Church Commissioners of Kenya v Lemurian & 28 others (Environment & Land Case 209 of 2014) [2024] KEELC 6735 (KLR) (15 October 2024) (Judgment)

Neutral citation: [2024] KEELC 6735 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ENVIRONMENT & LAND CASE 209 OF 2014

EO OBAGA, J

OCTOBER 15, 2024

BETWEEN

CHURCH COMMISSIONERS OF KENYA ..... PLAINTIFF

AND

PAMELA JETO LEMURIAN ..... 1ST DEFENDANT

MOLU MAMO ..... 2ND DEFENDANT

JARSO ROBO ..... 3RD DEFENDANT

OSMAN KURACHO ..... 4TH DEFENDANT

MICHAEL KARANJA ..... 5TH DEFENDANT

SILBANO K. KOGO ..... 6TH DEFENDANT

MATEBE MASAI JAFTSA MASAI ..... 7TH DEFENDANT

MARGARET NALIAKA ..... 8TH DEFENDANT

EMILY JEROTICH ..... 9TH DEFENDANT

DAVID MWANGI ..... 10TH DEFENDANT

NATHAN K. KOLUM ..... 11TH DEFENDANT

DAVID WANYOIKE GITHUMBI ..... 12TH DEFENDANT

DINO WANDERA ..... 13TH DEFENDANT

SUKE AMINA ..... 14TH DEFENDANT

KHANALI F. LIKHUNDA ..... 15TH DEFENDANT

SILVA WAMBOI ..... 16TH DEFENDANT

NJERI WAIRAKU ..... 17TH DEFENDANT

PETER NDINGURI ..... 18TH DEFENDANT

FATUMA MALIKUA ..... 19TH DEFENDANT

MESHACK KINUTHIA NDUGI ..... 20TH DEFENDANT

EMILY JEPKETER JUDA ..... 21ST DEFENDANT

AKIBA MALICHA ..... 22ND DEFENDANT

MARY MAINA ..... 23RD DEFENDANT

ISAACK KIRONGOI ONYINGWO ..... 24TH DEFENDANT

GIDEON KIPLIMO BIWOTT ..... 25TH DEFENDANT

FRANCIS LELEPO ..... 26TH DEFENDANT

ANJALINE MACHARIA ..... 27TH DEFENDANT

RICHARD OKOLLA ..... 28TH DEFENDANT

RUTH MWANIKI ..... 29TH DEFENDANT

JUDGMENT

1. The Plaintiff filed this suit against the Defendants via a plaint dated 16th June, 2014 seeking for the following orders;

    a. A declaration that the invasion of the Plaintiff's parcel of land is illegal, null and void and amounts to trespass.

    b. An injunction permanently restraining the Defendants, its servants and or agents from entering, trespassing into, constructing upon, occupying, transferring, encumbering and or otherwise interfering with land parcel number Eldoret Municipality Block15/2026.

    c. An order of eviction as against the Defendant.

    d. Costs of this suit.

2. The Plaintiff pleaded that on 30th January, 2002 it was registered as owner of the parcel of land known as Eldoret Municipality Block 15/2026 measuring Approx. 5.440 Ha (the suit property) pursuant to a 99-year Lease issued to by the Government of Kenya commencing 1st January, 1990. That the Plaintiff took possession immediately and developed part of the suit property and has been in peaceful possession for over 18 years now. The Plaintiff averred that the Defendants illegally and unlawfully encroached/trespassed into part of the suit property claiming ownership on ground of possession and put up structures thereon. The Plaintiff set out the particulars of illegality on the part of the Defendants. The Plaintiff averred that the Defendants' actions will occasion it great loss and that despite notice to the Defendant to vacate the land, they have refused and or neglected to do so, hence this suit.

3. The 5th and 23rd-29th Defendants entered appearance through the firm of Mwinamo Lugonzo & Company Advocates and filed Defence. They denied the averments in the Plaint, specifically the issuance of the Lease and registration of the Plaintiff as proprietor of the suit property. They further denied that the Plaintiff was entitled to the reliefs sought in the Plaint and instead averred that they were

duly allotted the parcels of land they occupy by the Municipal Council of Eldoret. That they are the legal and lawful owners thereto, and their parcels do not form part of the land claimed by the Plaintiff.

4. On 2nd February, 2015 the Plaintiff filed a Reply to the 5th, 23rd-29th Defendant's Defence reiterating the contents of its Plaint in response to the said Defendants' allegations. The Plaintiff denied the alleged allocation of parcels of land to the said Defendants which did not form part of its property, or that they were the legal and lawful owners thereto. The Plaintiff prayed that the said Defence be struck out/ dismissed and judgment be entered as prayed in the Plaint.

