Wanjohi v Baringo County Government & another (Environment & Land Case 29 of 2022) [2022] KEELC 4788 (KLR) (27 July 2022) (Judgment)

Neutral citation: [2022] KEELC 4788 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ITEN

ENVIRONMENT & LAND CASE 29 OF 2022

L WAITHAKA, J

JULY 27, 2022

FORMERLY ELDORET ELC APPEAL NO.5 OF 2018

BETWEEN

ESBORN K. WANJOHI ..... APPELLANT

AND

BARINGO COUNTY GOVERNMENT ..... 1ST RESPONDENT

EZEKIEL KIPCHUMBA ..... 2ND RESPONDENT

JUDGMENT

1. By a Plaint dated 27th July, 2015 the appellant herein instituted a suit in the lower court to wit Eldama Ravine PMCC No.32 of 2015 seeking to restrain the respondents from interferring with his ownership and possession of Plot No.82 Mogotio Township (hereinafter referred to as the suit property).

2. The appellant's suit was premised on the grounds that he is the lawful allotee of the suit property; that he was allocated the suit property by the Government of Kenya in 1958; that upon being allocated the suit property, he took possession and developed it by constructing residential houses; that since that time he has been letting the houses to various tenants.

3. It was the appellant's case that in 1995 he applied for development of the plot to the Baringo County Council; that his application was approved and that in 1997 he was issued with an allotment letter in respect of the suit property by Koibatek County Council.

4. The appellant further pleaded that in 2007, during the political clashes, he was forcibly displaced and he lost most of his ownership documents. In 2008, sensing that the suit property was in danger of being grabbed, he wrote to the Ministry of Local Government seeking protection of his interest in the suit property and he was assured that the plot would not be allocated to another person because records in their possession showed that he was the owner of the suit property. A year later (2009), he learnt that

the Town Council of Mogotio was in the process of dispossessing him of the plot in order to allocate it to another person from the area. He complained to the District Commissioner (DC) who instructed the District Criminal Investigation Officer (DCIO) to investigate his complaint.

5. It is the appellant's case that the 1st respondent who was involved in the grabbing of the plot did not cooperate with the DC. The appellant further pleaded that in 2015, the 1st respondent gave him copies of minutes and survey plan indicating that the 1st respondent had allocated the suit property to the 2nd respondent. The appellant lamented that on 11th May 2015, the 2nd respondent using goons, invaded the suit property and destroyed the developments he had effected thereon. The appellant further pleaded that the 2nd respondent had on several ocassions attempted to evict his caretaker from the suit property without success.

6. Terming the actions of the 2nd respondent wrongful, malicious, illegal and unlawful, the appellant urged the court to grant him an order of permanent injunction to restrain the respondents by themselves or through their agents, employees, servants or any other manner howsoever from inteferring with his ownership and possession of the suit property.

7. The 2nd respondent filed a statement of defence and counter-claim denying the appellant's contention that he is the lawful owner of the suit property and all other allegations levelled against him. The 2nd respondent further deposed that he is the lawful owner of the suit property and that he was allocated the suit property by the County Council of Koibatek in 1994; that he has been paying the requisite fees, rent and rates to the County Council and that he has been pleading with the appellant to vacate the suit property to no avail.

8. Terming the appellant's occupation and possession of the suit property illegal, the 2nd respondent prayed for an order of eviction against the appellant and an order of permanent injunction to restrain the appellant from in any manner whatsoever interferring with the suit property.

9. The appellant filed a reply and defence to counter-claim reiterating the contents of his plaint.

10. The 1st respondent did not defend the case urged against it.

11. When the matter came up for hearing, the appellant availed three witnesses himself included. Similarly, the 2nd respondent availed three witnesses himself included. The testimonies of the witnesses can be summarized as follows:-

12. The appellant, who testified as P.W.1, informed the court that he has a plot in Mogotio. He acquired the plot in 1958. He was allocated the plot by Sadala Haji and Wachira who were elders. He was shown the plot. He developed the plot. The plot was connected with water. The County Council allocated them with numbers. He could not remember the number allocated to him. He stayed in the house he put up. Later he established that his name was missing in the register of plot owners. He knows the 2nd respondent. He got to know him when he was summoned by the area chief after his house was pulled down and the caretaker chased away.

13. In cross examination the appellant maintained that he was allocated the suit property in 1958. He was allocated the land by a committee established by the County Council after approval of the Council. He had five plots. He sold two and retained one for himself and another for his wife. He could not remember the plot number. He had no documents to show that the plot belongs to him. He lost documents during election violence. He did not report to police. He got to know about allocation to Ezekiel (2nd Respondent) when the structures he had erected on the suit property were pulled down. He never followed up for re-allocation after the documents were destroyed. He complained to the Council. His people wrote to the Ministry of Local Government. He does not know Hussein Kipsergwon who

allegedly was allocated the plot in 1993. He does not know that the Council stated that he does not own the land.

14. The appellant further stated that he does not know that there was Cholera outbreak in 2014; that the Public Health Department gave orders to pull down the structures for public health reasons; that he did not see the 2nd respondent demolishing his house but was told he is the one who demolished the houses; that he was not given minutes showing that the 2nd respondent grabbed the plot and that he was given survey plan to show that the plot was his.

15. The appellant further stated that the 2nd respondent did not evict people from the plot but demolished the structures. He does not know that the 2nd respondent was paying rates for the plot. He paid once. He was not paying because he was told that someone else was listed as the owner. He went to elders who told him the plot was his. He did not know that the Town Planning Works Committee determined that the plot belonged to the 2nd respondent.

16. In re-examination, the appellant stated that he could not recall the plot number. He is old (93). Was never called by the council over the suit property. Was not notified of any outstanding rates due for payment. He thumb printed documents at his lawyer's office. He could not tell whether his daughter wrote a complaint letter to the DC. He is not party to any agreement between the 2nd respondent and the seller of the plot. He does not know how much was paid. He verbally reported to the DCIO the issue touching on the suit property. He does not know who demolished his house. He was not issued with any letter by Public Health before demolition. Later, he got to know that the 2nd respondent was involved; that the letter dated 15th August 2007 shows that the plot is his. He paid for rates. He had information that the chief and the 2nd respondent were involved in grabbing his plot.

17. On 27th July 2017, following a consent recorded by the parties, the appellants documents contained in his list of document were admitted in evidence. Documents No. 4 (letter of allotment dated 15th August 1997 and receipt for rent were to be admitted in evidence after certification and production in court).

18. Peter Kipkwe Kipinon, informed the court that he knows the appellant. He got to know him in 1951. He knows that the appellant has a plot in Mogotio but does not know the plot number; that the appellant was in occupation of the plot and had developed it. He knows the 2nd respondent as a recent settler in the area. Unless he bought the plot, the 2nd respondent is not the owner of the plot. PW.2 informed the court that everyone knows that the plot belongs to the appellant.

19. In cross examination, P.W.2 informed the court that the appellant was given the plot by elders. Once allocated a plot by elders, the council sanctions. He does not know whether appellant had other plots or whether the appellant was given ownership documents.

20. In re-examination, he maintained that he saw the appellant in 1951 and stated that during that time it is the elders who used to give out plots.

