**Njuki v National Lands Commission & 2 others (Environment & Land Case 105 of 2020) [2022] KEELC 15571 (KLR) (31 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 15571 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ENVIRONMENT & LAND CASE 105 OF 2020**

**JO MBOYA, J**

**OCTOBER 31, 2022**

**BETWEEN**

**GEORGE KIMANI NJUKI ........................................................................ PLAINTIFF**

**AND**

**NATIONAL LANDS COMMISSION ............................................. 1ST DEFENDANT**

**THE CHIEF LAND REGISTRAR ................................................. 2ND DEFENDANT**

**THE HON.ATTORNEY GENERAL ............................................. 3RD DEFENDANT**

**JUDGMENT**

1. Vide Plaint dated the 4th April 2020, the Plaintiff herein has approached the Honourable Court seeking the following Reliefs;

   i. An Urgent Temporary Injunction restraining both the 1st and 2nd Defendants herein, their Agents, servants and/or employees from alienating, selling, trespassing, Charging and/or dealing with the said suit premises known as L.R NO.209/14435 in any way and in any manner whatsoever, while pending the hearing and determination of the Suit.

   ii. A Declaratory Judgment to the effect that the Defendants' purported Revocation is illegal, Unconstitutional and null and void under the Provisions of law.

   iii. A Declaratory Judgement to the effect that the Plaintiff is the legal and rightful registered owner of the suit premises known as L.R NO. 209/14435.

   iv. A Permanent Injunction to restrain the Defendants jointly and severally from ever interfering with the Plaintiff's ownership of the suit premises.

   AND/OR

v. An Order directing the Defendants to pay the Plaintiff compensation, on account of loss of his property, being a sum of Kshs.240 million, according to Valuation carried out on the property sometimes on 30th March 2020, together with interest at Court rates of 14% p.a. from the date of filing suit until payment in full.

vi. Mesne Profits of Kshs.120,000/= Only, per Month. aforesaid and or any other sum that this Honourable Court may consider just and fair in the circumstances of the case.

vii. Costs of the suit.

viii. Such other and/or further relief as this Honourable Court might deem fit and just to grant in the unique circumstances of this matter.

2. Upon being served with the Plaint and Summons to enter appearance, the 1st Defendant duly entered appearance and thereafter filed a Statement of Defense wherein same denied and contested the Plaintiff's claim.

3. On the other hand, the 2nd and 3rd Defendants also entered appearance and thereafter filed Statement of Defense dated the 25th November 2020. For clarity, the 2nd and 3rd Defendants' also denied and disputed the Plaintiff's claim.

4. Thereafter, the Pleadings in respect of the subject matter closed and the matter was ripe and ready for hearing.

**EVIDENCE BY THE PARTIES:**

**a. THE PLAINTIFF'S CASE:**

5. The Plaintiff's case gravitates and revolves around the testimony of the Plaintiff who testified as PW1.

6. The Plaintiff testified and stated that on or about April/May 1999, same learnt that there were some Plots which were being allocated in Lang'ata Area by the Commissioner of Lands, for residential development. For completeness, the witness added that he learnt of the said information from his Friends.

7. Further, the witness added that upon learning of the information relating to the allotment of Plots by the Commissioner of Lands, same decided to write a letter to the Commissioner of Lands to be allocated one of the plots in the said area. In this regard, the witness alluded to the letter dated the 18th May 1999.

8. The witness further testified that after writing the Letter dated the 18th may 1999, the Office of the Commissioner responded thereto and indeed issued a Letter of allotment dated the 24th June 1999.

9. On the other hand, the witness also testified that thereafter same accepted the Letter of offer on the 14th August 2002 and similarly paid the some of Kshs.175, 100/= only to the office of the commissioner of lands, which payment was duly accepted and acknowledged.

10. Other than the foregoing, the witness added that after making the payments, in the sum of Kshs.175, 100/=Only, the Office of the Commissioner proceeded to and generated a Grant, namely, Grant No. I.R 89657, which Grant was ultimately registered on the 22nd August 2002.

11. It was the witness' further testimony that upon the registration of the Grant, same was thereafter issued with a Certificate of title relating to and concerning L.R No. 209/14435, measuring approximately

0.6001Ha. In this regard, the witness stated that same was therefore the lawful and legitimate owner of the suit property.

12. Be that as it may, the witness added that on or about the 17th July 2017, the 1st Defendant herein issued and published a Gazette Notice purporting to revoke the Certificate of title over and in respect of the suit Property.

13. However, the witness contended that the attempted revocation was not only unlawful, but illegal and unconstitutional.

14. On the other hand, the witness testified that upon being registered as the owner of the suit property, same developed residential houses thereon, which he (witness) rented out to various tenants. For clarity, the witness added that the tenants used to pay unto him (Witness) the sum of Kshs.120, 000/= Only, per Month.

15. Nevertheless, the witness also testified that after the 1st Defendant issued and published the Gazette notice, purporting to revoke his Certificate of title to and in respect of the suit property, the Tenants who were in occupation of the suit Property stopped paying rents unto him.

16. Besides, the witness also testified that as a result of the failure by the various tenants to pay rents in respect of the houses situated on the suit Property, same was constrained to and indeed filed a Complaint before the Rent Restriction Tribunal at Nairobi. In this regard, the witness added that the cases filed were duly registered and assigned Tribunal Cause No. 2055 of 2019.

17. In any event, the witness further testified that thereafter the Rent Restriction Tribunal allowed his Complaint and granted unto him the liberty to levy Distress against the defaulting tenants and to recover the outstanding arrears of rents.

18. Further, the witness also testified that currently the suit property is valued at approximately Kshs.240, 000, 000/= Only. In this regard, the witness alluded to a Valuation Report dated the 30th March 2020.

19. Notwithstanding the foregoing, the witness has added that the manner in which the Defendants herein have dealt with the suit property constitutes violation and infringement of his (the witness) Fundamental Freedoms. In particular, the witness has added that the Defendants have treated him in a discriminatory manner by attempting and or purporting to revoke the Certificate of title over and in respect of the suit property.

20. Despite the foregoing, the Witness added that same lawfully and duly applied to be allocated the suit Plot and that thereafter same was lawfully allocated the suit Plot by the Office of the Commissioner of Lands, who was the relevant allocating authority.

21. At any rate, the Witness has further stated that upon the allocation of the suit Property, and subsequently upon the transfer and registration of the property in his name, same enjoyed exclusive and peaceful occupation of the suit Property, to the exclusion of all and sundry.

22. However, the witness has added that despite the lawful and legal manner in which the suit property was allocated unto him, the Defendants herein have now sought to interfere with his lawful rights over the suit property.

23. Premised on the foregoing, the witness testified that same is therefore entitled to protection by the Honourable Court and in this regard, the witness implored the Honourable court to protect his rights to the suit Property.

24. In the alternative, the witness added that if the Defendants are keen to take over the suit property, then same ought to pay unto him (the witness), the sum of Kshs.240, 000, 000/= Only, being the Monetary value of the suit Property.

