



REPUBLIC OF KENYA



**Sidcup Enterprises Limited v Kaurai & 2 others (Environment & Land
Case 83 of 2015) [2022] KEELC 3565 (KLR) (19 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 3565 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 83 OF 2015**

JO MBOYA, J

MAY 19, 2022

BETWEEN

SIDCUP ENTERPRISES LIMITED PLAINTIFF

AND

JOHN SEREWA KAURAI 1ST DEFENDANT

COUNTY GOVERNMENT OF NAIROBI 2ND DEFENDANT

NATIONAL LAND COMMISSION 3RD DEFENDANT

JUDGMENT

Introduction

1. Vide plaint dated the January 15, 2015, the plaintiff herein has sought for the following Reliefs;
 - a. A Permanent Injunction to restrain the defendants whether by themselves, their agents, officers, servants from entering or removing upon the suit premises, demolishing or attempting to demolish the plaintiff's boundary wall erected thereon, committing any other acts of trespass or waste or interfering in any way with the plaintiff's lawful and quiet possession of the suit premises.
 - b. A declaration that the purported Letter of allotment dated July 1, 1999 by the 2nd defendant's Predecessor to the 1st defendant is illegal, null and void and incapable of conferring any Interest in and to the suit premises to the 1st defendant.
 - c. Damages for trespass.
 - d. Interests on (c) above.
 - e. Costs of the suit.



- f. Any other or further relief deemed fit.
2. Upon being served with the summons to enter appearance and the plaint in respect to the subject matter, the defendants herein variously entered appearance and thereafter filed Statement of Defense denying and or disputing the plaintiff's claim. It is worth noting, that the 1st defendant filed his statement of Defense on the August 22, 2020, whereas the 2nd defendant filed her Statement of Defense on the February 18, 2016.
3. On her part, the 3rd defendant filed her Statement of Defense on June 14, 2018.

Evidence by the Parties:

The plaintiff's case:

4. The plaintiff herein called one witness, namely Jimnah Mwangi Mbaru, who testified as PW1.
5. According to the witness, the plaintiff company was allocated the suit property on or about June 1995 and thereafter the plaintiff company complied with the terms of the letter of allotment culminating into the issuance of a Lease, the latter which was issued on the June 16, 1995.
6. It was the witness' statement that the plaintiff was later issued a Certificate of Title/ Grant in respect of the suit property, namely LR No 209/12226 (Grant no IR 66150) and thereby the plaintiff became the lawful proprietor and/or lawful owner of the suit property.
7. PW1 further testified that on or about the August 7, 2008, the plaintiff herein applied to the City Council of Nairobi, which is the 2nd defendant's predecessor for a change of user for the suit property from commercial to Multi-dwelling units, which application was duly approved and a Notification of such approval issued by the 2nd defendant.
8. On the other hand, the witness further testified that upon procuring and obtaining the change of user, the plaintiff similarly applied for a permit from the 2nd defendant to facilitate the erection of a perimeter wall around the suit property.
9. Further, the witness also testified that the application for permit to erect a perimeter wall over the suit property was approved and the approval was communicated vide the 2nd defendant's Notice dated the December 11, 2014.
10. Be that as it may, the witness further testified that after procuring and or obtaining the permit to carry out the construction of the perimeter wall, the plaintiff herein commenced the process of the construction of the subject wall.
11. However, the witness testified that sometime On or about the February 17, 2015, the 1st defendant went to the suit property and laid a claim to ownership thereof.
12. On the other hand, the witness further testified that the 1st defendant herein also threatened to pull down and/or demolish the boundary wall which was under construction at the time.
13. Other than the foregoing, the witness herein also testified that on or about the March 5, 2015, the 3rd defendant generated a letter and which was addressed to the 2nd defendant and in respect of which the 3rd defendant notified the 2nd defendant that same had received a complaint from the 1st defendant pertaining to the illegality in the allocation and/or the alienation of the suit property to the plaintiff.



