survey and District Lands Officer (P.25); that the Commissioner of Lands gave his final approval on 22/1/1999 (pg.26); that after subdivision, he transferred the land to 4 other buyers plots 347, 348, 353, 351, 362 and 363. PW1 said that the 1st defendant continued to insist that the plaintiff could not develop the Land although he was paying land rates; that the Town Clerk wrote to the Secretary Physical Planning Liasion Committee explaining why they could not approve development plans. The plaintiff said that to date, the plots have not been developed including those which had been sold by him.

It is the plaintiff's contention that as matters stand, he is the registered owner of parcels Naivasha/Municipality Block 5/349 to 364 and some of them are sold to other people.

DW1 Samuel Watunu Karanja, an employee of Naivasha Municipal Council working in the Engineer Department, in the Drawing office testified that he had worked in the Council for 29 years and was involved in showing people plots and other related duties.

He was aware of plot 5/235 which was originally allotted to 20 defendants by the council in 1992 and confirmed by the council in 1993; that the plaintiff complained to the council that the land was allotted to him in 1994. DW1 explained that it is the Commissioner of Lands who was the allotting authority after recommendation by the local authority that the land is available for allocation. DW1 recalled that the subject land has developed between 1997 – 1999 after approval was given by the council.

According to DW1, after the plaintiff complained, he was allotted an alternative plot which he accepted – Plot B Industrial Area; which he disposed of after acceptance.

DW1 referred the court to the minutes of 57th meeting of Town Planning Committee which deliberated the issue and resolved that the plaintiff be allotted an alternative plot; that the P.D.P. was approved on 22/10/1996 which refers to both low density and high density areas; that the high density area (B) was allocated to the defendants.

DW2 James Kanora Kuria represented his son Eddy Kuria, the 2nd defendant who was allotted plot and was issued with an allotment letter dated 3/12/1992, from the Naivasha County Council and one from Commissioner of Lands Dated 1/9/1993; the UNS Residential Plot No 'G' High density Koinange Road Naivasha Ref 19447/XXI/277; that he put up a store on the plot but before he finished, the plaintiff demolished it and yet he was aware of the double allocation of the plot. He prays that the title issued to the plaintiff be cancelled and he be compensated for his material which was destroyed by the plaintiff. DW3 exhibited the receipts in which he paid Naivasha Municipal Council in terms of the allotment letter. (Pages 116 – 118 of defendant's documents).

DW3 Grace Wanjiru Kariuki bought a plot from J.B. Ngugi in 2006 (see page 77 of defendant's bundles) as per Sale Agreement dated 23/9/2006; that J.B. Ngugi had bought it from one Mohamed Osman Hassan who had been allotted the land by Naivasha Town Council as per letter dated 3/12/1992 (page 78). She produced a police abstract as evidence that her documents to the land got lost in a carjacking

incident vide O.B dated 25/7/2000 (page 79).

DW4 Margaret Wanjiru is the 4th defendant. She stated that she was allotted plot 'O' on 1/9/1993 as per the letter of allotment exhibited (page.119) Ref 19447/XXI/285; that she fenced it and poured stones. She said that she had paid for the plot but could not avail the receipts. She denied having been allotted alternative plots. DW4 denied that she was ever notified of cancellation of her letter of allotment.

DW5 Jane Chaku Ndiga, the 16th defendant testified that she bought plot 'M', Koinange Road from Irene Nyokabi Mathenge in 1996, who had been allotted the said plot – Sale Agreement is dated 31/12/96 (page 46) and letter of allotment dated 1/9/1993(Page 45) Ref 19447//283. She made payments for the plot ref. page 47, 55 – 56. She had started building and poured material on the plot but the plaintiff destroyed it as he claimed the land to be his.

DW6, Catherine Koskei the 8th defendant testified that she was allotted a plot as per allotment letter from the Naivasha County Council dated 3/12/1992 and another dated 1/9/1993 from Commissioner of Lands Ref 19447/XXI/279 (page 4 & 7). She accepted the offer and wrote to Commissioner of Lands vide the letter dated 29/12/1994 (page 8) and made payments in 1995 for the plot as per receipts exhibited at pages 9 – 13; that the payments were accepted and that she was not aware of any dispute between the council and the Commissioner over the plot at the time she made payments.