5. The 1st Defendant entered Appearance in person on 31st January, 2019. She denied the averments in the Plaint averring that the Plaintiff's intention is to extend its boundaries and alienate their portions. She averred that they had all tried to register their land with minimal success. The 1st Defendant alleged that there has been a protracted ownership dispute for over 30 years against the Plaintiff. According to the 1st Defendant, it is the Plaintiff who has encroached/trespassed the boundary that has existed since 1984. The 1st Defendant averred that there had been an oral agreement with the late Bishop Alexander Muge since he found them already in occupation of part of the land which the Plaintiff refuses to take into account. The 1st Defendant averred that the Plaintiff's 5.440Ha can be realised through survey without interfering with their portions. The 1st Defendant prayed that the suit be struck out and that there be a survey for the Plaintiff to realise his 5.440Ha portion.

6. Similarly, the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st, 22nd Defendants also entered Appearance and filed their Defences on 31st January, 2019. Their statements of Defence are a mirror of the 1st Defendant's Defence, which is summarised above, repeating it word for word up to and including the prayers made thereunder.

7. The Plaintiff replied to these Statements of Defence vide the Reply to the Defendants' Statement of Defence dated 7th February, 2019 and filed on the same day. The Plaintiff reiterated the contents of its Plaint in answer to the allegations in the Defence. It averred that it is the first registered owner of the suit property and that the Defendants have never been registered owners of the parcels of land or any land registered under the Plaintiff. That its name was entered into the register of the land after paying the requisite fee and following the prescribed procedures under the law. The Plaintiff denied the allegation of a protracted ownership dispute of over 30 years, reiterating its 18 years peaceful possession. The Plaintiff denied encroaching the Defendants' land, or that the Defendants owned the land since 1948 and the alleged oral Agreement asserting that it was contrary to the law. The Plaintiff averred that the suit property wholly and lawfully belongs to the Plaintiff who holds title thereto. The Plaintiff again prayed that the Defendants' Defence be struck out/dismissed and judgment entered as prayed in the Plaint.

8. On 27th July, 2023 the firm of Kiboi Tuwai & Company filed a Notice of Appointment of Advocates, on behalf of the 2nd, 4th, 10th, 11th, 12th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st, 22nd Defendants.

Hearing and Evidence;

9. When the matter came up for hearing, the Plaintiff called three witnesses. PW1 was Enock Whenkeya Opuka who was sworn and adopted his witness statement dated 21st March, 2017 as his evidence-in-chief. In the said Statement, he had stated that he worked for the Diocese from 1986 until 1994. That he was close to Bishop Muge and knew that he applied to the Government to be allocated land for construction of the cathedral. PW1 testified that Bishop Muge was asked to identify land for allocation and he chose Pioneer using Mbwagwa, who was the District Physical Planner. That a Map was prepared and registered and a letter of allotment was thereafter issued, and PW1 states that he saw both documents. PW1 confirmed that the land belongs to the church. PW1 testified that he was not

aware that the Defendants occupied the suit property with the permission of Bishop Muge, or that they were allotted land by the Municipal Council of Eldoret. He asked that the Court grant the prayers sought in the Plaint.

10. On cross-examination, PW1 testified that the Defendants are occupying the land without the Plaintiff's permission. He reiterated that he was not aware of Bishop Muge allowing the Defendants into the land, the allotment letters or that the Defendants were paying rates over the plots they occupy. PW1 testified that he was an eye witness and was thus privy to the original allotment letter, but that he was aware there were subsequent letters of allotment. PW1 added that the church holds title to the church properties. He explained that the Lease must have been issued before 1990 when Bishop Muge died. He testified that the land measures 5.44 Ha and is in Pioneer next to Kamalel Primary School. He added that he was aware that people had encroached on the land. He was re-examined, upon which he testified that the letter of allotment was issued on 7th September, 1990 and the Certificate of Lease on 30th January, 2002.

11. Robert Simiyu, an Assistant Director, Land Administration from the Ministry of Lands & Settlement testified as PW2. Upon being sworn testified that he had brought a file in respect of Eldoret Municipality Block 15/2026. He testified that the Plaintiff applied for allocation of the suit property and the application was allowed, he produced the application dated 28th April, 1990 as PEX1. That the land was previously Government land and was allotted vide Letter of Allotment dated 7th September, 1990 (PEX2) issued to Church of the Province of Kenya Diocese of Eldoret. That the church accepted, paid the requisite premium and was issued with a receipt dated 5th February, 1996 that he produced as PEX3.