14. It was the witness further testimony that premised on the letter dated the March 5, 2015, which was written by and/or on behalf of the 3rd defendant, the 2nd defendant herein proceeded to and revoked the approval for the developments and/or constructions on the suit properties.
15. Besides the witness also testified that the 2nd defendant further directed that the plaintiff should stop any further constructions and/ or developments on the suit property.
16. Based on the foregoing, the witness testified that the plaintiff herein was constrained to stop the construction and thereafter same filed the subject suit with a view to protecting and/or vindicating her property rights over and in respect of the suit property.
17. Other than the foregoing, the witness herein wholly adopted and relied on the witness statement dated the April 20, 2020.
18. Besides, the witness herein also relied on the list and bundle of documents dated the 20th April 2020, containing 10 documents. For clarity the documents at the foot of the list dated 20th April 2020 were admitted in evidence and marked as plaintiff exhibit 1 to 10, respectively.
19. Other than the foregoing, the witness also relied on the list and bundle of documents dated the 10th February 2021 and which bundle contained 4 documents.
20. It is worthy to note that the documents at the foot of the list dated 10th February 2021, were similarly admitted in evidence and marked as plaintiff exhibits P11 to 14, respectively.
21. On cross examination, the witness testified that the suit property was allocated to and in favor of the plaintiff company and thereafter a Grant was issued in favor of the plaintiff company on the 16th June 1995.
22. It was the witness further evidence that at the point in time when the suit property was allocated to and in favor of the plaintiff company, he (witness) was not a Director of the said company.
23. Further, the witness also testified that same bought and/or acquired shares in the plaintiff company in the year 2000 and following the purchase and acquisition of the shares, same became a director of the plaintiff company.
24. On the other hand, the witness further testified that upon acquiring the stake in the plaintiff company, same therefore gained control over the plaintiff company which owned the suit property.
25. In answer to a question as to when the plaintiff company was incorporated, the witness testified that same was incorporated on the 9th May 1995.
26. Besides, the witness also stated that the incorporation of the company predated the issuance of the Grant over and in respect of the suit property. In this regard, the witness stated that the Grant was signed on the 16th June 1995, whereas the plaintiff company was incorporated on the May 9, 1995.
27. In answer to a question as to whether the certificate of title/Grant which was adduced in court as evidence was complete, the witness herein acknowledged that there was a page, which was missing and the witness explained that the missing page may have been omitted during the compilation of the bundle of documents.
28. Nevertheless, while still answering the question on the completeness of the certificate of title/Grant, the witness intimated to the court that same had the original Certificate of title/Grant before the court and indeed the original thereof was duly shown to counsel for the defendant and the court.



29. On the issue of whether the plaintiff company was duly issued with a letter of allotment, the witness reiterated his earlier testimony that the plaintiff was indeed issued with a letter of allotment, but proceeded to concede that same had not produced a copy of the letter of allotment.
30. It was the witness further answer that the Letter of allotment was issued to the plaintiff company long before the witness became a Director of the plaintiff company.
31. On cross examination by counsel for the 3rd defendant, the witness stated that the Grant contained provisions and/or terms including condition 2, which provided time for submissions of the building plans and necessary approval.
32. It was the witness further evidence that other than the timelines for the submissions of the Building plans and approval, there was also a condition for the completion of the proposed building/development.
33. Notwithstanding the foregoing, the witness conceded that by the time of filing the subject suit the plaintiff had not developed and/or constructed any building on the suit property.
34. It was the witness' further answer that the plaintiff herein however, submitted Application for change of user which Application was duly approved and/or duly granted.
35. Further, the witness also stated that the plaintiff company also applied for permit to construct a perimeter wall around the suit property and which permit was also granted.
36. Nevertheless, the witness testified that it was at the time when the perimeter wall was being constructed that the 1st defendant laid a claim on the suit property and also lodged a complaint with the 3rd defendant, culminating into the 3rd defendant issuing a letter addressed to the 2nd defendant.
37. It was the witness' further statement that the failure to complete the perimeter wall as well as the intended construction, whose plans had been duly approved by the 2nd defendant, was caused by the dispute over the ownership of the suit property as well as the revocation of the approvals of the building plans.
38. On re-examination, the witness herein reiterated that the Grant in favor of the plaintiff company having been issued on the 19th June 1995, same came later after the incorporation of the plaintiff company. In this regard, the Witness reiterated that the plaintiff Company was Incorporated on the 9TH May 1995.
39. As concerns the issue of the completeness of the certificate of title/Grant, the witness reiterated that same had shown to the court the original documents which was complete and containing the page which was otherwise omitted during the compilation of the bundle of documents.
40. Finally, the witness herein stated that the plaintiff company has never been served with any default notice by the commissioner of lands, or her successor, namely the National Land Commission.
41. With the foregoing testimony, the plaintiff's case was closed.

