



**Umar v Elema & 21 others; County Government Of Isiolo (Interested Party) (Environment & Land Case 29 of 2019) [2022] KEELC 12767 (KLR) (28 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 12767 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT & LAND CASE 29 OF 2019  
CK NZILI, J  
SEPTEMBER 28, 2022**

**BETWEEN**

**ABDI NOOR UMAR ..... PLAINTIFF**

**AND**

**ADAN MAMO ELEMA ..... 1<sup>ST</sup> DEFENDANT**  
**ANWAR ABDUL ..... 2<sup>ND</sup> DEFENDANT**  
**STEPHEN ELOTO ..... 3<sup>RD</sup> DEFENDANT**  
**NASIR ALI ..... 4<sup>TH</sup> DEFENDANT**  
**NIMO MOHAMED ..... 5<sup>TH</sup> DEFENDANT**  
**SAMSON NAMUDANG EDOME ..... 6<sup>TH</sup> DEFENDANT**  
**AHLKANO MOHAMED ..... 7<sup>TH</sup> DEFENDANT**  
**ABDIKADIR ALI KORICHA ..... 8<sup>TH</sup> DEFENDANT**  
**ABDI RASSA ..... 9<sup>TH</sup> DEFENDANT**  
**AKUYA NANOK ..... 10<sup>TH</sup> DEFENDANT**  
**VERONICA MUSA ..... 11<sup>TH</sup> DEFENDANT**  
**AYUB MUSA ..... 12<sup>TH</sup> DEFENDANT**  
**BUKE OKOBA ..... 13<sup>TH</sup> DEFENDANT**  
**HAWO MUGAMBI ..... 14<sup>TH</sup> DEFENDANT**  
**ABDULAHY GUYO ..... 15<sup>TH</sup> DEFENDANT**  
**JOHN ARITE ..... 16<sup>TH</sup> DEFENDANT**  
**MARIA EDOME ..... 17<sup>TH</sup> DEFENDANT**



FRANCIS LOKUK ..... 18<sup>TH</sup> DEFENDANT  
JOHN ECHWA ..... 19<sup>TH</sup> DEFENDANT  
JOSEPH NIBEYO ..... 20<sup>TH</sup> DEFENDANT  
JOHN EMBU LOKAI ..... 21<sup>ST</sup> DEFENDANT  
FATUMA RACHO ..... 22<sup>ND</sup> DEFENDANT

AND

COUNTY GOVERNMENT OF ISIOLO ..... INTERESTED PARTY

## JUDGMENT

### A. Pleadings

1. The plaintiff through a plaint dated September 13, 2013 as the bonafide and registered owner of Parcel No 11 situated at Chechele Isiolo township area within Isiolo county, lawfully allocated to him by the defunct county council, sued the defendants for trespass and erection of illegal structures on the suit land. He sought for permanent injunction against any trespass, developments or interference by the defendants, declaration that he is entitled to vacant possession, general damages for trespass and mesne profits.
2. By a defence dated December 18, 2020 the defendants denied the claim, stated the suit land is occupied by more than 25 families as their only known home for a longtime, out of a purchase between 1994-2016 from the late Edowe as his inherited land, which as at the time was unalienated, unadjudicated or unregistered government land.
3. The defendants averred that the process of surveying and the delineation of the suit land to the plaintiff was unprocedural, irregular and unlawful given the land is trust land.
4. The defendants averred upon paying for the land, they took vacant possession and made various permanent developments thereon and have been occupying the suitland since 1986 while paying the required annual ground rent, rates and other charges to the interested party.
5. Further the defendants averred the suitland was initially held by the County Government of Isiolo in trust for the community which ought to have been involved in the subdivision and allocation.
6. The defendants urged the court to declare the plaintiff is not a bonafide owner and find that, any transfer thereof is fraudulent, irregular, illegal null and void, cancel of the certificate of lease for Parcel No Isiolo Township Block 2/11 and restore the land in the name of the interested party as the registered owner for reallocation and permanent injunction do issue restraining the plaintiff or its agents from interference or entry thereof.
7. In line with order 11 *Civil Procedure Rules* the plaintiff filed a paginated bundle of pleadings dated November 10, 2020 whereas the defendants filed theirs on January 12, 2021.

