



Njoroge Mugo t/a Chege Haraka Timber v Mugwika (Environment and Land Case Civil Suit 40 of 2012) [2022] KEELC 2910 (KLR) (16 June 2022) (Judgment)

Neutral citation: [2022] KEELC 2910 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 40 OF 2012**

JO MBOYA, J

JUNE 16, 2022

BETWEEN

NJOROGE MUGO T/A CHEGE HARAKA TIMBER PLAINTIFF

AND

STEPHEN MUNGANIA MUGWIKA DEFENDANT

JUDGMENT

Introduction

1. Vide Plaintiff dated the 25th January 2012, the Plaintiff herein has sought for the following Reliefs:
 - a. A Declaration that the Plaintiff is entitled to exclusive and unimpeded right of possession and occupation of all that piece of land known as Plot No. 85/New Komarock/Mutarakwa Road Shopping Centre.
 - b. A Declaration that the Defendant whether by themselves or their agents or servants or otherwise howsoever are wrongfully in occupation of the suit *property and are accordingly, trespassers on the same.
 - c. A Permanent Injunction restraining the Defendant, his agents, servants and/or employees or any one claiming under him from interfering, leasing, sub-dividing, selling, trespassing and in any other way with the Plaintiffs quiet use and enjoyment of Plot No. 85/New Komarock/ Mutarakwa Road Shopping Centre.
 - d. Vacant possession of the suit property.
 - e. General Damages for Ttrespass.
 - f. Costs of the suit together with Interests thereon at such rate and for such period of time as this Honourable Court may deem fit to grant.



- g. Any such other or further Relief as this Honourable Court may deem appropriate.
2. Following the service of the Summons to Enter appearance and the Plaintiff herein, the Defendant proceeded to and indeed entered appearance on the 20th May 2013 and thereafter filed a Statement of Defense and Counter-claim on the 4th July 2019.
3. Vide the Statement of Defense and in particular the Counter-claim, the Defendant sought for the following Reliefs:
- a. The Defendant pray for orders that the district surveyor accompanied by the parties respective surveyors do attend the site forthwith and prepare and file in court within 60 days a comprehensive survey report showing the areas trespassed upon by either the Plaintiff and/or the Defendant on the property Komarock/Mutarakwa Road Jua Kali Scheme situated at Kariobangi South Estate, Nairobi.
 - b. The offending party do within a period of 14 days from the date of adoption of the report by this honourable court do remove all illegal beacons and or any other unlawful structures at their own cost.
 - c. That the letter of allotment dated the 7th May 1992 and the beacons certificate dated the 7th May 1992 held by the Plaintiff herein be annulled by this court unconditionally forthwith.
 - d. Cost of the suit.
 - e. Any other relief that this honourable court deem fit and equitable to grant.
4. Subsequent to the filing of the Statement of Defense and Counter-claim, the Plaintiff herein filed a Reply to Defense and Defense to Counter-claim, wherein same controverted and or disputed the allegations by and/or on behalf of the Defendant.

Evidence by the Parties'

Plaintiff's case

5. The original Plaintiff in respect of the subject matter died and/or passed on the 4th July 2019, prior to and before the subject matter proceeded for hearing.
6. Following the death of the original Plaintiff, an application was made for purposes of substitution of the deceased Plaintiff and the said application was heard and allowed vide Consent on the 2nd January 2020. Consequently, one, namely, Gitiche Chege, son of the original Plaintiff, now deceased, was substituted and thereby became the Plaintiff in the matter.
7. Pursuant to the substitution, Gitiche Chege, thereafter testified as PW1 and same contended that the Property known as Plot No. 85/New Komarock/mutarakwa Road Shopping Centre, was initially allocated to his Father, namely, Njoroge Mugo, now deceased, on the basis of a Temporary Occupation License.
8. The witness further testified that his Father, now deceased, occupied the suit property on the basis of the Temporary Occupation License, up to and including the 7th May 1993 when his Father, now deceased, was issued with a Letter of allotment.
9. Further, the witness testified that upon being issued with a Letter of allotment, his Father proceeded to and payed the monies that were indicated at the foot of the Letter of allotment, namely, the Stand