The 1st defendant's Case:

42. The 1st defendant herein testified as DW1 and same essentially relied on and adopted his written statement dated the 22nd August 2020.
43. Essentially, it was DW1's testimony that same made a request to the Office of the Commissioner of Land, now defunct, to be allocated the suit property, which is situated within the City of Nairobi.



44. It was the witness' further evidence that after the Application to be allocated the suit property, the Commissioner of Land proceeded to and issued unto him a Letter of allotment dated 1st July 1999, in respect of which same was allotted the suit property.
45. On the other hand, the witness further testified that after the issuance of the Letter of allotment, same was also called upon to accept the allotment and to pay the under noted charges, including stand premium.
46. Further, the witness testified that same proceeded to and indeed accepted the allotment and also proceeded to pay the stand premium and the incidental charges vide Bankers cheque dated the 7th January 2005. In this regard, the witness referred to the Bankers cheque as well as the receipt, the latter which was dated the 17th January 2005.
47. Other than the foregoing, the witness herein testified that before same was issued with the Letter of allotment, the officer who signed the Letter of allotment informed same that the Plot in question was vacant and that an inspection had indeed been done on the ground.
48. Further, the witness testified that on or about March 2014, same realized some interference and/or development on the suit property and as a result of same he, namely witness wrote a Protest letter to the 3rd defendants protesting against the grabbing of the suit property by the plaintiff.
49. Further, the witness also testified that same was also constrained to and lodged a complaint with the Chief officer, Urban Planning and Housing Sector, City county of Nairobi.
50. On the other hand, the witness also testified that after the lodgment of the complaint with the 3rd defendant, the 3rd defendant herein, wrote a letter to the 2nd defendant, wherein the 3rd defendant brought to the attention of the 2nd defendant that the suit property had been allocated to the 1st defendant, namely the witness, vide letter of allotment dated the 1st July 1999.
51. Based on the foregoing testimony, the 1st defendant laid a claim to ownership of the suit property and implored the court to find that the plaintiff company had grabbed his land.
52. On cross examination, the witness herein admitted that the letter of allotment which was issued to him contained a Disclaimer on the part of the Commissioner of land that the Government shall not accept any liability whatsoever, in the event of prior commitment or otherwise.
53. In answer to a question as to whether the witness accepted the allotment of the suit property and complied with the terms of the letter of allotment, the witness stated that same indeed accepted the allotment of the suit property, but did not have the letter of acceptance.
54. As concerns compliance with the terms of the letter of allotment, the witness herein admitted and acknowledged that same did not pay the Stand premium and the incidental levies within thirty days. For clarity, that witness conceded that the payment of the levies shown at the foot at the letter of allotment were made on the 17th January 2005.
55. In answer to the question whether the time for payment of the stand premium and incidental levies was ever extended, the witness stated that same was not aware of any extension.
56. In answer to a suggestion by the counsel for the plaintiff that the letter of allotment in his favor was illegal, the witness herein reiterated that same was properly allocated the land in question.
57. On cross examination by the counsel for the 3rd defendant, the witness herein testified that the Plot in question is located along Mbagathi Road, but next to a River.



58. It was the witness' further testimony, that despite being issued with a Letter of allotment, same has never build and/or developed the suit property.
59. Finally, the witness stated that by the time the Plot in question was being allocated to him, same had already been surveyed.
60. Premised on the foregoing, the 1st defendant thereafter closed his case.

The 2nd defendant's Case:

61. Though the 2nd defendant herein duly filed a Statement of Defense, same however did not file any witness statement and/or list of documents.
62. On the other hand, the 2nd defendant did not tender any evidence and thereafter proceeded to close her case.

The 3rd Defendant's Case:

63. Similarly, the 3rd defendant herein also filed a Statement of Defense, but during the course of the hearing, same intimated to the court that she would not be calling any witness and/or leading any evidence.
64. Besides, the 3rd defendant proceeded to close her case, without tendering any evidence, whether oral or documentary.