25. Other than the foregoing, the witness herein alluded to the witness statement dated the 4th April 2020 and same sought to adopt and rely on the witness statement. In this regard, the witness statement was admitted and constituted as Further evidence of the witness.

26. On the other hand, the witness also referred to a further witness Statement dated the 10th November 2021 and sought to adopt same as Further evidence in chief. Suffice it to point out that the further witness statement was duly adopted and or constituted as further evidence in chief on behalf of the witness.

27. Finally, the witness alluded to the List and Bundle of Documents dated the 4th April 2020 and same invited the Honourable court to adopt the Documents. In this regard, the documents were duly adopted and marked as exhibits P1 to P9, respectively.

28. On cross examination, by counsel for the 1st Defendant, the witness stated that the Letter seeking to be allocated a piece of Plot in Lang'ata Area arose from the information which same obtained/received from his Friends.

29. Nevertheless, the witness added that even though he submitted and delivered the Letter requesting to be allocated a Plot within Lang'ata Area, the Letter does not bear any stamp from the Office of the Commissioner of Lands.

30. As pertains to Capri Enterprise, which is shown to be the allottee of the Plot, the witness stated that same did not bring forth a copy of the Certificate of registration. However, the witness added that Capri, is a Business name and not a Limited liability Company.

31. In further answer to a question in cross examination, the witness pointed out that the Letter of allotment which same has produced before the Honourable court does not show/contain a Plan Number.

32. On the other hand, the witness also testified that the letter of allotment similarly does not show or state that the Land was being allocated on behalf of which County Council.

33. Nevertheless, the witness acknowledged that the Letter of allotment which same has produced in evidence was incomplete and essentially, same did not contain the page bearing the signature of the allocating authority/person.

34. Other than the foregoing, the witness acknowledged that the Letter of allotment also had Special conditions contained thereon. In particular, the witness stated that one of the Special conditions was that the allottee was to accept the terms of the letter of allotment within 30 days from the date of the issuance of the said Letter of allotment.

35. On the other hand, the witness added that there was another requirement that the monies at the foot of the letter of allotment were to be paid within 30 days from the date of issuance of the Letter of allotment.

36. Despite the foregoing, the witness pointed out that same wrote the acceptance letter on the 14th August 2002. Further, the witness added that the letter of acceptance was written more than 2 years from the date of allocation of the suit plot.

37. Similarly, the witness testified that the payments at the foot of the letter of allotment were also made on the 15th August 2002. However, the witness added that by the time he made the payments, same had not requested for extension of time within which to make the payments.

38. Further, the witness added that despite the lateness to accept the allotment and pay the levies contained at the foot of the Letter of allotment, the Commissioner of land proceeded to and accepted his payments.

39. On the other hand, the witness added that at the time of allotment of the land, same had not been surveyed. However, the witness testified that the land was thereafter surveyed culminating into the issuance of the Certificate of Lease.

40. The witness further added that the land which was allocated to him was Fourty (40) meters away from Southern bypass. In this regard, the witness stated that the land did not comprise of or form part of the Road Reserve.

41. In respect of the nature and type of developments, which had been carried out and undertaken on the suit property, the witness stated that the Developments were Temporary in nature.

42. In any event, the witness added that the Temporary structures were constructed in the year 2015 and that same would derived rental income therefrom. For clarity, the witness added that same used to derive a total of Kshs.120, 000/= Only, Per month from the rental premises.

43. Nevertheless, whilst still under cross examination, the witness still conceded that same has not availed to Honourable court any Books of Accounts or any Tax filed Returns.

44. Other than the foregoing, the witness also testified that currently the land in question has been invaded by strangers, but admitted that the strangers are not Employees/officers of the 1st Defendant.

45. Be that as it may, the witness also stated that same has not conducted any Official search over and in respect of the suit Property. In this regard, the witness conceded that same does not know of the obtaining status pertaining to the suit Property.

46. Other than the foregoing, the witness also stated that the commission, namely, the 1st Defendant, published Gazette notice and invited various affected persons to make Representations before her. In this regard, the witness added that same duly instructed his advocates to appear before the 1st Defendant and to represent his interests.

47. Nevertheless, the witness added that after his advocates had attended the hearings before the National Land Commission, the commission ultimately issued a decision whereby same recommended revocation of his title.

48. On re-examination, the witness stated that same made payments of the monies shown at the foot of the letter of allotment on the 15th August 2002.

49. Further, the witness added that the monies which he paid were duly accepted, acknowledged and receipted by the commissioner of lands. Further, the witness also testified that after the commissioner of land had accepted and acknowledged receipt of the monies in question, the Commissioner of land proceeded to and processed the title document, including the Grant which was ultimately registered in his name.

50. Other than the foregoing, the Witness also added that same was issued with a notice to cancel his title. However, the witness added that the suit Plot does not lie or fall within a Road Reserve.

51. With the foregoing testimony, the Plaintiff's case was closed.

**b. - THE 1ST DEFENDANT'S CASE:**

52. Though the 1st Defendant had duly filed a Statement of Defense, same however indicated to the Honourable court that same would not be calling any witness.

53. Essentially, the 1st Defendant's case was thereafter closed without calling any witness or tendering any evidence, whatsoever.

**c. THE 2ND AND 3RD DEFENDANTS' CASE:**

54. The 2nd and 3rd Defendants' case revolves around the Evidence tendered by one Milcha Muendo, who indicated that same is an Assistant Director of Survey and Mapping, currently working with Kenya National Highway Authority (KNHA). Further, the witness added that she is a Licensed surveyor and same is duly registered with the Land Surveyors Board of Kenya.

55. Further, the witness also testified that same has been the Assistant Director of Survey and Mapping with KHNA since the year 2009.

56. On the other hand, the witness testified that as concerns the subject matter, same recorded a witness statement dated the 20th September 2021. In this regard, the witness sought to adopt the Witness statement as her Evidence in chief.

57. At the instance and request of the witness, the witness statement dated the 20th September 2021 was adopted and constituted as her Evidence in chief.

58. On the other hand, the witness pointed out that same had also availed before the Honourable court two sets of documents contained at the foot of the List of documents dated the 26th October 2021. In this regard, the witness sought leave to have the Documents produced as Defense Exhibits.

59. Nevertheless, the documents at the foot of the list dated the 26th October 2021, were objected to on various reasons, inter-alia, that same were neither certified nor authenticated in accordance with the provisions of the *Evidence Act*, Cap 80 Laws of Kenya.

60. Subsequently, the Honourable court was enjoined to render a ruling concerning the admissibility of the impugned documents. For clarity, the Honourable court upheld the objection raised by counsel for the Plaintiff.

61. On cross examination by counsel for the 1st Defendant, the witness stated that the suit Property was/is Public Land and that same was reserved as a Transport Corridor including a Road and Railway line.

62. Further, the witness added that currently what is obtaining on the suit property is the road, namely, Southern bypass, which has since been constructed and completed.

63. Nevertheless, the witness added that the Railway line has not been constructed, but however added that the Plan for the construction of the Railway line remains in the pipeline.

64. On the other hand, the witness added that there is no clear line between the land in question and the road. However, it was stated that the land in question falls between the buffer zone and hence it is within the Road reserve.

