



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE NO. 1814 OF 2002**

**NORBIXIN KENYA LIMITED..... PLAINTIFF**

**VERSUS**

**THE HON. ATTORNEY GENERAL.....RESPONDENT**

**JUDGMENT**

**The Plaintiff's Case**

The Plaintiff's case is stated in its Plaint dated 16<sup>th</sup> December 2002 as amended on 10<sup>th</sup> July 2009. The Plaintiff avers that it is the registered owner of all that piece of land referred to as L.R. 209/11009 (hereinafter "the suit property") measuring approximately 1.320 hectares, which is situated in Industrial Area in Nairobi, Villa Franca area. It is the Plaintiff's further averment that the Commissioner of Police, without any colour of right or justification or permission, trespassed onto the suit property and arbitrarily constructed a temporary structure currently being used as a police post and known as Kwanjenga Police Post.

The Plaintiff claims that the said Commissioner's action unlawfully deprived it of its right to absolute ownership of the suit property, and outlined the particulars of unlawful deprivation as: continuing with the trespass despite demands to vacate; unlawfully constructing a police post thereon without authority, permission or justification of any kind; confiscating the Plaintiff's property without compensation; and denying the Plaintiff the right to use its property. Further, that the Defendant failed to comply with the provisions of sections 6(2), 8 and 9 of the repealed Land Acquisition Act and 16 of the Government Proceedings Act, and breached the provisions of Section 75 (6) and (7) read together with Section 84 of the repealed Constitution of Kenya.

The Plaintiff contended that the Defendant's action of depriving it of its right to ownership and user occasioned it loss and damages. It prays for judgment against the Defendant for orders that:

- a. A declaration that the Commissioner of Police is in illegal possession/occupation of the suit property as a trespasser.
- b. An order that the Commissioner of Police, its agents and/or its servants do vacate and remove all structures or its properties from the suit property and to hand-over the said property to the Plaintiff with vacant possession within 14 day from the date of judgment. Further, that in the alternative and without prejudice to the aforesaid claim, the Commissioner of Police do pay to the Plaintiff Kshs.130 Million compensation for the said property.
- c. General damages to be determined by the Court for loss of user.

d. Payment of appropriate mesne profits for loss of user.

e. Costs and interests on (b) above at court rates from 9/1/2010 till payment in full.

The Plaintiff called two witnesses to testify on its behalf during the hearing of the suit. Abdi Ali Dere (PW1) testified that he is a Director together with Maina Ahmed Ali and Osman Abdi Ali of the Plaintiff company which was incorporated in 1993. PW1 testified that the company purchased the suit property on 1/7/1996 from Jefitha Motaroki Ogeto, Rose Kwamboka Momanyi and Joash Otori Mukuwa (hereinafter referred to as “the vendors”), for a consideration of Kshs. 2.5 Million. Further, that the land was thereafter transferred to the Plaintiff on 26/8/1996, who was subsequently issued with a certificate of title on 4/2/2000 for a term of 99 years from with effect from 1/12/1995. PW1 testified that the Plaintiff took immediate possession of the property which was vacant as at the date of purchase. It was his evidence that the vendors had been allocated the suit property by the Commissioner of Lands on 15/12/1995 and they made payments of Kshs. 593,000/- through banker’s cheque to the Departments of Land.

He also testified that on 8/2/2000 the Ministry of Lands demanded land rent of Kshs. 508,200/-, which the Plaintiff paid on 16/2/2000 to the Commissioner of Lands. PW1 testified that sometime in March 2000, the Police entered into the suit property, forced the Plaintiff out and put up a structure thereon, yet neither the allocation nor the title had been cancelled. PW1 stated that he instructed the firm of Njuki Muoka Rashid & Co. Ltd at a fee of Ksh. 20,000/- to carry out a valuation of the property which valued the property at Kshs. 45 Million as at 3/6/2008.

PW1 produced the certificate of incorporation of the company and memorandum & articles of association (Plaintiff’s Exhibits 1 and 2), the said sale agreement and transfer (Plaintiff’s Exhibits 3 and 4), the allocation letter in favour of the vendors (Plaintiff’s Exhibit 5), a receipt dated 6/8/1996 to show payments made of Kshs 593,934/= to the Department of Lands (Plaintiff’s Exhibit 6), copies of the banker’s cheques with respect to the said payment dated 2/8/1996 (Plaintiff’s Exhibits 7 (a), (b) & (c)), copies of a cheque and receipt both dated 16/2/2000 being payment Kshs 508,200/= as land rates (Plaintiff’s Exhibits 9, 10 and 11), and the 1<sup>st</sup> Valuation report dated 3/6/2008 showing the value of the suit property to be Kshs 45 million and a receipt acknowledging payment for valuation (Plaintiff’s Exhibits 12 and 13).

On cross-examination, PW1 stated that he purchased the property from the vendors and paid for the allocation fees. He stated that the allotment letter was issued on 15/12/1995, but that the Plaintiff entered into an agreement with the vendors on 1/7/1996 and paid the purchase price on 2/8/1996. PW1 admitted taking note of the disclaimer that the allocation offer lapses if payment is not made within 30 days. PW1 stated that he was not aware that the allocation letter was cancelled through a letter dated 15/7/1998, and that he did not know that the plot was reserved for purposes of a Police Station. It was his testimony that he confirmed the vendor’s allocation letter with the Lands Office before purchasing the property and subsequently paying stamp duty. In re-examination, PW1 stated that the allocation fees indicated in the allotment letter was paid by the vendors.