- premium and the Ground rent and thereafter the city council of Nairobi issued the deceased with a Beacon Certificate delineating the extent and scope of the suit property.
10. It was also the witness' testimony that on or about the year 2006, the Defendant herein, together with his agents and employees, trespassed onto the suit property and pulled down the perimeter fence, which same had erected on the suit property.
 11. It was the Plaintiff's further testimony that as a result of the offensive activities by the Defendants and his agents, same variously reported the matter to the Provincial administration, for purposes of intervention and protection.
 12. Nevertheless, the witness testified that the various report and or complaints that were made to the Provincial administration, were never acted upon and/or complied with.
 13. On the other hand, the witness further testified, that sometime the year 2011, the Defendant herein proceeded to and interfered with the Plaintiff's occupation of the suit property and as a result of the offensive activities, the original Plaintiff, now deceased, was constrained to lodge a Complaint with Buru Buru Police Station, which was recorded vide OB N0. 49/19/11/2011.
 14. Other than the foregoing, the witness proceeded to and testified that the original Plaintiff also proceeded to and filed the subject suit, so as to vindicate his rights and/or interests over the suit property.
 15. On the other hand, the witness sought to and adopted his witness statement dated the 21st January 2019, which witness statement was thereafter constituted as part of the witness Evidence in- chief.
 16. Besides, the witness also referred to and relied upon the Bundle of Documents which were contained at the foot of the List dated the 25th January 2012. For clarity, the said Documents were thereafter produced as exhibits P1 to P15, respectively.
 17. Further, the witness also alluded to the Supplementary Lists and Bundle of Documents dated the 21st January 2019, containing two documents and in this regard, the witness sought to and indeed relied upon the said Documents, which were produced as exhibits P16 and 17 respectively.
 18. On cross examination, the witness stated that the original Plaintiff, now deceased, acquired the present Property in the year 1978/1979.
 19. Further, the witness also stated that at the time when the original Plaintiff, now deceased, occupied the Property, the area was vacant and there was nobody in the said area.
 20. Besides, the witness further stated that after the Plaintiff, now deceased, acquired the portion now comprising the suit property in the year 1978, same thereafter approached the City council of Nairobi and was issued with a Letter of allotment.
 21. It was the witness' further statement on cross examination that the original Plaintiff, now deceased, duly complied with the terms and conditions at the foot of the Letter of allotment and in the premises, the original Plaintiff acquired and or accrued lawful rights and/or interests over the suit property.
 22. On the other hand, the witness stated that the Defendant herein was responsible for the various invasions and trespass onto the suit property even though the suit property belonged to the original Plaintiff, now deceased.
 23. Based on the foregoing, the witness implored the court to find and hold that the suit property belongs to the original Plaintiff, now deceased and by extension the Estate of the Plaintiff, currently, represented by the Plaintiff herein.



24. Other than the foregoing, the witness also stated that the document dated the 12th July 2013 from the Director of City Planning, which disowned the Letter of allotment issued to the original Plaintiff was neither lawful nor legitimate. In any event, the witness stated that the contents of the said letter/memo were not correct.
25. Other than PW1, the other witness that was called by the Plaintiff is one, Humphrey Mureithi. For clarity, this witness testified as PW2.
26. According to PW2, he stated that the original Plaintiff, now Deceased, entered upon and started operating on the ground now comprising of the suit property in the year 1980's.
27. The witness further stated that the land in question was given to the original Plaintiff by the City Council of Nairobi and that the original Plaintiff, now deceased, used the suit property as a Timber yard.
28. On the other hand, the witness further testified that during the time when the original Plaintiff occupied and used the suit property, there was no other person using the said property other than the original Plaintiff.
29. On cross examination, the Witness stated that same was not aware whether the land in question had been donated by the Late President, H. E Daniel Toroitich Arap Moi, now Deceased.
30. Further, the witness stated that he was aware that the original Plaintiff had filed some other cases over and in respect of the suit property, but same was not aware whether the cases had been concluded and/or finalized.
31. Finally, the witness also stated during cross examination that the Defendant and the people who continuously interfered with the Plaintiff's use of the suit property, do not reside on the suit property, but in the neighborhood thereof.
32. With that, the Plaintiff closed his case.

Defendant's Case:

33. The Defendant herein testified as DW1 and indicated that same is the Chairman of Komarock Mutarakwa Road Jua Kali Association, as well as Chairman Embakasi Jua Kali Association.
34. Further, the witness testified that the Association which same heads approached the City Council of Nairobi, now defunct, and the Association was allocated a portion of land measuring 40 acres, comprising of Komarock/Mutarakwa Road Jua Kali Scheme.
35. Further, the witness testified that though the original Plaintiff was not a member of his Association, same continued to undermine the efforts of the Association by laying a claim to the suit property, which did not lawfully belong to him.
36. On the other hand, the witness further testified that at no point in time has he ever trespassed and/or invaded the Plaintiff's parcel of land, either as alleged or at all.
37. On the other hand, the witness also testified that the Letter of allotment dated the 7th May 1992, which the Plaintiff has exhibited was found to be a forgery and indeed the City Council of Nairobi generated a Memo dated the 12th July 2013, to that effect.
38. Be that as it may, the witness further contended that the original Plaintiff herein, now Deceased, does not lawfully own the suit property, which same is claiming.