Submissions by the Parties:

65. Following the conclusion of the hearing, the advocates for the parties herein sought for and obtained time to file written submissions.
66. Consequently, the court gave directions pertaining to and/or concerning the filing of the written submissions by the Parties herein. For clarity, the Parties thereafter proceeded to file their respective submissions.
67. It is worthy to note that the plaintiff filed her written submissions on the March 10, 2022, and for completeness same are on record.
68. On his part, the 1st defendant filed his submissions on the March 4, 2022, which clearly predated the filing of submissions by the plaintiff.
69. Other than the plaintiff and the 1st defendant, it is also worthy to note that the 2nd defendant also filed her written submissions in agitating the case on behalf of the 2nd defendant.
70. Briefly, it was the plaintiff's submissions that the suit property having been allocated and alienated to and in favor of the plaintiff, same ceased to be un-alienated Government land that could be available for further alienation, if at all, to the 1st defendant.
71. Secondly, the plaintiff also submitted that upon the allocation and alienation of the suit property in favor of the plaintiff, the plaintiff complied with the terms at the foot of the letter of allotment and thereafter same was issued with a Certificate of title denoting Ownership of the suit property.
72. In support of the foregoing submissions, the plaintiff advocates relied in the decision in the case of *Joseph N. K Arap Ngok v Moijo Ole Keiwua & 4 others* (1997) eKLR and *Wreck Motors Enterprises v Commissioner of Lands* (1997) eKLR, respectively.



73. Thirdly, the plaintiff submitted that the suit land was not Riparian land and that the allocation and alienation thereof was lawfully and legally carried out.
74. At any rate, the plaintiff submitted that no evidence was tendered to show and/or prove that the suit property was Riparian land. In this regard, the plaintiff relied on the provisions of *Environmental management and Coordination(Water Quality) Regulation*, 2006.
75. Further, the plaintiff also invited the court to take cognizance of and to apply regulation 116 of the *Water Resource Management Rules* 2006, as pertains to the meaning and scope of Riparian land and whether Riparian land would imply change of ownership.
76. Fourthly, the plaintiff submitted that the letter of allotment which was issued to and in favor of the 1st defendant was invalid, insofar as the land under reference stood alienated and was therefore not available for alienation.
77. In any event, the plaintiff further submitted that having failed to comply with the terms and conditions of the letter of allotment, same lapsed automatically and hence the 1st defendant's claim to the suit property is baseless.
78. Finally, the plaintiff also submitted that to the extent that the 2nd and 3rd defendant did not adduce and tender evidence before the court, the statement of Defense, which were filed by and on behalf of the said defendants remained bare allegations, devoid of any probative value.
79. In support of the foregoing submissions, the plaintiff invited the court to take note of the decision in the case of *North End Trading Company Ltd (Carrying on Business under the registered name of Kenya Refuse Handlers Ltd) v City Council of Nairobi* (2019) eKLR and *CMC Aviation Ltd v Cruis Arif Ltd* (1978) eKLR.
80. On his part, the 1st defendant submitted that same was lawfully and legally allocated the suit property vide letter of allotment dated the 1st July 1999. In this regard, the 1st defendant therefore maintained that same is the lawfully and legitimate proprietor of the suit property.
81. Besides, the 1st defendant has similarly submitted that the plaintiff company was not lawfully and legally allotted the suit property. In this regard, the 1st defendant has therefore challenged the legality of the certificate of title/Grant which was issued to and in favor of the plaintiff.
82. In support of his submissions, the 1st defendant has invited the Court to take note of the case of *Philemon L Wambia v Gaitano Lusitas Mukufo & 2 others* (2019) eKLR and *Nancy Wanjiru Kunyiba v Samuel Njoroge Kamau* (2018) eKLR.
83. Finally, the 1st defendant has submitted that the contention by the 3rd defendant that the suit property was Riparian land was not true. For clarity, the 1st defendant has submitted that the suit property is located between L.R No's 209/12225 and L.R No. 209/12227, respectively and in this regard, the suit property does not immediately touch on the river.
84. On her part, the 2nd defendant has submitted that the plaintiff was not lawfully allocated the suit property and in the premises, the plaintiff has been in unlawful occupation over and in respect of the suit property.
85. It is also the 2nd defendant's submissions that the plaintiff herein is not entitled to the Reliefs sought at the foot of the plaint. In this regard, the 2nd defendant has therefore implored the court to dismiss the plaintiff's claim.



Issues for Determination:

86. Having reviewed the Pleadings filed by and/or on behalf of the Parties herein, the witness statement by the plaintiff and the 1st defendant, as well as the oral testimonies which were tendered and having similarly appraised the submissions filed by the Parties, the following issues do arise and are thus germane for determination;
- a. Whether the plaintiff herein is the lawful and legitimate proprietor of the Suit Property.
 - b. Whether the 1st defendant was lawfully allotted and/or allocated the suit property and whether the suit property was indeed available for allocation in favor of the 1st defendant.
 - c. Whether the Suit property is Riparian land.
 - d. What Reliefs are appropriate.