DW7 Gladys Wairimu, the 14th defendant testified that she was allotted plot 'K' Koinange by the Naivasha Council (page 101) and allotment letter from the Commissioner of Lands dated 1/9/1993 Ref 19447/XXI She made payments in 2000 vide receipts page 107 – 109 and that she wrote to the Commissioner accepting the allotment as per letter (page 110).

DW8 Beatrice Wangari Ndung'u, the 9th defendant was allocated land by the Municipal Council of Naivasha vide allotment letter and then the Commissioner of Lands dated 1/9/1993, plot E Ref 19447/XXI/275 (page 81). DW8 paid for the plots between 1994 – 1997 vide receipts at pages 82 – 88. She started construction, built a house and stone fence. Later, she was told not to step there because the land had been allocated to somebody else. She later learned that the houses were pulled down and stones carried away.

DW9 David Adams Mbugua, the 5th defendant testified that he applied and was allotted plot 'A' at High Density Area on 3/12/92 by Council of Naivasha (page 61). He got a letter of allotment from the Commissioner of Lands dated 1/9/1993 (page 59) Ref 19447/XXI/271. He made payment between 1993 – 1998. In cross-examination, DW9 admitted to having sold the plot to somebody else but did not notify the Commissioner of the sale.

DW10 Agnes Wanjiku Kariungi is the 20th defendant. She stated that she applied to the Commissioner of Lands and was allotted plot 'S' on 3/12/1992 as per letter from Municipal Council of Naivasha and another dated 1/9/93 from Commissioner of Lands (page 18 & 14)Ref 19447/XXI. She made payments for the plot on 18/1/1994 and in 2000 (page 20 – 23); that she took possession of the plot, put up a residential house which was nearly complete save for doors. She also put up a peripheral wall and plans had been approved by the Council. One day she learned that her building had been demolished by the plaintiff who had a court order and yet the letter of allotment had not been revoked. He was not aware of any other alternative plot having been given to the 21 defendants.

DW11 Margaret Wakonyo Kihari represented her daughter Leah Njeri Karanja, the 21st defendant who bought a plot from Irene Nyokabi but is away in the United States of America; that the land was bought in 1997 as per Sale Agreement (page 68) and gave her the allotment letter dated 1/12/1992 (page 70) and another dated 1/9/1993 Ref 19447/XXI/290 from Commissioner of Lands (page 71); that the allottee had been given a certificate dated 17/9/1997 after she made payments for the plot (page 75). PW11 said that her daughter had built a stone house on the land but it was demolished.

DW12 Damiano Likalamu, then the Provincial Surveyor of Rift Valley Province testified that Survey plan No.272/182 is a certified true copy of the original, certified by the Director of Survey and that the plans survey of 20 plots in Naivasha Municipality Block 5; executed by a licensed surveyor Wahome Warugia and dated 5/1/1995. His evidence is that the council could not have 2 survey plans for same site D.Ex.No.1. He said that from the survey plan, if an allottee meets the conditions given by the Commissioner of Lands, a lease would issue.

DW13 Christopher Mburu Kamau is the 3rd defendant in this case. He introduced himself as a surveyor based at Survey Field Headquarters – Ruaraka; that his wife has sued the plaintiff in a related matter and he is aware of the issues between the plaintiff and defendants. He said as regards allocation of land, the council oversees all developments within its jurisdiction; that the council allocates land on advisory basis to the Commissioner of Lands. He stated that during allocation of the subject plots, a Part Development Plan (PDP) (page 16) dated 17/5/1993 was approved; that a survey was undertaken and Wahome Warugia was instructed to survey the land for the people and issued a survey certificate (page 124); that the allottees took possession but problems started with alleged double allocation to the plaintiff; that the plaintiff applied for allocation of plot No. 'D' dated 14/7/1992 (plaintiff's documents); that the said application was approved and he was allotted plot D1 on 20/12/93 (defendant's page 125) measuring 1.8HA Ref 19447/XXI/21. According to PW13, this is a totally different land than what was allotted to the defendants; that the plaintiff again wrote to the Commissioner of Lands on 29/11/93 (page 128) seeking to be allotted an alternative land to D1 & D11 because it was not suitable and that he was allotted plot measuring 1.4535 HA vide letter of allotment dated 10/11/1994 Ref No 158196/15 was unsurveyed land and it did not show the number of the plot. It cancelled the earlier letter of a allotment Ref.19447/XXI/21 dated 20/12/93 for 1.8 HA. In this letter, the Commissioner indicated that the council did not accept any liability whatsoever in the event of prior commitment or otherwise; that it is at this stage that the issue of double allocation was raised by the 1st defendant, – that the said land had been allotted to 20 people; a letter indicating the double allocation was written to the Commissioner for Lands (defendants page 137-138) and a letter dated 21/4/1995 was written to the Town Clerk to identify 2 alternative plots for the plaintiff (page 136); that an alternative plot was identified for the plaintiff by letter dated 19/12/1995 – LR 1144/12 un-surveyed plot but the Commissioner did not cancel the allotment to the 20 people; that the plaintiff was allocated plot 'A' vide the letter dated 9/7/96 and the letter canceled Ref.158196/15 dated 10/11/94 (page 153), the land subject of double allotment to the 20 people; that the plaintiff went ahead to pursue title for both the cancelled plot and the alternative Plot 'A' which became Naivasha/Municipality 1/815 as per abstract of title dated 24/9/07, (page 157); that the plaintiff also obtained title for Naivasha Municipality Block 5/235; that upon being issued with the title, the plaintiff sold part of the land to other people including the Faith Church but it could not accept it because the 20 people had taken