The second witness for the Plaintiff was Anthony Kariuki Mwaura (PW2), who testified that he has a degree in Land Economics from the University of Nairobi and works with Kenstate Valuers as a valuer under Geoffrey Waburi, a registered and practicing valuer. It was his evidence that he conducted a search on the suit property and found it registered in the name of the Plaintiff, and that the property was unencumbered. PW2 testified that he agreed, upon instruction by the Plaintiff, to value the property at a fee of Kshs. 50,000/-. He testified that he valued the property at Kshs.130 million and made a report dated 7/5/2010, which was produced as the Plaintiff’s Exhibit 14.

On cross examination, PW2 testified that he was not a registered valuer but practiced under a registered valuer. PW2 testified further that he could carry out the valuation and inspection on behalf of the registered valuer, who has to sign the report before the same is issued. On re-examination PW2 confirmed that the registered valuer he works under owns Kenstate Valuers and has a practicing certificate. He clarified further that he would be eligible for registration within 3 years of graduation and after undertaking practice and a professional exam.

## **The Defendant's Case**

The Defendant denied all the allegations of trespass and unlawful deprivation alleged by the Plaintiff in an Statement of Defence dated 19<sup>th</sup> February 2002 as amended on 18<sup>th</sup> August 2009, The Defendant averred that if any occupation took place, the same was done within the precincts of the law, without any intention to trespass and/ or unlawfully deprive the Plaintiff as alleged in the plaint. It is the Defendant's averments that the allotment of the suit property to Joash M. Otoro and six others was withdrawn and cancelled on 15/8/1998, after it was confirmed that the land had prior to the allocation been reserved for the Police Department. Subsequently, a letter of allotment was issued to the Commissioner of Police who accepted the offer and made requisite payment on 28/5/1999.

The Defendant called three witnesses to testify. The first witness, Gordon Odeka Ochieng (DW1), stated that he is the Chief Lands Administration Officer at the office of the Registrar of Lands. He testified that he is aware that the Plaintiff holds title to LR 209/11009, the suit property. It was DW1's evidence that planning and survey of the said land was carried out, and on 15/12/1995 parcel LR 209/11009 measuring 1.320 hectares was allotted to the vendors and by extension the Plaintiffs, for a period of 99 years from 1/12/1995. DW1 testified that the vendors were required to pay Kshs.495,990/= for the land, but before they could pay the amount, they requested the Commissioner of Lands vide a letter dated 27/2/1996 for consent to sell and transfer the property to enable them purchase property in their rural homes.

DW1 further testified that the Deputy Commissioner of Lands received the letter and issued instructions which were noted on the vendors' letter stating that there was no objection subject to the payment of outstanding fees due. DW1 testified that their records show that the vendors paid the fee of Kshs. 593,934/- on 5/8/1996 and a payment receipt was issued on 6/8/1996. He also referred to the form of transfer dated 26<sup>th</sup> August 1996 consented to by the Commissioner of Lands that showed that the vendors were selling the suit property to the Plaintiff for Kshs.2.5 Million, and the said figure was raised to Kshs 3.5 million after valuation, and the stamp duty subsequently assessed and paid.

It was DW1's evidence that they obtained the deed plan for the suit property from the Director of Survey and begun preparing a title in favour of the Plaintiff. However in the process, they received notification that the property could have been reserved for purposes of a police station. DW1 testified that the Commissioner, vide a letter dated 15/7/1998 addressed to the vendors and copied to the Plaintiff, directed that the allotment be withdrawn and the vendors be refunded their money. DW1 stated that following withdrawal they issued a fresh letter of allotment in favour of the Commissioner of Police on 10/12/1998. Thereafter, on 28/5/1999, the Police paid Kshs. 3,530/- for the property and was receipt issued.

It was DW1's further testimony that while preparing to issue title to the Police, the then Commissioner of Lands issued an internal memo instructing that the title to the suit property be processed in favour of the Plaintiff. Following that directive, DW1 said, the title was processed and registered under IR.83073 on 4/2/2000 in the names of the Plaintiff.

DW1 testified that the development plan No. 309 recognized the existence of a police station on the suit property. He stated that the Police are in possession of an allotment letter, which has not been revoked, and also in occupation of the suit property. It was his evidence that the Plaintiff has never been in occupation. DW1 testified that the allotment had a special condition wherein the Plaintiff was required to submit building plans for approval within 6 months of actual registration, but that the Plaintiff had failed to submit such plans.

Further, that the user for the land was stated on the letter of allotment as residential purposes. Additionally, that the Plaintiff is required to pay an annual amount of Kshs.92,400/- being rent but there was no evidence demonstrating payment of rent. DW1 stated that the Plaintiff was in breach of the conditions as specified under Special Conditions No. 2 and 5 in the Grant. Further that Section 77 of Government Lands Act provides for forfeiture. In respect to the value of the property claimed by the Plaintiff, DW1 testified that the Plaintiff was only entitled to the refund of what was paid to the Commissioner of Lands.

On cross examination, DW1 admitted that the Plaintiff is the registered owner of the property. He also admitted that he learnt about the property and the suit in 2005 and had no knowledge of the dealings before then. In support of his evidence, DW1 produced the allotment to the vendors dated 15/12/1995 (Defendant's Exhibit 1); a letter from the vendors to the Commissioner of Lands seeking consent to transfer dated 27/2/1996 (Defendant's Exhibit 2); a receipt of payment for legal fees at the Department of Lands dated 6/8/1996 (Defendant's Exhibit 3); the transfer form from the vendors to the Plaintiff dated 26/8/1996 (Defendant's Exhibit 4); a letter addressed to the vendors and copied to the Plaintiff dated 15/7/1998 cancelling the allotment (Defendant's Exhibit 5); the allotment letter in favour of the Commissioner of Police dated 10/12/1998 (Defendant's Exhibit.6); and a receipt of payment of Ksh.3,520/- dated 28/5/1999 made by the Police (Defendant's Exhibit 7).