65. In any event, the witness added that the land in question had hitherto been reserved for public purposes, namely, for transport corridor and hence same was not available for allocation or alienation by the Commissioner of Lands.

66. Further, the witness also added that having been reserved for Public use, the land would not be converted for Private use and be alienated in the manner that the Commissioner of land purported to do.

67. Other than the foregoing, the witness testified that Kenya National Highway Authority raised a Complaint with the Commission and sought the intervention of the commission to review the Grant relating to inter-alia, the suit Property.

68. Thereafter the witness added that the commission indeed took up the complaint raised by KNHA and issued the requisite Public notices, inviting representations from the various affected persons.

69. It was the further evidence of the witness that KNHA indeed attended the hearings before the Commission and that ultimately the Commission issued recommendations, whereby the commission recommended, inter-alia, that the title in respect of the suit property be revoked.

70. On cross examination by counsel for the Plaintiff, the witness indicated that same had attended Honourable court to represent the Interests of KNHA, who is her Employer.

71. Further, the witness testified that the suit Property falls within the Road reserve and was therefore Public land which had hitherto been set aside and reserved for a designated purpose.

72. Nevertheless, the witness averred and added that same has never worked with the office of the commissioner of lands.

73. When referred to the Plaintiff's Bundle of Documents, the witness testified that same contained a Certificate of Title relating to the suit Property. However, the witness clarified that what had been shown to her was a photocopy of the Certificate of title and not the original.

74. In respect to whether the certificate of title was duly signed, the witness clarified that same was indeed signed. However, the witness added that despite the signature appearing on the title, same could not authenticate whether the signature belonged to the commissioner of land.

75. On the other hand, the witness also pointed out that the main complainant pertaining to the proceedings before the National Land Commission was Kenya National Highway Authority, who complained about the Plaintiff's title. For clarity, the witness added that the authority was claiming that the land in question falls within the Road reserve and hence ought not to have been alienated, either in the manner purported by the Commissioner of Land or at all.

76. Besides, the witness pointed out that the issue about the illegality pertaining to the alienation and allocation of the suit property, came to the attention of Kenya National Highway Authority in the year 2014. Further, the Witness reiterated that it is in the year 2014 that KNHA sought the intervention of the Commission to review the title which was hitherto issued in favor of the Plaintiff.

77. At any rate, the witness added that other than the suit property, there are many other properties which have also been affected. Indeed, the witness added that same has given Evidence in many other related cases.

78. Nevertheless, the witness added that same is not privy to or knowledgeable of the outcome/decisions, if any, that have since been made in respect of the many other cases.

79. It was the further evidence of the witness that the transport corridor passes through or traverses the suit property. At any rate, the witness added that the suit property lies approximately 20 meters away from the road, but falls within the road reserve.

80. Further, the witness added that same has been to the suit property and that by the time she visited the suit property in 2013, the suit property was vacant and undeveloped.

81. On the other hand, the witness added that during the proceedings before the National Land Commission, the Plaintiff herein was not able to prove the legality of his title to and in respect of the suit property.

82. Be that as it may, the witness also stated that same cannot confirm whether the Plaintiff was aware that the suit property fell within Public land, which had been reserved. Besides, the witness added that there was already a structured plan in place which was to guide development along the Southern bypass. In this regard, the witness added that the Structure Plan is ordinarily kept Director of Physical Planning.

83. At any rate, the witness stated that same did not have any evidence to show or prove that the Plaintiff acted irregularly or unlawfully in the process leading to the acquisition and registration of the suit property.

84. On re-examination, the witness testified that her evidence before the Honourable court is calculated to protect the interests of the Government of the Republic of Kenya and in particular, Kenya National Highway Authority.

85. Other than the foregoing, the witness pointed out that the discovery that the suit Property had been unlawfully alienated and allocated to the Plaintiff transpired in the year 2014.

86. In any event, the witness further added that the discovery was informed by a Survey Plan which showed/indicated that the impugned property was falling within the Transport corridor.

87. Finally, the witness added that though same was shown a copy of an order emanating from the Rent Restriction Tribunal, the said order did not show the Plot number affected and relating to the order.

88. With the foregoing testimony, the 2nd and 3rd Defendants' case was duly closed.

**SUBMISSIONS BY THE PARTIES:**

**PLAINTIFF'S SUBMISSIONS:**

89. The Plaintiff filed written submissions dated the 11th May 2022 and in respect of which the Plaintiff herein has isolated, identified and highlighted four issues for consideration by the Honourable Court.

90. First and foremost, the Plaintiff has submitted that upon being issued with the Letter of allotment dated the 24th of June 1999, same complied with the terms of the letter of allotment, culminating into the registration of the Plaintiff as the proprietor of the suit property.

91. Further, the counsel for the Plaintiff has submitted that upon being issued with the requisite Certificate of title, the Plaintiff became the proprietor of the suit property and hence his rights and Interests thereto are legally protected and insulated.

92. In any event, counsel for the Plaintiff has invited the Honourable court to find and hold that by dint of Section 23(1) of the Registration of Titles Act, Chapter 281 Laws of Kenya, now repealed, the Plaintiff's title to the suit property cannot be defeated, unless it can be proved that same was issued or acquired by Fraud or Misrepresentation and in respect of which, the Plaintiff was a Party to.

93. Further, counsel for the Plaintiff has added that even where fraud or misrepresentation is proved, there was a further requirement and to show that the Plaintiff was aware of or privy to the fraud or misrepresentation alluded to.

94. Premised on the fact, that the Plaintiff's title was lawfully and legally processed, issued and registered, counsel for the Plaintiff has thus contended that the Plaintiff's title cannot be defeated in any other manner other than in accordance with *the Constitution*, 2010 and the relevant statutes.

95. In support of the foregoing submissions, counsel for the Plaintiff has invited the Honourable court to take cognizance of the holding in the case of Dr. Joseph N. K Arap Ngok versus Justice Moijo Olekewua (1997) (Unreported).

96. Secondly, counsel for the Plaintiff has invited the Honourable court to find and hold that upon accepting, acknowledging and receiving the monies at the foot of the letter of allotment, the Commissioner of Land created a Binding Contract between the Plaintiff and the Government of Kenya.

97. Consequently, counsel for the Plaintiff submitted that the Defendants herein cannot now purport to challenge, impugn and impeach the legality of the title that was issued in favor of the Plaintiff, on account of lateness of the payments of the statutory levies.

98. Thirdly, counsel for the Plaintiff has also invited the Honourable court to find and hold that by receiving the monies at the foot of the letter of allotment, albeit out of time, the Commissioner of Land therefore signaled waiver of the conditions or stipulations pertaining to timelines. In this regard, counsel for the Plaintiff invited the court to take into account and to apply the Doctrine of waiver.

99. To this end, counsel for the Plaintiff quoted and relied on the holding in the case of Serah Njeri Mwodi versus John Kimani Njoroge (2013)eKLR, to amplify and underscore the submissions relating to the relevance and application of the Doctrine of waiver.