possession and the church requested the Commissioner of Lands to allocate the church land. However, the District Commissioner declined to do so because the church had not been allocated land by the Commissioner of Lands but was a buyer; that the church was never issued with an allotment letter nor was the plaintiff issued with a re-allocation letter for the allotment that was cancelled. PW13 further testified that the subdivisions arising from title 5/235 should be cancelled because they were irregular.

After close of defendants' case, counsel filed submissions for their respective clients. I have considered the pleadings, evidence on record and submissions and the issues that stand out for consideration are:

- 1. Who is the valid allottee of land parcel Naivasha/Municipality 5/235;**
- 2. Whether an order of injunction can be issued against the defendants to restrain them from interfering with the subject parcel;**
- 3. Whether an order of injunction should issue against the plaintiff to restrain him from interfering with the subject parcel;**
- 4. Who bears the costs.**

The dispute herein arose before the promulgation of the Constitution, 2010. The laws applicable are therefore the old Constitution and applicable Land Laws that were in force then.

It is a fact not disputed that both the plaintiff and defendants sometime in 1992 applied to the Commissioner of Lands for allotment of plots within Naivasha Municipality. Prior to allotment, the land in question was Government land which was defined in the Government Lands Act (now repealed) to mean:

“In this Act, and in all conveyances, leases and licenses in all agreements, notices, documents relating to Government Land, except where inconsistent with the context...”

‘Government Land’ means, land for the time being vested in the Government by virtue of Section 204 and 205 of the Constitution (as contained in Schedule 2 of the Kenya Independence Order in Council 1963) and Sections 21, 22, 25 and 26 of the Constitution of Kenya (Amended) Act 1964”.

The subject land in issue is situated in Naivasha Municipality and as of 1992 was not alienated. Section 2 of GLA (Cap 280) defines un-alienated Government Land as:

“Un-alienated Government Land means land which is not for the time being leased to any person, or in respect of which the Commissioner of Lands has not issued any letter of allotment or reservation.” Since the suit land had not been alienated to anybody, it was available for allotment or alienation.

Under Section 3 of the GLA, it is the President who had the power and authority to make grants and disposition of un-alienated land. Section 5 of GLA creates the office of the Commissioner of Lands. It provides:

“There shall be a Commissioner of Lands and such other officers as may be necessary for the administration of this Act who may, if so authorized by the Commissioner either generally or specially, perform any of the duties or do any of the acts or things required or authorized by the Act, or by any law regulating the sale, letting, disposal and occupation of Government Land, to be done by the Commissioner”.

In the case of ***Industrial Estate Ltd v Anne Chepsiror & 5 others 2015 KLR***, the court said

“38 The procedure for issuance of Government Land and Government leases was governed by provisions of the Government Land Act (GLA) Cap 280 Laws of Kenya. This was pursuant to the provisions of Section 4 of the Government Land Act which provides as follows:

“Government Land Act Section 4”, All conveyances, leases and licenses of or for the occupation of Government Lands, and all proceedings, notices and documents neither this Act, made, taken, issued or drawn, shall serve as otherwise provided, be deemed to be made, taken, issued or drawn under and subject to the provisions of this Act.

38.....My reading of the Government Land Act has revealed that two entities had power to issue Government Land and Government lease. These are the President and the Commissioner of Lands. The powers of the President were set out in Section 3.....”