39. Contrarily, the witness further proceeded to and testified that the suit property which is claimed by the Plaintiff belongs to the Association, which is chaired by himself (the witness).
40. Other than the foregoing, the witness referred to and relied on the Written statement dated the 30th June 2019, which was duly constituted as the witness further Evidence- in- chief.
41. On the other hand, the witness also sought to rely on the List and Bundle of Documents dated the 20th June 2019 and the said documents were produced as D exhibit 1 to 40, respectively.
42. Further, the witness testified that the Plaintiff's claim was therefore misconceived and legally untenable and same should be dismissed.
43. On cross examination, the witness conceded that same has not produced and/or availed to the court evidence of Certificate of Registration of Komarock/Mutarakwa Jua Kali Association. Besides, the witness also conceded that same had also not adduced in evidence any documents to show that same was duly elected as the chairman of the association.
44. Further, the witness contended that the suit property belongs to the Association, but however, conceded that same had not tendered any documents in proof of ownership of the suit property.
45. In respect of the Letter of allotment dated the 7th May 1992, the witness herein confirmed that same was issued in the name of Chege Haraka Timber, which was the name used by the original Plaintiff for his business.
46. On the other hand, the witness stated that the Letter of allotment, dated the 7th May 1992, was disowned and or disputed by the City County of Nairobi vide Memo dated the 12th July 2013, which same produced as an Exhibit.
47. Further, the witness stated that the Letter of allotment which the Plaintiff relied on and which is dated the 7th May 1992, namely, Exhibit P6 was fraudulent and therefore same does not confirm that the Plaintiff was the owner of the suit property.
48. As concerns trespass and interference with the Plaintiff's property, the witness herein denied and/or disputed ever interfering with the Plaintiff's use and/or possession of the suit Property.
49. At the conclusion of the testimony by DW1, the Defendant's case was duly closed.

Submissions by the Parties:

50. Following the conclusion of the hearing, the Parties herein agreed to file and exchange written submissions and in this regard, timeline for the filing and exchange of the written submissions were stipulated and/or circumscribed.
51. Pursuant to the foregoing directions, the Plaintiff proceeded to and filed written submissions on the 16th May 2022, whereas the Defendant herein filed his written submissions on the 8th February 2022. For clarity, the Defendant's submissions preceded those by and/or on behalf of the Plaintiff.
52. Briefly, it was the Plaintiff's submissions that the original Plaintiff, now Deceased, herein previously occupied and used what comprises of the suit property on the basis of a Temporary occupation license, issued by the City council of Nairobi, now defunct.
53. Nevertheless, the Plaintiff has further submitted that on or about the 7th May 1992, the original Plaintiff, now deceased, was issued with a Letter of allotment, over and in respect of the suit property, which same had hitherto occupied on the basis of Temporary occupation license.



54. Besides, it is the Plaintiff's submissions that after being issued with the Letter of allotment, same proceeded to and paid the requisite Stand premium and Ground rents, albeit ,out of the stipulate timeline. For clarity, the Plaintiff submitted that the Payment was made on the 8th November 2011 and same was duly acknowledged and receipted by the City council of Nairobi, now Defunct.
55. Further, the Plaintiff has submitted that even though the payment of the Stand premium and the Ground rent was paid out of time, the fact that same was received and acknowledged, confirms that the city council of Nairobi admitted and therefore authenticated that the Plaintiff was the lawful allottee of the suit property.
56. Other than the foregoing, the Plaintiff has further contended that the receipt of the payment of the Stand premium and Ground rent out of time amounted to Waiver on the part of the City Council of Nairobi and therefore same cannot dispute ownership and title of the Plaintiff.
57. In support of the foregoing proposition, the Plaintiff relied on the decision in the case of Joseph Mutua Zakayo v County Government of Makeni & 9 others [2020]eKLR.
58. Other than the foregoing, the Plaintiff further submitted that to the extent that the suit property had hitherto been allocated and alienated in favor of the Plaintiff, the said property therefore became private property and was thus unavailable for allocation and/or alienation in favor of the any third party, the Defendant not excepted.
59. In support of the foregoing submissions, the Plaintiff has relied on the decision of the case of Benja Properties Ltd v Syedna Mohamed Bur Hanudeenn Said & 4 others [2015] eKLR, Rukaya Ali Mohamed v David Gikonyo Nambacha & another Kisumu HCCA No. 9 of 2004 and Dr. Joseph N. .K Arap Ngok v Moijo Olekiewua & 4 others [1997] eKLR.
60. Finally, the Plaintiff has submitted that on the basis of the Letter of allotment dated the 7th May 1992, coupled with the belated payment of the Stand premium and Ground rent as well as the rates, same is therefore the lawful and legitimate Proprietor of the suit property.
61. Based on the foregoing, the Plaintiff has thus relied on the provisions of Sections 24 and 25 and 26 of the [Land Registration Act](#), 2012, to propagate a stand point that same is entitled to protection of the Law by virtue of being the Proprietor of the Suit Property.
62. On his part, the Defendant has submitted that the suit property lawfully belongs to Komarock/ Mutarkwa Road Jua Kali Association and hence the court should make a declaration to that effect.
63. Secondly, the Defendant has further submitted that by virtue of being the chairperson of the Association Komarock/Mutarkwa Road Jua Kali, same has the authority to protect and preserve the property of the Association, including the suit property.
64. Other than the foregoing, the Defendant has also submitted that same has not trespassed onto the property belonging to the Plaintiff, either as alleged or at all. In this regard, the Defendant has disputed the Plaintiff's claim.
65. Finally, the Defendant herein has relied on the decisions in the case of Eliud Njoroge Gachiri v Stephen Kamau Nganga [2018] eKLR, Judith Julia Wanjiru Njoroge v Samuel Njeru Mwangi [2019] eKLR and Elizabeth Wambui Githinji & 29 others v Kenya Urban Roads Authority & 4 others [2019] eKLR.