### B. Testimony

8. PW 1 adopted his witness statement dated September 16, 2013 stating he was allocated the land by the defunct County Council of Isiolo in 1999, *vide* PDP 15L/117/93/134 where after on January 20, 2000 the District Survey carried out a survey of the plot and issued him with a beacon certificate dated



June 20, 2002 as Parcel No 11 and thereafter took vacant possession. The plaintiff testified one Robert Dokhole invaded his and land filed a suit which was dismissed on April 21, 2010, thereafter which the defendants trespassed into his land. He referred to the order in item number 21 of his bundle of documents.

9. The plaintiff testified after the filing this suit, a county surveyor pursuant to a court order made a scene visit and, prepared a report contained in item number 16 of the bundle.
10. The plaintiff told the court after discovering the encroachment he made several reports to the Ministry of Lands who wrote to the County Commissioner to intervene and stop the encroachment. Later on, he was advised to go to court. PW1 stated he filed a suit attaching all the said correspondence and documentation and obtained an injunction. The plaintiff confirmed none of the claimants have produced any documents of ownership.
11. Eventually the plaintiff said he obtained a certificate of lease on July 12, 2016 and search is contained in his bundle as items number. 31 and 32 respectively.
12. The plaintiff told the court investigations were done by the Ethics & Ant-Corruption. He referred to items number 59 and 62 and eventually one Stephen Etob Edama was charged with forceable detainer in Cr Case No 308 of 2017 for allegedly completed by the CID who was constructing on the land despite the court order.
13. The plaintiff confirmed he knew the 1<sup>st</sup> defendant who had commenced the building but he stopped after being served with the court order while the 2<sup>nd</sup> defendant was his neighbor and his witness while the 21<sup>st</sup> defendant was already dead.
14. As regards the 16<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup> and 19<sup>th</sup> defendants, the plaintiff stated they were brothers of Stephen Elope, the 3<sup>rd</sup> defendant who live elsewhere but the 16<sup>th</sup> defendant though deceased wrote a statement at the police station confirming that he was not interested in the land as the County Government of Isiolo pulled out of the case.
15. The plaintiff produced the surveyors report dated November 10, 2005 as P Exh (1) survey receipts P Exh (2), decree dated April 26, 2010 as (P Exh (3) registry index map amendment letter dated January 16, 2013 as P Exh (4), allotment letter dated March 19, 1999 as P Exh (5), letter from the Ministry (National Land Commission) dated September 6, 2013 as P Exh No (6), receipts of payments dated July 15, 1999 as P Exh No (7) beacon certificate as P Exh No (8), lease P Exh No (9), certificate of lease as P Exh No (10), the certificate of search dated August 15, 2017 as P Exh No (12), letter by Oruenjo Kulet & Co advocates dated December 23, 2015 to as CCIO P Exh No (13), rates payment receipts to the county as P Exh No (14), letter to National Land Commission from DCI Isiolo seeking for verification of PDP dated September 6, 2017 as P Exh No (15), letter dated September 8, 2017 from county surveyor Isiolo verifying the PDP and confirming that the parcel by 1<sup>st</sup> defendant had been reserved for poultry farming, letter dated December 7, 2017 from County Surveyor Isiolo to OCS Isiolo police station confirming the encroachment as P exhibit (17) letter dated November 1, 2017 from National Land Commission confirming that the PDP held by the 1<sup>st</sup> defendant was not genuine and similarly his allotment letter as P Exh (18) receipt dated October 12, 2007 for Kshs 18,750 as P Exh No (19), copy of sale agreement dated February 17, 2015 between Francis Ekuwon Edome and Samuel Tasfae Balate P Exh (20) letter dated December 7, 2017 by the plaintiff to OCS Isiolo police station complaining on disobedience of court order by Samuel Balata as (P Exh 21), letter dated December 7, 2017 by OCS Isiolo to chief office land department isiolo seeking for report on status of the ownership documents as P Exh (24), copy of an affidavit by Charles Ndambo in Isiolo PMCC No 25 of 2002 as P Exh (22), sale agreement between Stephen Edome and Hussein Mohammed Hussein dated August



28, 2014 as P Exh (25), letter dated June 28, 2018 from national land commission confirming that the allotment letter dated June 23, 1999 to Stephen Eloto was fraudulent as based on a fake PDP No 1Sh/117/80 minutes of the meeting held on January 8, 2019 over Chechelesi land dispute as (P Exh No (26), sketch map P Exh as (27), letter dated February 1, 2020 to the County Secretary Isiolo County Government by the plaintiff over the interference by principal officer land and physical planning Isiolo County Government one Abdikadir Ali Koricha as P Exh letters dated July 4, 2020 by the plaintiff to OCS Isiolo police station No's 30 & 31 respectively hand over the report dated March 12, 2012 by EACC on documents, as P exh (29), evidence by Joshua Rum Ochieng as P exh No (35) in Criminal Case No 308 of 2017, witness statement by PC Isaak Muthomi in Criminal Case No 308 of 2017 as P exh No (36), ruling in criminal case No 308 of 2017 as P exh No (34), official search as P exh No (33) rates payment receipt for February 25, 2020 as P Exh No (32). Cross examined by the court the plaintiff stated he was not aware of any other lease existing over his land.

