



**Njoroge v Wanyange (Personal representatives of the estate of Francis John Wanyange) & 4 others (Environment & Land Case 336 of 2013) [2022] KEELC 13329 (KLR) (29 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 13329 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 336 OF 2013  
LA OMOLLO, J  
SEPTEMBER 29, 2022  
(FORMERLY HCCC NO. 220B OF 2007)**

**BETWEEN**

**JOYCE NYAMBURA NJOROGE ..... PLAINTIFF**

**AND**

**CATHERINE WAIRIMU WANYANGE, JAMES ISSAC MWANGI  
(PERSONAL REPRESENTATIVES OF THE ESTATE OF FRANCIS JOHN  
WANYANGE ..... 1<sup>ST</sup> DEFENDANT  
NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> DEFENDANT  
CHIEF LAND REGISTRAR ..... 3<sup>RD</sup> DEFENDANT  
DIRECTOR OF SURVEY ..... 4<sup>TH</sup> DEFENDANT  
ATTORNEY GENERAL ..... 5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**Introduction**

1. This court is required to write a judgement based on the plaintiff and 1<sup>st</sup> defendant's evidence taken by D O. Ohungo J who was seized of this matter. The learned judge has since been transferred to ELC Kakamega.
2. I took over the proceedings at a time when the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants case was scheduled for hearing.



3. On 20<sup>th</sup> January, when the matter came up for further hearing of the defence case. The 2<sup>nd</sup>-5<sup>th</sup> defendants stated that they would not be calling any witness to adduce evidence and proceeded to close their case.
4. It is upon this background that the matter was reserved for mention for submissions and subsequently, the court retired to write judgment.

### **Factual Background.**

5. The plaintiff filed a further amended plaint dated May 19, 2017.
6. She avers that on July 30, 1996 she was allotted by the commissioner of lands a parcel of land known as LR No 1144/695/Naivasha municipality; the suit property herein.
7. The plaintiff avers that she is the lawful owner of the suit property which the defendants have trespassed onto and illegally taken possession of.
8. She avers that her claim is to have the 1<sup>st</sup> defendant evicted from her parcel of land and an order of injunction issued against him; restraining him from selling, charging, transferring, alienating, undertaking and/or carrying out any development on the suit property.
9. The plaintiff prays for judgement against the defendant for:
  - a. A temporary injunction order do issue to restrain the 1<sup>st</sup> defendant by himself, his servant, agents and/or employees from selling, charging, transferring, alienating, undertaking and or carrying out any development on the suit property Naivasha/municipality block 7/10 being the property also allegedly known as LR No 1144/695 comprised in a purported grant registered as number IR 109599/1 pending the hearing and determination of this suit.
  - b. A declaration that the purported grant allegedly for LR No 1144/695 registered in the name of Peris Wambui Munge as number IR 109599/1 at land titles registry Nairobi is null and void and the same does not confer any proprietary right of the suit property known as Naivasha/ municipality block 7/10 to the alleged Peris Wambui Munge and/or the 1<sup>st</sup> defendant or any other person or group of persons whomsoever claiming title under them.
  - c. An order do issue directed to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to forthwith revoke and/or cancel the registration of the purported grant allegedly for LR No 1144/695 registered at the land titles registry in Nairobi as number IR 109599/1.
  - d. An order do issue to compel the 1<sup>st</sup> defendant by himself, his agents, servants and/or employees to pull down, demolish and or remove any underground fuel tanks, fuel pump machines, structures and buildings (“the nuisance”) put up on the plaintiff’s suit property known as Naivasha/municipality block 7/10 and or to handover vacant possession thereof to the plaintiff and in default, the 1<sup>st</sup> defendant and/or his servants, agents and/or employees thereat be forcefully ejected forthwith and the plaintiff be put in possession thereof with liberty to remove the said nuisance at the 1<sup>st</sup> defendant’s costs.
  - e. A permanent injunction order do issue to restrain the 1<sup>st</sup> defendant by himself, his agents, servants and/or employees or any person claiming title under him and/or under the alleged Peris Wambui Munge from ever trespassing into and/or interfering with the suit property in any manner whatsoever.
  - f. Damages for trespass and the quantum thereof to be determined by this honourable court



- g. Costs of the suit.
10. The 1<sup>st</sup> defendant filed his amended statement of defence and counterclaim on July 3, 2015.
11. He avers that the suit property was allocated to one Peris Wambui Munge on September 1, 1975. He further avers that the commissioner of lands wrote to the plaintiff advising her that the suit property had already been allocated to another person.
12. In his counterclaim he prays for judgement against the plaintiff for: -
- a. That the court orders the plaintiff to pay Kshs 5,000,000 to cover costs and outgoings incurred in defending the suits instituted by the plaintiff.
  - b. That the costs of the suit in HCCC No 220 of 2007 be provided for as no costs were awarded when the suit was dismissed.
  - c. That the costs of civil suit No 374 of 2011 which was filed by the plaintiff and then abandoned be provided for.
  - d. That the lease registered as Naivasha/municipality/block7/10 and the certificate of lease issued by Nakuru district registry be cancelled by order of this honourable court.
  - e. That this honourable court orders the plaintiff to pay the defendant general damages of Kshs 5,000,000 to expense involved in defending the suits instituted time wasted in attending court hearing, costs of hiring legal experts to advise on filing the defence and mental distress caused in worrying how to defend all suits instituted against the defendant.
  - f. That this honourable court may award any other costs that the court may deem just.
  - g. That this honourable court may award interest on all amounts at a rate to be decided by court until final settlement.
13. The 1<sup>st</sup> defendant denied all the other allegations in the plaint.

#### **Plaintiffs Evidence.**

14. At the hearing, Joyce Nyambura Njoroge testified as PW1. She produced her witness statement dated June 11, 2015 which the court adopted as part of her evidence. She also produced a list of documents dated June 11, 2015 which the court adopted as part of her evidence. The documents were listed as numbers 1-23 and marked as PExb 1 to 23 as follows: -
- 1. Copy of official search dated March 28, 2012.... PExb1
  - 2. Plaintiff's letter to the commissioner of lands dated November 3, 1990.... PExb 2
  - 3. A copy of letter of allotment dated July 30, 1996.... PExb 3
  - 4. Commissioner of lands letter to the town clerk dated December 11, 1992.... PExb 4
  - 5. Naivasha town council clerk's letter dated November 15, 1992.... PExb 5
  - 6. Commissioner of lands letter to the DC Nakuru dated May 29, 1996.... PExb 6
  - 7. DC's letter to the commissioner of lands letter dated July 2, 1996.... PExb 7
  - 8. Commissioner of lands letter to the minister of lands and settlement dated July 4, 1996.... PExb 8



