



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ENVIRONMENTAL AND LAND DIVISION**  
**ELC CIVIL NO. 2076 OF 2001**

**JAMES WAIGWA KAIRETI..... PLAINTIFF**

**VERSUS**

**THE HON. ATTORNEY GENERAL..... 1<sup>ST</sup> DEFENDANT**

**STEPHEN GITAU KAMUYU ..... 2<sup>ND</sup> DEFENDANT**

**THE DIRECTOR LAND ADJUDICATION & SETTLEMENT..... 3<sup>RD</sup> DEFENDANT**

**DISTRICT LAND REGISTRAR NYANDARUA ..... 4<sup>TH</sup> DEFENDANT**

**AND**

**PETER MBUGUA MUTURI ..... 1<sup>ST</sup> INTERESTED PARTY**

**VERSUS**

**VIRGINIA WAMBUI KABUGI ..... 2<sup>ND</sup> INTERESTED PARTY**

**J U D G M E N T**

The plaintiff initiated the present suit by a plaint dated 30<sup>th</sup> November 2001 which plaint was amended on 31<sup>st</sup> March 2004 and further amended on 29<sup>th</sup> July 2014 with leave of the court. The plaintiff by the plaint seeks orders that:-

- a. A permanent injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants from occupying disposing, alienating or otherwise disrupting or interfering with the plaintiff's possession, occupation and enjoyment of all that a parcel of land known as Land Reference Number **Nyandarua/OlJOROROK Salient/1840** until the case has been heard and finally determined.
- b. A declaration that the plaintiff is the legal allottee of the suit land subject only to the charge in favour of the Settlement fund Trustees.
- c. An order directing the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants to cancel the allocation of the parcel of land reference number **Nyandarua/OJOROROK Salient/1840** to the 2<sup>nd</sup> Defendant and re instate the allocation of the same to the plaintiff.
- d. An order directing the 3<sup>rd</sup> defendant to cancel the title **L.R. NO. Nyandarua/OlJOROROK Salient/1840** held by the 2<sup>nd</sup> Defendant and in his place thereof issue title to the plaintiff.

- e. General damages.
- f. Costs of the suit.
- g. Such further or other relief as this Honourable court may deem fit and just to grant.

The plaintiff's contention is that he was vide a letter of allotment dated 18<sup>th</sup> May 1992 allocated the suit property and in respect of which the settlement Fund Trustees took a charge to secure the sum of Kshs.5,425/- which was to be paid by the plaintiff in installments vide an instrument of charge dated 5<sup>th</sup> June 1992. The plaintiff claims that the 3<sup>rd</sup> and 4<sup>th</sup> Defendants irregularly and wrongfully purported to cancel the allocation of the suit property to the plaintiff in 2001 and to re-allocate the same property to the 2<sup>nd</sup> Defendant precipitating the filing of the instant suit.

The plaintiff applied and was granted leave to enjoin the 1<sup>st</sup> and 2<sup>nd</sup> interested parties to the present suit as such as the suit property had following the alleged irregular subdivision been transferred and registered in their names and titles issued thereof and they therefore stood to be affected by any orders that may be issued in the instant suit.

The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants filed a joint statement of defence dated 29<sup>th</sup> January 2002 which was subsequently amended on 28<sup>th</sup> February 2002. The 2<sup>nd</sup> Defendant filed his defence on 7<sup>th</sup> February 2002. The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants by their defence deny any wrong doing in allocating and issuing title to the 2<sup>nd</sup> Defendant in regard to the suit premises stating that the plaintiff failed to honour the terms of the allotment and the provisions of the charge and had failed to fully pay for the suit plot. The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants further state that he title documents relating to the suit property were erroneously issued to the plaintiff and thus contend the consequent cancellation was justified and deny the reallocation to the 2<sup>nd</sup> defendant of the plot was irregular and/or fraudulent as alleged by the plaintiff.

The 2<sup>nd</sup> Defendant by his defence states he had bought the suit plot from one **Mary Njambi Wairagu** in 1983 and was in occupation of the plot from 1983 and in 1991 he applied for allocation of the plot which was formerly allocated to him in 2001. The 2<sup>nd</sup> defendant further claims having been in adverse possession of the suit property he was lawfully and regularly allocated the suit property. The interested parties did not file any pleadings but filed a bundle of documents and final written submissions and it is their contention that they were innocent purchasers for value without any notice of any defect in the title held by the 2<sup>nd</sup> defendant.