21. Zakaria Kiptoo Kirui, informed the court that the appellant and the 2nd respondent are his neighbours. During post election violence the appellant took him to the chief and told him to look after his plots over the period. He agreed. He looked after the plots until the violence ended. After the violence ended, the appellant returned. He told him that there was another person claiming the land. The appellant went to the chief and to Eldama Ravine County Council to complain. The plot in dispute had houses with tenants living there. Sometime in 2012, he found the houses had been vandalized and the doors removed. The people who removed the doors told him that they were instructed to do that by the 2nd respondent.

22. In cross examination, he stated that he knows the plot in dispute as plot number 82. Other plots were No.16 and 33. Contrary to what he stated in his statement that he had never seen the 2nd respondent, he maintained that the 2nd respondent is his neighbour.

23. The 2nd respondent testified as D.W.1. He informed the court that he knows the appellant. He got to know him after the case over the suit property started. He bought the suit property in 1993 from Kiprotich Kipsegerwa who converted to Hussein after he became a Muslim. He went to the lands office with the seller and he surrendered the letter of allotment. On 21st July 1994, he was allocated the plot and he paid the fee. He went to the County Council of Koibatek to pay rates. He continued paying rent. He produced his ID as Dexbt 1, sale agreement Dexbt 2, letter of allotment Dexbt 3(a), map Dexbt 3(b); bundle of receipts for land rent (14 reciepts) as Dexbt 4 and allotment letter issued by County Council dated 9th March 2010 as Dexbt 5.

24. He informed the court that the appellant and public health officers from Mogotio have been bothering him. He was informed of a meeting to deal with the appellant's claim but could not attend because he was a police officer. The meeting was held in his absence. It was agreed he continues owning the plot. He produced a copy of the report as Dexbt 6. In 2014, he was summoned to the chief, elders and ward administrator. They met with the appellant and it was decided the plot is his. He produced the minutes of the meeting as Dexbt 7.

25. D.W.1 informed the court that the plot had a mud structure. He asked the appellant to pull it down because the public health office was pushing him to do so. The county development administrator stopped all construction on the plot. He produced notice dated 18th August 2014 as Dexbt 8; letter dated 21st August 2014 as Dexbt 9, letter to Sub-County Administrator dated 30th June 2015 as Dexbt 10; letter from Sub-county Administrator dated 1st July 2015 as Dexbt 11. There after, he received court summons.

26. D.W.1 denied having grabbed the plot. He stated that in 1958 there was no map for Mogotio town because the country was still a colony. He stated that he bought the plot long before post election violence. He further stated that in 2007, he was the Officer Commanding Police Division (OCPD) Bondo and could not have travelled home leave alone grabbing the plot. Maintaining that the suit property is his, D.W.1 urged the court to dismiss the appellant's case. He further stated that in the meetings they held, the appellant had water receipts only.

27. In cross examination, D.W.1 maintained that he bought the suit property from Kiprotich Kipsegerwa alias Hussein. The seller gave him the letter of allotment and he surrendered it to lands office. He had nothing to show that he served the Commissioner of lands. He had no receipts to show that he paid the seller. He did not file the agreement in his initial list of documents because he had misplaced it. The agreement was witnessed by Kipkenei advocate who was not a witness in the case. He saw the plot before he purchased it, it was vacant. In 1997 he found a structure erected thereon. He went to the County Council and they said they would call the appellant to demolish it. He obtained a letter of allotment from the Commissioner of Lands. He had no communication between the Commissioner of Lands and the County Council. Hussein was a staff of the County Council. In the meeting of 2014, he stated that he went to the ground but could not identify the plot.

28. D.W.1 acknowledged that he did not meet the conditions of the offer within the stipulated time but stated that his payment, three years later, was accepted meaning that the allotment was still valid.

29. Upon being shown Pexbt 1, Baraza la wazee 1958 meeting minutes, he acknowledged that the appellant was allocated the plot and for that reason the plot could not be vacant.

30. The persons they appeared before were all kalenjins like him. The committee decided in his favour. The decision was proper. He did not apply for allotment of the plot in 2010. All plots received new allotment. He acknowledged that his agreement is not stamped by the revenue collector.

31. In re-examination, D.W.1 stated that Hussein's documents were retained by the Commissioner of Lands in order for him to be issued with an allotment letter. He filed the sale agreement letter because he had misplaced it. When he bought the plot it had no structures. His complaint over the structures was verbal. He has never connected water to the plot. He does not know whether the plot has water connection. The receipts produced do not mention plot No.82. He did not apply for letter of allotment because Hussein had one. He simply changed ownership. His first payment was in 1997 and it was accepted. Pexbt 1 doesn't refer to plot No.82 anywhere. Pexbt 2 shows the appellant was allocated 5 plots but plot No.82 is not mentioned. Pexbt 3 does not mention plot 82. He maintained that he did not take advantage of the post election violence. The verdict by the committee was not based on tribal consideration; that he did not attend the meeting through which Dexbt 6 was generated; that he could therefore not state why they wrote Kipchumba instead of Chumba. It was not his responsibility to give the appellant an alternative plot. In 2010, there was a blanket renewal of all letters of allotment. Revenue stamp was not needed when he lodged his documents.

32. D.W.2, Kiprotich Kipsegerwo alias Hussein, informed the court that the suit property was allocated to him in 1993. It was vacant in their register. He talked to the surveyor who advised him to apply for it, which he did. When the plot was allocated to him, the surveyor told him that the 2nd respondent was looking for a plot. He sold the plot to the 2nd respondent and surrendered all the documents to him. The 2nd respondent went to the Commissioner of Lands and was issued with an allotment letter.

33. In cross examination, D.W.2 informed the court that he saw from the register that the plot was vacant. He did not go to the ground. He applied for the land to the Commissioner of lands in Nairobi. He paid the application fee but had neither the allotment letter nor the receipt for the payment he made for the plot. He acknowledged that the 2nd respondent's lease is for 99 years beginning in 1994. The 2nd respondent paid the full purchase price but he did not issue him with a receipt for the payment. His testimony in court was the first in respect of the plot. He was not called as a witness in the commitee meeting. He went with Chumba (2nd respondent) to the Commissioner of Lands after he fully paid for the plot. He visited the plot after he got the allotment letter. He did not show the 2nd respondent the plot when he sold it to him. It is the surveyor who showed the 2nd respondent the plot. He could not tell whether the appellant entered the plot in 1958 but acknowledged that by the time he sold the plot to the 2nd respondent the plot was developed. He assumed that the surveyor showed the 2nd respondent the plot. He was in Eldama Ravine during post election violence (2007) but could not tell whether the appellant was an Internally displaced person (IDP).

34. In re-examination, he stated that the agreement was on 6th September 1993 and the balance was paid fully. There was no need for acknowledgement. The plot was vacant as per the register in 1993. He was given a letter of allotment by the Commissioner of lands. Dexbt 3(a) was written at the Commissioner's discretion. He confirmed that the plot was allocated to him. He never retained a copy of the documents when he accompanied the 2nd respondent to Nairobi. He did so as the seller.

35. D.W.3 Jonah Kiprono Korir, a surveyor attached to Mogotio Sub-County Survey Department, produced the register for Mogotio Sub-county showing plot allotees and how they paid rent. He informed the court that the suit property is in the name of the 2nd respondent. He was the one paying rent for the property. The record he had was from 2007 to 2017. He could not tell when and how the 2nd respondent obtained the plot. He referred to receipts from Koibatek Council, Dexbt 5.