Issues for Determination

66. Having reviewed the Plaint filed by the Plaintiff, as well as the Counter claim by the Defendant herein and upon considering the documents which were tendered in Evidence as well as the oral testimonies



by the witnesses and upon considering the submissions by the Parties, the following issues do arise and are worthy of determination;

- a. Whether the Suit Property was lawfully and legally allocated to the original Plaintiff, now deceased and whether the Plaintiff herein is the Bona fide Proprietor of the Suit property.
- b. Whether the Doctrine of waiver can be invoked and relied upon by the Plaintiff.
- c. Whether the Defendant herein has trespassed onto to the Suit Property.
- d. Whether the Defendant herein is the legitimate owner and/or proprietor of the suit property.

Analysis and Determination

Issue Number 1

Whether the suit property was lawfully and legally allocated to the original plaintiff, now Deceased and whether the plaintiff herein is the Bona fide proprietor of the Suit Property.

67. The Plaintiff herein testified and tendered evidence that one Njoroge Mugo, now deceased, was authorized and/or allowed to enter upon and occupy all that portion of land, namely, Plot Number 85/New Komarock/Mutarakwa Shopping Centre, albeit on Temporary Occupation License.
68. Further, the Plaintiff also submitted that latter, same was issued with a Letter of allotment dated the 7th May 1992, whereby the property, which same had hitherto occupied on the basis of temporary occupation license, was now alienated to and in his favor.
69. Besides, the Plaintiff also submitted that after the issuance of the Letter of allotment, same proceeded to and paid the Stand premium and the Ground rents, albeit out of the statutory timeline, but the payments were duly received and acknowledged by the City council of Nairobi, now defunct.
70. Based on the Letter of allotment and the payment of the Stand premium, as well as Rates in favor of the City council of Nairobi, the Plaintiff has contended that same is therefore the lawful and legitimate owner of the suit property.
71. In view of the foregoing, it is therefore expedient and appropriate to interrogate the validity, propriety and the legality of the Letter of allotment dated the 7th May 1992, which underpins the Plaintiff's claim to the suit property.
72. Suffice it to note that the Letter of allotment, and upon which the Plaintiff's claim is predicated, contained various terms and conditions, which the Plaintiff was called upon to comply with and or adhere to. For clarity, one of the fundamental conditions stipulated as hereunder;

“If acceptance and payment is not received within thirty (30) days from the date hereof contained will be considered to have lapsed without further reference to yourself”
73. Premised on the foregoing condition, it was incumbent upon the allottee of the letter of allotment to endeavor to and ensure that both the acceptance and the payments, if any, were remitted and made to the allotting authority within the stipulated thirty (30) days period and not otherwise.
74. Despite the foregoing conditions, it is worthy to note that the Plaintiff herein neither availed to nor tendered in Evidence a copy of the Letter of acceptance, if any, that was addressed to the allocating authority and confirming acceptance of the terms of the letter of allotment.



