



**Onchwati & 4 others v Nakuru County Government & another (Environment & Land Case 228 of 2014) [2024] KEELC 460 (KLR) (1 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 460 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 228 OF 2014  
A OMBWAYO, J  
FEBRUARY 1, 2024**

**BETWEEN**

**CHARLES ONDIEKI ONCHWATI ..... 1<sup>ST</sup> PLAINTIFF  
WILLIAM RATEMO NYAMURO ..... 2<sup>ND</sup> PLAINTIFF  
CHARLES ANYANZA NYAANGA ..... 3<sup>RD</sup> PLAINTIFF  
ANDREW MAGOMA OMWOYO ..... 4<sup>TH</sup> PLAINTIFF  
MARGARET WANGARE MAINA (LEGAL ADMINISTRATRIX ESTATE OF  
JAMES MAINA (DECEASED) ..... 5<sup>TH</sup> PLAINTIFF**

**AND**

**NAKURU COUNTY GOVERNMENT ..... 1<sup>ST</sup> DEFENDANT  
BOARD OF GOVERNORS NATEWA SECONDARY SCHOOL 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiffs commenced this suit vide an Amended Plaintiff on 13<sup>th</sup> August, 2019 against the Defendants seeking the following orders:
  - a. The Plaintiffs herein are the owners and beneficiaries respectively of the suit land herein known as Nakuru/Municipality Block 25/1109 Plots No. A, B, C and D and now LR No 12570/238, 239, 240 & 241 respectively.
  - b. Declaration that the Plaintiffs herein are owners of their originally respective plots in the said land herein originally known as Nakuru/Municipality Block 25/1109 Plots No. A, B, C and D and now LR No 12570/238, 239, 240 & 241 respectively.



- c. Permanent injunction restraining the Defendants herein, their servants, agents from evicting/invading or interfering with the Plaintiff's agents/servant's quiet enjoyment of the said land thereafter.
  - d. Any other relief this honourable court may deem fit.
2. The 2<sup>nd</sup> Defendant filed its Amended Defence and Counter claim on 1<sup>st</sup> February, 2021. It sought for the following orders in its counter claim:
  - a. A declaration that the suit land Nakuru/Municipality Block 25/1109 is public land.
  - b. An order of perpetual injunction restraining the Plaintiffs now Defendants by themselves, their employees, agents and/or servants from trespassing upon, entering, remaining, dealing in, constructing on, disposing of or in any other manner whatsoever interfering with the use of the 2<sup>nd</sup> Defendant now Plaintiff in respect of Nakuru/Municipality Block 25/1109.
  - c. An order of eviction against the Plaintiffs now Defendants to vacate the 2<sup>nd</sup> Defendant now Plaintiff's beneficial parcel of land known as Nakuru/Municipality Block 25/1109 and the Officer Commanding Station Central Police Station be directed to enforce the eviction order.
  - d. An order in the form of a mandatory injunction be issued to the Plaintiffs to restore the suit parcel of land known as Nakuru/Municipality Block 25/1109 to its original form.
  - e. Costs and interest of this suit.
  - f. Any other/further order that this Honourable court shall deem just to grant.

### **Plaintiffs' Case**

3. Charles Ondiek Onchwati testified as PW1 where his statement dated 31/7/2014 and filed on 5/8/2014 was adopted as his evidence in chief. He testified that he had a list of documents filed on 29/3/2023 which was produced and marked as P Exhibits No 1- PEX 16. He testified that he is a retired civil servant and lives at Teachers Estate Nakuru.
4. He stated that he was issued with an allotment letter where he paid Kshs 24,762 to the Commissioner of lands. He testified that he paid rates to the County Government of Nakuru. He further testified that the school came on board in 2014. It was his testimony that he developed the land from 1995 to date and that he also lives on the land.
5. PW1 testified that he has been in occupation from 1995. He added that Natewa Secondary school was built in 2012 and registered in 2014. It was his testimony that the school is 500 metres from the suit land. He added that there is no playground. He has not trespassed on the school property. He testified that he is rightfully on the land and was not involved in any fraud. He further testified that subdivision was done and that he was allotted the suit land by the Government. He added that plots number A-D were proposed for residential use.
6. It was his evidence that there are no documents that the plots were for public utility. He requested that he be allowed to continue staying in the property. He testified that he had applied for title but could not be issued due to the allegation that it was public land. He further testified that they have been on the land for more than 18 years and that no one claimed the land.
7. On cross examination by Konosi for the 1<sup>st</sup> Defendant, he confirmed that he only had one page of the allotment letter. He admitted that he was allotted the land on 6/10/1995 and that he had 30 days to pay. He further admitted that he paid on 19/1/1996. He stated that he had been looking for a piece of