12. PW2 explained that since the church was a non-profit making organisation, the then Commissioner of Lands Mr. Gacanja wrote a note to the Assistant Commissioner to treat it as a school. That therefore, instead of paying KShs. 350,000/- as indicated in the letter of allotment, it paid KShs. 72/-, the minimum allowed under the category. PW2 also produced a letter dated 15th April 1996 from the Commissioner of lands to the Director Surveys to survey the Plot and the Survey fee was paid as PEX4. PW2 produced as PEX5, a letter dated 5th April, 2001 asking the Surveys Office to produce the Registry Index Map (RIM), which was released by the Director of Surveys vide letter dated 25th April, 2001 (PEX6). PW2 testified that an authentication Slip was issued on 3rd December, 1999 (PEX7) as well as a receipt also dated 3rd December, 1999 issued (PEX8).

13. PW2 testified that the survey was done and forwarded to the Commissioner of Lands who processed the Lease in the name of the Church Commissioners of Kenya dated 30th January, 2002 that he produced as PEX9. That the Lease was forwarded to the District Land Surveyor vide letter dated 19th November, 2001 (PEX10) and a Certificate of Lease was issued in the name if the Church Commissioners of Kenya (PEX11). PW2 further testified that the Municipal Council of Eldoret had no authority to allocate the land. That Government records indicate the owner of the suit property as the Church Commissioners of Kenya. PW2 produced a copy of the RIM as PEX12. PW2 was referred to a letter dated 29th May, 2013 which he testified was a letter he wrote when he was a District Land Registrar in Eldoret confirming ownership of the land as per records held in Eldoret, he produced it as PEX13.

14. PW2 was cross-examined by Mr. Matekwa and he testified that he has been working in the Ministry since 1993. He testified that the Municipal Council of Eldoret did not have power to allocate land, that it is the Commissioner of Lands who had power to do so on behalf of the President under the Government Lands Act (repealed). PW2 testified he had no role in the Lease issued to the Plaintiff. Further, that he is unable to tell who the occupants of the land in dispute are. PW2 stated that the

responsibility of knowing who rate payers are lies with the county Government. PW2 testified that his letter dated 29th May, 2013 was in response to the Bishop of Anglican Church of Kenya seeking confirmation of the ownership of the suit property. He confirmed that the land measures 5.440 Ha.

15. PW3 was Elizabeth Nyakundi, a Land Registrar in Eldoret, she also gave a sworn testimony. She indicated that she had received summons to come and testify in respect of Eldoret Municipality Block 15/2026. PW3 testified that the registered owner of the suit property is Church Commissioners of Kenya who were so registered on 30th January, 2002 and a 99-year Lease given with effect from 1st September, 1990. She produced a certified copy of the White card as PEX14 and a letter forwarding the Lease as PEX15. She also produced a letter dated confirming that the RIM had been amended which she produced as PEX16. She testified that Block 15 is a lease from the National Government not a Municipal Lease.

16. On cross-examination by Mr. Matekwa, PW3 testified that she could not tell if there was a previous lease on the suit property. She confirmed that the she did not prepare the white card. That she had come to court to produce what they have in their records. PW3 testified that she could not tell if there was double allocation of the suit property. She testified that the current owner of the suit property is Church Commissioners of Kenya. Further, that she cannot tell who is in occupation of the suit property.

17. She was re-examined by Ms. Chesoo where she testified that if there was any other lease, it would have been indicated in the white card. After PW3's testimony, the Plaintiff's case was closed.

18. The Defence case opened by calling Lolepio Joseph, the 26th defendant, to testify as DW1. He was sworn and adopted his witness statement dated 12th March, 2021 as his evidence-in-chief. In his statement, DW1 was testifying on behalf of the 5th and 23rd-29th Defendants. DW1 testified that they were all allocated plots in Block 15 being Plot Nos. 620-645, which allotments were done during the Town planning & Works Committee of the Municipal Council. That they were issued with letters of allotment among other documents as a sign of ownership and have been paying rates for the plots. DW1 testified that they are therefore legally and lawfully on the suit property. DW1 was adamant that they are the legal owners of the parcels of land they occupy which he stated do not form part of the land that the Plaintiff was claiming.

19. In his oral testimony, DW1 testified that they were allotted the land by the Eldoret Municipal Council as a result of an out-of-court settlement and that they had letters of allotment in respect of the suit property. DW1 testified that his father had filed a case but the Eldoret Municipal Council did not want it to proceed so they settled. He produced his letter of allotment as DEX1 and invoices for rates as DEX2 (a)-(f) and also produced Minutes dated 16th October, 1991 as DEX3. He then produced a letter dated 12th October, 2017 as DEX4 (a), a Sale Agreement dated 19th March, 2019 as DEX4 (b) and a letter dated 24th February, 2012 as DEX4 (c).