Analysis and Determination

ISSUE NUMBER 1 : Whether the plaintiff herein is the lawful and legitimate proprietor of the suit Property.

87. The plaintiff's witness, namely PW1 gave elaborate and extensive evidence, touching on and/or concerning the allocation and alienation of the suit property to the plaintiff company.
88. On the other hand, the witness further testified that following the allocation of the suit property in favor of the plaintiff company, the plaintiff company complied with the terms of the allocation and thereafter the plaintiff company was duly issued with a certificate of title/Grant on the June 16, 1995. For clarity the certificate of title was produced as exhibit P1 by the plaintiff.
89. Upon being issued with certificate of title/Grant over and in respect of the suit property, the plaintiff company became the registered owner and proprietor of the suit property and her rights over and in respect of the suit property were thus protected and vindicated vide the provision of section 23 the *Registration of Titles Act*, chapter 281 Laws of Kenya (now repealed).
90. For convenience and to underline the significance of the said provisions, same is hereby reproduced as hereunder;
- 23.
- (1) The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.
 - (2) A certified copy of any registered instrument, signed by the registrar and sealed with his seal of office, shall be received in evidence in the same manner as the original.
91. Other than the statement of the law underscored vide the provisions of section 23 (supra), it is also imperative to note that the status of a certificate of title issued to a recipient after complying with the terms of letter of allotment and meeting the conditions thereunder was considered by the Court of



Appeal in the case *Joseph N K Arap Ngok v Moiwo Ole Keiwa & 4 others* (1997) eKLR, where the court held as hereunder;

Section 23(1) of the Act gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.

92. Other than the fact that the plaintiff was duly issued with the certificate of title/Grant over and in respect of the suit property, it is also important to note that no rivalling Title has been proffered and/or adduced before the court by the 1st defendant. At any rate, what the 1st defendant has relied on is a letter of allotment issued on the July 1, 1999 (whose validity shall be the subject of the second issue hereof).
93. The situation before the court pits the plaintiff who has a Certificate of title/ Grant over and in respect of the suit property versus the 1st defendant, whose claim to the suit property is premised on a Letter of allotment.
94. Based on the foregoing, the court is called upon to determine who between the title holder, namely, the plaintiff and the holder of a letter of allotment, in this case the 1st defendant, has legal rights to the suit property.
95. In my considered view, a Letter of allotment signifies the intention of the Government to allocate and/or alienate the under noted plot or property, in favor of the recipient, albeit upon compliance with and meeting the conditions stipulated therein.
96. On its own and without compliance with the terms stipulated therein, a Letter of allotment ipso-facto does not confer title or legal rights to the recipient, not until the conditions therein are met, complied with and the requisite Certificate of Title/ Grant issued.
97. At any rate, where a contest pits the holder of a title as against the holder of a letter of allotment, the holder of a title, who has acquired legal rights to the suit property, would have priority on the basis of registration.
98. Nevertheless, it is also imperative to point out that the legal rights accruing to a title holder on the basis on registration, are however subject to impeachment on the basis of fraud or misrepresentation to which the title holder is proved to be a party to.
99. However, in respect of the subject matter, it is worthy to note that there has been no plea of fraud and/or misrepresentation contained in the Statement of Defense by the 1st defendant, nor proved during the course of trial.
100. Consequently and taking into account the certificate of title in favor of the plaintiff, the Court comes to the conclusion that the plaintiff has lawful and legal rights over the suit property, which surpass the claim by and/or on behalf of the 1st defendant.



101. In support of the foregoing statement of the law, I beg to adopt and restate the holding of the court in the case of *Wrek Motors Enterprises v Commissioner of Lands* (1997) eKLR, where the court stated as hereunder;

‘Title to landed property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of title document pursuant to provisions held.’

102. In a nutshell, it is my finding and holding that the plaintiff herein has proven and/or established her rights, entitlements and thus Title to the suit property. Consequently, same is entitled to protection under the law.

103. In any event, the rights and interests of the plaintiff to and in respect to the suit property are underscored and underpinned vide the Provisions of section 24 and 25 of the *Land Registration Act, 2012*, which stipulates as hereunder;

24. Interest conferred by registration Subject to this Act—

- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

25. Rights of a proprietor

- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
 - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

Issue Number 2

Whether the 1st defendant was lawfully allotted and/or allocated the suit property and whether the suit property was indeed available for allocation in favor of the 1st defendant.