9. Receipt No D865537 dated October 6, 1997 for Kshs 17,827.00.... PExb 9
  10. Commissioner of lands letter to the director of surveys dated October 6, 2003.... PExb 10
  11. Director of surveys letter to the commissioner of lands dated January 9, 2004.... PExb11
  12. Commissioner of lands letter dated May 18, 2005 to the plaintiff.... PExb12
  13. Receipt No 6048562 dated November 3, 2006 for Kshs67,000 in respect of payment for land rent and rates.... PExb13
  14. Receipt No 015571 dated March 21, 2006 for Kshs 12,440/-.... PExb14
  15. Rent demand note dated November 1, 2006 for Kshs 102,760/-.... PExb15
  16. Receipt No 6048653 for Kshs 102,760 in respect of the land rent dated November 3, 2006.... PExb 16
  17. Receipt No 0250382 for Kshs 825 dated December 15, 2006.... PExb 17
  18. A copy of lease of title No Naivasha municipality/block 7/10 between the commissioner of lands and the plaintiff registered on December 15, 2006.... PExb 18
  19. A copy of certificate of lease dated December 15, 2006 of the suit property.... PExb 19
  20. Plaintiff's letter to the director of surveys of sometimes in December, 2006.... PExb 20
  21. Director of surveys letter to the town clerk Naivasha municipal council dated December 27, 2006.... PExb 21
  22. Grant in the name of Peris Wambui Munge for LR No 1144/695.... PExb 22
  23. Commissioner of lands letter dated April 8, 2008 to the plaintiff.... PExb 23.
15. PW1 testified that she has been the registered owner of the suit property since December 15, 2006. She explained that she applied to the commissioner of lands for a plot and was issued with a letter of allotment dated July 30, 1996.
  16. She stated that the plot number issued was LR No 1144/695 Naivasha municipality and that she paid a sum of Kshs 30, 270/= as provided in the allotment letter. She stated that on December 11, 1992 the commissioner of lands wrote to the town clerk Naivasha who responded on December 15, 1992 stating that the suit property was not among those that had been allocated by the council.
  17. PW1 went on to testify that on May 29, 1996 the commissioner of lands wrote to district commissioner Nakuru to inquire whether there was any objection to the plot being allocated to her but there was none. She testified that on July 4, 1996 the commissioner of lands wrote to minister of lands authorizing issuance of letter of an allotment to her.
  18. It was her testimony that on May 18, 2005 the commissioner of lands wrote to her asking her to pay Kshs 64, 170/= which she did and was issued with receipt. She further testified that she received land rent demand dated November 1, 2006 for Kshs 102, 760/= which she paid and was issued with a receipt dated December 3, 2006.
  19. She further testified that a lease in respect to the suit land was drawn in her favour and she was issued with a certificate of lease on December 15, 2006.



20. Her further evidence was that the documents of the 1<sup>st</sup> defendant are not genuine as she was the first person to be allocated the plot. She testified that the grant allegedly issued to Peris Wambui was registered on January 10, 2008 when she had already been issued with a certificate of lease by the commissioner of lands on December 15, 2006. She further testified that her title came first in time and that she had followed all the processes and steps.
21. It was her testimony that the suit land is currently being occupied by the 1<sup>st</sup> defendant and urged the court assist her recover it.
22. It was further her testimony that the commissioner of lands followed the correct procedure in allocating her the plot. PW1 testified that when she was issued with the letter of allotment and visited the plot, met the 1<sup>st</sup> defendant and this is the point at which he became known to her.
23. It was also the plaintiff's evidence that they sat down in the year 2007 to try and resolve the dispute. She testified that the 1<sup>st</sup> defendant told her in April, 2007 that he could buy the plot from her and she asked for a sum of Kshs 3 million but the 1<sup>st</sup> defendant only offered to pay Kshs 1 million.
24. She concluded her oral testimony by urging the court to grant her the orders as sought in the plaint.
25. On cross examination, PW1 confirmed that she was allocated the suit property by the commissioner of lands and that Peris Wambui Munge was never issued with the lease certificate. She also stated that there was no earlier grant on the suit property.
26. This marked the close of the plaintiff's case.

#### **Defendants Case.**

27. Francis John Wanyange Mwangi hereinafter referred to as DW1 testified as the witness for the 1<sup>st</sup> defendant.
28. He stated that he is a retired politician and a businessman.
29. He produced his witness statement dated July 3, 2015 which the court adopted as part of his evidence. He also produced a list of documents dated July 3, 2015 which the court also adopted as forming part of his evidence. The documents were listed as numbers 1-9 and marked as DExb 1 to 9 as follows: -
  1. Letter of allotment from commissioner of lands addressed to Peris Wambui..... DExb 1
  2. The power of attorney dated June 14, 1995 registered with registrar of titles as No IPA/29667/1 donating the property LR No 1144/695 to Francis John Wanyange..... DExb 2
  3. The title deed of LR No 1144/695 Naivasha issued as grant number IR 109598/1 and dated January 10, 2008.... DExb 3
  4. The letter of allotment of plot LR 1144/695 Naivasha dated July 30, 1996 to Joyce Nyambura Njoroge..... DExb 4
  5. The letter written by Kariuki J K on behalf of commissioner of lands dated October 6, 2003.... DExb 5
  6. The letter of January 9, 2004 from director of survey to commissioner of lands and signed by Sarah Komu (Mrs) ..... DExb 6
  7. The certificate of lease of title No Naivasha/municipality block 7/10 issued at Nakuru on December 15, 2006.... DExb 7



8. The letter addressed to Joyce Nyambura Njoroge dated April 8, 2008 and signed by E K Kosgei for commissioner of lands..... DExb 8
9. Section 14(a) of the *Sales of Goods Act* (cap 31) Laws of Kenya..... DExb 9
30. It was DW1's testimony that he had approached Peter Munge Kinuthia, now deceased, for purposes of Peter renting to him his two plots owned by himself and his wife. He testified that he agreed and leased him the plots where he put up a kerosene kiosk. It was also his testimony that Peter wanted to borrow some money from him and he suggested that instead of lending him the money, he could buy the two plots, to which suggestion Peter Munge Kinuthia agreed.
31. He testified that the plot LR 1144/694 was in the name of peter and that it was transferred immediately. He further testified that Peter's wife did not have title over her plot 1144/695 and therefore gave him power of attorney over the plot.
32. DW1 went on to testify that he went to the offices of the commissioner of lands but the lease document was not ready until January 10, 2008 adding that that is when he got title.
33. He further testified that he subsequently expanded the kerosene kiosk and put up a petrol station which business he runs to date. He also testified that at some pint he leased out the petrol station to Samson Mwirigi Nkanata who was running it and paying him rent.
34. He went on to testify that around 1997, Samson Mwirigi informed him that Joyce Nyambura Njoroge had come to the station and claimed that it was hers and she was confident that she was the owner as the process of getting her title was on course.
35. DW1 further testified that in 2007 he was served with court pleadings where he was being sued together with Mr Samson Nkanata. He stated that they attended High Court in Nakuru in HCCC 220B of 2007 severally after which the case was ultimately dismissed.
36. He also testified that after some time, he was served with pleadings for HCCC 374/2011 which case was not prosecuted and that HCCC 220B/2007 was later reinstated which is the current case. He further testified that he has always protested that he is being harassed for a plot which he bought and should enjoy. He testified that he has the original letter of allotment that was issued in 1975.
37. It was also his testimony that he has never sold anything to the plaintiff and that if she had found him in occupation, she should have gone to the person who sold her the suit land and claim her money or be issued with another plot.
38. It is his testimony that the plaintiff found him in his plot going about his business and lamented that he has been brought to court despite having supplied all the documents that show that he is the lawful owner of the plots.
39. On cross examination by Mr Kimondo for the plaintiff, he confirmed that he leased the two plots No 1144/694 and No 1144/695 from Mr Peter Kinuthia Munge around 1994 or 1995 for two years.
40. He stated that the rent was Kshs 1,000 per month for both plots and that he paid Kshs 24, 000 in advance being 2 years rent for the two plots. He testified that he occupied the plots as a lessee first and that there was a written lease agreement which he confirmed had not been produced in court. He also confirmed that he did not have any document in court to show that Mr Kinuthia had a title for plot No 1144/694.
41. DW1 was referred to DExbt 1 and admitted that he was not given the original allotment letter by the allottee.