36. With regards to Pexbt 5, he informed the court that it is a document from Koibatek County Council. The documents were issued to people with allotment letter from Commissioner of Lands or those who had "Ombi la Ploti". He did not have the register for previous years. He could not trace it. The register in court shows that the plot had rent arrears of Kshs.1000/= before 2007.

37. In cross examination, he stated that Ombi la ploti was a proper allotment letter then as per Pexbt 4. He however pointed out that Pexbt 4 had no plot number. As a surveyor he is not the custodian of the register and he does not deal with revenue collection or issuance of receipts. With regard to the allotment letter for 9th March 2010, he stated that it is from the Clerks Department. He had no records for Hussein. He joined the county in 2008. He was not in the committee meeting which sat to deliberate on the plot.

38. In re-examination, he stated that they relied on Ombi la ploti or letter of allotment from the Commissioner of Lands.

39. On the basis of the foregoing evidence, the Learned Trial Magistrate framed two issues for determination namely, who is the rightful owner of Plot No.82 Mogotio town and who should bear the costs of the suit.

40. With regard to the 1st issue, she found in favour of the 2nd respondent. In so doing the Learned Trial Magistrate stated:-

> " The plaintiff's case is that he was allocated plot No.82 in 1958 and soon thereafter he put up mud walled houses hence took possession of the said plots but lost documents of ownership in 2007 during post election violence. He says that after post election violence is when he learnt of the 2nd defendant's claim of the suit premises. He says that the 2nd defendant took advantage of post election violence to grab his plot. From the plaintiff's documents, a list of plot allocation dated 17th June 1958 shows the plaintiff had 5 plots in Mogotio. Another document dated 20th December 1995 (Ombi la ploti) says the plaintiff will be shown his plot at a later date. It is important to note that none of these documents makes reference to plot No.82. The other documents are water receipts for the year 1992 but equally they have no plot number. From the plaintiff's documents and also his evidence, it is clear that the plaintiff never paid rates/land rent from the year he allegedly was allocated the suit land (1957). Any letter of allotment carries with it conditions which must be fulfilled because a letter of allotment is simply an offer and acceptance is signified by fulfilment of the conditions of offer. As a matter of fact the plaintiff did produce any letter of allotment to show that he was allocated plot No.82 Mogotio township at any time. He said his documents were all lost during the 2007-2008 post election violence. The plaintiff produced a Police Abstract showing that on 4th June 2015 he reported loss of some documents i.e ATMS, title deed and a mobile phone and five allotment letters. First of all I have to wonder aloud if these documents were lost in the year 2007-2008, why did the plaintiff have to wait for 8 years to report their loss? The most puzzling thing is that this report for loss of documents was made one and half months prior to filing this suit. It appears to me that the Police Abstract was obtained purposely for purposes of this case, otherwise the plaintiff would not have waited for 8 years to report loss of ATM cards and title deeds.
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> The 2nd defendant (read 2nd respondent) on the other hand maintained that he bought the suit land from Kiprotich Kipsegerwo alias Hussein on 6th September, 1993. He produced a sale agreement drawn by Kipkenei and Company Advocates and called the said Hussein who admitted to having sold the land to the 2nd defendant. He produced a receipt dated 18th

July 1997 for Kshs.4,200/= to show that he complied with the conditions in the allotment letter. However, the allotment letter states that he was supposed to give acceptance to the department of lands with 30 days effective from July 1994 together with a banker's cheque for Kshs.6,110/=. That is to say 2nd defendant paid only part of the amount stated in the allotment letter and actually the payment was done three years past the 30 days stated in the allotment letter. He produced receipts to show that on 19th March 2007 he paid rent for plot No.82 for the years 2001-2006. It is important to point out that out that neither the plaintiff nor the 2nd defendant met the conditions for the allotment of the suit land. None of them has a title deed; in fact the plaintiff doesn't even have an allotment letter. He says it got lost.....as stated earlier the theory about loss of the allotment letter in this case isn't convincing. No explanation even a flimsy one was given as to why the plaintiff waited for 8 years to report loss of this crucial document. I am afraid just like the judge in the aforestated case, without the allotment letter I cant assume the plaintiff was allocated plot No.82 Mogotio Township.

The plaintiff in his letters dated 14th October, 2008, 9th December 2011 states that his land plot No.82 was grabbed by Hussein Cheburet who sold it afterwards to the 2nd defendant. He accuses the 2nd defendant of obtaining the plot fraudulently....

I fully agree with the plaintiff that the defendant never met the conditions in the allotment letter, however, the County Council did accept his payment three years later for part payment of charges in the allotment letter and thereafter entered his name in the register and that is why he has been able to continue paying rent for the suit land until 2014. D.W.3 said that he was unable to trace the register for allotees covering the years before 2007 but the register from 2007 to date shows the 2nd defendant is the lawful allotee of the suit land. So if the surveyor from the County Govenment of Baringo testifies that the 2nd defendant is the lawful owner of the suit land, I have no basis of terming his allotment letter a nullity unless I am shown an earlier allotment letter to someone else....

In conclusion, from the analysis of the evidence, I find the plaintiff has not proved that he was allocated plot No.82 by the County Council of Koibatek and if he was, he was indolent and not vigilant and cannot be allowed to reap from his indolelence. I therefore dismiss the plaintiff's case.

On the counter-claim I find that the defendant (now plaintiff Ezekiel Chumba) has proved his case on a balance of probabilities and I declare him the lawful allotee of plot No.82 Mogotio Township. I allow the prayer for an order evicting the plaintiff, Hesbon Kinyanjui, from the suit land unless he vacates the same on his own.....the plaintiff will bear the costs of the suit to the 2nd defendant."

41. Aggrieved by the decision of the Learned Trial Magistrate the appellant appealed to this court on 16 grounds that can be condensed to seven (7) as follows:-

i. That the Learned Trial Magistrate erred by holding that the appellant had not proved that he was allocated the suit property by the County Council of Koibatek;

ii. That the Learned Trial Magistrate erred by admitting the sale agreement produced by the respondent in evidence when the same had not been stamped as required under the *Stamp Duty Act*;

iii. Holding that the appellant did not prove a case of fraud against the person who sold the suit property to the 2nd respondent;

iv. Holding that the 2nd respondent was the owner of the suit property when there was no evidence that he complied with terms of the offer;

v. Relying on the testimony of D.W.3 to determine that the 2nd respondent was the lawful owner of the suit property;

vi. By failing to deal with the issue of possession of the suit property

vii. Allowing the 2nd respondent's case and counter-claim.

42. Pursuant to directions given on 6th March, 2019 the appeal was disposed of by way of written submissions.

The Appellant's Submissions

43. It is the appellant's submission that Pexbt 1, 2, 3 and 4 as read with the testimony of DW1 were enough proof that the appellant was the lawful allotee of the suit property. Doc 3 and 4 in the appellant's list of documents were confirmation that the appellant's allocation of the suit property in 1958 had been ratified by the County Council of Baringo and Koibatek. It is submitted that the suit property having been allocated to the appellant first by the Government in 1958 and secondly by the County Council of Koibatek on 15th August 1997 was not available for allocation to the 2nd respondent on 9th March 2010 when the County Council purportedly re-allocated it to the 2nd respondent through a letter of allotment.