20. DW1 also produced DEX5(a)-(c), which were invoices issued by the County Government of Uasin Gishu. Alongside these documents, DW1 produced DEX6 (a), a letter dated 19th March, 1990, a letter dated 4th July, 1998 as DEX6 (b) together with a letter dated 13th June, 1986 as DEX6 (c). DW1 also presented before this court a Notice from the Municipal Council dated 27th November, 2011 which he produced as DEX7, as well as three notices demanding rates that he produced as DEX8 (a)-(c). Lastly, DW1 presented a letter dated 21st December, 2006 and produced it as DEX9.

21. On cross-examination, DW1 testified that there are squatters on the land as well as people with allotment letters, and explained that he had authority to speak on behalf of the squatters. He testified that he was not aware that he needed authority from the Defendant's to speak on their behalf and he

had not filed any. DW1 testified that DEX6 is the first letter of allotment that resulted in the case his father filed but he had not produced any evidence on this case. That he had no allotment letter for where they were staying. He admitted that he had indicated in his statement that the Defendants were allocated Plots Nos. 620 to 645. He acknowledged that only his father's name appeared on the minutes produced as DEX3. Further that he had not produced any receipt for payment of rates. DW1 testified that there was no PDP attached to the allotment letter and that he did not have any beacon certificate or certificate of Lease.

22. Still on cross-examination, DW1 admitted that a letter of allotment cannot form the basis of a sale agreement. He testified that he was aware Block 15 was a national Government Lease, but he did not know that the County Council could not allocate on its behalf. He was referred to DEX7 and testified that it was a notice to demolish structures on the suit property. DW1 admitted that the documents showed the land belonged to the Plaintiff. He admitted that the letter he produced did not separate squatters from allottees. DW1 testified that he had no evidence his father's complaint was acted on, and neither was he sure that they were occupying Plot No. 2026. DW1 further testified that the RIM did not capture the names of Defendants. The witness was referred to DEX 6(a)-(c) and he testified that his father was given notice for repossession of the suit property. He went on to tell the court that he had no evidence that his father complied with the Notice. DW1 conceded that they had not filed a counterclaim for eviction of the church.

23. When he was re-examined, DW1 testified that the Defendants and the church are in occupation of the land. He clarified that he was testifying on behalf of the allottees and not the squatters, adding that they were given their re-allotment letters by the defunct Eldoret Municipal Council which letters are now with the County Government of Uasin Gishu. DW1 was referred to DEX7 and he testified that the notice to demolish came after 16 years, and that they could not have stayed on the land that long if they had no allotment letters. DW1 testified that he made the last payment in February, 2023 after he received an invoice from the County Government. He explained that he had been paying rates because he is the legitimate owner of the land, otherwise the invoices would have been sent to the church.

24. The 5th, 23rd-29th Defendants' case was closed on 7th March, 2024 after they failed to avail witnesses and the court declined an application for adjournment on that front.

25. One of the Defendants, Michael Karanja, then took to the stand as DW2. He testified under oath that they had pleaded with the court for time to hold talks with the church. That they were given 90 days and the church immediately called all the squatters asking them why they were on the church land. He testified that they informed the Bishop that they had inherited the land from their parents. That the Bishop informed them that he would call them for a second meeting, but this was never done.

26. On cross-examination, DW2 clarified that he was testifying on behalf of his fellow squatters but admitted that he had no authority to plead on their behalf. He confirmed that the 2nd, 17th and 19th defendant are deceased, the 4th and 20th Defendant are not on the suit property, whereas the 8th and 23rd Defendants were on the suit property. When he denied that they had bought the land, DW2 was referred to his witness statement and he claimed that it had been prepared by a human rights organisation. He admitted that the title is in the name of the church, adding that they have no problem moving out of the church's land but they wanted the church to give them a place to go. DW2 admitted that they have put up mud-walled houses and are cultivating on the church's land. DW2 testified that the Municipal Council permitted them to build a pit latrine. He explained that his parents went to the land in 1946 while the church came to the land in 1984. He further said that the church did not permit them to occupy its land. He insisted that he could not move from the land unless the church gives him alternative land. DW2 was not subjected to re-examination and this marked the close of the Defence.