The plaintiff and the defendants filed a statement of agreed issues dated 15<sup>th</sup> July 2004 which having regard to the pleadings, the evidence and the documents produced as exhibits in the case can be condensed to the following issues:-

- (i) Whether the plaintiff was allotted land parcel number **Nyandarua/Oljoroorok Salient/1840** hereinafter referred to as the suit property.
- (ii) Whether the plaintiff accepted the allotment and took possession of the suit property.
- (iii) Whether the 3<sup>rd</sup> defendant cancelled the allocation of the suit property to the plaintiff and if so whether the 3<sup>rd</sup> defendant was justified to do so.
- (iv) Whether the subsequent allotment of suit property to the 2<sup>nd</sup> defendant was irregular, fraudulent and/or unlawful.
- (v) Whether the registration of the 2<sup>nd</sup> defendant as owner of the suit property ought to be cancelled and the plaintiff be registered as owner instead.
- (vi) Whether the interested party was an innocent purchaser of the suit property from the 2<sup>nd</sup> defendant and therefore entitled to be registered as owner.

(vii) By whom are the costs of the suit payable.

The plaintiff called 3 witnesses including himself in support of his case while the defence also called 3 witnesses who testified on behalf of the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants. The 2<sup>nd</sup> defendant did not testify and/or call any witness. The interested parties equally did not testify and/or call any witness.

### **The plaintiff's case**

The plaintiff testified as PW1 and called a neighbour **Samuel Wanjuguna** as PW2 and a police officer **Paul Irungu Kabuga** as PW3. All these witnesses gave evidence before **Hon. Lady Justice Murugi Mugo** and in the preparation of this judgment the court is entirely relying on the recorded evidence and the documents tendered in evidence before **Hon. Lady Justice Murugi Mugo**.

The plaintiff testified that he was allotted land parcel Salient/1840 by the Settlement Fund Trustees (SFT) who took a charge over the subject parcel of land to secure the repayment of the total sum of Kshs.5,425/- which was to be payable in installments. The plaintiff stated that he started cultivating fenced the land and planted trees but did not build a residential house on the property. The plaintiff testified that he used to farm wheat on the parcel of land and that he was doing so jointly with **Samuel Muchiri Wa- Njuguna** who was his neighbour and who testified as Pw2. The plaintiff stated that pw2 had machinery for ploughing and planting and that he used to plough, plant the wheat and tend it to maturity and after harvesting he would recover his expenses and that they would share the profit. The plaintiff recalled that he and pw2 had planted wheat on the suit property in 1999 but when the wheat matured the 2<sup>nd</sup> Defendant invaded the farm and harvested the wheat which led to the plaintiff and pw2 lodging a complaint that led to the arrest and charging of the 2<sup>nd</sup> defendant with the offence of theft of the wheat in a criminal case in Nyandarua.

The plaintiff further testified that sometime in 2001 he got information that someone else had been registered as the owner of the suit property and that upon carrying out a search at the lands office he confirmed that the 2<sup>nd</sup> defendant had been registered as the owner of the suit plot. The plaintiff lodged a caution which was registered against the title on 16/10/2001 to protect his interest in the suit property. A copy of the search and abstract of title were produced in evidence as Plaintiff Exhibit 3 and 4 respectively. The plaintiff further stated that he afterwards came to learn that the Director of Settlement had purported to cancel the allocation of the suit property to him vide the letter dated 11/5/2001 which he produced as plaintiff exhibit 5. The letter addressed to the plaintiff through the District Land Adj/Sett. **Officer Nyahururu** was in the following terms.

Dear Sir,

### **Re: Cancellation of Allocation: Plot.NO.1840-Oljoroorok Salient Settlement Scheme**

**I regret to inform you that due to unavoidable circumstances the allocation of the above land to you has hereby been withdrawn.**

**You are hereby informed that you should surrender back the documents released to you by settlement Fund Trustees. The said documents will be cancelled after which you will be offered an alternative plot.**

**Signed**

**A. Shariff**

**Director of Land Adjudication and Settlement**

**Cc Ministry of Lands & Settlement**

The plaintiff testified that he had not received this letter and only became aware of it after the 2<sup>nd</sup> Defendant had been allocated the suit land when he (the plaintiff) went to inquire about his plot that had been allocated to a 3<sup>rd</sup> party from the offices of the Director of Adjudication & Settlement. The plaintiff testified that he did not surrender his title documents to the suit property and that he was never offered any alternative plot by the Ministry as indicated in the letter from the Director of Land Adjudication and Settlement.

The plaintiff in his evidence clarified that between 1982 and 1992 there had been a problem on the recording of plots on the ground relating to plot NOS. 1840, 394 and 1902 **Oljoroorok Scheme** but the problem was sorted out by the District Land Adjudication & Settlement Officer, **Nyandarua** and he vide a letter dated 16/4/1992 to the Director of Land Adjudication & Settlement confirmed that the plots were to be documented as follows:-

**Plot 1840- James Waigwa Kairethi**

**Plot 1902- Catherine Ngina Kimuyu**

**Plot 393- James Ndungu**

The plaintiff testified that he was allotted plot **NO. 1840** after this clarification and denied that he had applied and paid for plot NO. 394. The plaintiff stated that it was **Catherine Ngima Kamuyu** who was claiming to be entitled to plot NO. 1840 but the dispute was arbitrated upon by the District Commissioner Nyandarua who ruled that the plaintiff was to continue in occupation of plot NO. 1840 while **Catherine Kamuyu** was to continue occupying plot NO. 1902. The plaintiff in cross examination insisted that the 2<sup>nd</sup> Defendant never featured at all when plot NO. 1840 was allotted to the plaintiff and the alleged allotment to the 2<sup>nd</sup> defendant in 2001 cannot have been justified since the land had already been allotted to the plaintiff.