44. The 2nd respondent is said to have colluded with D.W.2 who was an employee of the 1st respondent and the entire organs of the 1st respondent to deprive the appellant of the suit property. The actions of the respondents are said to have been an infringement of the appellants right to own property in any part of Kenya. It is pointed out that the record produced by D.W.3 did not have records for prior to 2007 and submitted that if those records were produced ,they might have been adverse to the respondents' cases.

45. Based on the provisions of section 19 of the *Stamp Duty Act* and the evidence adduced in court showing that the sale agreement executed between the 2nd respondent and D.W.2 was not stamped as by law required, it is submitted that the sale agreement was inadmissible in evidence. The Learned Trial Magistrate is faulted for having accepted and relied on it. Concerning the reason given by the Learned Trial Magistrate for admission of the sale agreement in evidence, want of objection by the appellant, it is submitted that a document that requires stamping and has not been stamped cannot be accepted in evidence with or without objection. The Learned Trial Magistrate is said to have erred by admitting the sale agreement, in the circumstances. The issue of admission of documents required to be stamped under the *Stamp Duty Act* is said to be a matter of law and not a technicality curable under article 159 of *the Constitution*.

46. Reference is made to the testimony of D.W.2 on how he acquired the suit property and submitted that D.W.2 used his position as an employee of the 1st respondent to unlawfully acquire the suit property.

47. D.W.2 is said to have acted in collusion with the 2nd respondent who was at the time a Senior Police Officer using tribe and the disadvantage of the appellant of being an IDP to deprive the appellant the suit property. The evidence of D.W.2 that he had an allotment letter and title documents which the 2nd respondent surrendered to the Commissioner of Lands in 1993 is said to be untrue because the letter of allotment issued to the 2nd respondent indicates that the file for plot No.82 Mogotio Township was opened on 1st July 1994 for a term of 99 years, a year after the plot was allegedly sold by D.W.2 to the 2nd respondent. The sale of the plot to the 2nd respondent by D.W.2 is said to have been a nullity because D.W.2 did not have the legal capacity or authority to sell the plot to him. The plot never belonged to

D.W.2 at any time. D.W.2 had no title or allotment letter on which the sale could hinge. In that regard reliance is made on the case of Bernard Otieno Okoth (Suing as Administrator of the Estate of Auma Agunda Deceased) vs. Riyaz Abdulkarim Pasta & Another-Mombasa High Court Case No.121 of 2009 where it was held:-

> "It is trite law that where title to a parcel of land is obtained by way of fraud or misrepresentation, then such title is invalid and cannot form the basis for any future transaction..."

48. The Learned Trial Magistrate is faulted for having held that the 2nd respondent was the lawful allotee of the suit property a finding which is said to be inconsistent with her earlier determination that none of the parties had met the conditions for allotment. It is submitted that the County Council had no capacity to enlarge time.

49. The Letter of allotment given to the 2nd respondent on 9th October, 2010 is said to be a nullity because the County Council had no mandate or power to issue another allotment letter over the suit property. It is submitted that the 2nd respondent had not made any application on which the letter of allotment could hinge; that evidence was adduced in support of the allegation that the letter of allotment was a renewal of the previous allotment; and that there was nothing to renew because the offer had lapsed. It is further submitted that renewal could only be made by the Commissioner of Lands yet that was not the case. It is further submitted that the 2nd respondent did not prove that he was allocated the plot after undergoing all the procedures. It is contended that the 2nd respondent was assisted by his Kalenjin tribesmen working with the 1st respondent to defraud the appellant.

50. The Learned Trial Magistrate is said to have ignored the aspect of the evidence of long possession of the plot by the appellant. As a result, she failed to enforce the equitable rights of the appellant accruing by long possession of the suit property. It is submitted that payment of rent and land rates by the 2nd respondent was of no consequence having failed to comply with the conditions of offer.

The 2nd Respondent's Submissions

51. The 2nd respondent submits that the appellant had not proved that he was lawfully allocated plot No.82 by the County Council of Koibatek; that none of the appellants documents made reference to the plot and that the appellants never made any payments of land rent from the year he was allegedly allocated the suit land. Further, that the appellant did not have any allotment letter. The Learned Trial Magistrate is said to have been guided by facts that were presented before her by the parties. Exhibit No.1 merely shows the number of people who were allocated several plots in Mogotio township. It doesnt specify the particular plot each one of them was allocated. It shows that the appellant was allocated 5 plots. No plot numbers were given. The exhibit does not relate to the suit property and does not qualify as an ownership document (Exhibit 1-document dated 17th June 1958).

52. Exhibit 3 a document dated 20th December, 1995 (Ombi la Ploti) does not make reference to the suit property. It is merely evidence that the appellant had been allocated a plot, which was to be identified to him later. D.W.3 is said to have confirmed that the document had no plot number. It is contended that as at 20th December 1995, when the appellant was issued with Ombi la ploti, the 2nd respondent had already been issued with letters of allotment dated 21st July 1994 produced as Dexbt 3a. It is the 2nd respondent's case that the Ombi la ploti could not have been issued in respect of the suit property because it had already been allocated to the 2nd respondent. It is further submitted that the Ombi la ploti could have been issued in respect of any of the five plots that were allocated to the appellant in 1958.

53. Concerning Pexbt 4, the document entitled 're-alignment and show of plot', it is pointed out that the document was never produced in evidence and submitted that failure by the appellant to produce that document despite having been given an opportunity to certify it and produce it, means it was not a genuine or authentic document. Similar submissions are made in respect of appellant's document 20, payment receipt for land rent. It is further submitted that by the time the appellant was being shown the plot, on 15th August 1997, the plot had already been allocated to the 2nd respondent vide the letter of allotment of 1994 (Dexbt 3a). The suit property was unavailable for allocation to him. It is contended that the fact that the 2nd respondent was re-issued with an allotment letter by the County Council of Koibatek negates the fact that the plot was allocatted to the appellant as purported by the documents marked for identification as MFI 4 and 20.

54. D.W.3 is said to have confirmed that the 2nd respondent was the owner of the suit property and that he was the one who was paying land rent.

55. It is further pointed that MFI 4 is not signed by the surveyor and submitted that the appellant was not shown the plot. It is reiterated that the appellant did not produce any document to prove his alleged ownership of the plot. The documents relied on by the 2nd respondent prove his ownership of the suit property namely Dexbt 3a, b and 5 being letter of allotment dated 21st July 1994, map and/or town plan and allocation of a plot letter dated 9th March, 2010.

56. Based on Dexbt 3b-map issued alongside Dexbt 3a in 1994 showing physical location of the suit property, it is submitted that by 1994 the County Council had already numbered and established the location of the suit property; that there was no basis on which the Learned Trial Magistrate would hold that the appellant was the owner of the suit property.

57. The contention by the appellant that the 2nd respondent colluded with D.W.2, in his capacity as an employee of the 1st respondent and the entire organs of the 1st respondent to deprive the appellant of the suit property is said to be unproven.