The second witness for the Defence was Musa Kingoli No. 230132 (DW2), who stated that he is a Senior Superintendent in the Police attached to Kisumu Town as the Officer Commanding Police Division (OCPD), having been previously the Deputy OCPD at Embakasi, and that he was aware of the land in dispute. It was his testimony that on 13/11/1986 the Commissioner of Police made an application to the Commissioner of Lands for allocation of 6 acres of land to put up a police station between Bellevue and City Cabanas area along Nairobi – Mombasa Road. He testified that the request was as a result of many estates coming up in the area, and an attendant upsurge of crime.

DW2 testified further that the Commissioner of Lands replied by a letter dated 28/11/1986 stating that 6 acres could not be allocated but that there was a parcel of land at Villa Franca area, set aside for a police station, and forwarded a Part Development Plan of the area to the Police stating that the land could be offered to them. DW2 testified that the Commissioner of Police accepted the offer and was given an allotment letter – LR No. 209/1109 – Villa Franca dated 10/12/1998, signed by an Assistant Commissioner of Lands. It was DW2's testimony that the allotment letter had conditions to be met which were complied with and a fee of Ksh. 3520 /- paid to the Lands Office for purposes of generating a title deed. DW2 stated that since the Police met its obligation, it has been expecting the title deed.

In the meantime, however, that the Police Station is on site and has been operating since 1992 and if the same is moved the residents will greatly suffer. He stated further that before the allocation, the police were previously accommodated by the Catholic Church in Mukuru kwa Njenga. DW2 further testified that on 15/7/1998, it came to his attention as Deputy OCPD Embakasi that the Plaintiff was claiming ownership of the land and that the Police should be evicted for being thereon illegally. However, the Police had not received any cancellation of its allotment letter by the Commissioner of Lands. It was his evidence that they made effort and approached the relevant officers to check the structural maps which still showed that the land was reserved for a police station.

DW2 testified that they have structures on the suit property occupied by police officers who serve the public in different areas including Plot 10, Imara Daima Estate, Villa Franca Estate, Mukuru Kwa Njenga Slum area, Riara Group of Schools, Sunrise Estate, Oak Park Estate, Muimara Estate, Pipeline Estate, city cabanas area, a financial institution, the factories and industries within the area including ASL, RAMCO, Transami Kenya Limited, among others, and Rumbara Road from Mlolongo to Bellevue. DW2 stated that the other police stations located in the area are Industrial Area and Embakasi police stations which are 8 kilometers and 10 kilometers away respectively. It was DW2's averment that the police station on the suit property is very important to manage the vast area and facilities and hence centrally placed. He reiterated that if removed members of the public will be left to fend for themselves.

On cross examination, DW2 stated that the suit property as shown in the Part Development Plan is reserved for a police station, and that was what the police requested. Further, that there was a police station set up thereon referred to as Villa Franca Police Station. DW2 stated that in 1998 he was the Deputy Officer Commanding Police Division at Embakasi and in charge of administration including the assets of the police. DW2 reiterated that the Police in 1986 applied for the plot and as of 1992 they were in occupation of the suit property. Further, that there have been physical structures thereon since 1998, namely housing structures built with iron sheets where the police reside.

DW2 stated that the Police have an allotment letter from the Commissioner of Lands but do not have title

deed. It was his evidence that the Police, over and above meeting their obligation, made an effort to obtain title but that the Commissioner of Lands had failed to deliver on his part. In response to the allotment letter in favour of the allottee (the Plaintiff's Exhibit 1), DW2 stated it was an allotment letter of the same property issued to many persons. When questioned on the title deed issued in favour of the Plaintiffs, DW2 responded that the same could be a forgery.

On being referred to the letter dated 23/12/1998 (marked "AAD 1") from the Permanent Secretary Provincial Administration addressed to the Commissioner of Lands, DW2 denied being part of the letter. DW2 also admitted that the said letter came after the letter of 10/12/1986 (marked Defendant's Exhibit.11) by the then Administrative Secretary, Kenya Police S.K. Koinange addressed to the Commissioner of Lands which requested the reservation of the plot for purposes of putting up a police station.

In re-examination, DW2 stated that the said letter dated 23/12/1998 by the Permanent Secretary Provincial Administration, Mr. Cheruiyot, was copied to the Commissioner of Police, and that at no time did the Commissioner of Police indicate that the police was not interested in the suit property. DW2 admitted not to carrying out a search of the suit property, but stated that the remaining part was for the Commissioner of Lands to generate a title deed following the allocation. DW2 stated that he would not be aware if there was any other Part Development Plan, and he only knew of the one reserving the suit property for purposes of a police station.

In support of his evidence DW2 produced the letter dated 13/11/1986 being the application made by the Administrative Secretary, Kenya Police to the Commissioner of Lands for a plot of 10 acres along Mombasa Road between Belle Vue Cinema and General Motors (Defendant's Exhibit 8); a letter dated 28/11/1986 signed by A. F. Osman for the Commissioner of Lands in response to the request made by the police stating that there is a site within Villa Franca reserved for a Police Station, and is available on request (Defendant's Exhibit 9). The said letter attached an approved Part Development Plan No. 309 dated 2/9/1986 showing the land set aside for the Police Station. He also produced a letter dated 10/12/1986 from Administrative Secretary, Kenya Police to the Commissioner of Lands making a request for allocation of the said plot (Defendant's Exhibit 10).

The last Defence witness, Patrick Waweru (DW3), stated that he is the Principal Physical Planning Officer at the Ministry of Lands. He testified that a Part Development Plan is ordinarily extracted from a larger Development Plan for an area for purposes of alienation of land. He elaborated on the process of preparing a Part Development Plan at the time the one produced as evidence before Court was prepared as follows:-

- i. The Commissioner of Lands requests the Director of Physical Planning to prepare a Part Development Plan, which is prepared by the Director and submitted to the Commissioner of Lands for approval.
- ii. Once it is approved a copy of the PDP is returned to the Director of Physical Planning and an entry made in the register showing when it was prepared and approved and a number given in the register which identifies the Part Development Plan.