Pw2 **Samuel Muchiri Wanjuguna** testified that he owns plot NOS. **Oljoroorok/Salient/3 and 4** which are adjacent to **plot NO. 1840**. The witness identified his plots in relation to the plaintiff's **plot NO. 1840** on the map produced as plaintiff Exhibit 6. Pw2 stated that he knew the owners of **1840** and **1902** as **James Waigwa Kareithi** and **Catherine Ngima Kamuyu** respectively. He stated that **Catherine Ngima Kamuyu** was the wife of the 2<sup>nd</sup> Defendant.

Pw2 testified that he was introduced to the plaintiff about 1984 by **Mr. David Musila then P.C Central Province** who informed him the plaintiff was his driver and was requested to assist the plaintiff to develop his plot. The witness testified that the plaintiff planted cypress trees along the perimeter of plot NO. **1840** and placed a barbed wire fence along the plot. Pw2 states that he used his machinery to remove tree stamps on the land and that he agreed with the plaintiff to grow wheat together on the parcel of land and to share the produce and states they continued with the venture until 1999. Pw2 stated there was no permanent development on plot NO. **1840** and further that **Mrs. Kamuyu** whom he knew well resided in plot NO. **1902** and had a house built thereon and kept cows and grew food stuffs on her parcel of land. Pw2 was emphatic there was no house constructed on land parcel NO. **1840**.

PW2 stated that he had not known the 2<sup>nd</sup> defendant until January 2000 when the 2<sup>nd</sup> Defendant was implicated with the theft of their wheat in late December 1999 which had unlawfully been harvested in plot NO. 1840 and the 2<sup>nd</sup> defendant was arrested as a suspect and charged with a criminal case at the Nyahururu Resident Magistrate's court.

Pw2 further testified that during the month of October 2001 the 2<sup>nd</sup> Defendant showed him a title deed for land parcel **Oljoroorok Salient/1840** which he offered to him to purchase but pw2 declined the offer since he knew the land to belong to the plaintiff. Thereafter pw2 stated that the plaintiff went to see him and he had copies of letters from the Ministry of Lands and Settlement which included one letter requiring that he surrenders documents relating to **plot NO. 1840** in consideration of being allotted an alternative plot. The witness further stated that since the 2<sup>nd</sup> Defendant had produced a title showing he

was the owner of plot NO. 1840 the police withdrew the criminal case observing that the matter related to a dispute relating to land ownership. Pw2 further testified that he had no neighbour by the name of **Mary Njambi Wairagu**, from whom the 2<sup>nd</sup> Defendant claims to have purchased plot **NO. 1840** and who he further claimed had constructed a house on **plot number 1840**. The witness maintained there was no structure built on **plot NO. 1840**.

In cross-examination Pw2 reiterated that he cultivated plot NO. **1840** from 1984 to 1999 but since the filing of the suit he has not been cultivating as the determination by the court as to ownership is awaited. On the basis of the ownership documents that the plaintiff held over land parcel 1840 pw2 asserted that the plot was legally owned by the plaintiff.

The plaintiff called pw3, **Paul Kungu Kabuga**, a police officer attached to **CID Kiambu** at the time of testifying. Pw3 testified that in 1999 he was stationed at **Oljoroorok police station** and that on 19<sup>th</sup> December 1999 he received a report from pw2 who claimed that someone had harvested wheat belonging to him on plot **NO. 1840 Nyandarua Salient Scheme**. Pw3 testified that he visited the scene and found that wheat had been harvested from plot **NO. 1840**. The witness stated that he recovered 4 bags of wheat which had been hidden in a house adjacent to the plot which he learnt belonged to **Mr. Kamuyu** from his wife, one **Catherine Kamuyu** who was present and introduced herself as such. After investigations Pw3 charged the 2<sup>nd</sup> defendant together with another person with the offence of stealing. The witness however stated that after the 2<sup>nd</sup> defendant obtained a title for plot 1840 about two (2) years after he was charged, the charge of stealing was withdrawn against him to await the ascertainment of the real owner of plot NO. 1840 by the court.