58. Concerning the appellant's contention that the reason the register that was produced by D.W.3 contains entries spanning from 2007 and not before is because he began owning it then, it submitted that the register confirmed that the 2nd appellant was the owner of the suit property. The appellant is faulted for having failed to adduce evidence to show that the 2nd respondent was not the owner of the property from 1994 as contended.

59. Regarding the appellant's contention that the 2nd appellant took advantage of the post election violence to deprive the appellant of the suit property, it is submitted that no evidence was produced capable of proving that allegation.

60. Reference is made to the case of Joseph Kagunya v. Boniface k. Mulli & 3 others (2018) e KLR where it was observed that once a letter of allotment is issued and the allotee meets the conditions therein the land in question is no longer available for allocation, and submitted that in the absence of any evidence capable of showing that the letter of allotment issued to the 2nd respondent in respect of the suit property was ever cancelled or was invalid in any way, this court should uphold the decision of the Trial Court that the 2nd respondent is the lawful owner of the suit property.

61. Reference is also made to the case of *Joseph Kagunya v. Boniface k. Mulli & 3 others* (supra), where it was further stated:-

> " ...since a letter of allotment confers absolute right of ownership unless it is challenged by the allocating authority or is acquired through fraud, mistake, misrepresentation or that the

allotment was out rightly illegal or it was against public interest. In other words, where land has been allocated, the same land cannot be reallocated unless the first allocation is validly and lawfully cancelled."

62. On whether Learned Trial Magistrate erred by admitting in evidence the sale agreement executed between the 2nd respondent and D.W.2 when the same was not stamped as by law required, it is submitted that failure to stamp the agreement did not invalidate the agreement, that the agreement was merely a document witnessing the sale transaction and that failure to stamp the agreement is not fatal to the 2nd respondent's case. It is further submitted that the 2nd respondent's ownership of the suit property hinges on the letter of allotment in respect of which he paid stamp duty. It is the 2nd respondent's case that the letter of allotment, as opposed to the sale agreement, is the proof of ownership. The appellant is faulted for having failed to raise objection to admission of the document in evidence during hearing of the case only to raise it in his submissions. It is contended that admission of the document in evidence did not cause any prejudice to the appellant.

63. As to whether the Learned Trial Magistrate erred by holding that no fraud was proved against Hussein, the seller of the suit property, it is submitted that the suit before the Trial Court was not one of fraud. The appellant is said to have failed to plead and particularize fraud on the part of the 2nd respondent as by law required. The appellant is also said to have failed to join D.W.2 in the suit and to plead fraud against him. It is submitted that the appellant cannot urge a case of fraud against D.W.2 whom he did not make a party to the suit.

64. Based on the provisions of sections 109 and 112 of the *Evidence Act* and the decision of the Court of Appeal in the case of *Demutila Nanyama Purumu v. Salim Mohamed Salim* (2021) e KLR, it is submitted that the onus was on the appellant who sought to rely on fraud on the part of the 2nd respondent and alleged forgery on his documents to prove to the court that there was an element of fraud on the documents relied upon by the respondent in support of his case.

65. On whether the Learned Trial Magistrate erred by holding that the 2nd respondent was the proper allotee of the suit property, it is submitted that the 2nd respondent met the conditions in the allotment letter; that the County Council of Koibatek accepted the payments made by him and issued him with a receipt and entered his name in the register; that the 2nd respondent subsequently paid all the yearly land rates and rent and was upto date. Upon evaluation, the Learned Trial Magistrate weighed the evidence of the appellant against that of the 2nd respondent and the balance tilted in favour of the 2nd respondent.

66. As the first appellate court, it is the duty of this court to examine and re-evaluate the evidence on record, assess it and make it's own conclusion, bearing in mind that this court has neither seen nor heard the witnesses and make due allowance for that. This court has also to take into account the circumstances upon which this court may differ with the Trial Court on findings of fact namely, if it appears either that the Trial Magistrate has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistence with the evidence in the case generally. See *Selle & another v. Associated Motor Boat Co. Ltd and others* (1968) EA 123.

Analysis and determination

67. From the evidence adduced before the lower court and the submissions made in respect thereof, I do find as a fact that the appellant was in use and occupation of the suit property as at the time D.W.2

purported to sell it to the 2nd respondent. That fact is made bare by the testimony of D.W.2 who stated as follows concerning that fact:-

> " I don't know whether Kinyanjui (Kinyanjui is the appellant) entered the land in 1958. I have seen the houses in the plot since 1994. As at 1994 the houses were on the plot and they were already old houses."

68. In his evidence, the 2nd respondent contradicted D.W.2 on the issue of use and possession of the suit property by the appellant by stating as follows:-

> " I saw the plot before purchase. It was vacant. I found a structure erect there later in 1997 and I went to the County Council and they said they would call Kinyanjui to demolish it".
>
> The testimony of the 2nd respondent to the effect that he saw the plot before purchase is not only untrue but also contradictory to the documentary evidence contained in his own document-Dexbt 7 (Minutes of the meeting held in Sub-county Office on 12th August 2014 of land case of plot Number 82 in Mogotio Township between Kinyanjui sons and Ezekiel Chumba). In that meeting, the 2nd respondent stated:-
>
> "Minute 1/8/2014 Explanation by Ezekiel Chumba
>
> He explained that he bought the plot in 1993 so that his children could get good education from his classmate called Hussein Kipsegerwo who was an employee of the county council.
>
> In 1994 he went to the County Council in Eldama Ravine to look for agreement. He was advised to apply from a Commissioner of lands to get allocation. Then he took to county council and then to a commissioner of lands. It was approved and given allotment in 1994. In 1995, he wanted to built it but he didn't see the plot. He went to ask the person who sold it to him and found there were structures. He was told it belonged to Kinyanjui. He went to complain of the structures and he was told to write a note in which he was replied that he was going to be shown. He was shown the same plot and he was told Kinyanjui never applied. He didn't want to demolish someone's house so he wrote a letter..."

69. The circumstances upon which D.W.2 sold the suit property to the 2nd respondent are that, being an employee of the 1st respondent at the material time, he discovered from the records of the 1st respondent (read the County Council of Koibatek), the suit property was vacant (my reading of vacant here is to mean that the record did not indicate that the property had a registered owner). He talked to the Surveyor who advised him to go to the Commissioner of Lands for allotment. He did as he was advised. He was issued with an allotment letter in respect thereof. After he was issued with an allotment letter, the surveyor told him that the 2nd respondent wanted a plot. He sold the plot to the 2nd respondent and handed over all documents to him.

70. Although D.W.2 was not made a party to the suit and was not expected to defend himself, I do find as a fact that the circumstances upon which the 2nd respondent obtained the suit property was a key issue for consideration by the court. The 2nd respondent had in his statement of defence and counter-claim, paragraph 4 thereof, pleaded that he is the only lawful allotee and owner of the suit plot having been allocated the same by the County Council of Koibatek in the year 1994 upon being a beneficial owner of the same. Although it is not clear what the 2nd respondent meant by stating that he was allocated the property upon being the beneficial owner of the same, from the evidence adduced namely the sale agreement entered into between the 2nd respondent and D.W.2, it is discernable that the beneficial interest arises from the said sale agreement.