100. Fourthly, learned counsel for the Plaintiff submitted that the issues being raised pertaining to and concerning the legality of the Plaintiff's Title, were never raised nor contained in the Statement of Defense filed by the Defendants.

101. To the extent that the issues pertaining to the regularity, legality or otherwise of the Plaintiff's title were not contained in the Statement of Defense, counsel has thus contended that the Defendants are barred by the Doctrine of Departure from ventilating issues that were not captured in their Statement of Defense.

102. In support of the foregoing submissions, counsel for the plaintiff has invoked and relied on the case of Dakianga Distributors Ltd versus Kenya Seed Company Ltd (2015)eKLR, Independent Electoral & Boundaries Commission & Another versus Stephen Mutinda Mule and David Sironga Oletukai versus Francis Arap Muge & Others (2016)eKLR.

103. Finally, counsel for the Plaintiff has also submitted that the honourable court is seized of the requisite competence and Jurisdiction to issue and grant Declaratory Judgment in respect of the subject matter. In this regard, counsel for the Plaintiff has submitted that a Declaratory Judgment would have the requisite force to protect and preserve the Plaintiff's title and Interests over the suit property.

104. In support of the submissions pertaining to the legal import and tenor of a Declaratory Judgment, counsel for the Plaintiff has cited and relied on various decision including Republic versus Cabinet Secretary for Interior Security, Ex-parte Gregory Onaro Nyauchi & 4 Others (2017)eKLR, Republic versus Kenya Revenue Authority, Ex-parte Abadaire Freight Services Ltd & 2 Others (2004)2KLR

530, Matalinga & Others voersus Attorney General (1972)EA 518 and Johana Nyokwoyo Buti versus Walter Rasugu Omariba & Others Civil Appeal No. 182 of 2006, respectively.

105. Premised on the foreging submissions, counsel has contended that the Plaintiff herein has duly proved and established his case on a balance of probabilities and thus same implored the Honourable Court to grant the Reliefs sought at the Foot of the Plaint.

**b. 1ST DEFENDANT'S SUBMISSIONS**

106. It is appropriate to state that though the counsel for the 1st Defendant was present when directions were taken or issued pertaining to the filing or exchange of written submissions, same however did not file any written submissions either within the stipulated timeline or at all.

107. In the premises, it is appropriate to underscore that no written submission were filed by and on behalf of the 1st Defendant.

**c. 2ND AND 3RD DEFENDANTS' SUBMISSIONS:**

108. The 2nd and 3rd Defendants' filed written submissions dated the 10th June 2022 and same have raised, highlighted and amplified three issues for consideration by the Honourable Court.

109. First and foremost, counsel for the 2nd and 3rd Defendants has submitted that the 1st Defendant herein was seized of and bestowed with the requisite Jurisdiction and competence to review the Grant and Certificate of title, inter-alia, including the title issued to the Plaintiff herein.

110. Premised on the foregoing basis, counsel for the 2nd and 3rd Defendants has therefore added that the 1st Defendant was therefore within her constitutional mandate to issue the recommendations pertaining to and concerning revocation of the Plaintiff's title to and in respect of the suit property.

111. To this end, counsel for the 2nd and 3rd Defendants has invoked and relied upon the provisions of Article 68(c) (v) of *the Constitution* 2010.

112. Secondly, counsel for the 2nd and 3rd Defendants has submitted that even though the Plaintiff's title to and in respect of the suit property was issued pursuant to the Registration of Titles Act, Cap 281 Laws of Kenya, now repealed, the said title is still capable of being defeated under the law, provided the requisite conditions are established and proved.

113. Further, counsel for the 2nd and 3rd Defendants added that the Plaintiff's title to and in respect of the suit property was illegally procured and issued. In any event, counsel has added that the requisite procedures, established by and under the law were neither followed nor complied with before the issuance of the Plaintiff's title.

114. To the extent that the Plaintiff's title was issued contrary to and in violation of the established provisions of the law, counsel has added that the said title was therefore illegal, unlawful and thus invalid.

115. In support of the foregoing submissions, counsel for the 2nd and 3rd Defendants has cited various decisions, inter-alia, Moses Okatch Owuor & Another versus The Attorney General & Another (2017)eKLR, Nelson Kazungu Chai & 9 Others versus Pwani university (2014)eKLR and Joseph Kamau Muhoro versus Attorney General & Another (2021)eKLR.

116. Thirdly, counsel for the 2nd and 3rd Defendants has submitted that the title to and in respect of the suit property was recommended for revocation and was thereafter revoked following the dismissal of Judicial review proceedings filed by the Plaintiff herein.

117. For clarity, counsel invited the Honourable court to take cognizance of the decision made vide Republic versus National Land Commission & others Ex-parte Gorge Kimani Njuki T/A Capri Construction in Milimani JR Misc. Application No. 557 of 2017.

118. Other than the foregoing, counsel has also added that the Plaintiff herein has also not placed before the Honourable court any evidence to establish that same suffered any loss pertaining to and concerning the suit property, to warrant an award of Mesne Profits.

119. Essentially, counsel has pointed out that in the absence of the requisite evidence, the Plaintiff's claim for Mesne Profits is therefore misconceived, misguided and legally untenable.

120. In support of the submissions pertaining to claim for Mesne Profits, counsel for the 2nd and 3rd Defendants has relied on various decisions including Peter Mwangi Mbuthia & Another versus Samow Eden Osman (2014)eKLR and Karanja Mbugua & Another versus Marybin Holding Company Ltd (2014)eKLR.

**ISSUES FOR DETERMINATION:-**

121. Having reviewed the Plaint dated the 4th April 2020, the Witness statements attached thereto, as well as the List and Bundle of Documents relied on by the Plaintiff and having considered the Statement of Defense filed on behalf of the Defendants and upon evaluating the oral evidence tendered on behalf of the designated Parties; and similarly upon considering the written submissions, the following issues are pertinent and worthy of determination;

    i. Whether the Plaintiff's Title to and in respect of the suit property was lawfully acquired and thus indefeasible under the law.

    ii. Whether the Plaintiff herein is entitled to Declaratory reliefs/orders sought in respect of the suit Property.

    iii. Whether the Plaintiff has established or placed before the Honourable Court sufficient material to warrant an award of Mesne Profits.

    iv. What Reliefs ought to be granted.

**ANALYSIS AND DETERMINATION:**

**ISSUE NUMBER 1**

Whether the Plaintiff's Title to and in respect of the suit Property was lawfully acquired and thus Indefeasible under the law.

122. The Plaintiff tendered evidence that on or about April/May 1999, same received information from his friends, pertaining to and concerning plots around Lang'ata Area, which were being allocated by the commissioner of lands.

123. Pursuant to and upon receipt of such information, the Plaintiff testified that same was obliged to and indeed wrote an application letter to the office of the commissioner of land, seeking to be allocated a Plot thereat, namely, within the Stipulated area.

124. It was the Plaintiff's further evidence that arising from his application, the commissioner of land proceeded to and issued a Letter of allotment relating to and concerning the suit plot. Essentially, the witness pointed out that the commissioner of land duly allocated unto him the suit plot.