- land to purchase and brokers informed him that the suit land was available. He admitted that he did not know the name of the agent.
8. He further stated that he had gone to an advocate who did the agreement with the agent. He however admitted that he did not have the agreement. He also admitted that the person who signed the allotment was the person who cancelled his documents. He stated that Mr Osodo had confirmed to him that the land was available and he issued him the allotment letter. PW1 stated that Mr. Osodo later recalled the allotment letter. He also stated that the land to be subdivided was 4629 and that public utility plots were to be surrendered to the state.
  9. He confirmed that the illegality was not from his side but that of the government. He further confirmed that the houses on the suit land are made of stone and timber. He stated that he did not know the reason for the cancellation.
  10. On cross examination by M/S Chepkurui for the 2<sup>nd</sup> Defendant PW1 stated that the allotment letter did not show who issued the allotment letter. He confirmed that he was to pay the allotment fees within 30 days and that the same was paid on 19/1/1996. He admitted that it was after the expiry of the 30 days. He also admitted that there was an earlier allottee of the land in 1995. He confirmed that he knew that there was somebody allotted in 1995. He stated that he was legally occupying the suit land in 1995 to 2014 when the government recalled the allotment.
  11. PW1 stated that the surveyor had informed him that he was allowed to demarcate the land and give it out. He confirmed that the PDP did not have a plan and that he only discovered in 2014 that Natewa had an allotment letter. He admitted that the documents were forged and that he never applied for change of user. In conclusion, he stated that the letter of allotment was issued to him thorough a land agent.
  12. Upon reexamination, he stated that he did not have a document from the Defendant that the land was surrendered. He also stated that he got the PDP from the land's office. He stated that the document is not fraudulent.
  13. William Ratemo Nyamuro testified as PW2 where his statement dated 1/7/2014 and filed on 5/8/2014 was adopted as his evidence in chief. He testified that he bought the land from Mr Maina and that he had been was shown the allotment letter, acceptance letter and receipts. He clarified that there was no document showing payment by Mr Maina as the agreement was done by Oumo & Co. Advocates his advocate. He further testified that he bought the land from James Maina and added that he did not know the details of the land. He testified that he trusted the mzee who sold him the land. It was his evidence that Plot No 1109 was a playground. He added that the Commissioner of Lands allotted them the land. He testified that in the letter dated 4/1/2015, the Commissioner of Lands admitted his mistake. He further testified that he did not take any steps as he had not received the letter. That the error was by the government. He stated that they have not sued the government for the mistake.
  14. On cross examination by Chepkirui, he confirmed that he had a letter dated 16/8/1995. He admitted that the allotment had not been signed by Commissioner of lands. He further admitted that the allotment letter did not have the 2<sup>nd</sup> page. He also admitted that he did not have any document showing that the allotment fees was paid. He added that Mr Maina did not have a title.
  15. Upon reexamination PW2 stated that the letter dated 4/1/2015 was drafted after he had already been issued with the letter of allotment and after filing the case.
  16. Charles Anyanza Nyaaga testified as PW3 where his statement dated 31/7/2014 and filed on 5/8/2014 was adopted as his evidence in chief.