### **The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants case**

The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants called 3 witness. Dw1, **Rachel Wanjiku Maina**, a Senior Settlement Officer testified that the names of persons allocated land in settlement schemes are held in what she described as the Accountability Register. She produced as Defence Exhibit 1 the Accountability Register for **Oljoroorok Salient** which showed the allottees of plots serially and confirmed the existence of plot NOS. **394, 1840 and 1902**. The witness confirmed plot **NOs. 1840 and 1902** are adjacent to each other while plot **NO. 4 (SP)** allocated to pw2 borders the plots. The witness stated that as per the Accountability Register the plaintiff had been allocated plot **NO. 394** in respect of which he paid a deposit of Kshs.325/-. This plot did not however appear in the map Plaintiff Exhibit 6 since the same had been subdivided into 5 plots and new subplots issued new numbers. The witness stated that it could be possible that even though the plaintiff had paid deposit for plot **NO. 394**, he was showed plot **NO. 1840** on the ground. The witness stated that as per the accountability register plot **NO. 1840** was not allocated to anybody and the register was blank with no details as relates to the plot. Dw1 further conceded that the entry in the register can be blank even when the plot is occupied. The witness did not know whether or not the plot **NO. 1840** was developed as she had not visited the plot. The witness however confirmed that plot **NOs. 394 and 1840** had been discharged as evidenced by copies of the Green cards which the witness produced as Defence Exhibits 3 and 4.

Under cross-examination Dw1 confirmed that the plaintiff was allotted plot NO. **1840** and a charge by Settlement Fund Trustees was taken over the property as per Plaintiff Exhibit 1 and 2 respectively. The witness agreed that the letter of 11/5/2001 from the Director of Land Adjudication and Settlement cancelling the allocation to the plaintiff owing to "**unavoidable circumstances**" did not attribute any reasons for cancellation to the allottee. The witness conceded that if the plaintiff was to blame for the cancellation the SFT would not have promised to offer him an alternative plot. Indeed the witness as much as agreed that "**if the cancellation was so that the same is allocated to Stephen Gitau Kamuyu then that cannot be said to be unavoidable circumstances**".

The witness further stated she did not know whether or not in their records they had a letter of allocation to **Stephen Gitau Kamuyu**. How then did **Stephen Gitau Kamuyu** get to be allocated and registered as the owner of the suit land?

Dw2, **Thomas Moragu Nyangao** a Registrar of Titles in the Settlement Department of the Ministry of Lands testified and referring to the letter of 11/5/2001 Plaintiff Exhibit 5 he stated thus:-

**“The cancellation was done by the Director of Land Adjudication and Settlement. The letter gives the reasons for cancellation as “unavoidable circumstances”. The unavoidable circumstances relate to an ongoing dispute between the said James Waigwa Kaireti and one Mrs. Kamuyu the allottee of another plot NO. 1902 within the same scheme. There were several meetings held by the Director of settlement and the PS administering the Settlement Fund Trustees in attempting to resolve the dispute in which the “disputants” were represent. After evidence was taken it was resolved that the allocation of plot NO. 1840 to James Waigwa Kaireti was erroneous as the facts leading to the allocation to him had been misrepresented.**

**These facts are that plot NO. 1902 was allocated to Mrs. Kamuyu while the plot NO. 1840 was unallocated initially-----“.**

According to this witness **Catherine Ngima Kamuyu** occupied plot NO. 1840 on the ground and the plaintiff plot NO. 1902 which had been allocated to **Catherine Ngima Kamuyu**. The witness stated a process to swop the plots to correspond with the occupancies was initiated by the Land Registrar but since **Catherine Ngima Kamuyu** had fully paid for plot NO. 1902 and issued with the certificate of outright purchase the SFT was obligated to transfer and register the plot to her name.

The last witness for the defence DW3 was **Mr. John Welungai**, the District Land Adjudication and Settlement Officer, **Nyandarua North District** who had made a witness statement on 18<sup>th</sup> February 2014 and testified in court on 24<sup>th</sup> February 2014. Dw3 testified that the plaintiff was allocated plot NO. 1840 though he was occupying plot 1902 on the ground which was documented to **Catherine Ngima Kamuyu**. The witness stated that the person who was in occupation of plot NO. 1840 on the ground was the 2<sup>nd</sup> defendant, **Stephen Gitau Kamuyu** and that following discussions it was agreed that **Stephen Gitau Kamuyu** be documented for plot NO. 1840. The plots were swopped but since **Catherine Ngima Kamuyu** had already paid for plot 1902 she retained the plot and the plaintiff was supposed to be allocated an alternative plot by STF which he never was located on the ground.

In cross-examination the witness admitted he made his witness statement from the available records in their offices. DW3 stated he had never visited plot NO. 1840 and that there were no minutes of the discussions that led to the agreement of swopping the plots and that he could not confirm whether or not the plaintiff was present at any of the meetings that took place. According to DW3 the agreement to swop the plots is the one that led to the cancellation of the allotment of plot 1840 in favour of the plaintiff. The witness could not confirm whether or not the plaintiff was occupying plot NO. 1840.

The 2<sup>nd</sup> Defendant and the interested parties did not file any witness statements and/or tender any oral evidence. The plaintiff, the 1<sup>st</sup>, 3<sup>rd</sup> & 4<sup>th</sup> defendants and the interested parties filed written submissions to ventilate and articulate their respective positions in the case.