DW3 further explained that the structural plan is a policy document prepared for purposes of guiding the growth and development in urban areas or townships. It also directs private and public investors, as well as being the basis from which other short term plans such as Part Development Plans are prepared. It was DW3's testimony that the suit property, according to the structural plan had been reserved for a police station. Further, that he was not aware of any changes to the structural plan or other structural plans for the area. DW3 referred to a copy of the register of the approved Part Development Plan, produced by DW1 stating that the register reveals that the approved Part Development Plan of the suit property being No. 309 which was prepared on 20/8/1986 and approved on 2/9/1986. In support of the evidence DW3 produced a Structural Plan and an extract of the register as the Defendant's Exhibit 12.

DW3 further testified that Plans are not rigid documents, and that sometimes circumstances require replanning. Therefore, that if such a situation arose, the Commissioner of Land would request the

Director of Physical Planning to re-plan the area. If there was another plan existing, the new plan would indicate it had superseded the earlier plan. DW3 testified that the procedure for preparing a new Part Development Plan is the same, and that they did not have records of any Part Development Plan suspending the one described as No. 309. He reiterated that the suit property in as far as their search was concerned still remains a police station.

On cross examination, DW3 stated that a Part Development Plan is not a title document. He stated that Part Development Plan No. 309 shows it was for proposed District Centre, and that the register shows that the plan is for proposed sites because at the time the plan was prepared there were no existing users. Further that the Part Development Plan is the one used for allocation.

It was his testimony that where a Commissioner of Lands issued a title that was outside of the user stated in the Part Development Plan, he would be acting outside procedure and such action would be irregular. DW3 stated that he has been in the Department of Physical Planning for 15 years and did not know whether the Commissioner of Lands had issued titles which were against a Part Development Plan. DW3 clarified that the procedure for approval of Part Development Plan changed in 1998 with the enactment of the Physical Planning Act, stating that the current procedure requires that the Minister in charge of Lands approves the PDP, which is then given to the Commissioner of Lands to issue the allotment letters.

In re-examination DW2 testified that once the Commissioner of Lands is issued with a Part Development Plan, if it is for private use the same is forwarded to the valuation section for purposes of fees to be paid, and thereafter the Commissioner of Lands issues a letter of allotment in favour of the beneficiary.

### **The Submissions**

Wetangula, Adan & Makokha Advocates for the Plaintiff filed submissions dated 12/11/2013. The counsel referred to the annexures annexed to Abdi Ali Dere's affidavit marked "AAD 1" sworn on 12/3/2003 in support of an application for striking out the defence filed on behalf of the Defendant. One of the annexures is a letter dated 23/12/1998 from the then Permanent Secretary Provincial Administration Mr. Z.K.A. Cheruiyot MGH, addressed to the then Commissioner of Lands, Mr. W. Gachanja stating that the Provincial Administration had no objection to the issuance of title in favour of the Plaintiff in respect to the suit property. It was counsel's submission that on the strength of the said letter, the Commissioner of Lands proceeded to issue title. Further that from the evidence adduced, it is evident that the Plaintiff took immediate possession of the property and has been paying rates assessed by the local authorities. Counsel submitted that the right to own property is enshrined in the Constitution at Article 40 (1).

To emphasize the emotive nature of land disputes, counsel cited the case of **Samuel Murimi Karanja & 2 Others -v- Republic, HCCC Criminal Application No. 412 of 2003** where a 3 Judge bench of the Criminal division determining a Constitutional Reference, observed:

**"The issue of land ownership is volatile, it is for this reason that holders of valid titles to land must be protected by the law, the government and this court....once the court is faced with the claim of a valid title issued by the government, it has no obligation to inquire into the reasons or manner in which the title was obtained, unless of course there is clear evidence of fraud against the holder of the title. Courts must shy away from usurping the authority of the grantor or right to question title deeds...except in clear cases of fraud or where the title was not issued in accordance with the governing act. This strict observance of the property rights of a title holder is necessary to ensure certainty in transactions regarding land".**

Counsel submitted on the doctrine of sanctity of title that there was no doubt that the Plaintiff is registered proprietor of the suit property and that there was no evidence of fraud or an allegation of unlawful acquisition on its part. In that regard, that the Plaintiff's title remained indefeasible and therefore the Commissioner of Police had no right to impeach its title.

It was further submitted for the Plaintiff that no amount of public interest or policy could stand against

the Plaintiffs titles, since unlawful and un-procedural interference with a registered title is in itself an act that goes against public interest and policy. In support of this submission counsel cited several authorities including **Charles Ogejo Ochieng –vs- Geoffrey Okumu (1995) eKLR C.A. 181 of 1991**, and **Joseph Arap Ngo’k vJustice Moijo Ole Keiwua NAI Civil Appl. No. 60 of 1997** where the Court of Appeal upheld the conclusiveness of section 23(1) of the repealed Registration of Titles Act.

Counsel also submitted on deprivation of private property as provided under Article 40 (3) of the Constitution. It was their submission that the Constitution abhors deprivation of property unless such deprivation :-

(a) is as a result of acquisition in accordance with Chapter 5;

(b) is for a public purpose and is carried out in accordance with the constitution and any Act of Parliament that –

(i) Requires prompt payment in full, or just compensation to the person, and (ii) Allows any person who has an interest in or right over, that property a right of access to a court of law.