42. He further admitted that according to DExb 1, the acreage is 0.073 hectares. He stated that the amounts specified in DExb1 were paid but admitted that he did not have anything to show that the payments were made. He also admitted that he could not tell how much he purchased the two plots for.
43. He stated that he had paid the full rent for 2 years, totaling Kshs 24, 000/= and that he did not grab the plots. He further stated that they had a sale agreement for plot 1144/694 but admitted that he did not have it with him. He further stated that the lease according to DExb 1 was with effect from October 1, 1975 and that in his witness statement he stated that Peris Munge was allotted the plot on September 1, 1975.
44. He further admitted to not having the original of the power of attorney DExb 2 which indicates the acreage as 0.0668 hectares different from that indicated in DExb 1. He confirmed that the acreage stated in the title document is different.
45. DW1 went on to confirm that he did not have any document to show payment for and registration of the power of attorney. He also confirmed that the power of attorney did not state the consideration that he gave to Peris Wambui Munge for the plot.
46. He stated that he was given the power of attorney in 1995 so that he could transfer the plot to himself once the title is issued. He testified that Peris Wambui Munge may have since passed on.
47. The witness was referred to DExt 3 and he confirmed that the grant was issued about 12 years after the power of attorney and denied that it was a forgery.
48. He admitted that he did not have anything to show that he paid the government in order to be issued with the grant since it was not issued in his name but the allottee.
49. He stated that Peris Wambui Munge became the owner of the plot upon accepting the letter of allotment and payment.
50. He further stated that he usually pays rates for plot No 694 but confirmed that he did not have documents showing the said payments. He also stated that the land reference for the plot did not change and that he made the last rates payment for the plot in early 2019.
51. DW1 was referred to DExb 7 being the certificate of lease. He admitted that it was not issued before the grant. He further stated that there was communication from the commissioner of lands changing the regime from RTA to RLA and that it was pursuant to that change that the plot number changed from LR 1144/695 to Naivasha municipality block 7/10.
52. He further testified that DExb 6 is a letter dated January 9, 2004 from director of survey to commissioner of lands confirming that as at January 9, 2004 the former LR No 1144/695 had changed to Naivasha municipality block 7/10.
53. He testified that he could not confirm the said position but reiterated his statement that LR 1144/695 is the same plot as Naivasha municipality block 7/10. He also testified that the registrar of titles did not have power to issue titles to two different owners for the same plot.
54. DW1 was referred to PExb21 and reiterated that his documents were not forgeries.
55. Upon cross examination by Mr Weche for the 3<sup>rd</sup> – 5<sup>th</sup> defendants, he testified that he paid the seller through a banker's cheque which he confirmed not to have in court.
56. He admitted that he did not have copies of the transfer documents and that Peris Wambui Munge did not give him her original allotment letter.



57. He also admitted that he did not have the payment receipts from Peris Wambui Munge. He further confirmed that he was aware that for documents to be generated there are various payments to government. He admitted that he did not produce any of the receipts.
58. DW1 confirmed that there was variance on the acreage as captured in the letter of allotment and the power of attorney.
59. The 1<sup>st</sup> defendant then closed his case.
60. Parties were directed to file and exchange their written submissions.

### **Plaintiff's Submissions.**

61. The plaintiffs in their submissions gave a summary of the case and identified the following issues for determination:
  - a. Whether the plaintiff's title of the suit property is indefeasible?
  - b. Whether or not the suit property was available for registration under RTA and a grant issued to the said Peris Wambui Munge.
  - c. Whether the 1st defendant's purported grant of the suit property allegedly issued to Peris Wambui Munge was procured fraudulently, illegally, unprocedurally and through a corrupt scheme and if so, what is its legal effect.
  - d. Whether the issuance of a certificate of lease of the suit property to the plaintiff and the purported Grant allegedly to Peris Wambui Munge was a case of double allocation and if so, whose title should prevail?
  - e. Whether the 1st defendant is a trespasser in the suit property
  - f. Whether the 1st defendant has unlawfully deprived of the plaintiff's possession and use of the suit property and as a result the plaintiff has suffered and continues to suffer loss and damage.
  - g. Whether the plaintiff is entitled to the reliefs sought
  - h. Whether the 1st defendant is entitled to the reliefs sought in the counterclaim
    - i. Who is to bear the costs of the suit?
62. On the first issue, the plaintiff relied on section 27(b) and 28 of the *Registered Land Act* and submitted that after the plaintiff was registered as the proprietor of the suit property and issued with a certificate of lease, she acquired an indefeasible title and thus the legal owner.
63. She submits that the evidence of DW1 where the commissioner of lands recalled the plaintiff's allotment of the suit property after allegedly discovering that it had been allotted to someone else was not proved. She submits that it is of no legal consequence since the commissioner of lands did not have powers in law for recalling a title once issued. She further submits that it is only a court of law which can call for its cancellation as per provisions of section 143 of RLA (repealed) which provision is now enacted under section 80(1) of the *Land Registration Act, 2012*.
64. The plaintiff relied on section 28 of the *Land Registration Act, 2012* and submits that an allotment unless acted upon and a title in respect thereto is issued remains just an allotment which cannot create any rights recognized in law. She cited the case of *Dr Joseph N K Arap Ng'ok v Justice Moiyo Ole Keiwua & 4 others* civil application No Nai60 of 1997 [27/97 UR (unreported)]