75. Besides, it is also important to note that the Plaintiff herein did not make and/or tender the payments on account of the Stand premium and the Ground rents, within the stipulated thirty (30) day period.
76. To the contrary, the Plaintiff herein tendered in evidence a copy of the Revenue receipt dated the 8th November 2011, issued by the city council of Nairobi, in acknowledgement of the sum of Kes.122, 000/= only, indicated to be the payment of the Ground rent.
77. Other than the foregoing, the Plaintiff also tendered in Evidence another Revenue receipt issued on the 19th July 2011 for the sum of Kes.15, 000/= only, which was said to be the payment on account of the Survey fee.
78. Suffice it to note, that None of the payments which was alluded to in the letter of allotment dated the 7th may 1992 was the Stand premium, which was stated to amount to Kshs. 60, 000/= only. In this regard, one of the essential, albeit critical items that needed to be paid by and/or on behalf of the Plaintiff was the Stand premium.
79. Nevertheless, no evidence was tendered by and/or on behalf of the Plaintiff herein to show and/or authenticate that the Stand premium was ever paid, either within the stipulated timeline or at all.
80. Notwithstanding the foregoing, it is imperative to point out that the Letter of allotment fore-warned the allottee that if the stipulated payments were not paid within the stipulated timeline, then same shall stand extinguished and/or considered to have lapsed without further reference. In this regard, the thirty (30) day period was mandatory and/or peremptory.
81. It is common ground that the stipulated payments, which were required to be made within the thirty (30) day period were admittedly not been paid within that timeline. To the contrary, it was conceded that part of the payments was made on the 8th November 2011 and 19th November 2011, respectively.
82. The question that arises for determination, is whether the belated payments, in respect of the Letter of allotment dated the 7th May 1992, could revive and/or resuscitate the Letter of allotment beyond the statutory/contractual timelines.
83. To my mind, the Letter of allotment contained terms and conditions which were time bound and immediately the stipulated timelines lapsed and/or extinguished, the letter of allotment was rendered redundant and void, for all intents and purposes. For clarity, the Letter of allotment could only be revived by surrender thereof and replacement with a Fresh/new one.
84. On the other hand, it is also worthy to point out that once the Letter of allotment became redundant and void, the belated payments, which were made on the basis of the said letter could not revive, reinstate and or resuscitate the otherwise lapsed and extinguished letter of allotment.
85. To buttress the foregoing position, it is worthy to take cognizance of the holding in the case of H.H. Dr. Syedna Mohammed Burhannuddin 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”.
86. On the other hand, it is important to note that the foregoing decision was subject to appeal and the Court of Appeal upheld the decision of the high court, in terms of the preceding holding.



87. For convenience, it suffices to refer to the decision in the case of Benja Properties Limited v H.H. Dr. Syedna Mohamed Burhannuddin Saheb & 2 others [2015] eKLR, where it was ratified and adopted by the Court of Appeal.
88. Notwithstanding the foregoing position, it also common ground that despite the issuance of the letter of allotment to and in favor of the Plaintiff, same did not comply with the terms and conditions therein and in any event, no title document has ever issued and/or been granted to the Plaintiff either by the City county Government of Nairobi or at all.
89. To the extent that the Plaintiff did not comply with the terms of the Letter of allotment within the stipulated timeline and coupled with the fact that no title has since been issued to and in favor of the Plaintiff, no legitimate rights and/or interests crystalized to and in favour of the Plaintiff.
90. To vindicate the preceding position of the law, it is imperative to adopt and restate the holding in the case of Dr. Joseph N.K. Ng'ok vs Justice Moiwo Ole Keiwua and 2 others C.A. No. 60/1997 (1997)eKLR, where the Court of Appeal observed as hereunder;
- “It is trite that such title to landed property can only come into existence after issuance of letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of title document pursuant to provisions in the Act under which the property is held”.
91. Other than the foregoing, even though the Plaintiff contends that a valid letter of allotment was issued in his favor, there is the Decision of Hon Justice D. K Musinga, Judge, (as he then was), vide Nairobi Miscellaneous Application Number 667 of 1993 rendered on the 2nd December 2010 and in respect of which the judge found and held that the 2nd Interested Party therein, (who is the Plaintiff in the subject matter) was only occupying the suit property on the basis of Temporary Occupation License.
92. For convenience, the Honourable Judge observed as hereunder;
- “ ...The 2ndInterested party is occupying the said plot on the basis of temporary occupation license. One of the conditions for such occupation is that the 2nd interested party is not allowed to put up permanent structures thereon. The fact that the he has been in occupation for over 25 years cannot entitle him to any better rights than those conferred by the temporary occupation license. That being the case, I am not convinced that he is entitled to the orders sought. Consequently, the application dated the 1st December, 2005 is dismissed with costs to the Respondent”.
93. It is worthy to note that the decision alluded to in the preceding paragraph was rendered on the 2nd December 2010, long after the alleged letter of allotment dated the 7th May 1992, upon which the Plaintiff stakes a claim to ownership of the suit property.
94. Consequently, if indeed the Plaintiff had truly and validly been allocated the suit property vide the letter of allotment dated the 7th May 1992, then same ought to have ventilated the said position, as well as availed a copy thereof before the Honourable Judge, who rendered the ruling vide Nairobi Miscellaneous Application Number 667 of 1993
95. Finally, the validity of the Letter of allotment dated the 7th May 1992, was also challenged and or impeached vide a Memo issued by the Nairobi City County dated the 12th July, 2013. For clarity, the memo under reference provided as hereunder;

“This is to advise that the defunct city council of Nairobi did not allocate the purported Plot No. 85-New Komarock/Mutarakwa Road Shopping center to the Defendant/Applicant,



Mr. Njoroge Mugo, as alleged as there was no scheme by the name New Komarock/ Mutarakwa Shopping Center”.