71. Whilst the 2nd respondent pleaded that he was allocated the plot by the County Council of Koibatek in 1994, the evidence adduced did not disclose any dealing between the County Council and the 2nd respondent or D.W.2 at that time. According to D.W.2, he established from the register that the property had no registered owner, talked to the surveyor (Kandie) who advised him to apply for the plot. He applied to the Land Commissioner and after he was issued with a letter of allotment he got information from the surveyor that the 2nd respondent wanted a plot. He sold the plot to the 2nd respondent and handed over his ownership documents to him.

72. On his part, the 2nd respondent stated that he bought the suit property from D.W.2 in 1993 and that they went to the lands office where D.W.2 surrendered the allotment. In cross-examination, the respondent stated that D.W.2 gave him the letter of allotment letter and he surrendered it to the lands office. On 21st July 1994 he was allocated the suit property and he paid the requisite fee.

73. I have carefully reviewed the evidence by the 2nd respondent and the D.W.2 to the effect that the plot had been allocated to D.W.2 who sold it to the 2nd Respondent. I find as a fact that at no time was D.W.2 registered by the County Council as the owner of the plot. I find the evidence by D.W.2 and the 2nd respondent that the suit property was allocated to D.W.2 and a letter of allotment issued to him to be unbelievable on the ground that if indeed the property had been allocated to D.W.2, the allotee (D.W.2) would have applied for consent to transfer his interest in the suit property to the 2nd respondent as opposed to the 2nd respondent being issued with a new letter of allotment and being required to accept the offer and to pay for the allotment as if it was a new allotment. The term would run from the time the property was allocated to the seller, D.W.2 and not from the time of the purported new allotment. It is curious that neither the seller nor the 2nd respondent dealt with the county council, yet it was the owner of the property.

74. In the case of *Ali Mohamed Dagane (Granted Power of Attorney by Abdullahi Muhumed Dagane,suing on behalf of the Estate of Mohamed Haji Dagane) v Hakar Abshir & 3 others* [2021] e KLR it was stated:-

> " Once the Defendants attacked the allotment letter, the question of the process of acquisition of the allotment letter came into play. The question of acquisition behoves the court to trace the legal prescriptions for the issuance of an allotment letter and to adjudge the Plaintiff's acquisition from the light of the law."

75. In that case it was further stated:-

> " This court in the case of Mako Abdi Dolal v Ali Duane & 2 others [2019] eKLR noted that prior to the promulgation of the 2010 Constitution and the 2012 amendments to the body of Land Laws in Kenya, disposition of government land was governed by the Government Lands Act (Repealed). Section 4 of the Act provided as follows:
>
> > "All conveyances, leases and licenses of or for the occupation of Government Lands, and all proceedings, notices and documents neither this Act, made, taken, issued or drawn, shall serve as otherwise provided, be deemed to be made, taken, issued or drawn under and subject to the provisions of this Act."
>
> Power to dispose of public land was vested in two entities: The President and the Commissioner of Lands, under Sections 3 and 9 respectively. The process of the disposition of government land followed the following procedure: First, the respective municipal council in which the land to be disposed was situate had the mandate of advising the

Commissioner of Lands on which portions of land could be disposed. This step would have required the responsible council to visit the area or to carry out a fact-finding mission to satisfy itself that the land was first of all government land and second that it was indeed available for disposition. See Harison Mwangi Nyota v Naivasha Municipal Council & 20 others [2019] eKLR

> "...The question that the plaintiff seemed to raise is what role the Municipal Council of Naivasha had in the issuance of allotment letters to the defendants in 1992. According to DW1, an employee of the 1st defendant, the local authority (1st defendant) has to recommend that the land is available for allocation before an allotment letter can issue. DW13 also told the court that the Council oversees all developments in its jurisdiction and allocates land on advisory basis for the Commissioner. It seems that even if the 1st defendant issued the letters dated 1/12/1992, it was mere advisory to the Commissioner of Lands. The allotment of the land had to be ratified by the Commissioner for Lands. It is obvious even from the communication between the Municipal Council and the Office of the Commissioner of Lands that the Council played an important role in identifying what land was available for purposes of alienation."

The second step would be for the part development plan to be drawn up and approved by the Commissioner of Lands. See Nelson Kazungu Chai & 9 Others vs. Pwani University College (2014) eKLR

> "It is trite law that under the repealed Government Lands Act, a Part Development Plan must be drawn and approved by the Commissioner of Lands or the Minister of Lands before any unalienated Government land could be allocated. After a Part Development Plan (PDP) has been drawn, a letter of allotment based on the approved Part Development Plan is then issued to the allottee."

The third step involved the determination of certain matters by the Commissioner of lands which matters are listed under Section 11 of the Government Lands Act (Repealed). The matters to be determined include the upset price at which the lease of the plot would be sold, the conditions to be inserted into the lease; the determination of any attaching special covenants and the period into which the term is to be divided and the annual rent payable in respect of each period.

The fourth step would be for the gazettement of the plots to be sold, at least four weeks prior to the sale of the plots by auction under Section 13 of the Government Lands Act (Repealed). The notice was required to indicate the number of plots situate in an area; the upset price in respect of every plot; the term of the lease and rent payable, building conditions and any attaching special covenants.

The fifth step would be for the sale of the plots by public auction to the highest bidder. Section 15 of the Government Lands Act (Repealed).

The sixth step would be for the issuance of an allotment letter to the allotee. An allotment letter has been held not to be capable of conferring an interest in land, being nothing more than an offer, awaiting the fulfilment of the conditions stipulated therein by the offeree. See the decisions in: Gladys Wanjiru Ngacha v Teresa Chepsaat & 4 others 182/1992 (Nyeri);

and in Dr. Joseph N.K. Arap Ng'ok v Justice Moijo Ole Keiyua & 4 others C.A.60/1997 where the Court of Appeal held as follows:

> "It has been held severally that a letter of allotment per se is nothing but invitation to treat. It does not constitute a contract between the offerer and the offeree and does not confer interest in land at all. It cannot thus be used to defeat a title of a person who is the registered proprietor of the said parcel of land."

76. It was further stated:-

" In order for an allotment letter to become operative, the allotee was required to comply with the conditions set out therein including the payment of stand premium and ground rent within the prescribed period. See the decision in: *Mbau Saw Mills Ltd v Attorney General for and on behalf of the Commissioner of Lands) & 2 others* [2014] eKLR

> "I have considered the evidence on record and the submission of the parties and do find that a letter of allotment was issued to Mr. Joseph K. Mugambi on 21/10/1971 with a condition to accept the offer within 30 days. He did not do so and thereafter the offer lapsed 30 days after it was made in accordance with the allotment letter. Having failed to accept the offer as stipulated in the letter of allotment Mr. J.K. Mugambi did not acquire interest in the unsurveyed lorry depot and therefore had no interest to transfer to the plaintiff. This court holds that a letter of allotment does not confer any property rights to a person unless there is acceptance and payment of the stand premium and ground rent. In the letter dated 17/6/1988 which was written about 17 years after the allotment letter was issued, the Commissioner of Lands confirmed that the plot was allocated to Joseph M. Mugambi in 1971 for lorry depot. However, the plot had neither been paid for nor an acceptance of the offer in the allotment letter made. The implication of this letter was that the allottee had not complied with the terms of the allotment letter and therefore the offer had lapsed. The offer having lapsed, the allottee Mr. Joseph M. Mugambi did not have any interest to transfer to the plaintiff and therefore all transactions between the allottee and the plaintiff were a nullity in law."