65. The plaintiff submits that even if the grant issued to Peris Wambui Munge was lawfully acquired which is not the case; the same could not take precedence over the plaintiff's title which was first in time.
66. The plaintiff also submits that the purported grant is in conflict with the legal regime under which the suit property was held and converted that is, from RTA to RLA. She submits that the acreage of letter of allotment issued to Peris is stated as 0.073Ha while in the purported grant (D Exh1) it is 0.0694Ha and that DW1 could not explain the discrepancy.
67. On the second issue, the plaintiff submits that it was not possible for the commissioner of lands to issue the purported grant (DExh 3) under RTA as alleged by the 1<sup>st</sup> defendant. She further contends that the 1<sup>st</sup> defendant did not tender any evidence before court to show that after the letter of October 6, 2003 (PEXh 10) and January 9, 2004 (DExh 6) which are the same as PEXh 10 and PEXh 11 respectively, the legal regime of the suit property reverted back to RTA regime from RLA.
68. The plaintiff relied on section 108 and 109 of the *Evidence Act* and submits that failure by the 1<sup>st</sup> defendant to tender any evidence to that effect leads to the conclusion that there was no such re-conversion of the legal regime back to RTA from RLA and therefore no grant could have been registered under RTA.
69. On the third issue, the plaintiff relied on section 23 and 26(1) of the *Land Registration Act* and contends that the unchallenged evidence by the plaintiff is a clear testimony that even at the time the 1<sup>st</sup> defendant processed the purported grant in the year 2008, he knew that the plaintiff was the owner of the suit property but went ahead and had the purported grant issued in the name of Peris Wambui Munge.
70. She submits that the purported letter from the commissioner of lands was fabricated by the 1<sup>st</sup> defendant so as to defeat the plaintiff's claim over the suit property. The plaintiff further submits that DW1 did not produce any agreement for the alleged sale of the suit property to him by Peris Wambui Munge.
71. The plaintiff cited various authorities including *Munyu Maina v Hiram Gathiba Maina* [2013] eKLR, *Nancy Wanjiru Kunyiba v Samuel Njoroge Kamau* [2018] eKLR, *Govas Holdings Limited v Tom Mayani Omami & 2 others* [2004] among others.
72. On the fourth issue the plaintiff relied on the case of *Richard Kipkemoi Limo v Hassan Kipkemboi Ngeny & 4 others* [2019] eKLR and submits that the purported grant issued to Peris and on the basis which the 1<sup>st</sup> defendant is claiming ownership was fraudulently obtained and therefore a nullity.
73. The plaintiff distinguishes fraud from double allocation and submits that the issuance of the certificate of lease to the plaintiff and the purported grant to Peris Wambui Munge was not a case of double allocation but fraud.
74. The plaintiff has also made alternative submission stating that should this court find that this is a case of double allocation, then the plaintiff's title should prevail as it was first in time. She has made reference to the decisions in *Gitwany investment Ltd v Tajmal Limited and 3 others* [2006] eKLR, *Kamau James Njendu v Sera Wanjiru & another* [2018] eKLR and *Benja Properties Ltd v Syedna Mohammed Burbannudin Sabed & 4 others* [2015] eKLR.
75. On the fifth issue, she relied on section 3(1) of the *Trespass Act* and the definition of trespass as contained in *Black's Law Dictionary* 8<sup>th</sup> Edition.
76. She submits that the 1<sup>st</sup> defendant is a trespasser and his continued occupation is continued trespass and is therefore guilty of trespass.



77. On the sixth issue, the plaintiff relied on the case of *Park Towers Ltd v Moses Chege & 7 others* [2014] eKLR and submits that she has been deprived of the suit property which belongs to her.
78. She contends that arising from the trespass and unlawful occupation of the suit property by the 1<sup>st</sup> defendant, she has suffered and continues to suffer loss and damage and therefore she is entitled to damages.
79. Regarding the seventh issue, the plaintiff submits that she has proved her case to the required standard and therefore entitled to the prayers as sought in her further amended plaint.
80. She further urges the court to award her quantum to the tune of Kshs 50,000,000. The plaintiff relied on the cases of *Ajit Bhoga v Kenya Power & Lighting Co Ltd* [2020] eKLR and *Silvester K Kaitany v Nyayo Tea Zone Development Corporation & another; National Land Commission & another (interested parties)* [2021] eKLR.
81. On the eighth issue, the plaintiff submits that the grant issued to Peris Wambui Munge was procured and/ or obtained through fraud, illegally, unprocedurally and through a corrupt scheme. She submits that the grant is therefore not indefeasible and did not create any proprietary right over the suit property and does not enjoy protection under the now repealed section 23 of the *RTA* (repealed)
82. The plaintiff reiterates her submission under issue number three and submits that that the 1<sup>st</sup> defendant is not entitled to the reliefs as sought in the counter-claim.
83. The plaintiff also relied on section 3(3) of *Law of Contract Act* and submits that the 1<sup>st</sup> defendant has not produced a copy of the sale agreement.
84. On the ninth and final issue, she submits that costs follow the event and having submitted that she has proved her case on a balance of probabilities, she urges the court to award her the costs of the suit and counter-claim.

### **1<sup>ST</sup> Defendant's Submissions.**

85. The 1<sup>st</sup> defendant in his submissions identified the following issues for determination:
  - a. Who between the plaintiff and the 1st defendant is entitled to the suit property?
  - b. Whether the plaintiff is entitled to the prayers sought
  - c. Whether the 1st defendant has proved his case in the counterclaim and if so, what are the remedies?
86. On the first issue, the 1<sup>st</sup> defendant contends that the documents he had filed on March 23, 2012 is enough proof that the suit land was serviced by Peris Wambui Munge because the production of the documents was not objected to and further that the plaintiff did not require the makers to come to court and produce them. He submits that the documents are authentic and confer ownership to the 1<sup>st</sup> defendant.
87. He relies on the case of *Ndolo v Ndolo* (2008) 1 KLR (G & F) 742 as quoted in *Philemon L Wambia v Gaitano Lusitsa Mukofu & 2 others* [2019] eKLR and contends that the allegation of fraud was not proved by facts by the plaintiff.
88. Based on the decision in *Philemon L Wambia* (supra), the 1<sup>st</sup> defendant further contends that the second letter of allotment had no basis and cannot be used to validate title to the plaintiff. He argues that the plaintiff's grant is the only document conferring title to the suit land.