Counsel made reference to section 6 of the repealed Land Acquisition Act which provided that where the minister was satisfied that any land was necessary for a public body, the minister was to certify in writing to the Commissioner and direct the Commissioner of Lands to acquire the land. Further, that the Commissioner, under section 6(2), was required to cause a notice stating that the Government intended to acquire the land to be published in the Gazette, for the benefit of persons who had interests thereon.

Counsel also cited section 107 the Land Act of 2012 which outlines the procedure to be followed when the Government intends to compulsory acquire private land. Counsel drew the Court’s attention to sections 170 (5) and 111(1) which provides for publication and service of notice of intention to compulsory acquire the land and just compensation to be paid promptly and in full in the event of acquisition, or allocation of another land as an alternative to compensation.

Lastly, it was the Plaintiff’s counsel’s submission that the Defendant flouted the process and procedures that provide for compulsory acquisition of land, for failing to serve the Plaintiff with notice of the intention of acquisition of its land by the Commissioner of Police, and also failing to compensate or allocate alternative land to the Plaintiff. Counsel submitted that the Defendant’s action amounted to trespass on the Plaintiff’s property which resulted to breach of the Plaintiff’s constitutional right to property. Thus, unless the Plaintiff is justly and promptly compensated, it will be prejudiced primarily because title thereto was lawfully obtained. Counsel urged the Court to enter judgment as prayed in the Amended Plaintiff.

Stephen Terrell, a Litigation Counsel at the Office of the Attorney General filed submissions on behalf of the Defendant on 21/2/2014. Counsel submitted that the Defendant had demonstrated that the allotment letter in favour of the previous owners of the suit property was cancelled. Further, that the notice of cancellation was copied to the Plaintiffs, acknowledgement of which had not been denied.

It was counsel’s submission that the Plaintiff fraudulently caused a titled to be drawn in its name in view of the knowledge of revocation of the allotment letter. Counsel also submitted that an unequivocal request was made to the Plaintiffs to identify an alternative piece of land which the Commissioner of Lands was willing to allocate, but instead the Plaintiff chose to misrepresent the true picture resulting in the issuance of title. In support of this submission, counsel cited the cases of to rely on the famous case of **Midland Bank Trust v Green (1981) AC 513** wherein the court held that fraud unravels everything; and **Redgrave v Hurd (1981) 2Ch. DI** where the court held that fraud consists of intentional deceit, a false representation by the Defendant of an existing fact, made knowingly, or without belief in its truth, or recklessly, careless whether it is true or false, with the contention that the claimant should act on it, and which result in damage to the claimant.

It was also submitted that the Defendant had demonstrated that the property had been set aside for a

public purposes, namely, the establishment of a police station to serve the Nairobi South area. Counsel submitted that the allocation of the suit property to the national police service was lawful and came first in time, therefore that the subsequent allocation to the vendors could not supersede an earlier allocation. Counsel relied on the maxim that the first in time prevails.

Counsel referred the court to the disclaimer captured in the allotment letter that, '*Government shall not be liable for the loss suffered*', submitting that the suit property fell within such bounds, and that the Plaintiff had knowledge or ought to have known that the suit property was committed for the establishment of a police station. Counsel further submitted the practice by Government institutions and agencies is that they use letters of allocation as evidence of ownership, which practice exposed them to unscrupulous persons selling off public lands and utilities.

Counsel referred the Court to the evidence of DW2 who testified that before a change of user could be done the public purpose must have been extinguished, and that re-planning for the area must be undertaken. It was submitted that the Plaintiff had failed to avail a new Part Development Plan as evidence to show any re-planning exercise which would supersede the previous Part Development Plan. Additionally, that in the absence of change of user, the title could not have been issued procedurally and that such allocation was null and void. Further, that in any event, and as per the records at the Office of the Director of Physical Planning, the area is still reserved as a Police Station.

Mr. Terrell submitted that the circumstances surrounding the Plaintiff's acquisition of title over the suit property was such that one would make an inference of impropriety that led to issuance of title in its favour. In support of this submission counsel made reference to the repealed Registration of Titles Act at Section 23, which provided that a title shall not be subject to challenge except on grounds of fraud or misrepresentation to which the registered owner is proved to be a party.

The counsel also cited the case of **Republic v. Permanent Secretary Ministry of Public Works and Housing Ex-parte Tom Mallachi Sitima (2014) eKLR**, where it was held that even though Article 40 of the Constitution protects proprietary rights, the said rights are not absolute and can be limited. Further that one of the limitations in the Article is where the property has been found to have been unlawfully acquired. He also relied on the doctrine of public trust as found to exist in **Republic vs. Minister for Transport & Communication & 5 Others Ex Part Waa Ship Garbage Collector & 15 Others Mombasa HCMCA No. 617 of 2003 (2006) 1 KLR (E&L) 563** .

As regards the letter dated 23/12/1998 from the from the then Permanent Secretary Provincial Administration Mr. Z.K.A. Cheruiyot to the effect that the Kenya Police had no interest on the suit property, and authorizing the issuance to title to a private developer, counsel submitted that the said letter was written after the cancellation of the allotment in favour of the vendors was expressed in a letter dated 15/7/1998 and copied to the Plaintiff. It was counsel's submission that, first, the allottee, that is, the Commissioner of Police, was not asked to formally relinquish its interest on the suit property and secondly there was no application for change of user lodged before title was issued to the Plaintiff. Counsel submitted that in view of the evidence adduced in court, it was evident that the letter dated 23/12/1998 did not represent the interest of the Commissioner of Police in whose favour the land had been allocated.

Lastly, it was submitted for the Defendants that the court ought to take into consideration the public interest as presented by the Defence, that is, a Police Station that serves estates, schools, factories and industries within the area noting that the closest police station to the area is the Jomo Kenyatta International Airport Police Station that is approximately 7 kilometers away. It was submitted that the security of the public within the area is paramount including that of the Plaintiff.