17. Upon cross examination by Mr. Konosi, he confirmed that he was allocated plot B and that he got the new number from a surveyor. He admitted that he did not have a title. He stated that the rates were for the parcels of land as at the time he paid for the rates, the surveyor gave them the land. He added that he had not been issued with the letter dated 4/1/2015. He stated that he has the receipts issued on 5/8/1999.
18. He admitted to know the history of the land and stated that the land was public land. On reexamination, he stated that he did not refer to the letter dated 12/6/1998.
19. Andrew Magomo Omwoyo testified as PW4 where his statement dated 31/7/2014 and filed on 5/8/2014 was adopted as his evidence in chief. He testified that he paid Kshs. 24,762 and that he had the original allotment letter and receipt. He testified that the Kshs. 380,000 was an error. He further testified that the letter had been signed on 23/8/1996 by Mr Osodo S.M on behalf of the Commissioner of lands.
20. On cross examination by Mr. Konosi, PW4 confirmed that his claim is on parcel number A. He admitted that he had not seen the L.R number including the one in the plaint. He stated that subdivision was done by Mr Mirugu and admitted that he did not know whether the number exists. He stated that he made payments to the commissioner on 15/1/2015 for the said land.
21. He stated that his claim was on the land in dispute and added that the said number was picked from the commissioner of lands. He admitted that he did not have the title since the process stopped upon the death of the surveyor. He further admitted that he had never seen the letter dated 4/1/2015. He confirmed that the Commissioner of lands allotted them the land where they paid and were issued with documents. He further confirmed that he has been on the land for 28 years and that he bought the land in 1995 through John Kigen a broker. He stated that there was authority from the government.
22. On reexamination, PW4 stated that the letter dated 4/1/2015 was done after he had filed the case in 2014. He stated that a refund of the Kshs. 24,762 would have compromised the case.
23. Margaret Wangare Maina testified as PW5 where her statement dated 13/8/2019 was adopted as her evidence in chief. The documents marked as PEX 17 to PEX 19 were also produced as evidence. She testified that she has lived at Teachers Estate Nakuru since she was in class two and that her father was James Maina. She prayed that she be granted the prayers as sought in the plaint.
24. On cross examination by Konosi, she stated that she has the allotment letter that shows his father bought the land. She however admitted that she could not confirm from whom he bought the land. She stated that her claim is on plots No.1109 (c). She further stated that paragraph 4 gave number 12570/240 which she could not confirm. She stated that she came to court as a result of an enforcement letter. She added that she was aware that part of land was sold to Ratemo but she could not confirm the exact portion sold. She further stated that she did not follow up on the processing of the title due to the letter of administration ad litem. She admitted that she did not know that the land belonged to Nakuru Teachers Welfare. She also admitted that she did not know how her father applied for the land. She confirmed that she had never seen the letter dated 4/1/2015.
25. Upon cross examination by Chepkurui, PW5 confirmed that the letter dated 2/10/2012 showed that the school came into existence in 2012.
26. On reexamination, she stated that it was not possible that the school existed in 2012. This marked the close of the Plaintiff's case.



## Defendant's Case

27. George Karanja Njenga testified as DW1. He produced his written statement dated 25/5/2015 which was adopted as his evidence in chief. He testified that he has been the principal of Natewa High School from 2011 up to 2021. He produced his list of documents which was marked as DEX 1-DEX 14(a) and 14 (b).
28. He testified that he was a teacher at Nakuru High School and a member of Nakuru Teachers Housing Sacco. He testified that it was a primary school driven Sacco. He testified that he wrote PEX 12 giving a brief history of the land and that they had written to the Municipal council of Nakuru requesting to use the land as a playing field. He testified that they shared the compound with Nakuru Teachers primary school. He further testified that the school farm was earmarked for the schools KACE project. He explained that the land in question was part of land purchased by Teachers Housing Sacco which was subdivided and some plots were left for public utility. He further explained that Plot number 1109 was surrendered as playing field and clearly shown as public utility plots.
29. He went on to explain that from the map, 1115 is the school, 1114, St Johns High School. He testified that according to page 21, the maps showed that 1109 was marked and planned as plots A.B.C.D.D
30. DW1 testified that PEX4 showed the surrender of the land to the government and the land was allocated to Natewa High School. He added that PEX 8 showed that the land was set aside for the school and when they then saw a notice to appear in court.
31. He testified that the letter of allotment was later revoked. He further testified that the plot number of Teachers phase 1 were reserved by the black book. He added that the numbers shown in the plan are strange. He further testified that when they surrendered the public utility plots, it was on trust that they would be used for public purposes. He prayed that the suit be dismissed and the land be made available for the school.
32. On further examination in chief by Chepkurui, he testified that he had filed a list of documents in 2018. He prayed that the court relies on them. He stated that the school was first established and registered 2010. He added that with the new constitution, the school was registered in 2014. In conclusion, he stated that the suit property is a public utility and used by the school.
33. Upon cross examination by Mr. Tombe, DW1 confirmed that he has been a member of Nakuru Housing since 1985 and that his membership number is 0279. He admitted that he did not have the register in court. He confirmed that he was posted to Natewa school in 2011 and in 2012 he retired. He admitted that he had not filed any posting letter for TSC. He stated that the letter dated 26/9/2023 referred to the previous documents. He admitted that the title cancels the previous ones.
34. He stated that the plot is currently used for cultivations and a residential purpose. He admitted that the plot has never been used for sports and games since the illegal occupation. He confirmed that the plot was subdivided. He further confirmed that he did not know how long the Plaintiffs have been occupying and added that the school found them there. DW1 admitted that he did not have an official search but had the original map showing the plot. He added that they made inquiries and found the allotment letter had not been procured. He stated that the allotment letter was to come through the Teachers Housing. He further stated that he had visited the lands office and made an informal inquiry.
35. DW1 stated that he visited the housing office and made a verbal inquiry. The witness was referred to PEX 2 where he admitted that the plots earmarked for public utility were not shown. He stated that the land has been surrendered to the commissioner of lands. He further stated that the plots are referred to in the letter dated 17/2/1993; PEX 2 is dated 13/1/1988 and PEX 5 is dated on 17/2/1993.