89. He further argues that he was already in possession of the suit land and that no evidence was adduced to show that the grant issued to the 1<sup>st</sup> defendant was revoked. He also argues that there was no evidence from the plaintiff to show that the terms of the letter of allotment issued to Peris Wambui Munge were never satisfied and therefore remains a good document for utilization to date.
90. The 1<sup>st</sup> defendant counters submissions by the plaintiff that sections 27 and 28 of the repealed Registered Land Act comes to her aid and instead submits that the plaintiff's title is defeasible under section 30 (g) for the reason that the plaintiff obtained the certificate of lease whilst the 1<sup>st</sup> defendant was in occupation and therefore the 1<sup>st</sup> defendant's rights in the suit property takes precedence over the plaintiff's. He submits that the plaintiff failed to conduct due diligence. On this same point the 1<sup>st</sup> defendant submits that the plaintiff is therefore not a bonafide purchaser and relies on the case of Katende v Haridar & Company Limited [2008] 2 E.A 173 as quoted in Lawrence P Mukiri Mungai, Attorney of Francis Muroki Mwaura v Attorney General & 4 others [2017] eKLR and submits that the plaintiff is not a bonafide purchaser.
91. He also relied on the case of Emma Wanjiku (Attorney for Roselyne Mary Njeri and Gerald Njoroge Mbugua) v Mary Kwamboka [2017] eKLR and submits that the plaintiff's title should be revoked because it was acquired while the 1<sup>st</sup> defendant was in occupation.
92. The 1<sup>st</sup> defendant further relied on the case of Munyu Maina v Hiram Gathiba Maina, civil appeal 239 of 2009 quoted in Mbiiri Kamau (Representing ACK Kitharaini Church, the Church Commissioners for Kenya Trustees of the Anglican Church of Kenya) v Munyangu Njoka & 2 others [2021] eKLR and submits that it is not enough for the plaintiff to use the certificate of lease to shield herself from the fact that she was aware the 1<sup>st</sup> defendant or Peris Munge were in fact in occupation of the suit land.
93. The 1<sup>st</sup> defendant urges the court to find that the acquisition by the plaintiff was not free from any encumbrances and is therefore subject of defeat.
94. On whether the plaintiff is entitled to the prayers sought, the 1<sup>st</sup> defendant cited the cases of Philip Ayaya Aluchio v Crispinus Ngayo [2014] eKLR, Anthony Kolani Mwanyale v Mwaka Omar Ali [2011] eKLR and proposes a nominal award of Kshs 1 as sufficient compensation to recognize that the 1<sup>st</sup> defendant trespassed. He submits that the plaintiff has not adduced evidence to show the state of the property before and after the alleged trespass.
95. The 1<sup>st</sup> defendant has made elaborate submissions on why he should not be condemned to pay general damages to the plaintiff.
96. On the third issue, the 1<sup>st</sup> defendant submits that the plaintiff's case should be dismissed and that the counterclaim should be allowed. The 1<sup>st</sup> defendant clarifies that he did not produce a contract for the sale of land as required by section 3(3) of the Law of Contract Act for the reason that as the time the agreement for sale of the suit property was entered into, that section of the law was not in force. He relies on the case of Anderson Omondi Owandho (suing as the legal rep of the estate of Thomas Owandho Rajwai (deceased) v Augustine Ondiek [2017] eKLR in support of this point.
97. In conclusion, the 1<sup>st</sup> defendant submits that the plaintiff's claim should be dismissed and the counterclaim upheld.
98. The 2<sup>nd</sup> – 5<sup>th</sup> defendants' did not file their written submissions.



## Analysis And Determination.

99. I have perused the pleadings in this matter, read the rival submissions and judicial decisions cited. I have also perused and analysed all the documents produced as evidence in this suit and forming part of the court record and have taken them into consideration in making my determination.
100. It is my considered view that the issues for determination are:
- a. Who, between the plaintiff and Peris Wambui Munge (The 1<sup>st</sup> defendant is claiming through her) has proprietary rights in the suit property?
  - b. Whether the plaintiff is entitled to damages for trespass.
  - c. Whether the 1<sup>st</sup> defendant is entitled to the prayers as sought in the counterclaim.
  - d. Who should bear the costs of the suit?

### **A. Who between the plaintiff and Peris Wambui Munge (The 1<sup>st</sup> defendant is claiming through her) has proprietary rights in the suit property?**

101. In order to answer this question, I will inevitably interrogate the processes culminating to the issuance of the certificate of lease and grant, the conversion from one registration regime to another, the documents produced and the law governing allocation of land.
102. As rightly observed by the 1<sup>st</sup> defendant, the decision in *Munyu Maina v Hiram Gathitha*, civil appeal number 239 of 2009 and referred to in *Mbiiri Kamau (representing ACK Kitharaini Church, the church Commissioners for Kenya Trustees of the Anglican Church of Kenya) v Munyangia Njoka & 2 others* [2021] eKLR the Court of Appeal stated thus;
- “We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”
103. Regrettably, the government departments who were parties to this suit and who in my view were important players in the process culminating to the of acquisition the suit property chose not to tender evidence and file submissions. I note, however, that counsel representing the 3<sup>rd</sup>-5<sup>th</sup> defendant only cross-examined DW1.
104. I am faced with two parties laying claim to the suit property.
105. The plaintiff begins her story by production of a letter dated November 3, 1990 addressed to the commissioner of lands. It is a letter through which she makes an application for a commercial plot at Naivasha. The letter points out that the plot she is applying for is shaded blue on the attached plan and explains that she wants to develop it a business shop.
106. She then produced a letter of allotment dated July 30, 1996 (PEXh 3). The parcel of land is described as LR No 1144/695-Naivasha municipality having an approximate area of 0.0694 Ha.
107. The general conditions of the allotment provide that the grant will be made under the provisions of the *Government Lands Act* (cap 280) and the title will be issued under the *Registration of Titles Act* (cap 281) or the *Registered Land Act* (cap 300).



108. Prior to this allotment, there is communication dated December 11, 1992 from the commissioner of land to the town clerk Naivasha seeking confirmation whether the suit property has been allocated
109. The letter is followed by a response dated December 15, 1992 from the town clerk, Naivasha town council stating that the suit property is not among those which were allocated by the council.
110. On May 29, 1996, there is another letter from the commissioner of lands to the district commissioner stating that the office has received an application from the plaintiff and seeks to know whether the said office has any objections to the processing of the suit land in favour of the plaintiff.
111. The district commissioner responds on July 2, 1996 and states that the said office has no objection to the suit parcel (he describes it as a commercial plot) being allocated to Joyce Nyambura Njoroge of P.O Box 11279 Nairobi and recommends that the same be allocated to the applicant.
112. On July 4, 1996 the commissioner of lands wrote to the minister of housing forwarding forms which he describes as being duly signed and completed for purposes of him giving authority for issuance of allotment. He further states that the plots are vacant for allocation.
113. After the allotment, the plaintiff has provided evidence of various payments made to the department of lands on diverse dates in the year 2006. They are payments for payment for Kshs 17,827, Kshs 67,000, Kshs 12,440 and 102, 760.
114. Sometime in October 6, 2003, the commissioner of land wrote to the director of survey informing him that he had information that suit parcel had been converted to a new registration regime; from RTA to RLA.
115. On January 9, 2004 the director of survey responds to the query on conversion, confirms the fact of conversion and states that the suit property has changed to Naivasha municipality block 7/10 adding that it measures 0.0694Ha.
116. Subsequently, on December 15, 2006 a certificate of lease is issued to the plaintiff under the provisions of the *Registered Land Act*.
117. It would seem that the plaintiff after receiving the certificate of lease, visited the suit property and found that someone else was in occupation. She writes a letter dated sometime in December 2006 to the director of surveys and complains about the owner of the neighbouring plot (block 7/9) encroaching onto hers and seeks a resurvey.
118. The director of surveys on receipt of this letter, writes to the town clerk Naivasha on December 27, 2006 seeking help in re-establishment of beacons between Naivasha municipality block7/9 and Naivasha municipality block7/10. This letter makes reference to the owner of Naivasha municipality block7/9 as Peter Munge Kinithua.
119. On April 8, 2008 the commissioner of lands wrote to the plaintiff informing her that Naivasha municipality block7/10 had already been allocated elsewhere and was not available for her possession. The same letter requests the plaintiff to go to their office so that arrangements are made to give her an alternative plot.
120. My deduction from this summary is that while the plaintiff followed all the necessary procedure for application and allotment of the suit property, the government office and officer charged with the responsibility for allocation of land after 12 years state that it has come to their notice that the suit property had already been allocated elsewhere and was therefore not available for the possession of the plaintiff.