96. Suffice it to observe that the said Memo was produced and admitted in evidence as exhibit D1 and when confronted with contents of the memo, the Plaintiff herein merely stated that the contents thereof were not true.
97. However, the Plaintiff herein, though aware of the contents of the memo under reference, has not impleaded the City County Government of Nairobi with a view to rescinding and/or quashing the Memo under reference.
98. Based on the foregoing, it becomes apparent and/or evident that the Plaintiff's claim to and/or in respect of the suit property, is actually built on Shaky evidence and thus same cannot anchor the claim for Ownership.
99. On the other hand, the burden of proving that the suit property belonged to the Plaintiff, laid at the door step of the Plaintiff and unfortunately, same has not been discharged. For coherence, the provisions of Section 107 and 108 of the Evidence Act, Chapter 80, Laws of Kenya, are paramount.
100. To vindicate the foregoing observation and the need by the Plaintiff to discharge the burden of proof, prior to and/or before attracting a favorable Judgment, it is imperative to take cognizance of the holding in the case of Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others [2020] eKLR, where the Supreme Court Of Kenya, held as hereunder;

(49) Section 108 of the Evidence Act provides that, “the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;” and Section 109 of the Act declares that, “the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

[50] *This Court in Raila Odinga & Others v. Independent Electoral & Boundaries Commission & Others, Petition No. 5 of 2013*, restated the basic rule on the shifting of the evidential burden, in these terms:

“...a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden...”

(51) In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the Court, in discharge of the evidential burden establishing their treatment at the hands of 1st respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1st respondent to prove the contrary. In the light of the turn of events at both of the Superior Courts below, it is clear to us that, by no means, did the burden of proof shift to 1st respondent.

101. Whereas the Supreme Court of Kenya was dealing with and/or handling a Petition, it suffices to note that the said court dealt with the discharge of evidential burden and confirmed that same rests on the shoulders of the Petitioners and in this case the Plaintiff.



Issue Number 2

Whether the doctrine of waiver can be invoked and relied upon by the plaintiff.

102. The Plaintiff herein, whilst being aware and/or privy to the lapse and/or extinction of the thirty (30) days duration, within which to pay the stand premium and the ground rent, proceeded to and paid payments (sic) of kes.122, 000/= only on account of ground rent, which was paid on the 8th November 2011 and kes.15, 000/= only, the latter which was paid on the 19th July 2011.
103. Suffice it to note that the payments, referred to in the preceding paragraph, were made outside the thirty (30) day period, stipulated vide the Letter of allotment, which Letter of Allotment had stipulated that in the event the monies are not paid within the 30 Day- period, same shall lapse without Further Reference.
104. Nevertheless, having made the aforesaid payments, the Plaintiff herein has now invoked and relied on the Doctrine of waiver, to contend that the acceptance of the late payments by the City Council of Nairobi has the effect of precluding City Council of Nairobi from disputing the validity of the letter of allotment.
105. However, it is imperative to note and observe that the doctrine of waiver can only arise and/or be invoked where the Contract and or representation, was valid and legally tenable.
106. Nevertheless, in respect of the subject matter, the letter of allotment upon which the doctrine of waiver is anchored, was disputed by the city council of Nairobi and indeed, it was contended that same was a fraud and forgery.
107. For the avoidance of doubt, the issue of fraud and forgery, which were alluded to at the foot of exhibit D1, produced by the Defendant, was addressed and analyzed in the course of dealing with issue number one herein before.
108. In my humble view, the Doctrine of waiver, which belies the Equity of estoppel, cannot be relied upon to give credence to an illegality.
109. On the other hand, the doctrine of waiver cannot be invoked and relied upon in respect of the subject matter, unless it is shown that the acts and/or representation, which is sought to be relied upon, was made by an authorized officer, whose actions and representations are legally binding on the body in question, namely, the City county of Nairobi.
110. For coherence, the mere receipt of payments on account of survey and ground rent, which are ordinarily received by the Revenue officers, cannot be said to bind on the city council of Nairobi, now defunct. For clarity, the provisions of the Local Government Act, Chapter 265 laws of Kenya,(now repealed) are now explicit.
111. Based on the foregoing, it is my humble view that the doctrine of waiver which has been invoked and relied upon the Plaintiff herein, cannot revive a 'Dead' or otherwise lapsed Letter of allotment, in any event.
112. At any rate, there is also the issue as to whether the doctrine of waiver can be used and be relied upon to negate the operation of the law and in this case the provisions of the Government *Land Act*, Chapter 280 Laws of Kenya,(now repealed), under which the allocation of public Land was being undertaken.