Guided by the above decision, apart from the President, the Commissioner for Lands had the power to alienate Government Land. Under Section 9 of GLA, the Commissioner of Lands is the person required to divide the land into plots and grant leases for a term not exceeding 100 years.

In this case, the defendants were first issued with letter of allotment from the Municipal Council of Naivasha all dated 3/12/1992. Some of the defendants produced the said allotment letters. The defendants who testified were each then allotted with an allotment letter by the Commissioner of Lands. All of the letters were dated 1/9/1993. There was no reason to doubt that the said allotment letters were authentic.

The question that the plaintiff seemed to raise is what role the Municipal Council of Naivasha had in the issuance of allotment letters to the defendants in 1992. According to DW1, an employee of the 1st defendant, the local authority (1st defendant) has to recommend that the land is available for allocation before an allotment letter can issue. DW13 also told the court that the Council oversees all developments in its jurisdiction and allocates land on advisory basis for the Commissioner.

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

Having established that it is the Commissioner of Lands who alienates land and allots land, the letters of allotment that are key in the alienation process are those issued by the Commissioner of Lands.

As earlier pointed out, all the defendants who testified produced allotment letters save for DW3 who said her documents got lost in a carjacking. All the rest produced their allotment letters from the Commissioner of Lands. It is also not in dispute that the suit land, Naivasha/Municipality 5/235 had been allotted to 20 people, the defendants. It is also a fact that the defendants were issued with the allotment letters on 1/9/1993 whereas the plaintiff was issued with his allotment letter on 10/11/1994. The question that will need to be answered later is whether any of the allotment letters takes preference?

In the case of ***Rukaya Ali Mohamed –vs- David Gikonyo Nambachia & another Kisumu HCCA.9/2004*** Warsame Judge held that, **“once allotment letter is issued and the allottee meets the conditions therein, the land in question is no longer available for allotment since a letter of allotment confers absolute right of ownership or proprietorship unless it is challenged by the allotting authority or is acquired through fraud, mistake or misrepresentation or that the allotment was out rightly illegal or it was against public interest”**.

Again in ***M’ Ikiara N’Rinkanya & another –vs- Gilbert Kabaare M’Mbijiwe (1982-1988) I KAR 196***, the court held that where there is double allocation of land, the first allotment prevails and there is no power to allot the same property again.

The defendants were the first allottees of the parcel of land Block 5/235 on 1/9/1993. All of them have testified to having met all the conditions stipulated in the letters of allotment. However, I noticed that even though the defendants made the relevant payments, they did not make them within 30 days as required of them. However, the payments were made, were accepted and have never been refunded to the defendants by the Commissioner of Lands, nor was there any communication from the Commissioner that the allotments were revoked because of the late payments.

The defendants’ case is that the allotment of Plot 2/235 to the plaintiff was made fraudulently and hence should be cancelled. To understand what transpired, I must consider the transactions that took place leading to the plaintiff being allotted with the plot that had been allotted to the defendants.

Following the plaintiff’s application for a plot dated 14/7/1992, he was first allotted Un-surveyed Residential Plot No.D1 Naivasha Township measuring Approximately 1.8HA vide letter dated 20/12/1993 Ref.19447/XXI/21 (page 125 of defendants documents). The plaintiff totally avoided mentioning that this was the land he was first allotted but later sought to be allotted with a different one.

The plaintiff was not pleased with the said plot and by the letter dated 29/11/93, sought an alternative piece of land as plots D1 & DII were not suitable (See page 128 of defendants documents). The plaintiff was issued with a letter of allotment dated 10/11/1994 for a plot measuring 0.58HA vide letter Ref.158196/14. The letter cancelled the earlier allotment dated 20/12/1993 Ref 19447/XXI/21 Pg.131 of defendants documents) which had been allotted to the defendants.

Again, by allotment the letter Ref 15896/15, the plaintiff was allotted Un-surveyed Residential plot Naivasha Municipality measuring 1.4524HA (page 134 defendants documents) and the same cancelled the letter Ref.19447/XXI/21. There is no doubt that Ref.199447/XXI/21 refers to the Koinange Road plot that had earlier been allotted to the 20 defendants. The defendants’ allotment letters were referenced as follows – 19447/XXI/21. It is the plot for which the plaintiff obtained a title, Naivasha Municipality Block 5/235, the subject of this suit.