16. PW 2 adopted his witness statement dated September 24, 2016 confirming he was a neighbor of the plaintiff, though allegedly joined as the 2<sup>nd</sup> defendant. He testified he had nothing against the plaintiff who he had known for over 29 years. He stated he witnessed, the defendants off-loading building materials on the plaintiff's land and constructing at night.
17. The plaintiff relies on his written and supplementary submissions dated June 16, 2021 and April 14, 2022 while the defendants rely on the submissions dated March 1, 2022 respectively.
18. The plaintiff submitted he was lawfully allocated the suit land as per his letter of allotment dated March 19, 1999, beacons certificate dated June 20, 2002 and a certificate of lease registered on July 12, 2016 running with effect from April 1, 1999 after he made payments made on July 5, 1999.
19. It is submitted the County Council of Isiolo on July 2012 evicted an encroacher one Major (RTD) Robert Dokhole after his suit was dismissed after he sued the council.
20. It is submitted the 1<sup>st</sup> defendant encroached on the land in July 2013 and he filed Isiolo Chief Magistrates Case No 51 of 2013 and injunction was issued against him on September 19, 2013 who stopped the works but afterwards enjoined other parties to the suit after his 1<sup>st</sup> defendant dated February 20, 2014, following an application dated December 15, 2013.
21. The plaintiff submitted one of the parties is the 3<sup>rd</sup> defendant who defied the court order leading to complaints being made to the relevant offices as per the raft of letters produced herein and the order made on April 15, 2015.
22. It is submitted the other defendants to the suit did not sign an authority for the 1<sup>st</sup> defendant to plead and defend the suit in line with Order 1 Rule 13 Civil Procedure Rules despite the court directives made on November 11, 2019.
23. The plaintiff submits on February 26, 2019, a notice of withdrawal of the suit against the county government of Isiolo was made.
24. The plaintiff further submitted he has presented enough evidence to show he lawfully and procedurally acquired the land which is confirmed by the affidavit of Charles Ndambo sworn on September 9, 2002 and March 6, 2003 respectively and survey reports dated November 11, 2006.
25. The plaintiff submitted the documents he presented as the 2<sup>nd</sup> defendant in the Isiolo suit are the same ones he has presented herein as per his list of documents dated September 17, 2013, September 24, 2019 and July 22, 2020, whose evidential value has not been shaken by the defendants.