125. Other than the foregoing, the Plaintiff added that after same was duly allocated the suit plot, same proceeded to and accepted the allotment of the suit plot. For clarity, the Plaintiff pointed out that the letter of acceptance was dated the 14th August 2002.

126. The Plaintiff further testified that after duly accepting the Letter of allotment, vide acceptance letter dated the 14th August 2002, same similarly proceeded to and made payments in respect of the Statutory levies, which were reflected at the foot of the Letter of allotment.

127. It is imperative to state and observe that both the Letter of acceptance and the payment of the statutory levies, were made on the 14th August 2002 and 15th August 2002, respectively.

128. Be that as it may, it is common ground that by the time the Letter of acceptance was generated and the payment of the statutory levies made, the stipulated 30 days period contained at the foot of the Letter of allotment had long lapsed and extinguished.

129. Other than the foregoing, it is also appropriate to recall that the 30-days period is stated and underlined to be a Special conditions in the letter of allotment.

130. Essentially, the Special conditions thus require to be complied with and adhered to, timeously, promptly and with due promptitude.

131. Notwithstanding the foregoing, there is no gainsaying that the said special conditions stipulate and underscore that in the event of failure, neglect and inability to comply with the said terms, the letter of allotment would be extinguished without further reference.

132. There is no contest that indeed the letter of allotment was neither accepted nor paid for within the stipulated 30-day period. Consequently, the question that arises for consideration and ultimate determination is whether the belated acceptance and payment of the statutory levies, would resuscitate the terms and life-span of the impugned Letter of allotment.

133. According to counsel for the Plaintiff, the fact that the commissioner of land (sic) received, acknowledged and receipted the payments of the statutory levies, connotes that the Commissioner of land waived any objection that same would have had as pertains to the lateness.

134. Other than the foregoing, counsel for the Plaintiff has also submitted that after receiving the statutory levies, albeit belatedly, the commissioner of land proceeded to and processed the lease documents pertaining to and concerning the suit property.

135. Premised on the foregoing, counsel for the Plaintiff has therefore invited the Honourable Court to invoke and rely on the Doctrine of waiver.

136. Nevertheless, the other aspect that would require due consideration and appropriate determination is whether any payment over and in respect of an extinct letter of allotment is capable of reinstating, restoring and reviving such Letter of allotment.

137. In my considered view, the terms and conditions contained in the letter of allotment were explicit and binding on the Parties. Consequently, it was obligatory upon the Plaintiff to ensure due and timeous compliance with the terms of the impugned Letter of allotment.

138. However, there is no gainsaying that the Plaintiff herein did not comply with and adhere to the terms of the Letter of allotment. Indeed, by the time the Plaintiff was endeavoring to accept the terms of the Letter of allotment and to make payments in respect thereof, the impugned Letter of allotment had lapsed and was therefore non-existent.

139. Essentially, by the time the Plaintiff was accepting the terms of the Letter of allotment and making belated payments thereto, there was no valid Letter of allotment that was capable of being accepted, let alone being acted upon.

140. On the other hand, it is appropriate to observe that the Letter of allotment had become void and invalid. Consequently, the Dead letter of allotment could not be revived by any amount of payment ex-post facto.

141. In respect of the foregoing submissions, I am duly persuaded and inspired by the holding in the case of H.H. DR. SYEDNA MOHAMMED BURHANNUDDIN SAHEB & 2 OTHERS versus BENJA PROPERTIES LTD & 2 OTHERS [2007] eKLR, where the Court observed as hereunder;

> " In any event, the letter of allotment relied upon by the Defendant had itself expired, and was therefore invalid. I do not accept Mr. Kirundi, Counsel for Defendant's argument, that the expired letter, when acted upon, had been "revived" through conduct. The letter had expired. It was dead. There was nothing to "revive".

142. Additionally, this Honourable court has also had an occasion to reflect on the same issue. For clarity, this court found and held that a letter of allotment whose terms have expired becomes extinguished and thus incapable of being acted upon, either on the basis of acceptance or payments of the statutory levies.

143. For coherence, this Honourable court made the observation in the case of Joseph Kamau Muhoro versus Attorney General & Another (2021)eKLR, where the court stated and observed as hereunder;

> 32. From the contents of the demand notice, it is evident and/or apparent that the payment of the stand premium and annual rent, were only made on the 23rd of December 2009. For clarity, it suffices to say that the said payments were being made more than 11 years from the date when the Letter of Allotment was issued.
>
> 33. In my humble view, by the time the Plaintiff/Applicant herein, was purporting to pay the stand premium and the annual rent, which were mandatory conditions to the letter of Allotment, the allotment in question was already extinguished and was thus incapable of attracting any payment and/or being activated whatsoever.

144. In view of the forgoing observation, it is my considered view that the Doctrine of waiver which has been invoked and relied upon by counsel for the Plaintiff, is irrelevant and inapplicable.

145. Additionally, it is my considered view that the Doctrine of waiver which is an equitable Doctrine cannot supersede or overtake the law. For completeness, Equity augments and follows the law and not otherwise.

146. Besides, I also wish to add that the Doctrine of waiver, would not in any event revive or restore a void document. Suffice it to point out that a document or an act which is void, is void for all intents and purposes. Consequently, same is incapable of revival or restoration.

147. To this end, it is appropriate to recall the dictum in the case of Benjamin Leornard Macfoy versus. United Africa Co. Ltd [1961] 3 All E.R. 1169, where Lord Denning, while delivering the opinion of the Privy Council at page 1172 (1) said and observed as hereunder:

> "If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every

proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

148. The second aspect that also merits consideration in the course of ascertainment whether the Certificate of title issued in favor of the Plaintiff was lawful and legitimate, touches on and concerns the Letter of allotment itself.

149. In this respect, it is appropriate to recall that the Plaintiff admitted and acknowledged that the Letter of allotment which same had availed to Honourable court and produced as an exhibit was incomplete.

150. For clarity, the witness stated that the Letter of allotment did not have the signature page and hence the Honourable court could not be able to confirm whether same was indeed signed or otherwise.

151. To this end, it is appropriate to reproduce the answers by the Plaintiff during cross examination by counsel for the 1stDefendant.

152. For convenience, the answers are reproduced as hereunder;

> " I don't have the original letter of allotment. What I have filed in court does not have the signature page. The letter of allotment as it is has not been signed."

153. From the reproduced excerpt, it is common ground that in the absence of a complete and duly signed letter of allotment, then it is doubtful how the Plaintiff procured and obtained the resultant certificate of title over and in respect of the suit property.

154. At any rate, it must be recalled that where the validity of a title or certificate of title is questioned, it behooves the title holder to avail and supply the requisite documentation to vindicate the legality, propriety and validity of the process.

155. Additionally, it would not be enough for the title holder to wave the Certificate of title and contend that because he/she holds the title, then same ought to be protected by the Honourable court.

156. In this respect, it is appropriate to take cognizance of the apt and succinct statement of the law as espoused vide the holding in the case of Munyua Maina versus Hiram Gathiha Maina [2013] eKLR, where the Honourable Court Of Appeal stated as hereunder;

> " 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 on the register.