36. He stated that Teachers sacco had 3 cases on public utilization. He also stated that the 1988 letter does not mention plot number 1109 but mentions the playing field.
37. On reexamination by Konosi, DW1 stated that the cancelled certificate was number PU/S/1/9396/11 and that the same was also cancelled in certificate number 3253000002. He added that the earmarked plot had not been given numbers and that the approval had to be reduced in case of different ranks. He stated that the letter dated 17/2/1993 confirms that 1109 became public plots and that it is a playing ground.

### **Submissions**

38. The Plaintiffs filed their submissions dated 7<sup>th</sup> November, 2023 on the following day. They submitted that they were allocated plot numbers A, B, C and D on Nakuru Municipality and that the allotment letters were produced as exhibits. They submitted that payments were also made to the Commissioner of Lands and they occupied the suit land uninterrupted for over 18 years. The Plaintiffs submitted that it is not in dispute that they made payments for their respective portions of the suit property. They submitted that the same can be confirmed from the 1<sup>st</sup> Defendant's exhibit No. 13 which letter corroborates the Plaintiffs evidence that their allotment letters were signed and paid for.
39. The Plaintiffs submitted that the surveyor did not conclude his assignment and that the Commissioner of Lands is purporting to withdraw allocations made more than 18 years after payment of the statutory legal fees. They argue that the Commissioner of Lands purports to allocate the suit property to the permanent secretary to hold in trust for the 2<sup>nd</sup> Defendant. The Plaintiffs submitted that their occupation has been open and that the 1<sup>st</sup> Defendant who should have initiated suit to assert any right if any against them has since been overtaken by the statute of limitation of actions. They relied on Section 7 of the *Limitation of Actions Act*.
40. They submitted that the 2<sup>nd</sup> Defendant's counterclaim is late as its predecessor the 1<sup>st</sup> Defendant had not passed any good title to it. They further submitted that the 2<sup>nd</sup> Defendant's certificate shows that the school is located at LANET and not KITI which raises questions whether the school moved. The Plaintiffs submitted that the letter dated 13/01/1988 produced as defence exhibit 2 did not mention the suit property as one of the plots earmarked for public utilities. They further submitted that letters dated 19<sup>th</sup> August and 9<sup>th</sup> November, 1988 do not mention the suit property as forming part of the plots to be surrendered for public utility. The Plaintiffs submitted that it is not clear how the letter dated 13<sup>th</sup> August, 1988 was to surrender plots earmarked for public utility. The Plaintiff mentioned the letter dated 22/06/2015 by the NLC which was filed on 1/09/2017 by the 1<sup>st</sup> Defendant but was not produced as exhibit. They argued that the 1<sup>st</sup> Defendant was to make payment within 30 days from the date of offer. They submitted that the receipt is dated 14/11/2010 thus not clear how payment was made before the said offer.
41. The Plaintiffs submitted that Defendant's exhibit no. 13 was authored after the instant suit was filed. They argued that the two letters contradict each other as to which of the two entities were allocated the plot if at all. They submit that they were allocated the suit land, made payments, initiated the process of issuance of the lease certificates in their favour, occupied and developed the same. They urge the court to find that the Defendants had not acquired any prescriptive rights over the suit property. They relied on the Supreme Court case in Petition No. 5(E006 OF 2022- Torino Enterprises Ltd Vs Hon Attorney General and submitted that an allottee cannot pass a good title to a third party until he acquires the title through registration. They submitted that they were allocated their respective plots A,B,C and D hived off the suit property as per the PDP. In conclusion, they submitted that they made payments and