121. The 1<sup>st</sup> defendant also gave his story on the acquisition process and it is contained in his evidence and documents. It is summarized in the subsequent paragraphs.
122. On a date in 1975 a letter of allotment was issued to Peris Wambui Munge (from whom he claims) it is produced as DExh 1. It bears a date in 1975 and the parcel of land is shown edged red on the attached plan number (the number is not legible and the plan is also not attached to D Exh 1). The area of the land is 0.073 Ha
123. On June 14, 1995 Peris Wambui Munge donated the suit property to the 1<sup>st</sup> defendant vide a power of attorney. The said power of attorney was registered on June 15, 1995.
124. Subsequently, a grant was issued on January 10, 2008 in the name of Peris Wambui Munge pursuant to the provisions of the [Registration of Titles Act](#) (cap 281). The parcel of land is described as LR No 1144/695 Measuring 0.0694 Ha. The land survey plan number is indicated as number 104025.
125. After the issuance of the grant, the 1<sup>st</sup> defendant approached the commissioner of lands for issuance of a rent clearance certificate for the suit property and it is at this point (In January, 2008) that it was discovered that the suit land had two allottees.
126. His testimony is that the commissioner of lands wrote to the plaintiff informing her that the suit land was not available for her possession as it had been allocated to someone else and that the plaintiff instead of going to the office, as advised, to be given an alternative plot, chose to institute this suit.
127. In summary the only documents produced that support the acquisition story as advanced by the 1<sup>st</sup> defendant is:
  - a. The letter of allotment addressed to Peris Wambui Munge bearing a date in 1975.
  - b. A power of attorney registered on June 15, 1995 by Peris Wambui Munge donating power to the 1<sup>st</sup> defendant to do certain things in respect of the suit property.
  - c. Grant dated January 10, 2008 in the name of Peris Wambui Munge
128. The other documents attached to the 1<sup>st</sup> defendant's list of documents are the same as those produced by the plaintiff, save for exhibit D9; an excerpt from the [Sale of Goods Act](#).
129. The following words in the allotment letter have caught my attention. They are to the effect that the plot is unsurveyed and that at the time of commencing building the allottee should exercise great care to ensure that any building or other works are contained within the boundaries of the said plot. It further states that issue of the grant will be undertaken as soon as circumstances permit.
130. The following things emerge from my scrutiny of the documents produced by the 1<sup>st</sup> defendant as compared to those of the plaintiff.
  - a. Peris Wambui Munge's allotment letter (DExh 1) is not clear. I have looked through the entire file in the hope of getting a clearer copy and found none.
  - b. I see a name-Wambui- written in long hand and it is adjacent to a word which is not clear and has been crossed out. I am unable to tell who the addressee is and I cannot tell what the postal address is. This stands out in comparison to the allotment letter produced by the plaintiff which is addressed to her and contains her postal address.
  - c. The area of the property as contained in the 1<sup>st</sup> defendant's allotment letter is 0.073 Ha. The grant issued in respect of this property states that it measures 0.0694 Ha. This is a



material inconsistency that has not been explained by the 1<sup>st</sup> defendant. On the other hand, the allotment letter, lease and certificate of lease as produced by the plaintiff are in consonance.

- d. The plaintiff has produced various receipts as evidence of payments made to the land's office. The 1<sup>st</sup> defendant has none.
- e. The particulars of the property in the plaintiff's allotment letter and the payment to be made on acceptance of the conditions are legible. i.e the property is LR No 1144/695 and the payment to be made on acceptance is Kshs30, 270/=.
- f. The information on the description of the property as contained in the allotment letter produced by the 1<sup>st</sup> defendant is not legible but the amount to be paid as a condition attaching to the allotment letter is indicated as Kshs 1,950/=.

131. It is clear that from the above summary that the 1<sup>st</sup> defendant's documents as produced in evidence are illegible and also contain material inconsistencies.

132. The 1<sup>st</sup> defendant in cross examination admitted that he did not have copies of the transfer documents and that Peris did not give him her original allotment letter.

The 1<sup>st</sup> defendant in his submissions states that the plaintiff has not shown that the grant issued to him was revoked or that the terms of the allotment letter issued to Peris Wambui Munge were not satisfied. I think otherwise. He who alleges must prove. The 1<sup>st</sup> defendant has failed to prove important aspects of his contention as relates to the inconsistencies on the acreage of the suit property and meeting conditions attached to the allotment letter by Peris Wambui Munge from who he claims.

133. The plaintiff on the other hand has been able to tell her story on acquisition from application to issuance of the certificate of lease. I have seen her documents. They are legible and consistent.

134. I said earlier and I say again, that it is not enough to wave a document of title without telling the story leading to acquisition of land. This story must also be backed with documentary evidence that is credible and legal.

135. In *Munyu Maina v Hiram Gathiba Maina* (2013) e KLR, The Court of Appeal stated as follows;

“We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted in the register.”

136. Away from the narration on the process of acquisition and interrogation of the documents produced, another important aspect that will aid the determination of this question relates to the legal effect of the letters of allotment, meeting of the conditions attached thereto and finally the date of issuance of the documents of title.

137. Both the plaintiff and 1<sup>st</sup> defendant have, respectively, produced a certificate of lease and grant as documents of title.

138. The following facts remain undisputed in respect of the documents of title:

- a. The certificate of lease was issued to the plaintiff on December 15, 2006.
- b. The grant to Peres Munge was issued on January 10, 2008.