### **Analysis and determination of the issues**

The plaintiff testified and produced documentary evidence to show that he was allotted land parcel Nyandarua/Oljoroorok Salient/1840. The plaintiff stated he had occupied and had utilized the suit land from 1983/1984 and that he was with the assistance of Dw2, **Samuel Muchiri Wanjuguna** who was his neighbour farming wheat on the parcel of land. The plaintiff further testified that in 1999 the crop of wheat that he and Pw2 had planted was unlawfully harvested by the 2<sup>nd</sup> defendant after the same had matured which led to the 2<sup>nd</sup> defendant's arrest and he being charged of theft of the wheat at Nyahururu Resident Magistrate's court. Pw2 gave evidence that supported the evidence of the plaintiff in all material particulars.

The plaintiff produced in evidence a copy of the letter of allotment dated 18<sup>th</sup> May 1992 marked

“**plaintiff exhibit 1**” which was duly signed by the settlement Fund Trustees and accepted by the plaintiff. The letter of allotment clearly identifies the allotted plot as plot NO. 1840 Oljoroorok Scheme. The Settlement Fund Trustees took a charge over the same parcel of land to secure the sum of Kshs.5,425/- payable by the plaintiff to them. The charge dated 5<sup>th</sup> June 1992 duly signed by the plaintiff was produced as “**Plaintiff Exhibit 2**”. The plaintiff was to pay the secured charge amount to Settlement Fund Trustees through installments and he gave evidence that he was effecting payment to the Settlement Fund Trustees as required.

The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants admit the plaintiff was indeed allocated plot NO. 1840 and documented for the same but state that the allocation was owing to a mistake and/or misrepresentation. The Defendants state that the plaintiff had paid a deposit for plot NO. 394 in the same scheme but owing to a mistake and error on the record in regard to the numbering, the plaintiff was allocated plot NO. 1840 on the ground.

The plaintiff produced in evidence a letter dated 16<sup>th</sup> April 1992 marked as “**Plaintiff Exhibit 7**” from the District Land adjudication & Settlement Officer Nyandarua addressed to the Director of Land Adjudication & Settlement where it appears the dispute relating to plot NOS. 1840, 1902 and 394 had been sorted out and the District L.A. & Settlement Officer cleared the plots for allocation as follows:-

**1840- to James Waigwa Kaireti**

**1902- to Catherine Ngina Kamunya**

**394 – to James Ndungu**

Thus it appears that the allocation of the plaintiff of plot NO. 1840 was after due verification on the ground by the District Land Adjudication & Settlement Officer. The claim by the 1<sup>st</sup>, 3<sup>rd</sup> & 4<sup>th</sup> Defendants that the plaintiff was allocated plot NO. 1840 through mistake and/or misrepresentation is not supported. The 2<sup>nd</sup> Defendant’s claim that allocated the plot in 2001 following a purchase from one **Mary Njambi Wairagu** is not convincing in the face of the plaintiff’s evidence that he (the plaintiff) had been farming wheat in the parcel of land since 1984 which evidence was materially corroborated by Pw2 who is a neighbour and owns plot NOS 3 and 4 which border plot NOS. 1840 and 1902 and who from the evidence knew both the plaintiff and Catherine Ngina Kamunya as his neighbours.

**Dw3 John Welangai** who testified before me was at pains to show that the plaintiff was mistakenly allotted plot NO. 1840 and alluded to discussions in the office where the dispute between the plaintiff and the 2<sup>nd</sup> defendant was discussed and it was resolved to cancel the allotment to the plaintiff and to reallocate plot NO. 1840 to the 2<sup>nd</sup> Defendant whereupon the plaintiff was to be allocated an alternative plot. The witness could however not produce any minutes of any such meetings and or indicate the dates when the meetings/discussions were held. One is left wondering how such meetings were convened. Were any notices given and if so how? The plaintiff states he never participated in any such meetings and denies he was given any notice before his allotment of plot NO. 1840 was cancelled and the 2<sup>nd</sup> defendant reallocated his plot.

The letter of 11<sup>th</sup> May, 2001 from the Director, Land Adjudication & Settlement which purportedly withdrew the allocation of plot NO. 1840 from the plaintiff cited “**unavoidable circumstances**” as the reason for cancelling/withdrawing the allotment of the plot to the plaintiff. The letter made no mention of the alleged meetings and/or discussions with the plaintiff. If there had been such meetings and/or discussions where a decision to cancel or withdraw the allocation to the plaintiff was reached or taken in the presence of the plaintiff no doubt the letter would have made reference to the same. My assessment of the matter is that indeed there were no such meetings and/or discussions and that DW2 and DW3 in my view were deliberately skewing their evidence to find a justification for the letter dated 11<sup>th</sup> May 2001 cancelling the plaintiff’s allocation of plot NO. 1840 and to justify the reallocation to the 2<sup>nd</sup> defendant. The letter it will be noted was sent to the plaintiff through the District Land Adj/Settlement officer

Nyahururu. There is no evidence that the letter was in fact forwarded to the plaintiff and/or received by the Plaintiff. The plaintiff in his evidence stated that he was furnished a copy of the letter after the 2<sup>nd</sup> defendant had been issued with title to the parcel of land plot 1840 when he called at the offices of Director Land Adjudication and Settlement to find out the circumstances under which the Defendant got to be allocated his land.