157. The third aspect which is also appropriate to consider and address relates to whether the suit property was unalienated public land capable of being alienated to and in favor of the Plaintiff or such other Private developer.

158. In this respect, the evidence of DW1 becomes relevant, paramount and critical. Suffice it to observe that the evidence of this witness was neither shaken nor controverted.

159. For coherence, the witness testified as hereunder during cross examination by counsel for the 1st Defendant;

> " The suit property is Public land and same was reserved for a transport corridor including a Road and Railway line. What is currently on the Land is a road. The railway-line has not been developed but there are future plans to do so. There is no clear line between the land and the road. The land in question is buffer-zone. Where the land is reserved for public use, the same cannot be converted for any private use.
>
> The commissioner of land cannot allocate such land or at all. I am not aware of any process that can be used to convert such land to private use."

160. From the foregoing excerpt, what becomes apparent is that the suit property fell within a segment of land that had already been reserved as a transport corridor, for purposes of construction of a road and railway-line.

161. Having been reserved and therefore designated for the intended purposes, the portion comprising the suit property therefore ceased to be unalienated Government land. Consequently, same was therefore not amenable for alienation or allocation whatsoever.

162. To buttress the foregoing observation, it is appropriate to adopt, reiterate and emphasize the holding in the case of Benja Properties Limited versus Syedna Mohammed Burhannudin Sahed & 4 others [2015] eKLR, where the Court Of Appeal held as hereunder;

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

163. Additionally, it is also appropriate to take cognizance of the holding in the case of Kenya Anti-Corruption Commission versus Online Enterprises Ltd (2019)eKLR, where the court stated as hereunder;

> " Further in the case of Milankumarn Shar & Two others –vs- City Council of Nairobi & Others, Nairobi HCCC No. 1024 of 2005 the Court found that the Commissioner of Lands did not have authority under Section 3 of the Government Lands Act to make any grant or disposition of any estate, interest or right in or over a portion that was a part of a public road and therefore not unalienated Government Land. The learned Judges in this case quoted with approval the case if Paul Nderitu Ndung'u & 20 Others –V- Pashito Holdings Limited & Another (Nairobi HCCC No. 3063 of 1996) where it was held that the Commissioner of Lands had no legal authority to allocate the two pieces of land which had been reserved for a Police Post and a Water Reservoir as they had already been alienated. In the Paul Nderitu Ndung'u case Justice Mbogholi Msagha said:
>
> > "Under the Government Lands Act (Cap 280, Laws of Kenya) the Commissioner of Lands can only make grants or dispositions of any estates, interests or rights in over unalienated government land. (Section 3). In the instant case, the two parcels

of land among others had been alienated and designated for particular purposes. It was not open for the Commissioner of Lands to re-alienate the same. So the alienated was void ab initio."

The above tackles the issue that the 5th defendant acted illegally and contrary to the provisions of the Government Lands Act (Cap 280), the *Kenya Railways Corporation Act* (Cap 397) and the *State Corporations Act* (Cap 446) when he purported to issue a lease over the suit property to the 1st defendant.

164. The final aspect that needs to be addressed relates to whether the land which was being allocated to and in favor of the Plaintiff was indeed in existence. For clarity, it is common ground that before the commissioner of land could allocate any land, the land intended to be allocated must have been identified, isolated and thereafter a Part Development Plan prepared to confirm its existence.

165. Similarly, it is important to state that the Part Development Plan, if any, would thereafter be subjected to the usual checking, confirmation and necessary approval, by the relevant authorities/ Offices.

166. Once the Part Development Plan is approved then same would be assigned the requisite number to signal the existence of the land, which is the subject of allotment, alienation or allocation.

167. However, in respect of the subject matter, it is common ground that the impugned letter of allotment did not identify or relate to any approved Part Development Plan.

168. Similarly, I must return to the evidence of the Plaintiff. For clarity, during cross examination, the witness testified as hereunder;

" The land in question was allocated to Capri Construction. Capri construction is a business name. I don't have the certificate of registration of Capri Construction. The said certificate is not one of the documents filed in court. The letter of allotment does not have a plan number shown on the same."

169. Surely, the commissioner of land could not purport to alienate or allocate any piece of land prior to the confirmation of its existence. In my respectful view, the existence of such land before alienation or allocation could only be confirmed upon the preparation and approval of the requisite Part Development Plan.

170. In the absence of the duly approved Part Development Plan, the Commissioner of land was allocating and alienating non-existent land.

171. To buttress the foregoing elementary, albeit significant observation, it is appropriate to adopt, reiterate and endorse the holding in the case of Moses Okatch Owuor & Another versus Attorney General & Another (2017)eKLR, where the court stated and observed as hereunder;

" It is trite law that under the repealed Government Lands Act, a Part Development Plan must be drawn and approved by the Commissioner of Lands or the Minister for Lands before any un-alienated Government Land could be allocated. After a Part Development Plan (PDP) has been drawn, a letter of allotment based on the approved PDP is then issued to the allotees. There was no evidence that the PDP herein was approved by the Commissioner of Lands. Angote J in Nelson Kazungu Chai & 9 Others ..Vs..Pwani University [2014] eKLR stated the steps of alienation of Government Land.

It is only after the issuance of the Letter of Allotment, and the compliance of the terms therein, that a cadastral survey can be conducted for the purpose of issuance of a Certificate

of Lease. The process was also restated in the case of African Line Transport Co. Ltd... Vs...The Hon. Attorney General, Mombasa HCCC No.276 of 2013, where Njagi J held as follows:-

> "Secondly, all the defence witnesses were unanimous that in the normal course of events, planning comes first, then surveying follows. A letter of allotment is invariably accompanied by a PDP with a definite number. These are then taken to the department of survey, who undertakes the surveying. Once the surveying is complete, it is then referred to the Director of Surveys for authentication and approval. Thereafter, a land reference number is issued in respect of the plot".

A Part Development Plan (PDP) can only be prepared in respect to Government land that has not been alienated or surveyed. It was not clear how the 2nd Defendant allotted this suit property to the Plaintiffs whereas it had been set aside for security purposes. DW2 testified that they had a project organized by the World Bank and the suit land was designated for security purposes that is the Police Post and the Police Line. The question then posed by this Court is; Was the right procedure for alienating the suit property followed? The Court finds that the right procedure was not followed at all. Once the PDP was published, the Director of Physical Planning did not submit to the Minister for approval, and there was no assignment of plan numbers and details entered into the register. This should have culminated to the approval and issuance of the allotment by the Commissioner of Lands.

172. In view of the various perspectives that have been highlighted, amplified and canvased in the foregoing paragraphs, it is my finding and holding that the Plaintiff herein did not acquire any legitimate and lawful title to the suit property.

173. Similarly, I find and hold that by the time the commissioner of land was purporting to allocate and alienate land in favor of the Plaintiff, the impugned land stood alienated and was therefore not available for further alienation or allocation, whatsoever.

**ISSUE NUMBER 2**

Whether the Plaintiff herein is entitled to Declaratory Reliefs/Orders sought in respect of the suit Property.