104. The 1st defendant testified before the court and contended that same made an application to the Office of the commissioner of land, now Defunct, seeking to be allocated and/or allocated the suit property



- and that pursuant to his application for allotment, the commissioner of land thereafter proceeded to and indeed issued a letter of allotment dated the 1st July 1999.
105. It was the 1st defendant's further evidence that after being issued with a Letter of allotment, same proceeded to and wrote a letter of acceptance, whereby same accepted the allotment. However, it suffice to note that the letter of acceptance, which the 1st defendant indicated to have issued, was never tendered and/or produced before the court.
 106. Other than the fact that the Letter of acceptance, if any, not being produced before the court, the 1st defendant also admitted that same did not pay the stand premium and the incidental levies within thirty (30) days.
 107. In any event, the 1st defendant is on record, as stating that the stand premium and the incidental levies, alluded to at the foot of the Letter of Allotment, were only paid to the office of the commissioner of land on the January 17, 2005.
 108. In view of the foregoing, two (2) critical issues do arise, which warrants deliberations and address. In this regard, I beg to address the issues in the following sequence;
 109. First and foremost, evidence abound that the suit property herein was already alienated and a certificate of title/ Grant was duly issued and signed in favor of the plaintiff on the June 16, 1995.
 110. It is also worthy to note that the certificate of title/Grant, which was issued in favor of the plaintiff on the June 16, 1995, has neither been recalled, rescinded nor canceled, whatsoever. In any event, even the 1ST defendant has not filed a Counter-claim to that effect.
 111. Based on the foregoing, it is therefore common ground that by the time when the commissioner of lands purported to issue and/or generate the Letter of allotment dated the July 1, 1999, to and in favor of the 1st defendant, the suit property, which was allegedly being alienated stood alienated and was thus not available.
 112. In this regard, it is important to reiterate that the commissioner of land, now defunct could only deal with and/or alienate and unalienated Government land, subject to observance of the provision of the Government Land Act chapter 280 Laws of Kenya, now repealed.
 113. To buttress the foregoing observations, it is imperative to take cognizance of meaning and definition of unalienated land. In this regard, the provisions of section 2 of the Government Land Act are paramount.
 114. For completeness, the provisions of sections 2 of the Government Land Act states as hereunder;

“unalienated Government land” means Government land which is not for the time being leased to any other person, or in respect of which the Commissioner has not issued any letter of allotment.
 115. In my considered view, the only time that the Commissioner of land could re-alienate and/or allocate the suit property, was if the previous allocation and/or alienation had been nullified and/or rescinded, which however is not the case.
 116. Secondly, it is also common ground that the stand premium and the incidental statutory levies were not paid within the stipulated/statutory 30 days period. For clarity, the 1st defendant conceded that the payment was only made on the January 17, 2005.



117. Clearly, by the time the 1st defendant was making the payment on account of Stand premium and the incidental payment, the Letter of allotment had long lapsed and became redundant.
118. Suffice it to state, that the acceptance of the payments by the office of the Commissioner of lands, now defunct, which was received and acknowledged more than six years after the date of the issuance of the letter of allotment, did not restore or otherwise revive the letter of allotment in question.
119. In respect of the foregoing statements, it is imperative to take cognizance of the holding in the case of H.H. Dr. *Syedna Mohammed Burbannuddin Saheb & 2 others v Benja Properties Ltd & 2 others* [2007] eKLR, where the Court observed as hereunder;

‘In any event, the letter of allotment relied upon by the defendant had itself expired, and was therefore invalid. I do not accept Mr. Kirundi, Counsel for defendant’s argument, that the expired letter, when acted upon, had been “revived” through conduct. The letter had expired. It was dead. There was nothing to “revive”. Finally, the letter of allotment had a disclaimer: the Government was not to be liable for any prior commitment. Indeed, here, the Government had prior commitments to the plaintiffs.’

120. Premised on the foregoing, it is note worthy that the 1st defendant herein clearly has no legal and or tenable claim to the suit property, insofar as the Letter of allotment upon which the claim is predicated lapsed and was rendered invalid.

Issue Number 3

Whether the Suit property is Riparian Land.