139. The 1<sup>st</sup> defendant in his written statement takes issues with the conversion of title from RTA to RLA. He states that the commissioner of lands did not have powers to change the legal regime governing the suit land while the neighbouring plots remained under a different regime i.e Registration of Titles Act. He terms this conversion and subsequent issuance of the certificate of lease to the plaintiff as null and void.
140. Allow me to digress from the question of conversion and very quickly deal with assertion by the 1<sup>st</sup> defendant that the conversion is null and void. I understand the reason for the 1<sup>st</sup> defendant's apprehension, if the conversion is upheld as legal, it would mean that the undisputed facts pertaining to dates of issuance of the documents of title will result in a pronouncement that the registration to the plaintiff was first in time. What would be the basis for stating that the registration to the plaintiff came first in time? A pronouncement that a person's registration came first in time is made when a court is dealing with two competing titles that are both legally and procedurally acquired save for a mistake accessioned by the issuing authority. This is otherwise known as double allocation.
141. In this case, I have not heard from the 2<sup>nd</sup> -3<sup>rd</sup> defendants who are charged with various responsibilities in the process of land acquisition. I am not able to state that this is outrightly a case of double allocation. Even if it were, it is evident that the suit property was first registered in the name of the plaintiff in 2006. There was nothing to be alienated to the 1<sup>st</sup> defendant by the grant issued in 2008. I do not wish to further delve into the law pertaining to double allocation as I am convinced that the circumstances in this case are different i.e two different documents of title (certificate of lease and a grant), issued to two people and at different points in time and no evidence from the government departments that both issues were regular, procedural and without fraud save for the mistake.
142. Going back to the question of conversion of title, no evidence has been tendered to show that the plots neighbouring the suit land are governed by a different regime. In any event, they are not subject of this suit. Further, more important and contrary to the assertions by the 1<sup>st</sup> defendant, the commissioner of lands did not change the registration regime. He wrote a letter dated October 6, 2003 to the director of surveys seeking clarification on whether plot 1144/695 had been converted to RLA and asked to be given the approved RIM map.
143. The director of surveys, responded to the letter dated October 6, 2003 from the commissioner of lands *vide* a letter dated January 9, 2004 and confirmed the fact of conversion of plot No 1144/695 to Naivasha municipality block 7/10. In the said communication, the director of survey attached the registry index map.
144. I also note that the 1<sup>st</sup> defendant in his amended statement of defence at paragraph 12 admits the fact of conversion of the suit land and states that the suit property formerly known as LR No 1144/695 was allocated a new number being Naivasha/Municipality Block 7/10.
145. I must also state that the grant held by the 1<sup>st</sup> defendant is in conflict with the legal regime under which the suit property was held and converted i.e from RTA to RLA There is no evidence adduced by the 1<sup>st</sup> defendant that after conversion to RLA the suit property reverted back to RTA It is my view that after conversion to RLA no grant would have been issued under RTA.
146. In the case of Ali Mohamed Dagane (granted power of attorney by Abdullabi Mubumed Dagane, suing on behalf of the estate of Mohamed Haji Dagane) v Hakar Absbir & 3 others [2021] eKLR, the learned judge cited with approval the decisions in Gladys Wanjiru Ngacha v Teresa Chepsaat & 4 others



182/1992 (Nyeri) and *Dr Joseph N.K Arap Ng'ok v Justice Moiyo Ole Keiyua & 4 others* CA No Nai 60/1997 (UR) and 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.” (Emphasis is mine)

147. In the decision of *Dr Joseph N.K Arap Ng'ok* (supra) the court of appeal held as follows;

“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.”

148. The law that speaks to indefeasibility of title is in section 27 (b) and 28 of the *Registered Land Act* (now repealed). It provides as follows:

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

28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject –

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.

149. The provisions of section 27 (b) and 28 of the *Registered Land Act* are in *pari materia* with section 24 (b) and 25(1) of the *Land Registration Act, 2012* which provides as follows:

24 (a) ...

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

25. (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—



- a. to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
  - b. to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
150. It is evident that the doctrine of indefeasibility of title is at the heart of the Kenyan legal system. Even after repeal of the [Registered Land Act](#), the provision on indefeasibility of title has continued to live in the [Land Registration Act, 2012](#).
151. In the case of *Dr Joseph N.K Arap Ngok* (supra), the court while considering the question of indefeasibility of title expressed itself thus;

“It is our law and law takes precedence over all other alleged equitable rights of title. In fact, the Act is meant to give such sanctity of title otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”
152. It follows that once the certificate of lease was issued it vested in the plaintiff a leasehold interest, express and implied rights and privileges and her title was not allowed to be defeated except as provided for in the Act.
153. The procedure for cancellation of title is provided for under section 143 of the [Registered Land Act](#) (now repealed). It mirrors section 80(1) of the [Land Registration Act, 2012](#). It is as follows;

143(1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.

  - (2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default. (Emphasis is mine)
154. It is noteworthy that the letter allegedly addressed to the plaintiff from the commissioner of lands informing her that the suit land had already been allocated to another party is dated April 8, 2008. This is happening after the Plaintiff has fulfilled the conditions attached to her allotment letter dated July 30, 1996 and after already being issued with her certificate of lease on December 15, 2006.
155. It is my considered view that the letter dated April 8, 2008 from the commissioner of lands is not only afterthought but is illegal, null and void. This letter dated April 8, 2008 is a mockery of the legal process for land acquisition as set out in the law.
156. I have deliberately failed to address my self on fraud as pleaded by the plaintiff. It was not proved.
157. I have also deliberately failed to address myself on the question of innocent purchaser for value. There is no evidence of purchase or the purchase price by either party. While I agree that the period in time when the alleged contract for sale was entered into by the 1<sup>st</sup> defendant and Peris Wambui Munge did not require it to be in writing, no oral evidence was tendered of its contents.



158. From the foregoing, I find that the plaintiff has been able to prove on balance of probability that she legally obtained title to the suit property. She therefore has proprietary rights in it, is the legal owner and should be allowed to take possession and enjoy it without any interference.

**B. Whether the plaintiff is entitled to general damages for trespass.**

159. The plaintiff urges this court to grant her damages to the tune of Kshs 50,000,000 as general damages for trespass by the 1<sup>st</sup> defendant to the suit property.

160. The plaintiff has made reference to the definition of trespass as contained in section 3(1) of the *Trespass Act* and the *Blacks Law Dictionary* 8<sup>th</sup> edition.

161. The plaintiff also urges the court to find that the defendant is guilty of continuing trespass and that the 1<sup>st</sup> defendant's continued use and occupation of the suit property has occasioned her loss and damage.

162. The 1<sup>st</sup> defendant has countered the plaintiff's submissions on trespass stating that the plaintiff has not adduced any evidence as to the state of the property before and after the trespass and its therefore difficult to assess loss incurred as a result of the alleged trespass. The 1<sup>st</sup> defendant submits that a nominal award of Kshs 1 would suffice as general damage.

163. *Halsbury's law of England* 3rd edition, Volume 38 at page 739 paragraph 1205 defines trespass as follows:

A person trespasses upon land if he wrongfully sets foot on, or rides or drives over, it, or takes possession of it, or expels the person in possession of pulls down or destroys anything permanently fixed to it, or wrongfully takes minerals from it, or places or fixes anything on it, or it seems if he erects or suffers to continue on his own land anything which invades the air space of another, or if he discharges water upon another's land, or sends filth or any injurious substance which has been collected by him on his own land to another's land.