### **The Issues and Determination.**

I have carefully considered the pleadings, evidence and submissions made by and on behalf of the Plaintiff and Defendant. I must at this stage express my gratitude for the various legal and judicial authorities that were cited by the counsel for the Plaintiff and Defendant, which have greatly assisted the

court in reaching its determination. Two facts are not disputed from the evidence and submissions made. The first is that the Plaintiff has title to the suit property whereas the Commissioner of Police is in possession of an allotment letter with respect to the said property. It is also not in dispute that the police are in possession of the suit property and have built a police post thereon. The issues therefore that remain for determination are :

1. Whether the suit property was planned and set aside for a public purpose
2. Whether the Defendant has trespassed on the property
3. Whether the Plaintiff is entitled to the reliefs sought

***Whether the suit property was planned and set aside for a public purpose***

The Defence contends that issuance of title in favour of the Plaintiff was irregular for reasons that the property was reserved for public purpose. They produced a copy of a development plan, numbered Part Development Plan No. 309 which identifies the suit property as “Police Station”. They brought evidence of the members of the public being served by the police post built on the suit property. It was also their evidence that the Plaintiff did not obtain change of user for conversion of the property from a public utility to private property for commercial purposes. The Plaintiff on the other hand submitted that they were not aware of the reservation of the suit property as a police station, and submitted that their sanctity of title which could not be surpassed by public interest.

The sequence of events regarding the allocation of the suit property is material in this respect. On 21<sup>st</sup> August 1986 the suit property was planned as a police station according to the approved Part Development Plan No 309 of the same date approved by the Commissioner of Lands on 2<sup>nd</sup> September 1986, that was produced in evidence as the Defendant’s Exhibit 9 by DW2. DW3 also stated that he was not aware of any other Part Development that had superseded Part Development Plan no 309. In November to December 1986, the police requested for allocation of land for a police station and are informed that the said property had been planned as a police station and was available and that they should apply for it, which the police subsequently do. This is shown by the correspondence between the Administrative Secretary, Kenya Police and the Commissioner of Lands produced by DW2 in evidence as the Defendant’s Exhibits 8 to 10.

In the meantime the vendors are issued with an allotment letter for the same land on 15<sup>th</sup> December 1995 which was produced as the Plaintiff’s Exhibit 5, which land they subsequently sell to the Plaintiff on 1<sup>st</sup> July 1996. The Defence adduced evidence to show that on 15<sup>th</sup> July 1998 the allotment in favour of the said vendors was cancelled in view of the fact that the property had been reserved for public utility. The said letter of cancellation produced as the Defendant’s Exhibit 5, is reproduced hereunder as follows:

“177181/24

15/7/98

**“REGISTERED”**

**J.T. Kamau & Others**

**P.O Box 50335**

**NAIROBI**

**L.R. NO. 209/11009 – VILLA FRANCA, NAIROBI**

**Please refer to your letter of allotment ref. 91993/VI dated 15/12/1995**

**It has it been realized that the plot allocated to you vide the said letter allotment had been planned and reserved for a police station.**

**In view of this, and considering the fact that the prior commitment was for public utility, this allocation is hereby cancelled to facilitate allocation of the same to the Department of Police.**

**You may wish to identify an alternative.**

**Meanwhile, arrangements are being made to refund the monies paid.**

**KILIMO J. L.**

**For: Commissioner of Lands**

**cc. The Permanent Secretary**

**Ministry of Lands & Settlement**

**NAIROBI**

**Norbixin (Kenya) Limiyed**

**P.O Box 22425**

**NAIROBI”**

Subsequent to the cancellation, a letter of allotment was issued to the Commissioner of Police on 10/12/1998 which the Defence produced as Defendant’s Exhibit 6 in evidence. The Defence led evidence to show that the Police paid the requisite fees stipulated in the letter of allotment, that is, Kshs. 3,530/- for purposes of processing title. However, on 10<sup>th</sup> March 2000 the Commissioner of Lands subsequently issued a certificate of title with respect to the suit property to the Plaintiff. Although the said title was not produced in evidence, its existence is not disputed and it was on the court record.

The applicable law at the time of the said actions by the Commissioner of Lands and as also expressly stated in the letters of allocation issued to the vendors and to the Commissioner of Police was the repealed Government Lands Act that vested the power and authority to alienate Government land in the President, under section 3 of the said Act. Section 7 of the Act provided that the powers of the President in this regard could be delegated to the Commissioner of Lands. Section 9 of the Act also gave the Commissioner of Lands discretion to dispose of land in townships other than land required for public purpose. The disposal and/or alienation of any town plot by the Commissioner of Lands pursuant to section 9 of the repealed Government Lands Act and subject to the prescribed and elaborate procedures that were provided in this regard in section 11 to 17 of the Act.

As evidenced by the above legal provisions, the Government Lands Act set out an elaborate procedure for the alienation of any unalienated Government Land. There is no evidence in this suit of the procedure used to allocate the suit property to the original allottees who subsequently sold the land to the Plaintiff. In addition, the Court of Appeal in the case of **Commissioner of Lands –vs- Kunste Limited, Nakuru Civil Appeal No. 234 of 1995** held that where the Commissioner of Lands exercises his statutory powers under the Government Lands Act, if there are persons likely to be affected by such exercise of discretion such persons ought to be heard before the decision is made. The Judges of Appeal in the case observed as follows:-

**“ The appellant (Commissioner of Lands) was exercising his statutory power under the Government Lands Act, when he decided to allot the subject plot to the interested party. The exercise of that discretion clearly affected the legal rights of Kunste Hotel Ltd. The exercise of that power was therefore judicial in nature and he was therefore obliged to hear all those who were likely to be affected by his decision (see Mirugi Kariuki –vs- AG) Civil Appeal NO. 70 of 1991 (unreported). It is therefore our view and we so hold, that the appellant should have consulted the hotel along with the other parties before he decided to allot the plot to the interested party”.**

In the present case the Commissioner of Lands was aware that the suit property had been planned and reserved for use as a police station, and it is my view that the Commissioner of Police ought to have been consulted before the decision to allocate the suit property to private individuals. This is particularly in light of the evidence produced by the Defence that shows that in November 1986 the police had specifically requested for land in the area of the suit property to build a police station, and this request was made before the allocation of the said land to the original allottees.