121. The 3rd defendant herein had stated vide paragraph 8 of the Statement of Defense that the suit property was Riparian land and hence same was not available for re-alienation to and in favor of the plaintiff.
122. For clarity, paragraph 8 of the 3rd defendant’s Statement of Defense states as hereunder;

“ the particulars of paragraph 9 of the plaint are admitted only to the extent that a complaint was received under section 14 of the *National Land Commission Act* seeking to have the grant held by the plaintiff herein reviewed to ascertain its legality and propriety. The 3rd defendant further avers that the suit properties constitutes a riparian reserve which is public land and not private land”
123. Based on the foregoing averment, the 2nd and 3rd defendant have contended that the suit property was therefore a Riparian land and hence same was thus unavailable for allocation and/or alienation.
124. However, it must be remembered that the said 3rd defendant herein upon receipt of a complaint from the 1st defendant generated a Letter dated the March 5, 2015, which was produced as exhibit P4 and purported that the subject land had been allocated to the 1st defendant.
125. From the foregoing, it is evident that the 3rd defendant is uncertain, if not unsure of the status of the suit property. Clearly, the 3rd defendant cannot be approbating and reprobating at the sometime.
126. Nevertheless, what is important and worthy of note is that neither the 2nd nor the 3rd defendant called any witness nor tendered any evidence in the matter.
127. In the premises, any allegation that was adverted to and/or contained in the Statement of Defense remained bare allegations, unproven and devoid of any probative value.



128. In support of the preceding observation, I can do no better than to adopt and endorse the holding of the court in the case *North End Trading Company Ltd (Carrying on business under the registered name of Kenya Refuse Handlers Ltd) v City Council of Nairobi* (2019) eKLR, where the court observed as hereunder;

21. It is my view, that a party to a case having filed his pleadings should call evidence where the matter is considered to proceed by way of evidence. It is trite law that where a party fails to call evidence in support of its case, the party's pleading are not to be taken as evidence, but the same remain mere statements of fact which are of no probative value since the same remain unsubstantiated pleading which have not been subjected to the required test of cross-examination. A defence in which no evidence is adduced to support it cannot be used to challenge the plaintiff's case. The failure to call evidence means that the evidence adduced by the plaintiff remain uncontroverted and therefore unchallenged. In such a situation the plaintiff is taken to have proved its case on balance of probability in absence of the defendant's evidence. In the instant case the plaintiff gave evidence which was not challenged, proved documents in support of her claim. I find the plaintiff's evidence to be credible and I am satisfied the plaintiff pleaded and proved her claim for special damages.

129. To my mind, the 3rd defendant had the burden and/or obligation to call evidence and thus prove the allegation vide paragraph 8 of the Statement of Defense.

130. Having not tendered such evidence, no amount of submissions can be taken to supplant the evidence and thus help the 3rd defendant agitate the unproven allegations, including the allegations that the Suit Property, was Riparian Reserve/ Land.

131. In respect of the foregoing statement, the holding in the case of *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* (2014) eKLR suffices. For coherence, the Court of Appeal observed as hereunder;

'Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented. In any event all the 1st respondent would claim and prove as loss could only relate to the shares in the companies and not the properties of the companies. And even that he did not do.'

Issue Number 4

What reliefs are appropriate.

132. The plaintiff herein sought for various reliefs, whose details were outlined at the onset of this judgment.

133. Having addressed and/or dealt with the rivaling positions and/ or perspectives taken by the Parties herein, the Court has come to the conclusion that the plaintiff has proved and/or established that same was lawfully allocated the suit property and thereafter the suit property was transferred and registered in her name. For clarity, the plaintiff tendered a copy of the certificate of title as proof of such ownership.

134. Given that the plaintiff is the lawful and legitimate owner of the suit property, premised and/or predicated upon the certificate of title/Grant issued on the June 16, 1995, it is therefore peremptory that an order of Permanent Injunction do issue in favor of the plaintiff.