- have never been refunded to pave way for fresh allocation to the 1<sup>st</sup> Defendant. They urged the court to grant them the prayers as per the amended plaint.
42. The 1<sup>st</sup> Defendant on the other hand filed its submissions dated 8<sup>th</sup> January, 2024 on 16<sup>th</sup> January, 2024. It gave a summary of the case and identified four issues for determination. One, whether the suit parcels of land were available for allocation to the plaintiffs. It submitted that the suit land was part of the larger portion initially owned by Milka Wamagatta which was later purchased by Nakuru Teachers Housing Cooperative Society Ltd. It submitted that the Society later surrendered the suit land to the Commissioner of Land for purposes of using it as public utility land. The 1<sup>st</sup> Defendant submitted that the Commissioner of Lands was to hold the said parcels in trust for the general public to be used as public utilities in line with section 28 of the Registered Land Act. It further relied on Section 7 of the Government Land Act.
  43. The 1<sup>st</sup> Defendant submitted that by virtue of the fact that the suit land was surrendered to the Commissioner of Lands to be used for public utilities, the same became public utility land not available for allocation. It cited the cases of Jimmy Gichuki Kiago & Another V Transnational Authority & 7 Others [2019] eKLR, Paul Nderitu Ndung'u & 20 Others V Pashito Holdings Limited & Another (Nairobi HCCC No. 3063 of 1996) among other cases. They submitted that they have demonstrated that the suit plots are occupied by the Plaintiffs as evidenced by the letter dated 13<sup>th</sup> January, 1988. The 1<sup>st</sup> Defendant submitted that it is not in dispute that the parcels of land are from the original no. 1109. It further argued that it is common knowledge that the said parcels were earmarked for various public utilities as evidenced by the letter from the Ministry of Cooperative Development to the chairman of Nakuru Teachers Housing Cooperative Society.
  44. It also submitted that in the year 1995 the said plots were mistakenly allocated to the Plaintiffs vide the various allotment letters. The 1<sup>st</sup> Defendant submitted that the said allocation was illegal as the said parcels were not available for allocation. It submitted that the Ministry of Lands vide a letter dated 4<sup>th</sup> January, 2015 informed the Plaintiffs that the plots they had been allocated were meant for public utility. That the Plaintiffs were notified through the said letter to surrender the original allotment letters and receipts for the refund of the monies they had paid. The 1<sup>st</sup> Defendant relied on the case of John Edward Njeru & Another V Commissioner of Lands & 8 Others [2019] eKLR. It submitted that the 4<sup>th</sup> Plaintiff admitted that he had been refunded a sum of Kshs. 24,000 and that their failure to vacate the suit land prompted the 1<sup>st</sup> Defendant to issue them with notices to vacate. It finally submitted that plot 1109 out of which the suit parcels arose from were not available for allocation and thus the purported allocation was illegal null and void abinitio.
  45. The second issue is whether the Plaintiff's suit merits for the orders sought. The 1<sup>st</sup> Defendant submitted that having demonstrated that the said parcels were illegally allocated and the Commissioner of Lands admitted to the said mistake, the said claim is unmerited and should be dismissed.
  46. The third issue is whether the 2<sup>nd</sup> Defendant's counterclaim merits. It submitted that the Defendants have demonstrated that the suit land was earmarked for public utilities which the Plaintiffs have provided evidence in support of its case. It submitted that the Counterclaim should thus be allowed as prayed. The 1<sup>st</sup> Defendant argued that the issue of Limitation of actions was not pleaded and that the said allocation being a nullity, time does not run. It added that as pleaded by the Defendants, once cannot sustain a claim of adverse possession against the County Government of Nakuru. It cited the case of Republic V Land Disputes Tribunal, Kitui District & Another; Ngotho Ndelu (interested party) Ex parte Mukai Katama [2019] eKLR.