In the premises it is my view that the plaintiff had no notification of the intention to cancel his allocation of plot NO. 1840 Oljorook Salient Scheme and this is exemplified by the fact that immediately the plaintiff learnt of the issue of a title over the suit land having been issued to the 2<sup>nd</sup> defendant he lodged a caveat over the suit property claiming beneficiary interest and initiated the instant proceedings.

I am not persuaded there were any “**unavoidable circumstances**” to justify the cancellation of the allotment of the parcel of land to the plaintiff which parcel of land the plaintiff had been using from 1983/84 and had held the allotment letter to the parcel of land for nearly 10 years before the purported cancellation. If it was true the allocation to the plaintiff was being made so as to correct a mistake or error in the allotment as the defendant witnesses stated, then the plaintiff would have been offered an alternative plot simultaneously with the cancellation of the allotment to him and allotment of the suit land to the 2<sup>nd</sup> Defendant. There is no evidence that the plaintiff was in fact offered an alternative plot and in those circumstances it is my view that the allotment to the plaintiff was not properly and/or lawfully cancelled. There could be no justification to cancel the allotment of plot NO. 1840 to the plaintiff so as to allot the same to the 2<sup>nd</sup> Defendant.

On the basis of the evidence tendered by the plaintiff, pw2 and pw3 I am persuaded that the plaintiff had been in occupation and was farming on plot NO.1840. I accept the evidence of the plaintiff and his witnesses that the 2<sup>nd</sup> Defendant had not put up a permanent house on plot NO. 1840 and neither was his family residing thereon. Pw2 who is the neighbour to both plot NOS. 1840 and 1902 was emphatic that there were no permanent developments on plot NO. 1840 which he knew to be owned by the plaintiff and was farming wheat thereon together with the plaintiff. Pw3, a police officer confirmed that when he received a report of theft of wheat he visited the premises where he found wheat had been planted on plot NO.1840 and there was no one residing thereon. The houses where he found some of the harvested wheat were on plot NO. 1902 where the wife of the 2<sup>nd</sup> Defendant **Catherine Ngima Kamunyu** was residing.

The 2<sup>nd</sup> Defendant did not attend court to testify and it is evident that after he was issued with a title he sought to dispose of the parcel of land to the PW2 as testified by Pw2. The 2<sup>nd</sup> Defendant eventually sold the parcel of land which apparently had been subdivided into parcel NOS. **Nyahururu/Oljoroorok Salient/17485 and 17486 to Peter Mbugua Muturi and Virginia Wambui Kabugi**, the 1<sup>st</sup> and 2<sup>nd</sup> interested parties herein. The sale to the interested parties was effected during the pendency of the present suit in 2007. The caution registered by the plaintiff in 2001 was irregularly removed on 23<sup>rd</sup> November, 2006 using a fictitious court order allegedly issued in this suit. **Hon Lady Justice Okwengu** (as she then was) on 23<sup>rd</sup> June 2011 delivering a ruling on an application by the plaintiff, where the plaintiff sought orders for the defendants to be required to explain the circumstances under which the land was subdivided and sold and how the caution registered by the plaintiff was removed, the Judge held there was no such order authorizing the removal of the plaintiff's caution.

Further on 15<sup>th</sup> December 2011 **Hon. Lady Justice Martha Koome** (as she then was) while dealing with this matter when **C.O. Birundu**, Land Registrar appeared on summons to show cause why he should not be punished for disobeying a court order, the Judge after examination of the Land Registrar ruled as follows:-

**“The District Land Registrar Mr. C.O. Birundu also attended court and gave evidence on events on how the caution was removed.**

**The caution was removed pursuant to the order which was registered on 23/11/2006 by the 2<sup>nd</sup> defendant. The order reads:-**

**“That whoever is in possession of piece of land known as land reference Number Nyandarua/Oljoroorok/Salient/C.207/1840 do have the right to remain in possession to the exclusion of the other party. That the application as against the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants be and is hereby dismissed”.**

**It is common ground that the order refers to a different parcel of land, the order does not direct the removal of the caution. The perusal of the court file shows that this matter was handled by Kuloba J and that order was not made on that day. This is a fraudulent order which was used to fraudulently transfer the suit land which was the subject of a dispute that was pending.**

**This was meant to subvert the cause of justice and the court should protect the dignity of its premises and the rule of law. The order that commends itself is the cancellation of entries NOS. 5 and 6. The District Land Registrar is hereby ordered to cancel the entries NOS. 5 and 6 of Nyandarua/Oljoroorok Salient/1840 and all other consequential dealings with the suit land and revert the title to status ante.**

**It is clear the fraudulent non-existent order was represented by the 2<sup>nd</sup> defendant. I direct the CID to investigate how Stephen Gitau Kamuyu and the District Registrar who registered the order of 30/5/02 obtained the order”.**

Following the order by **Hon. Lady Justice Koome** the titles issued to the interested parties were cancelled and the status obtaining as at the time of filing the suit now obtains. The interested parties having been enjoined as interested parties on 23<sup>rd</sup> June 2011 and having entered appearance in the suit did not oppose the plaintiff’s application to have the fraudulently obtained titles cancelled. The interested parties further in spite of being afforded the opportunity to do so did not file any witness statements and/or any defence to the plaintiff’s claim.