Submissions;

27. On 7th March, 2024 Parties were directed to file written submissions. When the matter was mentioned on 16th May, 2024 to confirm compliance, only the advocate for the 5th, 23rd to 29th Defendant had complied. Counsel for the Plaintiff undertook to file her submissions before the end of the said date but it appears they were not filed.

28. The 5th, 23rd-29th Defendants' Submissions are dated 2nd April, 2024. Counsel gave a summary of the respective parties' cases and the testimonies given in court and proceeded to submit on one issue, being the ownership of the suit property herein. On this issue, Counsel submitted that his clients were allocated their respective plots in 1989, while the Plaintiff's allotment letter was issued in 1990, after the Defendants' allotment, and the Certificate of Lease on 30th January, 2002. Counsel submitted that the Defendants were the first people to get into the land, and that the law is that the person who gets into the land first has proprietary interest in the land over those who come after. Counsel submitted that to the Defendants' knowledge, the Plaintiff had sold part of the suit land to third parties. That the Plaintiff now wants to compensate for the land sold by pushing the boundary of the suit property thus encroaching into the Defendants' land.

29. Counsel submitted that the Plaintiff had not presented a recent search showing the size of the land that remained after selling part of its property herein. Counsel added that the Defendants will suffer irreparable loss since they will lose part of their plots that the Plaintiff has encroached upon. Counsel submitted that the Plaintiff had not produced the White Card, the RIM, the Survey plan and Mutation to support its case. Counsel argued that the Plaintiff did not call the surveyor to determine the boundaries of the suit property, yet the boundaries are contested. that without the survey, the Plaintiff has not proved its case on a balance of probabilities.

Analysis and Determination;

30. From the pleadings, the testimonies of the witnesses, evidence tendered and the submissions filed, the following are in my view the issues which arise for determination in this suit:

    a. Who is the rightful owner/registered proprietor of the suit land?

    b. Whether the Plaintiff is entitled to the prayers sought in the Plaint

    c. Who shall bear the costs of this suit?

a. Who is the rightful owner/registered proprietor of the suit land?

31. Time and again, courts have held that a Title Deed is an indefeasible evidence of the ownership of land. This is the position as enumerated at Section 26 (1) of the *Land Registration Act*, which provides that:-

> " 26. Certificate of title to be held as conclusive evidence of proprietorship
>
> (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except:-

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme."

32. For the Plaintiff to succeed in obtaining the orders prayed for in the Plaint, it must first show that it is the owner of the suit property. Notably, the Defendants claim that they were allocated the property by the now defunct Eldoret Municipal Council, and thus claim they are lawfully on the suit property as legal owners thereto. What is before this court is therefore a contest on who between the Plaintiff and the Defendants is the rightful owner of the suit property. Whoever is to emerge victorious in this contest must demonstrate to this court the root of their title. See the case of, where the Court of Appeal held that:- Munyu Maina vs Hiram Gathiha Maina (2013) eKLR

> " We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register."

33. In order to prove root of title, it must be demonstrated that the title was properly acquired, and that the said acquisition followed the laid down procedures. It has been held that a certificate of tile is the end result of a process. Thereby, the acquisition of the title cannot be construed only in the end result, but as part of the entire process of through which it was acquired, which process is material and important. It is therefore necessary for the court to determine how the Plaintiff ended up acquiring the Certificate of Lease in its name.

34. Now, it is not in dispute in this suit that the Plaintiff holds a Certificate of Lease over the suit property dated 30th January, 2002. The suit property was government land before it was registered in the name of the Plaintiff, thus the root of the title herein must originate from the Government of Kenya, to establish that the Government intended to issue the Plaintiff with a Lease over the suit property. The process of allocation of Government land under the GLA (repealed) was done by the President under Section 3(a) which provided that:

> " The President, in addition to, but without limiting, any other right, power or authority vested in him under this Act, may:-
>
> (a) subject to any other written law, make grants or dispositions of any estates, interests or rights in or over unalienated government land;"

35. Section 2 defined a "township" means a township, a municipality or an area reserved for a township. At the time the land was allotted, Eldoret was still a Municipality under the repealed Act. Therefore it could as well be allotted under Section 9 of that same repealed Act which provided that:

> " 9. The Commissioner may cause any portion of a township which is not required for public purposes to be divided into plots suitable for the erection of buildings for business or residential purposes, and such plots may from time to time be disposed of in the prescribed manner."