113. Finally, the scope, extent and application of the doctrine of waiver, has been discussed in various decision. However, it is sufficient to take note of the decision in the case of 748 Air Services Limited v Theuri Munyi [2017] eKLR, where the Court of Appeal observed as here under;

This Court also did explore at some length the issues of waiver, estoppel and acquiescence in the Serah Njeri Mwobi case (supra) and we adopt its analysis in respect of waiver and estoppel by conduct, thus:-

“The doctrine of waiver operates to deny a party his right on the basis that he had accepted to forego the same rights having known of their existence. The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person. See *Seascapes Limited v Development Finance Company of Kenya Limited*, [2009] eKLR. The words waiver, estoppel and acquiescence have also been defined by the Halsbury’s Laws of England, 4th Edition, Volume 16. At page 992 waiver has been defined as follows:-

“ Waiver is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted, and is either express or implied from conduct. It may sometimes resemble a form of election, and sometimes be based on ordinary principles of estoppel, although, unlike estoppel, waiver must always be an intentional act with knowledge. A person who is entitled to rely on a stipulation existing for his benefit alone, in a contract or of a statutory provision, may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist. Waiver of this kind depends upon consent, and the fact that the other party has acted on it is sufficient consideration. Where the waiver is not express it may be implied from conduct which is inconsistent with the continuance of the right... The waiver may be terminated by reasonable but not necessarily formal notice unless the party who benefits by the waiver cannot resume his position, or termination would cause injustice to him?.”

114. Based on the jurisprudence flowing from the said decision, it is imperative to note that certain ingredients are necessary prior to and before the doctrine of waiver can be successfully relied upon.
115. In respect of the subject matter, it is important to establish and to authenticate that the person and/or persons, who made the act and or representation being relied upon, firstly had capacity so to do and, secondly made the act alluded to intentionally with the knowledge of (sic) waiving any right on the letter of allotment.
116. Simply put, I am afraid that the issuance of the revenue receipts, by the revenue officers of the City Council of Nairobi, who are not legally authorized to make any decisions for the City council of Nairobi, cannot ipso jure be taken to bind the city council of Nairobi and thus give rise to Waiver, either in the manner alluded by the Plaintiff or at all.
117. In a nutshell, the doctrine of waiver, which the Plaintiff has invoked, with a view to reviving the dead (sic) letter of allotment, is irrelevant and inapplicable in the circumstance herein.



Issue Number 3

Whether the defendant herein has trespassed onto to the suit property.

118. Other than the Plaintiff herein who claim to be the legitimate owner of the suit property, it is worthy to note that the Defendant has also laid a claim therein and indeed filed a Counter-claim to that effect.
119. However, on the part of the Defendant, it was further contended that the suit property belonged to and ought to be registered in the name of Komarock/Mutarakwa Jua Kali Association, which was said to be the lawful allottee thereof.
120. Indeed, the DW2 contended that the suit property was legally and lawfully allocated to the Association.
121. Nevertheless, despite contending that the suit property was lawfully allocated to the Association, DW2, did not adduce in evidence and/or tender before the Court any Letter of allotment, either from the city council of Nairobi, now defunct or even the Commissioner of land.
122. Other than the foregoing, the witness sought to rely on a letter of formalization of squatter/informal settlement in the city, dated the 2nd May 2002. For clarity, the letter under reference was produced as exhibits D13.
123. Nevertheless, the Letter on formalization of the squatter/informal settlement in the city, was admitted by the witness, not to have alluded to and/or referred to Komarock/Mutarakwa Jua Kali Association.
124. Notwithstanding the foregoing, it must also be pointed out that the said Letter of formalization of squatters/informal settlement in the city, did not constitute and/or amount to a Letter of allotment.
125. In the premises, it is evident that the Defendant herein did not tender before the court any evidence of allocation and/or alienation of the suit property unto him.
126. On the other hand, the claim that the suit property belonged to Konarock/Mutarakwa Jua Kali Association, was not also not proven and/or established.
127. At any rate, it is worthy to recall that even though the Defendant variously referred to Komarock/Mutarakwa Jua Kali Association, same neither availed any certificate of registration nor evidence of any election, whereby the Defendant was constituted as the chair thereof.
128. In my humble view, the Defendant herein cannot stake a claim to and in respect of the suit property, either in his own personal capacity or on behalf of the alleged Association, without having procured and/or obtained a Letter of allotment.
129. Be that as it may, I only wish to add that the allocation or alienation of unalienated government land fell within the scope and mandate of the office of the Commissioner of land, now defunct, vide Section 3 of the Government *Land Act*, Chapter 280 Laws of Kenya (now repealed).
130. Nevertheless, the power to alienate or allocate public land now inheres in the National Land Commission in terms of Article 67(2) of *the Constitution* 2010, as read together with Section 5(2) of the *National Land Commission Act*, 2012.
131. To fortify the foregoing observation, it is appropriate to take cognizance of the holding in the case of In the Matter of the National Land Commission [2015] eKLR, where the Supreme Court of Kenya stated as hereunder;

[222] The *Land Act* defines “alienation” as the sale or other disposal of rights to land, while the NLC Act confers the power of alienation of public land upon the



NLC. Thus, the disposal of such land can only be done by the Commission, with the consent of the National or County Government. The NLC, in effect, has been granted the power to sell or dispose of public land, on behalf of the National and County Governments. The National or County Government has to give consent, for such disposal.