174. Though the Plaintiff herein did not avail or tender evidence that same had previously filed Judicial Review proceedings vide Milimani JR Misc. Application No. 557 of 2017, evidence was availed to the court, whereupon it became crystal clear that indeed the Plaintiff herein had previously filed a Judicial review cause but which had been heard and dismissed.

175. For clarity, the said decision is duly reported and cited as Republic v National Land Commission & Another ; Kenya National Highways Authority (Interested Party) Ex-parte George Kimani Njuki T/a Capri Construction(2019)eKLR.

176. Other than the foregoing, evidence abound that the 1st Defendant herein published gazette notice whereupon same sought to review grants and dispositions in respect of various titles, inter-alia, the title of the suit property.

177. Subsequently, it was stated that the 1st Defendant indeed conducted Public hearings touching on and concerning various Properties, inter-alia, the suit property and thereafter same rendered her decision.

178. It is instructive to note that the 1st Defendant herein made a recommendation that the title in respect of the suit property be revoked. For clarity, it is the said decision that provoked the Judicial Review proceedings that were filed by the Plaintiff herein.

179. To my mind, the decision of the 1st Defendant herein, which was made after conducting the public hearings, was an administrative/statutorily decision, made in line with her Constitutional mandate. See Article 68(c) (v) of *The Constitution* 2010.

180. Having made the impugned decision, it behooved the Plaintiff herein or any such aggrieved Party to challenge the impugned decision either by way of Judicial Review proceedings or by virtue of a Constitutional Petition.

181. To my mind, it is only the Judicial Review proceedings or a Constitutional Petition, that would provide a basis upon which an appropriate Prerogatory Orders/ Writs can issue and or be granted, with a view to quashing the decision of the 1st Defendant made in exercise of her Constitutional Mandate.

182. At any rate, it is common knowledge that the Plaintiff herein indeed filed Judicial Review proceedings challenging the decision of the National Land Commission. However, the Judicial Review proceedings was dismissed.

183. In my humble view, an administrative/statutory decision like the one before hand, cannot be quashed, impeached or be invalidated vide a Declaratory order in the manner sought by the Plaintiff herein.

184. On the other hand, the other question that also arises is whether the Declaratory order sought, if at all, can revive or restore a Certificate of title that has already been revoked.

185. To my mind, once the certificate of title is revoked, unless the order recommending such revocation and the ultimate revocation are quashed, then the Declaratory order would superfluous and moot.

186. Premised on the foregoing, I am of the considered view that the Declaratory relief that is being sought by and at the instance of the Plaintiff herein, cannot issue, taking into account the obtaining circumstances.

187. Notwithstanding the foregoing, it is also appropriate to mention that the validity, propriety and legality of the recommendation for revocation, having hitherto been challenged vide judicial review, which was dismissed, the same validity, cannot now be re-visited by way of a Declaratory Relief.

188. Respectfully, the declaratory relief herein would be seeking to declare that the impugned recommendations were illegal and unlawful. Yet, on the other hand a court of competent Jurisdiction has already declined to quash the impugned recommendation by way of Judicial Review.

189. Essentially, what becomes evident is that the Plaintiff's suit and more particularly, the Reliefs seeking for Declaratory orders are constructively Res-judicata.

190. In this regard, the holding in the case of John Florence Maritime Ltd versus The Cabinet Secretary, Transport, Infrastructure & Public Works & Another (2015)eKLR, is apt and succinct.

191. For coherence, the Court of Appeal stated and observed as hereunder;

> " The rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter.
>
> Res judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon.

> It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law.
>
> Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably. In a nutshell, res judicata being a fundamental principle of law may be raised as a valid defence.
>
> It is a doctrine of general application and it matters not whether the proceedings in which it is raised are constitutional in nature. The general consensus therefore remains that res judicata being a fundamental principle of law that relates to the jurisdiction of the court, may be raised as a valid defence to a constitutional claim even on the basis of the court's inherent power to prevent abuse of process under Rule 3(8) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. On the whole, it is recognized that its scope may permeate broad aspects of civil law and practice. We accordingly do not accept the proposition that Constitution-based litigation cannot be subjected to the doctrine of res judicata.
>
> However we must hasten to add that it should only be invoked in constitutional litigation in the clearest of the cases. It must be sparingly invoked and the reasons are obvious as rights keep on evolving, mutating, and assuming multifaceted dimensions.

192. Premised on the twin issues that have been amplified in terms of the preceding paragraphs, I come to the conclusion that the declaratory reliefs, which are being sought by and at the instance of the Plaintiff herein are not only misconceived and bad in law but otherwise legally untenable.

193. Before departing from the arguments pertaining to whether declaratory orders sought, would be relevant and available to the Plaintiff, either in the manner sought or at all, there is yet a third aspect that deserves mention.

194. To this end, it is appropriate to recall the answers provided by the Plaintiff during cross examination by counsel for the 1st Defendant.

195. For coherence, the answers supplied by the Plaintiff are reproduced as hereunder;

> " The land in question has since been invaded by strangers. The strangers are not officers of the 1st Defendant. I have not conducted a search on the land. I don't know the obtaining status of the land in question. On the 17th of March 2017, the 1st Defendant published a notice. The notice was for purposes of inviting us to show cause why the title should not be revoked. I was represented during the commission hearing by an advocate known as M/s Murage & Juma Advocates, respectively. The commission informed me the reasons for revocation of title in respect of the suit property."

196. What becomes evident from the reproduction is that the title over and in respect of the suit property appears to have been revoked. For clarity, the Plaintiff acknowledged to have been furnished with the reasons for the revocation of the title.

197. Similarly, the Plaintiff herein also testified that same did not carryout or conduct an Official search over and in respect of the suit property prior to the filing of the suing or even after.

198. Additionally, the Plaintiff also stated that same was not aware of the obtaining status of the suit property. Clearly, it was incumbent upon the Plaintiff to prove that the suit property was still in existence and not otherwise.

199. Unfortunately, the Plaintiff has failed to tender evidence before the Honourable court to establish and demonstrate the existence of the suit property.

200. In my considered view, if the title to the suit property has been revoked and hence same is non-existent, can the Declaratory Orders sought be issued in respect of Title Document, which has since been revoked and is non-existent.

201. I am afraid, that Declaratory Orders/Judgment can only speak to existing rights and not otherwise. In this regard, I would similarly have declined to issue the Declaratory Reliefs sought and particularly, the claim that the Plaintiff is the legal and rightful owner of the suit property.

202. Looked at from the various nuances, which I have elaborated herein before, I come to the conclusion that the Declaratory Judgment sought by the Plaintiff herein is misconceived, inappropriate and legally untenable.

**ISSUE NUMBER 3**

Whether the Plaintiff has established or placed before the court sufficient material to warrant an award of Mesne Profits.

203. The Plaintiff herein similarly sought for Judgment on account of Mesne Profits, premised on the activities of the Defendants, which are contended to have denied and deprived the Plaintiff of his lawful rights to the suit property.