36. The Plaintiff wrote to the President vide letter dated 28th April, 1990 with the subject "Application for A High Cost Primary School", this is the letter that was produced as PEX1. The letter explained that the Church wanted to construct a high cost primary school in Eldoret and had identified an area that was free Government land that could be used for this purpose. It is signed by Bishop Alexander Muge. On that letter is a hand written endorsement directed to the Commissioner of Lands of the word "Approved", and under it what appears to be the signature of the late President Daniel T. Moi appended on 30th April, 1990. The letter was accompanied by a map that showed the area the church had identified. What followed was a letter of allotment dated, 7th September 1990 signed by one Mrs. P Amiani for the then Commissioner of Lands on Authority of Government F. 102749/20/V/26, the allotment letter was produced as PEX2. The land allotted measured 5.440Ha and was a lease commencing on 1st September, 1990.

37. The Plaintiff the paid Kshs. 4,124/- and a receipt issued dated 5th February, 1996, this is PEX3, and the amount therein included survey fees as indicated in the letter dated 5th April, 2001 (PEX4). Going by PEX4-6, the Director of survey was informed of the allotment of the land to the Plaintiff and its acceptance of the offer therein. The survey was duly conducted and the RIM amended to reflect the new Parcel No. 2026 measuring 5.440Ha. The 99-year Lease commencing on 1st September as indicated in the allotment, was drawn in the name of the Church Commissioners for Kenya and executed (PEX10) then forwarded to Nairobi. Thereafter, the Certificate of Lease was issued to the Church Commissioners of Kenya dated 30th January, 2002 (PEX11). Counsel's submission that the Plaintiff had not produced the White Card and the RIM to support its case is not truthful. The Rim was produced as PEX12 and the White card as PEX13. The White card shows that the Plaintiff was registered as proprietor of the suit property on 30th January 2002 and a Certificate of Lease was issued on the same date. There is no other entry on the said document.

38. For the Defendants, DW1 produced a Copy of a Letter of Allotment to one David Letting, whose date is not clear but it indicates that it was for a 99-year lease commencing from 1st October, 1995. He also produced a letter of allotment for David Momanyi dated 13th November 1991. He had another one for Ruth Wanjiru dated 12th November, 1990 I presume but the year is not clear. He produced one for Francis E. Olebio, his father, dated 13th June, 1986 [PEX6(c)] which is the oldest allotment among the letters of allotment produced by the Defendants. All these letters of allotment were however issued by the Eldoret Municipal Council and were signed by the Town Clerk.

39. Without a doubt however, the allocation of Government land, such as the suit property herein, could not be done during the Town planning & Works Committee of the Municipal Council. Only the President and the Commissioner of Lands had power to allocate land in the manner outlined above. PW2, an Assistant Director of Land Administration at the Ministry of Lands, testified that the Municipal Council of Eldoret had no authority to allocate the land. It should be noted that PW2 worked in Eldoret around the year 2013, so he is well aware of matters relating to the land having written a letter confirming its ownership. The Land Registrar also testified as PW3 testified that Block 15 was a Government Lease and she was clear that the Eldoret municipal Council had no authority to allocate that land. It matters not therefore that whether the allotment letters issued to them came before the Plaintiff's allotment, because the authority that purported to allocate the land to them had no authority to do so.

40. But even if I was to assume that the Municipal Council had authority to allocate the land, which for the avoidance of doubt it did not have, since the plot allotted vide the initial allotment of 12th June, 1986 was repossessed, on cross examination, DW1 stated that the plot that was issued to his father vide the said allotment letter was later repossessed. Indeed, in the letter dated 4th July, 1988 produced

as PEX6(b), Francis Lolebio was seeking intervention of the District Commissioner to recover the Plot. By 19th March, 1990 [PEX6(a)], Francis Lolebio still had not recovered his land. Thus, on 7th September 1990 the land would have been available for allocation to the Plaintiff.

41. In his witness statement, DW1 stated that they were issued with letters of allotment among other documents as a sign of ownership and have been paying rates for the plots. This seems to be a trend with all the Defendants herein, both the allottees and the squatters, this common belief that they are the legal owners of the land by virtue of the fact that they pay land rates. DW1 even testified that if he was not the owner, the invoices would be sent to the Plaintiff herein. DW1 produced a series of rates payment receipts and receipts for payment of utilities as proof of this claim.