47. On the final issue for determination on costs, the 1<sup>st</sup> Defendant relied on the Supreme court case in *Jasbir Singh Rai & 3 Others V Tarlochan Singh Rai & 4 Others* [2014] eKLR and submitted that the Plaintiffs suit be dismissed with costs.

### **Analysis and Determination**

58. I have considered the pleadings and the evidence on record and I am of the view that the following issues need to be determined:
- a. Whether the suit property is public land.
  - b. Whether the allocation of the suit land to the Plaintiffs was legal.
  - c. Whether the Plaintiff is entitled to the orders sought
  - d. Whether the 2<sup>nd</sup> Defendant is entitled to the orders sought in its Counterclaim.
59. The genesis of this parcel of land is the allotment letters ref. No. 30884/XL11 issued on various dates in respect of the unsurveyed plot No. "A, B, C and D" in Nakuru Municipality. The allotment letters were allegedly issued to the Plaintiffs' herein.
60. The Part Development Plan No. Nakuru R7/95/45 was forwarded to the Commissioner of Lands on 20<sup>th</sup> July, 1995 and the same was approved on 26<sup>th</sup> July, 1995. The said PDP did not have the plan annexed to it as admitted by PW1 The Plaintiffs averred that they were allotted the suit property and therefore they are the legitimate owners of the suit land.
61. PW1 testified that he had applied for title but could not be issued due to the allegation that the suit land was public land. He also testified that as the Plaintiffs', they have been on the land for more than 18 years and that no one claimed it.
62. On cross examination, he confirmed that he only had one page of the allotment letter. He also admitted that he was allotted the land on 6/10/1995 and that he had 30 days to pay which he paid on 19/1/1996 almost a year later. He further admitted that the land that was to be subdivided was 4629 and that public utility plots were to be surrendered to the state. PW1 added that the person who had signed the allotment letters was the same person who cancelled them, one Mr. Osodo. He confirmed that the illegality was not from his side but that of the government.
63. PW2 on cross examination admitted that the allotment had not been signed by Commissioner of lands. He further admitted that he did not have any document showing that the allotment fees was paid. PW3 on the other hand confirmed that he agreed with the contents in the letter dated 4/01/2015 and admitted that knowing the history of the land, the same was public land.
64. PW4 testified that he has been on the land for 28 years and that he bought it in 1995 through John Kigen a broker with the government's authority. PW5 stated that her father bought the suit property but she confirmed that she was not aware whom he bought from.
65. The 1<sup>st</sup> Defendant on the other hand testified that vide PEX 8, he wrote a letter to the Nakuru Municipal requesting that the suit land be set aside for public use in form of a playground for Natewa School. He stated that the land in question was part of land purchased by Teachers Housing Sacco which was subdivided and some plots were left for public utility. He further explained that Plot number 1109 was surrendered as playing field and clearly shown as public utility plots.
66. DW1 stated that the map confirmed the suit property and that the allotment letter was issued then later cancelled. He produced letters confirming the said communications from the time they wrote to the



- Nakuru Municipality requesting that the suit property be set aside for public use as playground for the school. He added that the letter dated 17/2/1993 confirmed that the suit property became public plots.
67. The Defendants produced DExh5 which is a letter from the Ministry Cooperative Development copies to the Commissioner of Lands Nairobi. The said letter was addressed to the Nakuru Teachers Housing Cooperative Society confirming that plot number 1109 was to be allocated to the Municipal Council for development. Further, the Municipal Council of Nakuru through its letter dated 2/10/2012 (DExht 9) confirmed that the suit property had been surrendered to them as a public utility by Nakuru Teachers.
  68. The Defendants led evidence to show how the suit property went on to be subdivided as evidenced by DExht2. The said letter by the Municipal Council confirmed that the plans as provided by the Nakuru Teachers
  69. In the case of Dr. Joseph N.K. Arap Ng'ok v Justice Moijo Ole Keiyua & 4 others C.A.60/1997, the Court of Appeal held as follows:

“It has been held severally that a letter of allotment per se is nothing but invitation to treat. It does not constitute a contract between the offerer and the offeree and does not confer interest in land at all. It cannot thus be used to defeat a title of a person who is the registered proprietor of the said parcel of land.”
  70. Further, in the case of Mbau Saw Mills Ltd v Attorney General for and on behalf of the Commissioner of Lands) & 2 others [2014] eKLR, the court held:

“In order for an allotment letter to become operative, the allottee was required to comply with the conditions set out therein including the payment of stand premium and ground rent within the prescribed period.”
  71. Looking at the instant case, it is not in dispute that the Plaintiffs did not meet the said conditions within the stipulated time. PW1 confirmed that he was issued with the allotment letter on 6/10/1995 and he had 30 days to pay but he paid on 19/1/1996.
  72. It is also not in dispute that neither of the Plaintiffs' was issued with a title for the suit property. This court has looked at the evidence and it is clear that the Plaintiffs were issued with allotment letters and PDP. It is also not in dispute that the PDP did not have a map attached to it which PW1 admitted. PW2 also confirmed that he did not have evidence of payment of the amount as provided for in the allotment.
  73. It is trite law that any litigant basing his/her interest in land on the foundation of an allotment letter must provide the following proof: First, the allotment letter from the Commissioner of Lands; Secondly, and attached to the allotment letter, a part development plan; Thirdly, proof that they complied with the conditions set out in the allotment letter, primarily that the stand premium and ground rent were paid, within the specified timeline.
  74. From the above, its is certainly clear that the Plaintiffs did not meet the said requirements. The allotment letters as issued to the Plaintiffs on different dates were not paid and if paid, it was after the stipulated 30 days. In addition, the allotment letters despite having an approved PDP, it did not have a map attached to it.
  75. In the present case, upon lapse of the offer contained in the allotment letters, the suit land was free to be allotted to someone else. The letters dated 15/01/1988 (DExht2) and 19/08/1988



(DExht3) confirmed that the Defendant requested and accepted to surrender the suit property to the government.

76. This court notes that the allotment letters seem to have been issued after the 2<sup>nd</sup> Defendant wrote to the Commissioner of Lands to set aside the suit property for public use. PW3 during cross examination confirmed that the suit property is indeed public land. It is clear that the Defendant's case is water tight as the Plaintiffs failed to counter its evidence especially with the documents produced by the Defendants. From the various correspondences and documents produced by the Defendants, this court is of the view that the same showed consistency pointing to the fact that the suit property is indeed public land.
77. In the premises, the Plaintiffs did not meet the conditions as stipulated in the allotment letter by failing to pay the requisite fees within the 30 days. This meant that the offer lapsed thus the Plaintiffs could not have been allotted the suit property. Therefore, the letter dated 4/01/2015 by Mr. Osodo trying to correct a mistake for sure does not hold any water since the requirements for the allotment letters issued to the Plaintiffs were never fulfilled in the first place.
78. In view of the foregoing, in determining the first and second issue, this court finds the suit property is indeed public land and that the allocation of the suit land to the Plaintiffs was illegal.
79. Having established that the allocation of the suit property to the Plaintiffs was illegal, this court finds that the Plaintiffs are therefore not entitled to the prayers as sought in their amended plaint dated 13<sup>th</sup> August, 2019.
80. In the alternative, the Defendants Counter claim dated 1<sup>st</sup> February, 2021 succeeds.
81. The upshot of the above is that the Defendants have established on a balance of probabilities that the suit property is indeed public land set aside to be used as playground for Natewa School. The Plaintiffs on the other hand have failed to prove that they legal owners of the suit land
82. Consequently, this court grants judgment to the Defendants in the following terms:
  - a. A declaration that the suit land Nakuru/Municipality Block 25/1109 is public land.
  - b. An order of permanent injunction is hereby issued restraining the Plaintiffs by themselves, their employees, agents and/or servants from trespassing upon, entering, remaining, dealing in, constructing on, disposing of or in any other manner whatsoever interfering with the use by the 2<sup>nd</sup> Defendant in respect of Nakuru/Municipality Block 25/1109.
  - c. The plaintiffs to vacate the property within 90 days failure of which an order of eviction and demolition of all the erected structures on Nakuru/Municipality Block 25/1109 is hereby issued.
  - d. The Officer Commanding Station Central Police Station to ensure compliance with the above orders.
  - e. The Plaintiffs shall bear the costs of the suit.

It is so ordered.

**JUDGMENT DATED AND DELIVERED VIRTUALLY ON THE 1<sup>ST</sup> FEBRUARY 2024.**

**A.O. OMBWAYO**

**JUDGE**