[223] It may be inferred that, the power of alienation of public land is one of the ways through which the NLC administers such land. The requirement of consent to such a transaction, from the National or County Government, is certainly a check-and-balance relationship between the two State organs. The NLC's function of monitoring the registration of all rights and interests in land, is another mechanism of checking the powers of the body responsible for registration.

132. To the extent that the Defendant herein did not avail and/or tender before the court evidence of Letter of allocation, it is difficult to understand how and on what basis same can stake a claim of ownership of the suit property.
133. On the other hand, by seeking a declaration from this court as to ownership of the suit property, the Defendant seems to be asking the court to allocate or alienate the suit property unto him. Clearly, this court is not conferred with the mandate to allocate or alienate public land to any person or at all.
134. Simply put, to purport to declare the Defendant herein as the lawful allottee or owner of the suit property, would be tantamount to usurping the Constitutional mandate of the National Land Commission, under the Provisions of Article 67(2) of *the Constitution*, 2010.
135. In the premises, I am afraid that no such declaration can issue and/or be pronounced in favour of the Defendant, in the manner sought or at all.
136. Based on the foregoing, it is my finding and holding that similarly, the Defendant herein does not Own the suit property and thus same has no legal rights and/or interests in respect of same, whatsoever and howsoever.

Issue Number 4

Whether the defendant herein is the legitimate owner and/or proprietor of the suit property.

137. Having found and held that neither the Plaintiff nor the Defendant is the registered owner and/or proprietor of the suit property, it is therefore obvious or evident that the suit property forms and/or constitutes Public land and not otherwise.
138. Besides, by virtue of being public land, same falls under the auspices and supervision of the City County Government of Nairobi, albeit for and/or on trust of the people of Komarock and by extension the people of Nairobi.
139. In the premises, the suit property herein needs to be managed and/or attended to by the National Land Commission, for and/or on behalf of the City County Government of Nairobi.
140. Nevertheless, in the event of need to alienate the suit property, then National Land commission must comply with the provisions of Sections 5(2) of the *National Land Commission Act*, 2012, as read together with the Provisions of Sections 12 and 14 of the *Land Act*, 2012 (2016).
141. Suffice it to note, that the manner in which Public land can be alienated and/or otherwise disposed of has hitherto received judicial interpretation and anchorage vide the holding of the Court of Appeal in



the case of Cordison International (K) Limited v Chairman National Land Commission & 44 others [2019] eKLR, where the Court of Appeal observed as hereunder;

30. Article 67 of *the Constitution* that establishes the National Land Commission gives it power to, inter alia, manage public land on behalf of the national and county governments. The suit land is public land as defined under Article 62(1) (a) of *the Constitution* and therefore vests in and is held by the County Government of Lamu in trust for the people resident in the County. Article 62 (2) of *the Constitution* provides that the land shall be administered on behalf of the County residents by the National Land Commission. Section 5 (1)(a) of the *National Land Commission Act* is also explicit that one of the functions of the National Land Commission is to manage public land on behalf of the national and county governments. Under section 5(2) of the Act the Commission may,

“on behalf of, and with the consent of the national and county governments, alienate public land.”

31. Section 12 of the *Land Act* grants the Commission authority to allocate public land on behalf of the national or county governments and section 14 of the Act specifies the steps that the Commission ought to take before it undertakes any such allocation. The Commission has to issue, publish or send a notice of action to the public and interested parties, at least thirty days before offering for allocation a tract or tracts of land.

33. It is therefore clear beyond any peradventure that it is the role of the Commission, and not a county government, to allocate public land. The allocation must however comply with the laid down constitutional and statutory procedure as stated above.

142. In a nutshell, it is my finding and holding that the suit property is public land held by the City County Government of Nairobi, albeit on trust for the residents of Komarock and not otherwise.

Final Disposition

143. Having reviewed the issues that were outlined herein before, the Court comes to the conclusion that the entire suit and the Counter-claim are bereft of merits.

144. Consequently and in the premises, the Court now makes the following Orders;

- a. The Plaintiff's suit vide Plaint dated 25th January 2022 be and is hereby Dismissed.
- b. The Defendant's Counterclaim dated the 21st January 2018 be and is hereby Dismissed.
- c. The Suit property, namely, Plot No. 85/New Komarock/mutarakwa Road Shopping Centre is Public Land belonging to the City County Government of Nairobi and held on trust for the residents of Komarock area and whose alienation can only be dealt with in line with Sections 12 and 14 of the *Land Act*, 2012 (2016).
- d. Each party to bear own costs.

145. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF JUNE 2022.



OGUTTU MBOYA,

JUDGE

In the Presence of;

Kevin Court Assistant

Mr. Mugoye for the Plaintiff.

N/A for the Defendant.