By a letter dated 19/12/1995, (Page 141 Defendants’ Documents) the Town Clerk wrote to the Commissioner of Lands indicating that they had identified an alternative plot for allocation to the plaintiff and advised him to cancel the earlier allotment to the plaintiff which affected the 20 allottees i.e. the defendants. By a letter of allotment dated 9/7/1996 a Commercial Plot No ‘A’ Ref 158196/27 was issued to the plaintiff. It measured 0.072412 and that letter cancelled Ref 158196/15 dated 10/11/1994 which had allotted 1.452 HA to the plaintiff - the land that had been allotted to the defendants. Plot ‘A’ is the land that became registered as Naivasha Municipality 1/815.

Again, vide a letter of allotment dated 9/7/1996 to the plaintiff, Ref No 158196/28 UNS Industrial Plot No 132 measuring 0.18 HA, lot 130 was allotted to the plaintiff. That letter cancelled Ref TP 18/1/IX/105 of 11/3/1994. The allotment was confirmed by another letter dated 9/10/1996.

Although the plaintiff holds a title in relation to plot 5/235, which he subsequently subdivided into several parcels Naivasha/ Municipality Block.5/235 – 363, the allotment to the plaintiff was cancelled on 9/7/1996. The defendants had not been issued with alternative allotments nor were the defendants’ allotment letters ever cancelled.

I have noted from the letters of allotment exhibited that for the land to be allotted to another, the previous allotment letter, had to be cancelled. In this case, the plaintiff has not demonstrated that the allotment letters issued to the defendants were ever cancelled. It seems that there is due process that has to be followed in cancellation of the allotment letters. Even if some of the defendants had delayed in complying with the conditions for allotment, some had complied and if there was intention to cancel the allotment letters, that should have

been done with the new allotment. The letters of allotment dated 10/11/1994 allotting the disputed land to the plaintiff did not cancel the defendants' allotment letters and having been the first allottees, their allotment takes precedent and still stands.

In the decisions of *M'Ikairie M'Rinlenya & another v Gilbert Kabeere Supra* and *Simon Mbugua Gachuki v City Council of Nairobi & 2 others HCC.1595/2002*, the courts held that a first allotment takes precedence over the subsequent one and even where a title has been acquired in a subsequent allotment, the title is obtained irregularly.

According to the defendants, the suit land had been allotted to the plaintiff irregularly and the allotment was cancelled but under unknown circumstances, the title of the same land was issued to the plaintiff, i.e. Naivasha Municipality Block 5/235 and hence it was obtained irregularly. As noted above, the allotment letter issued to the plaintiff on 10/11/1994 was cancelled when two other allotments were made to the plaintiff on 9/7/1996 Ref No 158198/27 (Commercial Plot) measuring 0.07412 and Ref 158195/28 Plot 132 measuring 0.18HA. By letter dated 21/4/1995, the Commissioner of Lands appreciated the fact that the disputed land had been allotted to 20 people and was not available for allotment to the plaintiff and asked the Town Clerk Naivasha to identify two plots for allocation to the plaintiff which the Town Clerk did. Amongst the various letters written between the Commissioner of Lands to the Town Clerk, Naivasha, is the one dated 21/6/1995 which referred to the letter of 21/4/1995. The Town Clerk indicated that the letter Ref.19447/XXI of 10/11/1994 was misused and it resulted in the double allocation involving the land that had already been allocated to 20 people in the year 1993. In the above letter, the Town Clerk was expressing surprise at how the plaintiff had got hold of a copy of a letter that had not been copied to him. As a result, by a letter of 19/12/1995, the Town Clerk wrote to the Commissioner of Lands indicating that they had identified an alternative plot to the Koinange Road plot for allocation to the plaintiff and the commissioner was asked to cancel the allocation of the 20 allottees land to the plaintiff.

Again, by letter dated 3/3/1998, the Town Clerk wrote to the Commissioner of Lands indicating that plot 5/235 was a case of double allocation the land having been allotted to the defendants in 1993 and that the Commissioner of Lands had cancelled the plaintiff's allocation vide letter Ref.1581/96/28 of 9/7/1996 (page 166 defendant's documents). Even as late as 3/3/1998, after the plaintiff had obtained a title deed, it was recognized that the Commissioner of Lands had cancelled the allocation of the disputed land to the plaintiff. There is no evidence that after the cancellation of the allotment on 9/7/1996, the plaintiff had been re-allotted with the suit land again.