26. Concerning the defence case the plaintiff submitted the 1<sup>st</sup> defendant on November 9, 2013 presented a replying affidavit and attached several documents which are also contained in the defendants list of documents which are not genuine, are contradictory or illegal hence confer no ownership to either the 1<sup>st</sup> or 3<sup>rd</sup> defendant.
27. Further, the plaintiff submitted the defence dated November 29, 2019 cannot stand given the 3<sup>rd</sup> defendant did not hold any valid title which he could transfer to the 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 7<sup>th</sup> defendants. It is therefore submitted that the alleged sale agreements were illegal and could not meet the standard of a land sale agreement.
28. The plaintiff submitted the 3<sup>rd</sup> defendant who is alleged to have sold the land to the defendants or any members of his family, was questioned by the CID, arraigned in court in Isiolo Criminal Case No 308 of 2017 for forceable detainer and forgery in which case the 1<sup>st</sup> defendant stood surety for him as per item No 81 in the plaintiff's bundle, was found with a case to answer as per item number. 68 of the said bundle.
29. Further the plaintiff submits the evidence by the county surveyor in the criminal case produced as item number 66 and 67 of the bundle of documents confirmed that there was encroachment on his land despite a court order.
30. As regards the 5<sup>th</sup> defendant and 8<sup>th</sup> defendants, the plaintiff submitted the 5<sup>th</sup> defendant bought the land from the 3<sup>rd</sup> defendant which sale was void and illegal while the 8<sup>th</sup> defendant produced no ownership documents as indicated in item No 59 of the bundle hence in absence of any valid ownership documents the defendants are trespassers to his land.
31. Concerning the 23<sup>rd</sup> defendant, the plaintiff submitted he swore an affidavit on April 22, 2014 claiming the 3<sup>rd</sup> defendant sold him the land in 2014 when there was already an injunction as indicated in items number 77 and 78 of the bundle which agreement is therefore invalid in law. The plaintiff submitted the 23<sup>rd</sup> defendant was summoned by the police and ordered to stop constructions on the land but instead his workers meted violence on the plaintiff him as per OB reports filed in 2015. Therefore the 23<sup>rd</sup> defendant lacks proper or legal claim to the suit land.
32. As regards Francis Ekuan Edome alleged sale of the land to Samuel Tasfae Balate, the former being a brother to the 3<sup>rd</sup> defendant, the plaintiff submits as per item Number 53 of the bundle, the 3<sup>rd</sup> and 6<sup>th</sup> defendants as signatories to the sale agreement were in court three years before the sale, while there was already an injunction in place hence did not bother to carry out due diligence.
33. On the issues of the 13<sup>th</sup> defendant, item number 72 of the bundle shows the said defendant denied before the police being party to the suit after he was confronted to stop the construction in 2015. The plaintiff submitted however, the 13<sup>th</sup> and 21<sup>st</sup> defendants passed on, though the defendants have not disclosed the same.
34. Further the plaintiff also submitted under sections 107-112 of the *Evidence Act*, the burden was on the defendant to prove the contents of their defence and in absence of any such evidence and the defence remains a mere statement as held in *Shaneebal Ltd v County Government of Machakos* (2018) eKLR.
35. The plaintiff also submitted he is the rightful owner on the suitland as per section 24 & 26(1) of the *Land Registration Act* having followed all the steps and procedures on allotment, acquired receipts, survey documents, the lease and certification of search hence entitled to protect the law.
36. Reliance is placed on *Dr Joseph Arap Ngok v Justine Moiijo Ole Keiwua Kiprotich Arap Chepkwony v Simion Langat & 3 others* (2017) eKLR, *Isadia Wasangale v Hellenah Muhiga* (2015) eKLR, *Waas*



- Enterprises Ltd v City Council of Nairobi & another* (2014) eKLR, on the allotment processes and the protection of the law to genuine allottees.
37. On the issue of trespass, the plaintiff submitted the defendants have unjustifiably intruded into his land, evidence has been presented which is not controverted and hence he is entitled to eviction orders. Reliance is placed on *Joel Kipchirchir Kitur v David Kimuti Langat & another* (2006) eKLR *Simion Njagi Njoka v Simion Gatimu Kanyi* (2007) eKLR, *Mary Nasamba Makanda v Dennis Wanyama* (2017) eKLR, *Rajan Shabt/a Rajan S Shab & partners v Bipin P Shaba* (2016) eKLR and *Park Towers Ltd v John Mithamo Njika & 7 others* (2014) eKLR.
  38. The plaintiff submitted all state agencies in the subject area have been involved in this matter but the defendants continues to deny him his land ownership rights hence seeks for an injunction, general damages and mesne profits at Kshs 10,000,000/= considering that his land has been wasted away in form of degradation and various buildings to his detriment.
  39. As regards the submissions by the defendants, the plaintiff in his further submissions maintained the defendants have no valid ownership documents unlike him who has demonstrated long standing and valid documentation culminating into a registered lease.
  40. The plaintiff submitted the letters dated September 27, 2013 and March 13, 2018 have no probative value coming after the suit was filed and were never produced in court.
  41. On the registration of the lease during the pendency of the suit, the plaintiff submitted he is neither the head lessor nor the land registrar and given he has not transferred the suit land to anybody he is not bound by the doctrine of lis pendens since having paid the requisite fees it goes without saying the process of the registration could go on as per the law.
  42. On the alleged discrepancies of the lease and the allotment letter the plaintiff submits the letter, of allotment gives an estimation but after the survey the land was found to be 1.34 ha.
  43. The defendants submitted whereas the lessor is the County Government of Isiolo, no title to the land had been issued by the time the suit was filed and the registration on July 12, 2016 and a certificate of lease dated July 12, 2016 was against the complaints by the County Government of Isiolo through protest letters dated September 27, 2013, March 13, 2018 and the doctrine of lis pendens.
  44. The defendants submit that given the two protest letters the registration and issuance of title to the plaintiff was null, void and illegal for lack of a consent from the lessor. Reliance was placed on *Francis Munyao Mulinge vs Mae Mohamed Abuu* (2017) eKLR.
  45. As regards the decree from the lower court, the defendants submitted it was not a final order or determination of proprietorship. Reliance is placed on *Naftali Rutbi Kinyua v Patrick Thuita Gachure & another* (2015) eKLR on lis pendens.
  46. On the issue of the documents produced as exhibits by the plaintiff the defendants submitted the same are not absolute proof of ownership as held in *Munyu Maina v Hiram Gathiba Maina* (2013) eKLR, given that the letter of allotment is not explained how the plaintiff obtained it since he has not been in occupation of the land by way of an application letter, minutes from the full council meeting unlike the 1<sup>st</sup> defendant who at page 141 of his bundle shows the same. Therefore, certificate of lease lacks a registry index map and a deed plan number hence is unprocedurally obtained.
  47. Further, the defendants submitted the date of appearing but the commissioner for oaths is not indicated and that it could not be possible to lodge documents for registration on July 12, 2012 and obtain the lease immediately.