On the evidence tendered there is uncontraverted evidence that the plaintiff was indeed allocated land parcel NO.1840 Oljoroorok Salient Scheme in 1992 as evidenced by the letter of allotment dated 18<sup>th</sup> May 1992 and charge dated 5<sup>th</sup> June 1992. These documents are not denied by the Defendants. The defence by the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants that the allotment to the plaintiff was made by mistake or error cannot hold. The letter by the Nyandarua District Land Adjudication and Settlement Officer of 16<sup>th</sup> April 1992 cleared any dispute that may have been there relating to the plots. This officer being the person who was directly involved with the allotments in Oljoroorok Scheme was the person best suited to sort out any disputes on the ground and he did so and authorized the plaintiff to be allocated plot NO. 1840. The mistake and/or misrepresentation or error alluded to in the defendants defence is a creation of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants acting in concert to deprive the plaintiff his lawfully allotted plot. The court will not sanction such machinations as to do so would to give a seal of authority and to otherwise cleanse the dubious actions of public officers.

As stated earlier in this judgment the 3<sup>rd</sup> defendant did not offer any valid reason for cancelling the allotment of plot NO.1840 to the plaintiff. The plaintiff was entitled to be given reasons before his allotment could be cancelled under the terms of clause 1 (d) of the letter of allotment which provides as follows:-

- 1. (d) Upon any breach of these conditions the land shall become liable to forfeiture to the SFT but such forfeiture by re entry, suit, or otherwise unless a notice shall have been served on the proprietor of the land-**

**(i) specifying the particular breach complained of and**

**(ii) if the breach is capable of remedy, requiring the proprietor to remedy the breach, and**

**(iii) in any case, requiring the proprietor to make compensation in money for the breach, and the**

**proprietor shall have failed within a reasonable time thereafter to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money”.**

There was no attempt on the part of the 3<sup>rd</sup> defendant to abide by the foregoing provisions as he simply wrote the letter of 11<sup>th</sup> May 2001 citing what he described as **“unavoidable circumstances”** as the reason for revoking and/or cancelling the plaintiff's allotment which the plaintiff had held for over 9 years. No notice had been given to the plaintiff and nor were the alleged **“unavoidable circumstances”** specified.

In the case of **Kihara Muttu –vs- the Director of Land Adjudication & settlement (Misc. application NO.555 of 1996)** referred to the court by the plaintiff, **Hon. Justice Githinji** (as he then was) considered somewhat a similar case where an allotment to an allottee was cancelled and re- allocated to an interested party as in the present case.

The Judge in the case observed as follows:-

**“in our case, applicant had been allocated land, paid initial deposit, signed necessary documents and had used the land for many years according to him. The land was forfeited and re-allocated to the interested party. The court in the present case is considering the exercise of statutory power, whether it was exercised in accordance with the law. If the cancellation of the allocation to applicant and the re-allocation was contrary to the law, the court has jurisdiction to grant orders sought although it cannot cancel the title. Applicant says that he will seek cancellation in another forum and the interested party will have a chance to be heard”.**

The judge in the case went ahead to grant an order of certiorari to quash the decision of the Director of Land adjudication and settlement cancelling the Applicant's allocation of plot NO. 47 Lewa Settlement Scheme and allocating the same to a **Mr. Mugambi M'mbogori**. The circumstances of the case that **Githinji J** faced are more or less similar to the circumstances of the case before me save for the fact that the matter before **Githinji J** was a Judicial Review application. However what was in issue was the validity or otherwise of the decision by the Director, Land Adjudication & Settlement to cancel and re allocate an allottee's parcel of land. The position of an allottee of a parcel of land was succinctly summed up by **Odunga J**, in the case of **Commissioner of Lands & Another –vs- Kithinji Murugu M'agere (2014) eKLR** where the learned Judge while referring to the decision in the case of **Rukaya Ali Mohammed –vs- David Gikonyo Nambacha & another (Kisumu HCCC NO.9 of 2004)** observed thus:-

**“21. As was held in Rukaya ali Mohammed –vs- David Gikonyo Nambacha & Another (supra) 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. No such allegation has been made by the Respondents herein”.**

The plaintiff herein was in the position of an allottee and his allotment of land parcel NO. 1840 could not be cancelled and/or revoked at the whims of the 3<sup>rd</sup> Defendant without observing due process. Having regard to the circumstances and the evidence tendered on behalf of the parties I am not satisfied that the 3<sup>rd</sup> Defendant acted within the law when he purported to cancel the allotment to the plaintiff of plot NO. 1840 and I hold the cancellation was unlawful and therefore invalid.