It is the plaintiff's contention that being the first registered owner of the land, he is protected by Section 143(1) of the Registered Land Act now repealed which provided:

“Subject to Sub-Section (2) the court may order the rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.”

In this case, the defendants are inviting the court to look at the process leading to the issuance of the plaintiff's title.

In *Wrecks Motors Enterprises v The Commissioner of Lands & 3 others C.A.71/1997*, the Court of Appeal held as follows:

“In our view, the endorsement or the appending of his signature by H.E the President on the applications to the Commissioner of Lands for the suit plot or for that matter any other unalienated Government Land is not sufficient to grant title over any land to anyone. H.E the President only approves the application for consideration by the applicants obtaining title to such lands. Title to landed property normally comes into existence after issuance of the letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of title document pursuant to provisions held.”

In the above case, the court confirmed that a letter of allotment does not confer title but one had to comply with conditions therein first, that would lead to the issuance of a title deed. The same views were held in the case of *Gladys Wanjiru Ngacha v Teresa Chepsaat & 4 others 182/1992 (Nyeri)*. See also *Dr. Joseph N.K. Arap Ng'ok v Justice Moijo Ole Keiyua & 4 others C.A.60/1997*.

In the above case, the court said:

“It has been held severally that a letter of allotment per se is nothing but invitation to treat. It does not constitute a contract between the offerer and the offeree and does not confer interest in land at all. It cannot thus be used to defeat a title of a person who is the registered proprietor of the said parcel of land.”

Being the first allottee of the land, the defendants ranked in priority to the plaintiff. I have also considered the manner in which the title was obtained. Despite the allotment of the plaintiff having been cancelled and the plaintiff being given three other plots, he managed to obtain a title to the suit land without any letter re-allocating the land to him and in my view, even though a first registration is absolute and indefeasible, I find that the manner in which the title was created is questionable and was not in accordance with the law. I am guided by the decision in *Chemei Investments Ltd v The Attorney General & other Nairobi Pet.94/2005* paragraph 64, where the court said: **“The Constitution protects a higher value, that of integrity and rule of law. Those values cannot be side stepped by imposing legal blinders based on indefeasibility.**

I therefore adopt the sentiments of the court in the case of *Milan Kumar & 2 others v City Council of Nairobi & another*, where the court stated as follows: “We hold that the registration of title to land is absolute and indefeasible to the extent, firstly, that the creation of such title was in accordance with the applicable law and secondly, where it is demonstrated to a degree higher than the balance of probability that such registration was procured through persons or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law and the public interest.”

In the instant case, this court cannot close its eyes to the manner in which the suit land was pulled from right under the feet of the defendants and ended up being registered in the name of the plaintiff who immediately started to dispose of it by way of sale to other parties. The

plaintiff had been allocated other plots upon cancellation of the allotment of the suit land. The plaintiff admitted to the fact that he was allotted other plots in his evidence. Whereas the defendants had only one plot allotted to them, the plaintiff has several. It seems the plaintiff enjoyed some special favour with the Commissioner of Lands and was allotted several plots in the same Municipal Council for undisclosed reasons.

In the end, the plaintiff has not satisfied this court that he is entitled to an injunction to permanently injunct the defendants from interfering with the suit land. To the contrary, I find that the suit land was first allotted to the defendants, and the subsequent allotment to the plaintiff was cancelled by the Commissioner of Lands and he was allotted other plots.

If the plaintiff is not barred from interfering with the defendants' allotment, they will suffer irreparable loss. For the above reasons, I dismiss the plaintiff's suit with costs to the defendants.

Instead, I allow the defendants' counterclaim and issue the following orders:-

1. A declaration do issue that the issuance of leasehold title Naivasha/ Municipality Block 5/235 to the plaintiff is illegal and fraudulent and a nullity;
2. A declaration that the defendants are the legal owners of the suit land and a perpetual injunction is hereby issued to restrain the plaintiff from;
3. A declaration that the plots emanating from subdivision of Block 5/235 i.e. Block 5/346 – 363 are illegal and are hereby cancelled and the plots well revert back to the numbers indicated in the respective allotment letters to the 20 defendants.

This Court declines to grant any order on damages for trespass as the defendants did not sufficiently establish their specific loss. The defendants will have costs of the counterclaim.

Dated, Signed and Delivered at NYAHURURU this 20th day of December, 2018.

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R.P.V. Wendoh

JUDGE

PRESENT:

Mr. G Chege Holding Brief for P.K. Njuguna for the plaintiff

Soi- Court Assistant