48. The defendants submitted the lease registration was done out as per the Deputy governor letter dated November 19, 2015 as per page 48 of the plaintiff's bundle who lacks powers to decide on the registration of leases under the County Government Act.
49. In addition the defendants submitted the acreage in the allotment letter differs from that in the certificate of lease which discrepancy would only be cured if the plaintiff had a registry index map or a deed plan to care it.
50. The defendants urge the court to find also the names used in the three documents are different and no explanation has been offered.
51. Concerning the general damages, the defendants submitted the plaintiff is not entitled to the same since they are the lawful allottees as per the letters of allotment in possession of their lawyers and going by the protest letters by the County Government of Isiolo they cannot be termed as trespassers hence the sum of Kshs 10 million is not justified as held in Ochako Obinchu v Zachary Oyoti Nyamongo (2018) eKLR for lack of a valuation report before and after the alleged trespass, more so since there was an injunction order issued which has been subsisting to date.
52. The defendants therefore urge the court to find the exact time of the alleged trespass is not clear, that they should be protected as well as the other families who live on the suit land under articles 40 and 43 (1) (b) of the Constitution.

### **C. Issues for Determination**

53. The court has carefully gone through the pleadings list of documents filed and produced by the parties in support of their respective claims and written submissions. The issues commending themselves for my determination are:-
  - i. What is the legality of the defence dated December 18, 2020 and filed on January 12, 2021 vis a vis the ones dated 12.5.2014 and November 28, 2019 respectively for lack of authority to act duly signed by the other defendants.
  - ii. What are the implications of the defendants' list of documents filed contrary to the order made on November 4, 2020 and in view of the order expunging them from the records made on March 17, 2021.
  - iii. If the plaintiff lawfully acquired and obtained title documents to the suit land.
  - iv. If the documents in support of the plaintiff's claim are valid, lawfully acquired and authenticated to be used as evidence.
  - v. If the plaintiff's registration offends the doctrine of lis pendens.
  - vi. If the defendants have impeached the manner and the process of allocation and subsequent registration of the land in the plaintiff's name.
  - vii. If the plaintiff is entitled to the orders sought.
  - viii. What is the order as costs.