In addition it is not disputed that the suit property was reserved as a police station as shown in the structural plan and Part Development Plan No. 309 produced in evidence by the Defendant. Reservation of land for a police station makes that land a public utility land as the police station serves a public as opposed to a private purpose. There was no evidence produced by the Plaintiff to show that the suit property was re-planned and its user changed from a public utility plot to a private plot.

The Physical Planning Act also has elaborate provisions as to the processes to be followed in the preparation or amendment of a part development plan when re-planning an area under sections 24 to 28, which were also applicable at the time of issue of title to the Plaintiff. These processes include specific and detailed requirements of consultation, approval and gazettelement before any part development plan can come into effect. No evidence of such consultation, approval or gazettelement of the change of use of the suit property from a police station to private use was provided by the Plaintiff. This Court therefore finds that in the absence of such evidence, the suit property is still reserved for a police station and accordingly for a public purpose.

Consequently, once the suit property was designated as a police station it ceased to be unalienated Government land, as it was set aside for use as a public utility for the general public. The Commissioner of Lands henceforth became a trustee with regard to this public utility plot on behalf of the public until such time as the police station was developed as envisaged or title issued to the police. The doctrine of public trust has been considered by the courts and upheld in various cases notably in the following cases John Peter Mureithi and 2 Others –vs- Attorney General & 4 Others, (2006) e KLR, James Joram & Another –vs- Attorney General & Another (2007) eKLR, Dennis Kuria & others –vs- Minister for Roads & Public Works & Others (2006) eKLR, Niaz Mohammed –vs- Commissioner for Land & Others HCCC NO. 423 of 1998 and Commissioner of Lands –vs- Coastal Aquaculture Ltd, Civil Appeal No. 252 of 1996.

The above-cited cases related to parcels of land that had been compulsorily acquired by the Government for public purpose, and the courts were emphatic that such land must be used for the purpose for which it was acquired and should not be allocated to private individuals for commercial purposes. This argument equally applies to any land that is planned and set aside for use as a public utility. I agree with the holding in this respect in Republic v Registrar of Lands in Kilifi ex-parte Daniel Ricci, Malindi HC JR No. 6 of 2013 [2013] eKLR where it was stated as follows:

**“For the court to arrive at a decision of granting the orders being sought in the current Motion, the court must be certain that indeed the Ex-parte Applicant’s title to the suit property is valid and that the land in question was not set aside for public purpose. I say so because if the suit property was indeed set aside for public purpose, then such land cannot be available for allocation. Where public land is allocated to a private person, the court has an obligation not to recognize such a title, because as it has been said time and again, public interest in a property will always outweigh an individual’s right to own the same property.”**

It is thus the finding of this Court that the suit property having been set aside and planned as a police station for public use was held in trust by the Commissioner of Lands for the public, and was not therefore available for further alienation or allocation. The allocation of the said property to the original allottees and subsequent issue of a title with respect to the property to the Plaintiff was therefore irregular, unlawful and illegal. In any event at the time of the registration of title of the suit property to the Plaintiff on 10<sup>th</sup> March 2000, there was no valid allocation of the said property by the Commissioner of Lands, as the letter of allocation that was the basis of the said title had been cancelled on 15<sup>th</sup> July 1998.

***Whether the Defendant has trespassed on the suit property.***

It is an established principle of law that trespass to land is a direct interference with the possession of another person's land without lawful authority. The person claiming trespass must show that he has a better title than the person in possession of the subject land. The Court of Appeal in **M'Mukanya v Mbijiwe 1984(KLR) 761** held that the tort of trespass is a violation of a right to possession, and that the Respondent in that case needed to prove on a balance of probabilities that he had the right to immediate and exclusive possession of the suit land, which is different from ownership.

The Court of Appeal further held that exclusive possession supporting a claim for trespass does not necessarily mean continuous physical possession and occupation, and that once a person had paid due rent and had been given a plot number upon allocation, he is presumed to be in possession and to sue for trespass.

In the present suit the Plaintiff claims the right to the suit property by virtue of being the registered owner of the same. The Commissioner of Police on the other is in actual possession of the suit property and he claims that his possession is legal by virtue of allocation and the suit property to him by Commissioner of Lands. The Commissioner of Police also disputes the Plaintiff's ownership and states that the land was reserved for public purposes and could therefore not be allocated to the Plaintiff.

The Court of Appeal has had occasion to determine which party takes priority in a conflict between a title holder and allottee of land in **Dr. Joseph N.K. arap Ngok v Justice Moijo ole Keiwa and 4 others, Civil Application No.NAI 60 of 1997** wherein the Court held that in cases of double allotment, a party who has been issued a good title takes precedence over all other alleged equitable rights to the title. In addition, in **Moya Drift Farm Ltd vs Theuri (1973) EA 114**, it was held by the Court of Appeal that an absolute and indefeasible owner of land is entitled to take proceedings in trespass. Further, that the Registration of Titles Act gives a registered proprietor title upon registration, and unless there is any other person lawfully in possession such as a tenant, that title carries with it legal possession.