164. The said text at paragraph 1213 explains the nature of extent of possession that is sufficient to support an action of trespass thus:

What possession is sufficient? Any form of possession, so long as it is clear and exclusive and exercised with the intention to possess, is sufficient to support an action of trespass against a wrong doer.

165. From the evidence adduced and on record, it is clear that since allotment the plaintiff has not taken possession of the suit land. An attempt at occupation was in the December 2006 when she writes to the director of surveys complaining that petrol, diesel and paraffin pumps have been erected on the suit land together with underground tanks and kiosks by the owner of the neighbouring plot one peter Munge Kinuthia. It turns out and is admitted by the 1<sup>st</sup> defendant that these things were erected by him.

166. The 1<sup>st</sup> defendant admits that he put up a petrol station on the suit land and has been in actual possession since 1995.

167. While it is evident that the 1<sup>st</sup> defendant has committed an act of trespass and continues to do so. The plaintiff has not justified the proposal for an award of Kshs 50,000,000 as general damage. She only submits that it is most reasonable and refers to judicial decisions in which the court awarded 50,000,000 and 20,000,000.



168. What, then, is the measure of damages? In the case of *Duncan Nderitu Ndegwa v KP&S LC Limited & another* (2013) eKLR P Nyamweya J. held that:

“...once a trespass to land is established it is actionable per se, and indeed no proof of damage is necessary for the court to award general damages. This court accordingly awards an amount of Kshs 100,000/= as compensation of the infringement of the plaintiff’s right to use and enjoy the suit property occasioned by the 1<sup>st</sup> and 2<sup>nd</sup> defendants’ trespass”

169. Therefore, where trespass is proved, a party need not prove that he/she suffered any specific damage or loss to be awarded damages; it is actionable per se. The court in such circumstances is under a duty to assess the damages to be awarded taking into consideration the unique facts and circumstances of each case.

170. The plaintiff has been denied use of her land for 26 years. The suit parcel is a commercial plot and as stated earlier, her application letter made in the year 1990 she indicated that she hoped to set up business shop and employ 4 people. I am aware that businesses are not static; they grow, they make profit and also make losses, they are wound up, they are closed for some time and re-opened and so many other circumstances that I cannot possibly predict.

171. I also take note that she has made various payments to the tune of approximately Kshs 200,000 in respect of fulfilling conditions attached to the allotment and land rent. The first payment having been made in 1997.

172. I further note that the 1<sup>st</sup> defendant has been running a petroleum business and/ or fuel station on the suit land.

173. Taking all these factors into consideration I am inclined to award the plaintiff a constant and modest amount of Kshs 350,000 per year for 22 years as general damages.

#### **C. Whether the 1<sup>st</sup> Defendant is entitled to the prayers as sought in the counterclaim**

174. As set out in A above, the evidence by the 1<sup>st</sup> defendant does not meet the standards of proof set out in law. It is trite law that he who alleges must prove. The 1<sup>st</sup> defendant has failed to prove his counter claim.

175. The documents produced by him are illegible and he admitted that he does not have the original allotment letter which is the fulcrum of his claim.

176. He failed to call persons in the land office to fill in the gaps in his evidence. For example, evidence on the payment of land rates by Peris Wambui Munge which evidence is important in explaining the root of his title. He has also failed to explain how he holds a grant under RTA after the suit land was converted to RLA This is taking into consideration an admission in his defence that there was a change in the registration regime i.e from RTA to RLA.

177. Consequently, the prayers sought by the 1<sup>st</sup> defendant in his counterclaim fail.

#### **D. Who should bear the cost of this suit?**

178. The general rule is that costs shall follow the event in accordance with the provisions of section 27 of the *Civil Procedure Act* (cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. This was the holding in *Hussein Janohamed & Sons v Twentsche Overseas Trading Co Ltd* (1967) EA 287.



179. Further, costs are granted at the discretion of the court. Justice Kuloba (Retired) in his book *Judicial Hints in Civil Procedure* (4<sup>th</sup> Edition) volume 10, Para 16 states as follows:

Costs are awarded at the unfettered discretion of the court subject to such conditions and limitations as may be prescribed and the provisions of any law for the time being in force, but they must follow the event unless the court has good reason to order otherwise.

### **Disposition**

180. The upshot of the foregoing is that the plaintiff suit as against the 1<sup>st</sup> -5<sup>th</sup> defendants succeeds and I grant orders as follows:

- a. A declaration is hereby issued that the grant for LR No 1144/695 registered in the name of Peris Wambui Munge as IR number 109599/1 at land titles registry Nairobi is null and void and does not confer any proprietary right in the suit property known as Naivasha/municipality block 7/10 to Peris Wambui Munge and/or the 1<sup>st</sup> defendant or any other person or group of persons claiming title under or through them.
- b. An order is hereby issued to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to forthwith revoke and/or cancel the registration of the grant issued for LR No 1144/695 in the name of Peris Wambui Munge registered at the land titles registry in Nairobi as number IR 109599/1.
- c. An order is hereby issued to the 1<sup>st</sup> defendant by himself, his agents, servants and/or employees to pull down, demolish and or remove any underground fuel tanks, fuel pump machines, structures and buildings put up on the plaintiff's suit property known as Naivasha/municipality block 7/10 and to handover vacant possession thereof to the Plaintiff and in default, the 1<sup>st</sup> defendant and/or his servants, agents and/or employees thereat shall be evicted and the plaintiff put in possession thereof with liberty to remove the structures at the 1<sup>st</sup> defendant's costs.
- d. An order of permanent injunction is hereby issued restraining the 1<sup>st</sup> defendant by himself, his agents, servants and/or employees or any person claiming title under him and/or under Peris Wambui Munge from trespassing into and/or interfering with the suit property in any manner whatsoever.
- e. The orders in (c) above shall be executed after the expiry of 90 days from the date hereof.
- f. General damages are awarded to the plaintiff in the sum of Kshs 7,700,000/= (seven million, seven hundred thousand only) plus interest from the date of this judgment until payment in full.
- g. The Plaintiff shall have the costs of the suit and interest thereon from the date of this judgement until payment in full.
- h. The 1<sup>st</sup> defendant's counterclaim is dismissed with costs to the plaintiff.

181. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 29<sup>TH</sup> DAY OF SEPTEMBER, 2022.**

**L. A. OMOLLO**

**JUDGE**



In the presence of:-

Mr Kimondo Kubea for the Plaintiff

No appearance for the 1<sup>st</sup> Defendant

No appearance for the 2<sup>nd</sup> Defendant

No appearance for the 3<sup>rd</sup>-5<sup>th</sup> Defendant

Court clerk. Miss Monica Wanjohi.