135. In respect of the foregoing, position it is sufficient to underscore that a registered owner and/or proprietor is entitled to protection under the law and such protection is thus availed to the current plaintiff.
136. Suffice it to take cognizance of the holding in the case of *Isaac Gathungu Wanjobi & another v Attorney General & 6 others* [2012] eKLR, where the Court observed as hereunder;
43. I therefore adopt the sentiments of the court in the case of *Milan Kumarn Shah & 2 Others v City Council of Nairobi & Another* (Supra) where the Court stated as follows, ‘We hold that the registration of title to land is absolute and indefeasible to the extent, firstly, that the creation of such title was in accordance with the applicable law and secondly, where it is demonstrated to a degree higher than the balance of probability that such registration was procured through persons or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law and the public interest.’”
137. Other than the prayer for Permanent injunction, the plaintiff herein also sought for a Declaration, to declare the purported Letter of allotment dated the 1st July 1999 issued in favor of the 1st defendant to be illegal, null and void and incapable of conferring any legal interest in the suit property.
138. While dealing with issue Number two herein before, the court observed that the suit property stood alienated upon the issuance of certificate of title/Grant in favor of the plaintiff, which was issued on the 16th June 1995.
139. Premised on the foregoing, it is therefore apparent that the suit property ceased to be Government land and same was therefore incapable of being alienated by and/or at the instance of the Office of the Commissioner of land, now defunct, vide letter of allotment dated the July 1, 1999.
140. To underscore the fact that the suit property was no longer available for for allocation, it is imperative to take cognizance of the holding by the Court of Appeal in the case of *Benja Properties Limited v Syedna Mohammed Burbannudin Sabed & 4 others* [2015] eKLR, where the court of appeal observed as hereunder;

In arriving at our decision, we note that an interest in land cannot be allotted, alienated or transferred when the specific parcel of land allotted is not in existence. Allotment of an interest in land is a transaction in rem attaching to and running with a specific parcel of land. In the instant case, the allotment by the Commissioner of Land to the original allottees did not attach in rem to any land since there was no parcel upon which the allotment could attach. What the 5th respondent, the appellant and the original allottees did was to engage in paper transactions without a parcel of land upon which any interest in land would attach and vest – it was paper transactions without any parcel of land as its substratum.

141. Suffice it to state that the impugned Letter of allotment, which was issued in favor of the 1st defendant, was therefore ipso facto null and void.
142. Other than the foregoing, the plaintiff also claimed for General damages for trespass. However, despite seeking for compensatory damages for trespass the plaintiff’s counsel did not make any submissions in respect thereof.
143. Notwithstanding the foregoing, it is trite and established law that trespass is actionable per se and therefore what was incumbent upon the plaintiff was to prove ownership over and in respect of the suit property. Having so proven ownership vide certificate of title, it thus means that the actions and/or activities by the 1st defendant therefore constituted trespass.



144. In the premises, there is no gainsaying that the plaintiff herein, by virtue of being the owner of the suit property is thus entitled to General damages for trespass. In this regard, an award of General damages in the sum of Kshs. 500, 000/= only would suffice.
145. In support of the foregoing position, I wish to adopt and endorse the decision in the case of *Nakuru Industries Limited v S S Mehta & Sons* [2016] eKLR where the court faced such a similar situation it was held as follows:

“A similar situation pertains in the present case. The exact value of the land before and after the trespass is not proved. However, I have found the defendants did trespass onto the plaintiff’s land and conduct some excavation. For this reason I award the defendant damages in the amount of Ksh 500,000/= (five hundred thousand only) plus interest and costs of this suit from the date of this judgment until payment in full.

Final Disposition:

146. Having reviewed and appraised the issues for determination which were outlined herein before, I come to the conclusion that the plaintiff herein has established and/or proved her case on a balance of probabilities.
147. Consequently and in the premises, I am now disposed to and I do hereby enter judgment in favor of the plaintiff as hereunder;
- a. A Permanent injunction be and is hereby granted to restrain the defendant’s whether by themselves, their agents, officers, servants from entering or removing upon the suit premises, demolishing or attempting to demolish the plaintiff’s boundary wall erected thereon, committing any other acts of trespass or waste or interfering in any way with the plaintiff’s lawful and quiet possession of the suit premises.
 - b. A Declaration be and is hereby made and it is declared that the purported Letter of allotment dated July 1, 1999 by the 2nd defendant’s predecessor to the 1st defendant is illegal null and void and incapable of conferring any interest in and to the suit premises to the 1st defendant.
 - c. General Damages for trespass be and are hereby awarded in the sum of Kshs.500, 000/= only as against the 1st defendant.
 - d. The award of General Damages in terms of order (c) hereof shall attract Interests at court rate from the date of this Judgment.
 - e. Costs of the suit be and are hereby awarded to the plaintiff.
148. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MAY 2022.

HON. JUSTICE OGUTTU MBOYA

JUDGE

In the Presence of;

Kevin Court Assistant

Ms Arora h/b for Mr. Rabut for the plaintiff

Mr. Wanyiri Kihoro for the 1st defendant



N/A for the 2nd defendant

N/A for the 3rd defendant