42. However, a letter of allotment has been held to be an intention by the Government to allocate land, it is not a title. It cannot therefore, be used to defeat title of a person who has been registered as the proprietor land. In the case of Philemon L. Wambia v Gaitano Lusitsa Mukofu & 2 others [2019] eKLR, the Court of Appeal had this to say:-

> " 43. Peradventure, even if we were to assume that the appellant's letter of allotment was authentic and genuine and we further assumed that the 1st respondent's letter of allotment was genuine and authentic, the legal principle stated in the persuasive case of Stephen Mburu & 4 Others –v- Comat Merchants Ltd & Anor [2012] eKLR by Kimondo, J becomes relevant. The learned judge correctly stated that:
>
> > '... from a legal standpoint, a letter of allotment is not a title to property. It is a transient and [is] often a right or offer to take property'
>
> 44. In this context, the 1st respondent by virtue of being registered owner of the suit land has vested rights and privileges which no person should interfere with. The position is reaffirmed in the persuasive case of Ahmed Ibrahim Suleiman and Another -v- Noor Khamisi Surur (2013) eKLR where it was stated that "the plaintiff having been registered as proprietor and having been issued with a certificate of lease over title is entitled to the protection of the law."

43. Similarly, payment of rates is not proof of ownership. In fact, there are many instances where the person who pays rate is not necessarily the owner of the property, therefore one cannot claim to have acquired title to property by paying rates. I am persuasively guided by the decision of Justice Dr. IUR Fred Nyagaka in the case of James Muigai Thungu vs County Government of Trans-Nzoia & 2 others (2022) eKLR, where he held that:-

> "It is immaterial that the plaintiff was paying rates to the County Government. If that happened, it was done in respect of land that was non-existent at that time for allocation or even after and cannot found a proper title thereto... The plaintiff did not prove how he acquired the land from the government and caused it registered in his name. A title is the end product of a process. This court finds that the plaintiff failed to follow the process of acquisition of land from the government. The mere payment of land rates could not confer title or guarantee ownership of land to the Plaintiff..."

44. Moreover, as per the letter dated 17th November, 1992 the Plaintiff was exempted from paying rates by Virtue of Gazette Notice No. 389 of 6th June, 1990. The fact that the Plaintiff was not paying rates is not reason enough to question or deny the Plaintiff's title.

45. From the above analysis, it is clear that the registration and proprietorship of the Plaintiff was done legally and procedurally. The Defendants have not exhibited a title for not just the suit property but any parcel of land they claim to occupy in relation to this suit. I therefore find and hold that the Plaintiff is the rightful registered proprietor of Eldoret Municipality Block 15/2026 measuring approximately 5.440 Ha, having been issued with the Certificate of Lease.

b. Whether the Plaintiff is entitled to the prayers sought in the Plaint

46. It is not in dispute that the Plaintiff holds a Certificate of Lease over the suit property showing that it is the registered proprietor thereof. The said Certificate of Lease has withstood scrutiny under the challenge by the Defendants herein and been declared legally and procedurally obtained. Under Section 26 above, the Certificate of Lease is to be taken as prima facie evidence that the Plaintiff is the proprietor of the suit property. Such registrations comes with the privileges are set out under Section 24 of the *land Registration Act* which provides as follows:-

> " 24. Interest conferred by registration
>
> Subject to this Act—
>
> (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
>
> (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease."

47. The title holder is also entitled to the proprietary rights comprised in the subject land as enunciated at Section 25(1) of the said Act which provides that:-

> " 25. Rights of a proprietor
>
> (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject:-
>
> (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
>
> (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register."

48. However, the Plaintiff will not be able to enjoy these rights and privileges granted under the law if the Defendants continue to stay on its land. And there can be no doubt that the Defendants occupy the suit

property. DW1 testified that currently, it is the Plaintiff and the squatters who reside on the property. He testified further that an order for maintaining status quo would mean they and the Plaintiff would remain on the land. DW2 admitted that they have put up mud-walled houses and are cultivating on the church's land. It is apparent that the Plaintiff did not authorise there stay on the land hence the present suit. DW2 admitted that the Plaintiff did not permit them to occupy the suit property.

49. Since the Plaintiff is the rightful owner of the property, what does that make of the Defendants' occupation of the suit property without the permission or consent of the registered owner? This is well explained at Section 3 (1) of the *Trespass Act*, Cap 294 which provides that:-

> " Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence."

50. There is no doubt in my mind that the Defendants herein are indeed guilty of encroaching and trespassing into the Plaintiff's suit land. Having found that the Defendants trespassed into the suit land, the next issue is whether as a result of the same, the Defendants should be evicted from the suit property.

51. It is evident that previous efforts to get them to leave did not bear any fruits. There was the Notice from the Municipal Council dated 27th November, 2012 which noted that there was encroachment onto the suit property belonging to the Plaintiff. The Notice directed the occupiers to remove their structures they had put on the suit property or the Council would remove them at the costs of the occupiers, the land but they did not heed to this call. I have also seen the Demand Notices sent to the Defendants' prior to commencement of this suit, but yet again, they did not comply. Consider also the testimony of the DW2, who testified that he would not move from the suit property unless the Plaintiff gave him alternative land. The Plaintiff is under no obligation to ensure that a party who invaded and encroached on its land is resettled elsewhere before it can begin to enjoy its constitutionally protected proprietary interests over the suit property.