## D. Preliminaries

54. The plaintiff filed this suit by a plaint dated September 13, 2013 sued the 1<sup>st</sup> defendant who entered appearance by a notice of appointment dated November 27, 2013 and filed a list of 21 persons to be added as defendants through a notice dated November 20, 2013.
55. By an application dated December 15, 2013 Stephen Eloto & and Fatuma Racho sought to defend the suit on a representative capacity of the twenty proposed defendants alleged to occupy four acres of the suit land.
56. Eventually the 1<sup>st</sup> defendant filed a defence dated February 20, 2014 denying the contents of the plaint. He stated that no title deed had been issued to no allocation had been made thereof.
57. At paragraph 4 of the defence, the 1<sup>st</sup> defendant alleged he was an allottee of a quarter of an acre of the suit land since 1996 referred to as Plot No 373 and planned as PDP No ISL/117/97/132, which he claimed he was occupying and had developed as separate from the plaintiff's parcel. He stated it was the plaintiff who had encroached on his land which land was also occupied by persons he had joined as co-defendants.
58. By an affidavit dated March 11, 2014, the plaintiff sought to join one Nura Duba as a defendant which application was however withdrawn by a notice of withdrawal dated March 18, 2014.
59. By a consent dated April 22, 2014 parties consolidated ELC No 51/13 and 18/14 with the lead file being No 51/2013.
60. through a preliminary objection dated August 29, 2017 the defendants opposed the list of documents dated August 1, 2017 as filed the plaintiff introducing the lease agreement. This was followed by a notice dated November 6, 2017 seeking for the said documents to be expunged from the court record. At the same time the plaintiff filed an application dated November 3, 2017 seeking to have the names of 2<sup>nd</sup>, 4<sup>th</sup>, 6<sup>th</sup> – 22<sup>nd</sup> defendant removed from the suit for reasons that since the order to join them was made on November 19, 2013, no defence had been filed and or authority given to the 3<sup>rd</sup> defendant to act for and on behalf of them. The interested party, the County Government of Isiolo by a notice dated March 5, 2019 withdrew from the suit with no objection from the defendants who were the ones who had brought it on board in the first instance.
61. The trial court on April 2, 2019 allowed the withdrawal as requested. The suit was eventually transferred to this court.
62. The defence was ordered to file the authority to act duly signed by all the defendants together with witness statements by November 20, 2019.
63. The defendants filed a joint defence dated December 18, 2020 oblivious of the previous defences on record and the orders made by this court to regularize the pleadings. The verifying affidavit sworn by the 1<sup>st</sup> defendant does not refer to the rest of the defendants as authorizing him to verify the contents of defence on their behalf.
64. There is also no letter of authority to plead on their behalf attached to the joint defence. Further the defendants never complied with the earlier order for the authority to act to be filed by November 20, 2019.
65. Eventually, by a ruling dated March 17, 2021 the court expunged from the court record the defendants paginated bundle of documents filed out of time.



66. The defendants did not seek leave thereafter to introduce the said list of documents or file them out of time.
67. In my considered view therefore and in absence of a review of the aforesaid order I find that the defendants' written submissions based on documents already not forming part of the court record, irregular, unprocedural, and lacking a substratum to stand.
68. Further the defendants did not attend court to testify and or produce any documents in support of the pleadings made in the three different defences filed in the course of this suit.
69. It is trite law that submissions however forceful cannot take the place of evidence as held in *Daniel Toroitich Arap Moi v Stephen Murithi* (2014) eKLR. The failure to call evidence by the defendants means the statement of defence herein are mere statements unsubstantiated by way of defence. They remain mere allegations of fact. The evidence by the plaintiff remains uncontroverted and unchallenged. See *Edward Mariga v Nathaniel David Shutter & another* (1979) eKLR, *CMC Aviation Ltd v Erusair Ltd* (1987) KLR 103.
70. Similarly, without an authority from the rest of the defendants, the joint statement dated December 18, 2020 is verified by the 1<sup>st</sup> defendant without an authority or consent by the rest of the defendants to plead to it. It is also made in fragrant disregard of the previous defences in existence in the court file among them that of the 1<sup>st</sup> defendant.
71. Order 1 rule 3(3) *Civil Procedure Rules* provides that where there are more than one defendant anyone or more of them may be authorized by any one or more of them to appear, plead or act for such other defendants in any proceedings.
72. Order 1 rule 13 (2) thereof provides that the authority shall be in writing signed by the party giving it and shall be filed in court.
73. While expounding this provision, the Court of Appeal in *Research International East Africa Ltd vs Julius Arisi & 213 others* (2007) eKLR held a verifying authority filed without authority of the other plaintiffs fell short of the law and the plaint could be struck out.
74. In this suit, the defendants were given an opportunity to comply within 30 days. They have failed to execute or sign any authority to mandate the 1<sup>st</sup> defendant to swear the verifying affidavit and or otherwise act on their behalf.
75. The failure to generate, execute and or sign any such authority during the window given by the court either as required by the law or at all, in my view renders the joint defence filed on January 12, 2021 fatally incompetent.
76. The defendants did not seek leave of court to extend time or comply with the law before the filing the said joint defence. Without such request for leave and or an application for extension of time this court finds the 1<sup>st</sup> defendant lacks capacity to file the joint defence and or verify its contents. The court cannot act in vacuum and without prompting by the defendants to cure the anomaly especially when the joint defence has been used by the defendants to make written submissions on issues, facts and documents whose contents, veracity, source and authenticity has not been verified by an authority and confirmed by the rest of the defendants either individually or jointly.
77. To make matters worse, the witnesses statements accompanying the joint defence running from pages 21-35 of the paginated bundle by the defendants are not signed and or dated by the defendants.