Turning to the framed issues it must by now have become obvious and clear from my discussion and analysis of the evidence that I would answer issues (i)-(iv) both inclusive affirmatively. There is evidence that the plaintiff was allocated plot NO. **Nyandarua/Oljoorok Salient/1840** which allotment the plaintiff duly accepted by signing the letter of allotment and the charge. The 3<sup>rd</sup> Defendant cancelled the

allotment to the plaintiff and I have held that the cancellation of the allotment to the plaintiff was not justified and was irregular and unlawful and was therefore of no legal effect.

It follows that if the cancellation of the allotment of plot NO. 1840 to the plaintiff was unlawful then the subsequent re allocation of the plot to the 2<sup>nd</sup> Defendant was irregular and unlawful. The 3<sup>rd</sup> Defendant had no right having regard to the reasons given to cancel the allotment to the plaintiff. The 2<sup>nd</sup> Defendant was in my view instrumental to having the allotment to the plaintiff cancelled so that he could obtain reallocation of the property to his name even though the person who it is alleged had a dispute with the plaintiff was his wife, **Catherine Ngima Kamuyu**. Somehow although the dispute was stated to be in regard to occupancies on the ground as between the plaintiff and the 2<sup>nd</sup> Defendant's wife in explicity the 2<sup>nd</sup> defendant and his wife ended up being the beneficiaries of plot NOS. 1840 and 1902 and the plaintiff was totally edged out. That would be inequitable and unacceptable as at any rate the plaintiff had been allocated the property. The re-allocation of plot NO. 1840 to the 2<sup>nd</sup> Defendant having been unlawful his subsequent registration as owner of the suit property was ineffectual and the same should be cancelled and the plaintiff registered as the owner of plot NO. **1840 Oljoroorok Salient Scheme**.

The interested parties as earlier demonstrated in this judgment acquired the suit property when this suit was pending and the court had issued an order for the observance of the status quo until the suit had been determined. Additionally the plaintiff had placed a caution to restrict any dealings with the suit property which caution was illegally and unlawfully removed to pave the way for the subdivision and sale of the property. Both **Okwengu, J and Koome J** held the caution to have been unlawfully removed and **Koome J** further held fraud had been perpetrated in the removal of the caution and transfer of the sub titles to the interested parties during the pendency of the suit resulting in her ordering the cancellation of the titles registered in the names of the interested parties.

To the extent that the 2<sup>nd</sup> defendant acted fraudulently in transferring the property to the interested parties it follows that the interested parties could not acquire any proprietary interest in the suit property. The doctrine of *Lispens* comes to the aid of the plaintiff in that the interested parties acquired the property during the pendency of the present suit and was therefore subject to the outcome of the suit. The interested parties did not show any cause or any sufficient cause before **Koome J** why their titles should not be cancelled. Equally before me the interested parties did not tender any evidence save to put forth documents to demonstrate that they had purchased the property from the 2<sup>nd</sup> defendant parties. The 2<sup>nd</sup> defendant as illustrated, acted unlawfully in procuring the removal of the caution, and in dealing with the suit property during the pendency of the suit and therefore he could not pass any good title to the interested parties. I am not satisfied the interested parties were innocent purchasers from the 2<sup>nd</sup> defendant and even if they were, their interest in the suit property would be defeated by the application of the **lispens doctrine** which I hold would apply in the circumstances and facts of this case.

In the premises I hold and find that the interested parties would not be entitled to be registered as the owners of the suit property.

The plaintiff made a mute claim for general damages for loss of use. The claim was rather subdued as the plaintiff stated that he was using the plot for farming wheat in conjunction with pw2. I however understood pw2's evidence to be that they were not breaking even and were running losses season after season. I therefore hold no proper basis was laid by the plaintiff to enable the court to make any assessment of damages and I will accordingly decline the plaintiff's prayer for general damages.

The upshot is that taking the totality of all the evidence and the submissions by the parties I am satisfied that the plaintiff has established his case on a balance of probabilities and is entitled to judgment. I enter judgment in favour of the plaintiff in term of prayers (a) (b) (c) and (d) of the plaint. Additionally in case the interested parties had taken possession of the suit property pursuant to the unlawful sale by the 2<sup>nd</sup> Defendant to them the court directs that they vacate and deliver vacant possession to the plaintiff within 60 days of this judgment failing which the plaintiff shall be entitled to an order of eviction upon application. The costs of the suit are awarded to the plaintiff as against all the defendants jointly and severally.

**Orders accordingly.**

Judgment dated, signed and delivered at Nairobi this **15<sup>th</sup>** day of **May** 2015.

**J. M. MUTUNGI**

**JUDGE**

**In presence of:**

..... for the plaintiffs

..... for the defendants

..... for the interested party