204. Further, the Plaintiff also contended that as a result of the impugned Notice which was issued by the 1st Defendant and in respect of which same sought to impugn the title of the suit property, the Plaintiff's tenants stopped paying rents over the suit property.

205. In any event, the Plaintiff had also testified that prior to or before the offensive activities, same was deriving or receiving the sum of Kshs.120, 000/= Only, per month from the suit property on accounts of rents.

206. In a nutshell, what I hear the Plaintiff to be saying is by virtue of being the registered proprietor of the suit property, same is now entitled to Mesne Profits arising from the activities of the Defendants.

207. In the premises, it is now appropriate to discern what then does Mesne Profits denote and in what circumstances is same payable.

208. As concerns the import and tenor of Mesne Profits, it is appropriate to adopt and reiterate the holding of the Court Of Appeal in the case of Attorney General versus Halal Meat Products Ltd (2016) eKLR, where the court stated as hereunder;

> " It follows therefore that where a person is wrongfully deprived of his property he/she is entitled to damages known as mesne profits for loss suffered as a result of the wrongful period of occupation of his/her property by another. See McGregor on Damages, 18th Ed. para 34-42.

209. Additionally, it is also important to recall the holding of the same Court Of Appeal in the case of Mistry Valji versus Janendra Raichand & 2 others [2016] eKLR, where it was observed as hereunder;

> 'Measure for mesne profits was described in the Privy Council decision in Invergue Investments v Hacketh (1995) 3 All ER 842 cited with approval in the Kenya Hotel Property Ltd case (supra) as follows:
>
> > " This is form of an ordinary claim for mesne profit, that is to say, a claim for damages for trespass to land….The question for decision is the appropriate measure of damages."
>
> The privy council observed that that measure of damages must be reasonable rent. The usual practice is to assess mesne profits down to the date when possession is given.'

210. Flowing from the fore-cited decision, what becomes apparent is that before one can lay a claim and entitlement to Mesne Profits, the claimant must prove title and ownership to the suit property.

211. Secondly, it would also be incumbent upon the Plaintiff/ Claimant to plead and thereafter to specifically prove loss suffered, to warrant entitlement to Mesne profits.

212. Additionally, Mesne profits are in the nature of or otherwise akin to special damages and therefore same must be particularly pleaded and specifically proved.

213. Guided by the foregoing observations, the question that arises is whether the Plaintiff herein has proved ownership over and in respect of the suit property, as the precursor to the claim for Mesne Profits.

214. Sadly, this Honourable court has since found and held that the Plaintiff's title to the suit property was illegally and unlawfully acquired and hence same was void ab initio.

215. To the extent that the Plaintiff's title to and in respect of the suit property was void and thus invalid, the critical ingredient that anchors a claim for Mesne Profits is therefore missing/absent.

216. Notwithstanding the foregoing, it is also imperative to point out that even if the Plaintiff had proved title to the suit property, which is not the case, the Plaintiff would still have been obliged to prove the claim for Mesne profits.

217. Yet again, I must point out that though the Plaintiff contended that same was deriving the sum of Kshs.120, 000/= only, per month, on account of rents, no credible evidence was tendered to vindicate such claim.

218. To the contrary, what the Plaintiff placed before the Honourable court was an order from the Rent Restriction Tribunal, allegedly granting the Plaintiff Leave to levy distress against named tenants.

219. However, it is important to point out that the order adduced by the Plaintiff does not show that same is related to or concerned with premises, if any, relating to the suit property.

220. Additionally, the said impugned order does not show what was the monthly rent, if any, that the tenants in question were paying.

221. Simply put, the extracted order from the Rent Restriction Tribunal, upon which the Plaintiff hinges his claim for Mesne profits, is of little/nominal assistance to the Plaintiff.

222. To my mind, the Plaintiff herein has failed to prove and demonstrate entitlement to Mesne Profits, both on account of Ownership of the suit property and on account of want of proof of the amount that was alluded to/claimed by the Plaintiff.

223. Consequently and in the premises, I find and hold that no basis has been laid to warrant to grant the Mesne Profits, either as sought or at all.

**ISSUE NUMBER 4**

What Reliefs ought to be granted.

224. Other than the Declaratory Judgment, the Plaintiff herein had also sought for a Permanent Injunction to restrain the Defendants from interfering with the Plaintiff's rights in respect of the suit property.

225. In the alternative, the Plaintiff herein had also sought for an order for compensation on account of loss of the suit property. In this regard, the Plaintiff sought to be paid the sum of Kshs.240, 000, 0000 only, according to a valuation carried on the suit property on the 30th March 2020.

226. Starting with the claim for Permanent injunction, it is my humble view that such a claim or order can only issue upon proof that the claimant has a clear, lawful and legitimate title to the Suit Property.

227. In respect of the subject matter, it has been established and demonstrated that the Plaintiff did not acquire any Lawful title and interest over the suit property.

228. In the premises, it is my finding and holding that in the absence of lawful rights and title to the suit property, the Plaintiff is not entitled to an order of Permanent injunction.

229. Similarly, as concerns the prayer for Compensation for loss of land, it is imperative to state and underscore that one can only be compensated for loss of what One hitherto owned and not otherwise.

230. Having found and held that the Plaintiff does not or did not lawfully own the suit property, my humble position is that same is not entitled to any scintilla or iota of compensation or at all.

231. Notwithstanding the foregoing, there is yet another aspect that requires to be mentioned. For clarity, this relates to the value assigned to the suit Property on the basis of the valuation report dated the 30th March 2020.

232. In this regard, what I wish to point out is that even assuming that I had come to a conclusion that the Plaintiff was entitled to recompense, on account of loss of the suit property, the proposed value would not be available to the Plaintiff.

233. The reason why the proposed value will not be payable is because the impugned valuation report was never produced by the maker thereof. In this regard, even though same forms part of the Exhibits tendered, its probative Value is nominal, if not, zero.

234. Be that as it may, I beg to reiterate that having made extensive and elaborate deliberations on the propriety, legality and validity of the Plaintiff's title to the suit property, the remainder deliberations, are merely meant to conclude the issues that had been highlighted.

235. Effectively, it is my humble and considered view that the Reliefs sought by the Plaintiff are not legally tenable and hence same cannot be awarded.

**FINAL DISPOSITION:-**

236. Having reviewed, analyzed and addressed the salient aspects of the Plaintiff's case, it must have become apparent and evident that the Plaintiff's suit is devoid and bereft of merits.

237. Consequently and in the premises, the Plaintiff has failed to prove his claim to the requisite standard in accordance with the law. See Sections 107, 108 and 109 Of the *Evidence Act*, Chapter 80, Laws of Kenya.

238. In a nutshell, the Plaintiff's suit be and is hereby Dismissed with costs to the Defendants.

239. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31st DAY OF OCTOBER 2022.**

**OGUTTU MBOYA,**

**JUDGE**

**In the Presence of;**

**Kevin Court Assistant**

**Ms. Mwebi h/b for Mr. J B Machira for the Plaintiff**

**N/A for the 1st Defendant**

**Ms Nyawira for the 2nd and 3rd Defendants**