78. The 1<sup>st</sup> defendant therefore lacks standing to generate and exhibit a document showing his nexus or relationship with the rest of the defendants, more so given he is the one in the first instance who sought to bring them on board by claiming that they co-own and or occupy the plaintiff's suit land as part of their inheritance and or by virtue of purchase. See [James Ndugi & 4 others vs Jamleck Waitbaka & 7 others](#) (2022) eKLR.
79. Even after the court allowed the defendants to be represented by the three defendants, no authority to act was filed and or served upon the plaintiff as ordered or at all.
80. Therefore, even if the court were to find that the only defence validly before it as the one filed by the 1<sup>st</sup> – 3<sup>rd</sup> defendants still the three defendants cannot purport to appear, plead and or act on behalf of the rest of the defendants without an authorization in writing duly filed before the court.
81. The Court of Appeal in [Chacha Farmers Co Society Ltd vs George Odhiambo & 9 others](#) (1987) eKLR held that such an omission though does not void the process, it incapacitates the person purporting to represent his co-parties from so doing.
82. My finding therefore is that the written submissions by the defendants as to the factual and evidentiary implications of documents filed by the rest of the defendants, who have not given authority to the 1-3<sup>rd</sup> defendants are of no consequence to the plaintiff's case and or evidence before this court.
83. The 1<sup>st</sup> to 3<sup>rd</sup> defendants have on their joint defence also faulted the process and manner in which the plaintiff obtained the letter of allotment and subsequently the certificate of lease.
84. In [Arihi Highway Developers Ltd vs West End Butchery](#) (2015) eKLR the court held that fraud must not only be pleaded but proved to a standard higher than in the ordinary civil suits.
85. Section 26 of the [Land Registration Act](#) provides that a certificate or title to land is to be taken as a prima face evidence of ownership unless it is impeached on account of fraud, misrepresentation, illegality, unprocedural or acquisition through a corrupt scheme.
86. In this suit the defendants have not disputed that the head lessor is the County government of Isiolo. The 1<sup>st</sup> defendant had joined the County Government of Isiolo as an interested party to this suit. The interested party eventually filed a notice of withdrawal from the suit. The defendants oppose that withdrawal or obtain and or file any witness statements from the said interested party to support their defence and or allege any impropriety or illegality in the manner the plaintiff was allocated the suit land and subsequently acquired a certificate of lease. The lease is duly signed by the said interested party and is drawn by the land registrar.
87. Nothing has been brought before this court by the defendants to the effect that the said lease was obtained or procured illegally, unprocedurally and or through corrupt means.
88. On the contrary the plaintiff has produced evidence that the 1<sup>st</sup> defendant's letter of allotment was invalid and was declared so by the National Land Commission given that the part development plan cited belonged to a poultry farm.
89. The plaintiff also produced documentary evidence that all his documents over the acquisition were subjected to investigations by government agencies and found to be genuine unlike those of the 1<sup>st</sup>-3<sup>rd</sup> defendants.
90. All these documentary evidences were not objected to by the defendants and or evidence to the contrary produced to break the plaintiff's chain of documents right from the allocation to the issuance



