**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**ENVIRONMENT AND LAND COURT**

**ELC. CASE NO. 532 OF 2012**

**JOHN MUCHIRI MBUTHIA……..…….……...…….PLAINTIFF**

**VERSUS**

**REBECCA WERE MUTANDA ……..…….……1ST DEFENDANT**

**CITY COUNCIL OF NAIROBI……..…….…..……2ND DEFENDANT**

**JUDGMENT**

This suit was commenced by way of Plaint dated 22nd August 2012 and filed on 23rd August 2012 wherein the Plaintiff prays that judgment be entered against the Defendants as follows:

1. A declaration be issued that the Plaintiff is the owner of Stall No. 647 situated in Kariobangi North Market (hereinafter referred as the "suit property") and further that any title that may be held by the 1st Defendant as issued by the 2nd Defendant be cancelled and the Plaintiff be registered as the lawful owner of the suit property.
2. A permanent injunction do issue restraining the 1st Defendant from invading, evicting, occupying, developing, leasing, letting, selling or completing any transfer or sale of the suit property.
3. Costs of this suit and interest.

The 1st Defendant filed her Defence and Counterclaim dated and filed on 25th September 2012. In her Counterclaim, she requested the court to dismiss the Plaintiff's suit, evict the Plaintiff out of the suit property and award her mesne profits and rent.

When this suit came up for hearing on 15th January 2015, the Plaintiff did not turn up though he had been served with the date and there was an Affidavit of Service filed to prove service. Upon the application by Counsel for the 1st Defendant, the Plaintiff's case was dismissed for non-attendance with costs to the Defendants. The 1st Defendant therefore proceeded with her Counterclaim.

Only one witness, being the 1st Defendant Rebecca Were Mutanda, testified during the hearing of the Counterclaim. She testified that she is a widow after the death of her husband Jairo Otanga Festo Okonyo. She testified that she came to know of the suit property through a friend after which she became interested in it and informed her husband about it. She testified that she encouraged her husband to apply to the 2nd Defendant for allocation of the suit property which he did. She confirmed that the 2nd

Defendant allocated the suit property to her late Husband by a letter of allotment dated 22nd July 1991, a copy of which she produced. She further testified that she together with her late Husband proceeded to accept the allotment by paying a deposit of Kshs. 500/- whereupon they were given a go ahead to construct a stall on the suit property. She exhibited the receipt issued by the 2nd Defendant upon payment of Kshs. 500/- and a letter from the 2nd Defendant dated 22nd July 1991 authorizing them to construct a stall. She confirmed that they did indeed proceed with the construction of the stall on the suit property which after completion was utilized by her late Husband for the purpose of operating their family business until his demise in the year 2007. She then testified that before her husband's death, they had allowed their grandson one Festus Litunya to use the stall and assist them to run their family business but that after the death of her husband that grandson took possession of the stall and started letting it out to tenants without her permission and consent. She testified that she was appointed as the sole administrator of the estate of her late Husband in **Succession Cause No. 1709 of 2010** and produced the Certificate of Confirmation of Grant dated 19th November 2012. The said Confirmation indicated that she was the sole heir of the suit property. She confirmed having requested the 2nd Defendant to transfer the suit property into her name which was duly effected. She produced a letter dated 9th July 2012 confirming that the suit property had been transferred into her name. The 1st Defendant then testified that the said Festus Litunya purported to sell the suit property to third parties while pretending to be the son and personal representative of her late Husband. She further testified that the Plaintiff in collusion with the said Festus Litunya had tried to lodge a transfer of the suit property at the 2nd Defendant's offices which was rejected. She confirmed that her advocates wrote to the Plaintiff demanding that he vacates the suit property which he did not comply with. She further testified that she is a stranger to any transaction that took place between the Plaintiff and the said Festus Litunya. She further indicated that the Plaintiff has been in possession of the suit property since June 2009 up to date which is a total of 36 months. She sought mesne profits and rent for that period at the rate of Kshs. 8,000/- per month amounting in total to Kshs. 288,000/-.

There are only three issues arising from the 1st Defendant's Counterclaim which I must determine. They are whether the 1st Defendant is the owner of the suit property and if so, whether she is entitled to an eviction order against the Plaintiff and finally whether she is entitled to mesne profits and rent therefrom.

On the first issue which is whether or not the 1st Defendant is the owner of the suit property, I note that the 1st Defendant has relied on a letter of allotment dated 22nd July 1991 issued to her late Husband in her claim of ownership over the suit property. What is the legal effect of a letter of allotment? In the case of **Rukaya Ali Mohamed vs. David Gikonyo Nambacha & Another Kisumu HCCA No. 9 of 2004,** Warsame J. [as he then was] stated as follows,

> ***"….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 outrightly 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."***

From the above case, it can be concluded that the letter of allotment issued to the 1st Defendant's late Husband conferred upon him the absolute right of ownership of the suit property. The 1st Defendant produced evidence to show that she was appointed the sole administrator of her late Husband's property and that in the Confirmation of Grant, she was named as the sole heir of the suit property. She has also convincingly demonstrated to this court that she attended to the transfer of the suit property into her name by the 2nd Defendant and she produced supportive documents from the 2nd Defendant to prove this assertion. In light of all the evidence produced by the 1st Defendant, I have no difficulty in finding that indeed, the 1st Defendant is the bona fide owner of the suit property and entitled to exercise all the rights accruing out of that ownership including vacant possession of the same. That finding leads to my further finding that the Plaintiff's continued occupation of the suit property goes contrary to the ownership rights

of the 1st Defendant. It follows that I hereby issue an order of eviction against the Plaintiff from the suit property with immediate effect.

The final issue that I am called upon to determine is whether the 1st Defendant is entitled to mesne profits and rent for the period of time the Plaintiff has occupied the suit property. The **Black's Law Dictionary 9th Edition** defines mesne profits as:

> ***"the profits of an estate received by a tenant in wrongful possession between (2) two dates"***

> **and in the Concise Oxford English Dictionary 12th Edition, mesne profits has been defined as:**

> ***"the profits of an estate received by a tenant in wrongful possession and recoverable by the Landlord."***

Mesne profits are classified as special damages. The principle is that special damages must be both pleaded and proved. In this case, the 1st Defendant made a claim of mesne profit as one of her prayers in her Counterclaim but she did not quantify or justify her claim in the Counterclaim. It is in her witness statement that she gave a figure of Kshs. 288,000/-. To this end, I am persuaded by the decision of the Court of Appeal in **Peter Mwangi Mbuthia vs. Samow Edin Osman & Naftali Ruth Kinyua Civil Application No. NAI No.38 of 2004 where it was** held that,

> ***"As regards the payment of mesne profit, we think the applicant has an arguable appeal. No specific sum was claimed in the plaint as mesne profit and it appears to us prima facie, that there was no evidence to support the actual figure awarded…… That being so, it must be very hard on the applicant to be forced to pay an amount which had not even been pleaded in the first place, and on which the first respondent offered no evidence at all."***

It is therefore my finding that since the 1st Defendant did not plead or prove her claim for mesne profits and rent, she is not entitled to the same.

The upshot of the above is that I hereby declare that the 1st Defendant is the owner of the suit property. I issue an order of eviction against the Plaintiff from the suit property with immediate effect. I decline to award any mesne profits or rent to the 1st Defendant. I also order that the Plaintiff do pay both Defendants their costs of this suit. It is so ordered.

**DELIVERED AND DATED AT NAIROBI THIS 27TH DAY OF FEBRUARY 2015.**

**MARY M. GITUMBI**

**JUDGE**