The allotment letter also must have attached to it a part development plan (PDP). See the decision in African Line Transport Co. Ltd Vs The Hon .AG, Mombasa HCCC No.276 of 2013 where Njagi J. held as follows:

> "...Secondly, all the defence witnesses were unanimous that in the normal course of events, planning comes first, then surveying follows. A letter of allotment is invariably accompanied by a PDP with a definite number."

And again, in Nelson Kazungu Chai & 9 Others vs. Pwani University College (2014) eKLR

> "Worth noting as well is that no Part Development Plan was produced to back the Appellants' claim that due process had been followed as alleged."

The seventh step, which comes after the allotee has complied with the conditions set out in the allotment letter is the cadastral survey, its authentication and approval by the Director of Surveys and the issuance of a beacon certificate. The survey process precipitates the issuance

of land reference numbers and finally the issuance of a certificate of lease. In Nelson Kazungu Chai & 9 Others vs. Pwani University College (2014) eKLR the court held as follows:

> 'It is only after the issuance of the letter of allotment, and the compliance of the terms therein, that a cadastral survey can be conducted for the purpose of issuance of a Certificate of Lease. This procedural survey was confirmed by the Surveyor, PW3. The process was also reinstated in the case of African Line Transport Co. Ltd Vs The Hon .AG, Mombasa HCCC No.276 of 2013 where Njagi J held as follows:
>
> "Secondly, all the defence witnesses were unanimous that in the normal course of events, planning comes first, then surveying follows. A letter of allotment is invariably accompanied by a PDP with a definite number. These are then taken to the department of survey, who undertake the surveying. Once the surveying is complete, it is then referred to the Director of Surveys for authentication and approval. Thereafter, a land reference number is issued in respect of the plot."

Having evaluated in detail the necessary steps to be followed, it is emergent that a litigant basing their interest in land on the foundation of an allotment letter must provide the following proof: First, the allotment letter from the Commissioner of Lands; Secondly, and attached to the allotment letter, a part development plan; Thirdly, proof that they complied with the conditions set out in the allotment letter, primarily that the stand premium and ground rent were paid, within the specified timeline. It would also help a litigant's case, although this may not be mandatory based on the stage of the transaction, to have a certified beacon certificate."

77. In the instant case, it is the testimony of the 2nd respondent that after he was alloted the suit property he paid the fee and was sent to the County Council of Koibatek to pay rates. The evidence adduced in this case shows that the 2nd respondent did not comply with the conditions in the letter of offer. The letter of offer issued to the 2nd respondent required him to formally accept the conditions listed therein within 30 days. It also warned him that if acceptance and payment was not made within 30 days, the offer would be considered to have lapsed. The contents of the letter of offer were as follows:-

> " RE: uns: Commercial plot 82-Mogotio Township
>
> I have the honour to inform you that the Government, on behalf of Baringo County Council, hereby offers you a grant of the above plot shown edged red on the attached plan No.19028/IV/7A subject to your formal acceptance of the following conditions and to the payment of the charges as precribed hereunder:-
>
> Area: 0.045 hectares (approximately).
>
> Term: 99 years from the 1.7.1994.
>
> Stand Premium: Sh. 2,800/-
>
> Annual RENT: 560 (Subject to adjustment on survey, but there is no claim for reduction in area on survey)
>
> General:.....
>
> I should be glad to receive your acceptance of the attached conditions together with banker's cheque for the amount set out below within thirty days (30) days of the post mark.....
>
> Total Kshs. 6,110.

If acceptance and payment respectively are not received within the said thirty (30) days from the date hereof the offer herein contained will be considered to have lapsed...."

78. The evidence adduced in this case shows that the 2nd respondent paid Kshs.4200/- to the County Council of Koibatek in respect of the suit property on 18th July, 1997 and a further Kshs. 1640/- to the Department of Lands on 11th March,1998, way after the time stipulated in the letter of offer had lapsed. By a letter dated 8th July 1999, ref no.198806/5, the office of the Commissioner of Lands wrote to the Director of Surveys informing him that the letter of allotment issued to the 2nd respondent had been formally accepted. The letter does not indicate when the offer was accepted.

79. It is not known under what circumstances, the 2nd respondent made payment in respect of the offer that had already lapsed. The issue that arises from the foregoing set of facts is whether the offer having lapsed through effluxion of time, as at the time the 2nd respondent purportedly accepted it, there was any offer capable of being accepted by the 2nd respondent. In answering that question, I adopt the decision in the case of Ali Mohamed Dagane supra where it was held:-

> " In order for an allotment letter to become operative, the allotee was required to comply with the conditions set out therein including payment of stand premium and ground rent within the prescribed period...." (emphasis mine).

80. In the case of *Paul Victone Otieno v. George Asuke & 2 others* (2022) e KLR it was stated:-

> " The appellant was required to accept the letter of offer in writing as per the conditions set therein which he failed to do. From the evidence on record..."

81. In the circumstances of this case, the offer lapsed by effulution of time on 21st August 1994, after the 2nd Respondent failed to meet the conditions in the letter of offer dated 21st July, 1994 (Dexbt 3(a). The offer to the 2nd respondent having lapsed by effulution of time, there was no offer in respect of which the 2nd respondent could make the payment which he made in 1997 and 1998.

82. In the absence of any evidence of the circumstances upon which the 2nd respondent made payments in respect of a none existent offer, the argument that the offer of 1994 was still valid and capable of performance by the parties has no leg on which it can stand.

83. There is evidence that the 2nd respondent paid rent in respect of the suit property. However, that payment of rent per se cannot form the basis of determining that the 2nd respondent was the lawful owner of the suit property. His claim to ownership to the suit property stems from the offer of the property to him, which offer he failed to accept within the time stipulated in the letter of allotment. As a result, the offer lapsed by effulution of time rendering it unavailable for acceptance on a later date.

84. There is evidence that in 2010, the County Council of Koibatek re-allocated the suit property to the 2nd respondent and issued him with a fresh letter of allotment. The circumstances upon which the County Council made the re-allocation of the suit property are unknown. The 2nd respondent had not made any application for allocation of the plot or any other plot to him. As pointed out herein above, in their initial dealings with the property, neither the 2nd respondent nor D.W.2 dealt with the County Council concerning the suit property. Both D.W.2 and the 2nd respondent dealt directly with the Commissioner of Lands, which dealing I find to be unprocedural. In that regard see the case of Ali Mohamed Dagane supra.

85. It is noted that the Town Planning Works and Markets Sub Committee on Plot Disputes and Numbering through its meeting held on 2nd June 2009 at Mogotio Council Offices resolved that the 2nd respondent retains the plot on the ground that he had paid some money to the council and had been entered into the register (Dexbt 6).