- of a certificate of title to the suit land. See *Dr Joseph Ngok (supra) Isadia Wasangale (supra) Waas Enterprises (supra)*.
91. The defendants also failed to attend court and offer any evidence that before the plaintiff was issued with title documents, the interest in the suitland had passed to them. The 3<sup>rd</sup> defendant had no good title to pass to any of his co-defendants as alleged or at all, given the investigations made and charges levelled against him for forceable detainer and of uttering forged documents.
  92. Further given the letter dated August 24, 2017 by the chief officer land physical planning and environment verifying the PDP, letter of allotment, cadastral survey plan, registry index map amendment, rate payments receipts, the lease and the confirmation from the National Land Commission by a letter dated 28.6.2018, that the allotment letter dated 23.6.1999 in favour of the 3<sup>rd</sup> defendant was not genuine, and did not emanate from their office. There was further confirmation in the said letter that the PDP that processed the letter of allotment of the plaintiff was ISL/117/97/134 and which was used to generate the title deed. My finding therefore and the conclusion is that the plaintiff's certificate of lease was legally acquired hence he is entitled to protection of the law under Article 40 of *the Constitution* as read together with Section 26 of the *Land Registration Act*.
  93. Additionally, since the 3<sup>rd</sup> defendant had no valid title to the suit land, any transactions between him and the 3<sup>rd</sup>, 5<sup>th</sup>, 8<sup>th</sup>, 13<sup>th</sup> and 23<sup>rd</sup> defendants were invalid and illegal in law.
  94. As held in *Shancebal Ltd (supra)* the failure to testify in support of a defence renders the said defence a mere statement.
  95. In *Chege vs Twiga Lodge Ltd and 2 others* (civil appeal 77 of 2018) (2022) KECA 429 (KLR) (March 4, 2022) (Judgment) the Court of Appeal held once an illegality is established all the subsequent action by a party at fault or lacking ownership of the property are also illegal and fraudulent including the sale.
  96. In this suit the letter of allotment held by the 3<sup>rd</sup> defendant was found invalid and not genuine by the issuing authority. It could not therefore be used as a basis of claiming or occupying and or disposing the plaintiff's suit land to other third parties, especially the other defendants herein.
  97. The evidence produced by the plaintiff shows at the time the 1<sup>st</sup> and 3<sup>rd</sup> defendants made transactions over the suit land, there were already in place injunctive orders. The defendants were and remain therefore trespassers to the suit land going by the definition of trespass under section 3(1) of the *Trespass Act* cap 294.
  98. The defendants did not tender any evidence that they possessed a valid allotment letter prior to the issuance of the certificate of title held by the plaintiff to justify their occupation of the suitland.
  99. In *Republic vs City Council of Nairobi & 3 others* (2014) eKLR the court held that once allotment letter is issued and the allottee meets the conditions therein, the land in question is no longer available for re-allotment unless it is challenged by the allotting authority or has been acquired through fraud, mistake, illegality, misrepresentation or against public interest.
  100. By virtue of being a legitimate owner, the plaintiff had every right to keep away and or apply for the law to come to his protection against any intruders to his land; by way of declaratory and permanent orders of injunction. The defendants having shown no plausible reason, justification or explanation why despite knowing they lacked valid ownership documents to stake any claim over the land or seeking for an explanation from the allocation authority for reasons why they were overlooked in the allocation of land. I find their actions belligerence and their adamancy in keeping away the plaintiff from his own land inconceivable and done without the consent of the plaintiff.



101. In *Philip Ayaya Aluchio vs Crispinus Ngayo* (2014) eKLR the court held a party is entitled to general damages for trespass, being the difference in the value of his property immediately after the trespass or the costs of restoration whichever is less.
102. In this suit the plaintiff failed to produce any valuation report prior to and after the trespass, though he has testified that he is still out of the land despite court orders which the defendants have admitted.
103. In *Nakuru Industries Ltd vs S.S Mehta & Sons* (2016) eKLR the court in spite of the lack of a valuation report awarded damages of Kshs.800,000/= while in *Willesden Investment Ltd vs Kenya Hotel Properties Ltd* (2007) eKLR, the court held that there was no mathematical or scientific formula applicable and awarded Kshs 10,000,000 as general/damages.
104. In *Mikidadi vs Khaigan and another* (2004) eKLR 496 the court awarded exemplary damages since there was oppressive, arbitrary and unconstitutional action, which conduct by the defendants was calculated to make profit.
105. In *Ajit Bhogal vs KPLC Ltd* (2020) eKLR, the court held where trespass is proved a party need not prove he or she has suffered any specific damage or loss to be awarded damages and the court is supposed to assess damages depending on unique facts and circumstances of each case.
106. In this suit the plaintiff has testified that he has been unable to access develop or utilize the suit land owing to the acts unjustified of the defendants to the extent of facing violence from them. In his submissions the plaintiff seeks for Kshs 10,000,000/= as general damages. The basis of that sum has not been explained at all.
107. That notwithstanding and looking at the circumstances of this case, there is no doubt that the defendants have caused a lot of anguish to the plaintiff even after the court granted interim injunctive orders against them. The defendants never take up any mitigating steps to reduce the loss and damage occasioned to the plaintiff even after he obtained a certificate of title to the land.
108. In my considered view, an award of Kshs 10,000,000/= is reasonably, given the value of the suitland. The claim for mesne profits being in the nature of special damages was not properly pleaded and proved. It is therefore disallowed.
109. In the circumstances I allow the plaintiffs claim in terms of prayer (a) & (b) and award general damages of Kshs 10,000,000/= plus costs and interests against the defendants jointly and severally.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT**

**THIS 28<sup>TH</sup> DAY OF SEPTEMBER, 2022**

**In presence of:**

C/A: Kananu

No appearance

**HON. C.K. NZILI**

**ELC JUDGE**