In addition, the Court of Appeal in **M'Mukanya v Mbijiwe 1984 (KLR) 761** also held that the Appellants in that case were not legitimate allottees of the disputed land, because at the time of the purported allocation of that land to them the local authority had no such land to allocate, as the same been leased to the Respondent and which lease had not been determined. The Appellants, having no legal right to the plot were therefore trespassers, and the fact that they truly believed that they were allottees was of no consequence and did not negate the tort.

It is however a defence to trespass to show a statutory, constitutional or other lawful right of entry. The distinction in this case therefore from the cases cited in the foregoing, is that this court has already found that the suit property was planned and reserved for a public purpose and use as a police station, and therefore could not in law be allocated for a private purpose. It has also been found that the title issued to the Plaintiff was in the circumstances invalid. The suit property was thus allocated for its proper use to the Police Commissioner, who is the proper and lawful allottee of the said land and is on the suit property lawfully. The Plaintiff's title to the suit property cannot therefore in the circumstances of this case take precedence over the allotment of the same property to the Commissioner of Police, as it was issued in contravention of the law and public interest.

The Plaintiff has in this respect relied on his constitutional right to hold property and the sanctity of its title. However, the two concepts are not absolute under the applicable law. Under Article 40 (6) of the Kenya Constitution 2010 property that is found to have been unlawfully acquired cannot be protected under the law. Likewise, under section 23 of the repealed Registration of Titles Act, under which Act the Plaintiff's title to the suit property was issued, the sanctity and indefeasibility of title is only guaranteed if the registered owner has not been party to any fraud or misrepresentation with regard to its issue. It is also now provided in section 26(1) of the Land Registration Act of 2012 as follows;

**“ (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie**

**evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—**

**(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or**

**(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”**

It was the Plaintiff’s testimony that he was not aware of the cancellation of the allotment of the suit property in favour of the original allottees. He also testified that he did not know that the suit property was reserved for a police station. However, the letter dated 15<sup>th</sup> July 1998 from the Commissioner of Lands cancelling its letter of allocation of the suit property was copied to the Plaintiff.

Both parties have in this respect relied on an annexure to an affidavit sworn by Abdi Ali Dere (PW1) on 12/3/2003, in support of an application by the Plaintiff for striking out the defence filed on behalf of the Defendant. The annexure is a letter dated 23/12/1998 from the then Permanent Secretary Provincial Administration Mr. Z.K.A. Cheruiyot, addressed to the then Commissioner of Lands, Mr. W. Gachanja stating that the Provincial Administration had no objection to the issuance of title in favour of the Plaintiff in respect to the suit property. The said letter read as follows:

**“OFFICE OF THE PRESIDENT  
PERMANENT SECRETARY  
PROVINCIAL ADMINISTRATION  
AND INTERNAL SECURITY**

**23<sup>rd</sup> December 98**

**Mr. W. Gachanja**

**Commissioner of Lands**

**Ardhi House**

**NAIROBI**

**PLOT NO. 209/11009 – VILLA FRANCA NAIROBI**

**I have been approached by Norbixin (K) which claims to have bought the above mentioned Plot in 1996 from Jefitha M. Ogeto, Rose K. Momanyi and Joash O. Mokuia as per the attached letter of transfer.**

**The said plot was planned for a Police Station according to the proposed Nairobi South District approved Development Plan No. 309 of 986**

**In view of the fact that most of the surrounding plots have been allocated to individuals for private development, this office has no objection for the issuance of the Title Deed for the plot.**

**Z.K.A Cheruiyot, MGH**

**PERMANENT SECRETARY/**

**PROVINCIAL ADMINISTRATION”**

The Plaintiffs submit that the said letter is evidence that the Defendant had no objection to the title issued to it . The Defendants allege that the said letter was written after cancellation of the allocation to the original allottees and is evidence that the Plaintiff was aware that the suit property was reserved for a police station.

In my view this letter implies that the Plaintiff was aware that the suit property was reserved for a police station, otherwise there is no reason why it would approach the Permanent Secretary for Provincial Administration as opposed to the Commissioner of Lands for assistance for the procurement of title. In addition the Plaintiff did not bring any evidence on the processes it subsequently followed to legally procure a title to the suit property.

***Whether the Plaintiff is entitled to the reliefs sought***

It is the position that the Plaintiff has title to the suit property. However, this court has found that the said title was acquired unlawfully, and that the Commissioner of Police is legally entitled to use the suit property. Therefore the remedies the Plaintiff seeks as against the Police Commissioner are not available to it. These remedies sought were a declaration that the Police Commissioner is illegally in possession of the suit property, for vacant possession, for mesne profits and damages for loss of user and in the alternative for compensation.

This Court however notes that the Plaintiff's title has not been revoked or cancelled, and that the Defendant did not file a counterclaim and/or seek any remedy in this regard. Notably, the said title was issued to the Plaintiff by the same office, being the Commissioner of Lands, which cancelled the letter of allotment to the original allottees on the proposition that the same was reserved for a police station.

The Commissioner of Lands must therefore bear the blame for the predicament that has befallen the Plaintiff as the said office issued it with title to the suit property, despite full knowledge that the property was reserved for a public utility. The result is that the Plaintiff in effect holds a title to land he cannot use, and on which he has expended money. The Plaintiff's relief, if any, therefore can only be against the Commissioner of Lands and not the Commissioner of Police.

The Plaintiff's suit is accordingly dismissed for the foregoing reasons. As the suit involved land that has been set aside for public purposes, each party shall be ordered to pay their own costs of the suit.

Dated, signed and delivered in open court at Nairobi this \_\_\_\_5<sup>th</sup>\_\_\_\_ day of \_\_\_\_August\_\_\_\_, 2014.

**P. NYAMWEYA**

**JUDGE**