86. From the case of Ali Mohamed Dagane supra, which I find to be persuasive, it is clear that the council could not lawfully re-allocate the suit property to the 2nd respondent. Only the Commissioner of Lands, in exercise of the powers donated to him under the Government Lands Act could do so. In any event, even if the council could allocate the suit property to the 2nd respondent, it could only do so on the basis of an application by the 2nd respondent. There was no application before the council that could have made the basis of the re-allocation of the suit property to the 2nd respondent. I say this well aware that the Council was seized of a dispute between the appellant and the 2nd respondent. In my view, that dispute cannot be taken as an application for a plot by the 2nd respondent when none was ever made. The only application made by the 2nd respondent, if any, was the one that led to the issuance of the letter of offer of 1994, which offer he failed to accept within the stipulated time hence lapsed.

87. The term re-allocation presupposes that the property had already been allocated to the 2nd respondent. Based on my finding that the offer to the 2nd respondent was not accepted and that it lapsed by effluxion of time, neither that offer nor the subsequent receipt of payment in respect thereof can be said to form the basis of concluding that the suit property was procedurally and/or validly allocated to the 2nd respondent.

88. In view of the foregoing, I need not say anything more to demonstrate that there were irregularities in the purported allocation of the suit property to the 2nd respondent. Those irregulaties vitiated the interest, if any, that the 2nd respondent had in the suit property. In that regard, see the case of Joseph Kagunya v. Boniface K. Mulli & 3 others supra, where it was held that an allotment letter is impeachable on the ground that it was outrightly illegal.

89. In the circumstances of this case, there was illegality/irregularity in the issuance of the plot to the 2nd respondent in that the applicable legal processes/procedures for acquisition of a valid letter of allotment were not complied with.

90. Turning to the question as to whether the appellant proved that he was the lawful owner of the suit property, It is noteworthy that the appellant's claim was that he was allocated the suit property way back in 1958. The appellant's evidence was that he was allocated five plots, the suit property being one of them. Although the documentary evidence relied on by the appellant does not identify the five plots allocated to the appellant, there is evidence that as at 1994 when D.W.2 purportedly applied and got issued with a letter of allotment in respect of the suit property, the appellant was in use and occupation of the suit property. If the testimony of D.W.2 is anything to go by, the property had been identified on the ground and given a plot number to wit Plot No.82. However, in the register of the County Council, the property had no owner. According to the evidence of D.W.2, the appellant had stayed in the suit property for a long period of time, as the structures he had erected thereon were old.

91. The evidence adduced in this case does not suggest that the use and occupation of the suit property by the appellant was at any time before 1997 challenged by the respondents or any other person. If the evidence by the 2nd respondent is anything to go by, the first time he raised concerns about the appellant's use and occupation of the suit property was in 1997, four or so years after he acquired interest in the suit property.

92. Despite having been informed of the respondent's use and occupation of the suit property, it is noted that the 1st respondent did not take any steps to remove the appellant from the suit property. Similarly, the 2nd respondent never took any action until sometime in 2015 when in purported bid to comply with enforcement notices issued by the 1st respondent, he attempted to evict the appellant from the suit property. In that regard see Dexbt 8 and 9 as read with the oral testimony of the 2nd respondent.

93. From 1994 to 2014, when the respondent attempted to evict the appellant from the suit property, the appellant was in use and occupation of the suit property for more than 20 years from the time the 2nd respondent acquired interest in the suit property. The appellant had been in possession and use of the suit property for a much longer period of time (36 years), when the 2nd respondent acquired interest in the suit property. His occupation and use of the suit property had at no time been declared unlawful or illegal by the owner of the suit property, the 1st respondent.

94. Although a claim for adverse possession does not lie against Government, I do find the appellant's possession of the suit property to be an overriding interest in the suit property, duly recognized and protected by law. In that regard see the case of *Wilson Njoroge Kamau v. Nganga Muceru Kamau* (2020) e KLR where it was held:-

> "Section 28(h) of the *Land Registration Act*, 2012 recognizes overriding interests on land, some of which are rights acquired or in the process of being acquired by virtue of any written law relating to limitation of actions or by prescription. Under section 7 of the *Land Act*, 2012 prescription is one of the ways of acquisition of land."

95. Although the appellant did not urge his case on prescription or the Limitations of Actions Act, I find the conduct of the parties to be an acknowledgement of the legitimate interest of the appellant in the suit property on account of his long use and occupation of the suit property.

96. In my view, had the Learned Trial Magistrate considered the totality of the evidence adduced before her composed of the circumstances upon which the appellant acquired the property, the fact that the appellant had been in use and occupation of the suit property long before the Commissioner of Lands purported to allocate it to the 2nd respondent; the conduct of the parties even after the property was purportedly allocated to the 2nd respondent and the evidence of D.W.3 to the effect that the document entitled Ombi la Ploti which the appellant relied on in support of his claim to the suit property was a valid document recognized by the council for purposes of plot allocation; she would not have arrived at the decision she arrived at.

97. Turning to the question as to whether the appellant has made a case for being granted the orders sought, I note that the appellant sought an order of permanent injunction to restrain the respondents from interferring with his ownership and possession of plot No.82 Mogotio township.

98. That prayer was premised on his claim that he was the lawful allotee of the suit property. upon review of the documentary evidence relied on by the appellant I agree that these documents are incapable of proving that the appellant was indeed allocated the suit property, either by the Government of Kenya or the County Council of Koibatek or Baringo. My view of the evidence adduced by the appellant is that it puts the appellant in the category of a person in unlawful occupation of Government land. Such a person enjoys protection under section 152B of the Land Laws (Amendment) Act, 2016 in that he

can only be evicted therefrom in accordance with the procedure stipulated under Section 152C and 152F. In that regard see the said sections of the law which provide as follows:-

> " 152B. An unlawful occupant of private, community or public land shall be evicted in accordance with this Act.
>
> 152C. The National Land Commission shall cause a decision relating to eviction from public land to be notified to all affected persons, in writing, by notice in the Gazette and in one newspaper with nationwide circulation and by radio announcement, in a local language, where appropriate, at least three months before eviction.
>
> 152F
>
> (1). Any person or persons served with a notice in terms of sections 152C, 152D and 152E may apply to court for relief against the notice.
>
> (2). The court, after considering the matters set in sections 152C, 152D and 152E, may-
>
> a). Confirm the notice and order the person to vacate;
>
> b). Cancel, vary, alter or make additions to the notice on such terms as it may deem equitable and just;
>
> c). Suspend the operation of the notice for any period which the court shall determine; or
>
> d) Order for compensation."

99. The upshot of the foregoing is that the appellant's appeal succeeds to the extent that the decision of the lower court declaring the 2nd respondent the lawful owner of the suit property is set aside. The appellant's use and occupation of the suit property is found to be an overriding interest in the suit property protected by law, particularly section 28(h) of the *Land Registration Act* and declared that the appellant can only be removed from the suit property, which by virtue of been owned by the 1st respondent is public land, can only be evicted therefrom by the National Land Commission in strict compliance with the provisions of sections 152C and 152F of the Land Laws (Amendment) Act 2016.

100. Being of the view that the 1st respondent by itself and through its officers, namely Hussein and Kandie, was responsible for the mess that led to the filing of the suit in the lower court and this appeal, I condemn it to bear the costs of the appeal and the suit in the lower court.

101. Orders accordingly.

DATED, SIGNED AND DELIVERED, AT ITEN THIS 27TH DAY OF JULY 2022.

L. N. WAITHAKA

JUDGE