52. It is this reluctance on the part of the Defendants to vacate the property that brought the Plaintiff to court seeking an eviction order. Having analysed the facts and circumstances of this case, the court finds that the Plaintiff is entitled to vacant possession of its property. However, the court is not blind to the fact that the Defendants possibly live on the land with their families, and have in all likelihood put up developments or have crops growing on the land. For this reason, the court shall allow the Defendants 6 months within which to collect their belongings from the suit property. At the end of those 6 months, if the Defendants shall not have vacated the suit property, the Plaintiff will be at liberty to evict them from the suit property without further reference to this court.

53. The Plaintiff also prayed that the Defendants should be permanently restrained from any dealings with the suit property. An order of permanent injunction fully determines the right of the parties before the Court and is normally meant to perpetually restrain the commission of an act by the Defendant in order for the rights of the Plaintiff to be protected. The Court thus has inherent powers to grant the said order of permanent injunction where it is of the mind that party's rights have been fringed, violated and/or threatened. See the decision of the High Court in of Kenya Power & Lighting Co. Limited vs Sheriff Molana Habib (2018) eKLR where it had been held inter alia as follows:-

> " ...A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually

restrains the commission of an act by the Defendant in order for the rights of the Plaintiff to be protected. A permanent injunction is different from a temporary/interim injunction since a temporary injunction is only meant to be in force for a specified time or until the issuance of further orders from the court. Interim injunctions are normally meant to protect the subject matter of the suit as the court hears the parties…"

54. The leading case on grant of injunction remains the celebrated case of Giella vs Cassman Brown & Co. Ltd (1973) EA 358. The principles established in this case are that the party seeking the injunction must establish a prima facie case, show that they will suffer irreparable injury, and where the court is in doubt, it will base its decision on the balance of convenience. The Plaintiff has already proved its case on a balance of probabilities. It goes without saying that the continued stay of the Defendants on its land will hinder the Plaintiff's ability to enjoy its proprietary rights over the suit property, hence the injury. Considering that the two conditions have been met, I would say that the balance of convenience herein tips in favour of granting the Plaintiff the Permanent injunction sought.

55. Having looked at the totality of the evidence before me, I hold that the Plaintiff has indeed proved its case to the required threshold to warrant the grant of permanent injunctive orders sought. Consequently, I will proceed to grant the permanent injunction sought against the Defendants in the Plaint.

c. Who shall bear the costs of this suit?

56. Section 27 of the *Civil Procedure Act* provides is the law on costs and it provides that:-

> "27 (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and give all the necessary directions for the purposes aforesaid; and the fact that the court has no jurisdiction to try the suit shall be no bar to the exercise of those powers;
>
> provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise direct."

57. The award of costs is left to the discretion of the court as provided under the above section. Courts recognise that costs ought not to be used to penalize the losing party, but that they are meant to compensate the successful party for the trouble taken in prosecuting or defending the case. The basic rule on attribution of costs is that costs follow the event unless the court has good reason to order otherwise, which will vary depending on the circumstances of each case. The Supreme Court of Kenya in the case of Jasbir Singh Rai & Others vs Tarlochan Rai & Others (2014) eKLR gave a few examples of what good reason could entail:

> " in the classic common law style, the courts have to proceed on a case by case basis, to identify "good reasons" for such a departure. An examination of evolving practices on this question shows that, as an example, matters in the domain of public interest litigation tend to be exempted from award of costs…"

58. In this case, the Plaintiff is the successful party, and this court would in any other circumstances have awarded it costs of this suit, especially considering that the case has been pending in court for the last 10 years. However, I note the difficult position that the Defendants have been placed in by this

very decision. They face the task of having to relocate and find new accommodations for themselves and possibly their families. Condemning the Defendants to costs at this point will be tantamount to penalising them, which is not the object of the award of costs of a suit. As a result, and bearing these very unfortunate circumstances in mind, the court will not award the Plaintiff costs of this suit.

Orders:

59. In the upshot, I make the following orders:-

a. A declaration be and is hereby made that the Defendants' invasion of the Plaintiff's parcel of land is illegal, null and void and amounts to trespass.

b. A permanent injunction is hereby issued restraining the Defendants, their servants and or agents from entering, trespassing into, constructing upon, occupying, transferring, encumbering and or otherwise interfering with land parcel number Eldoret Municipality Block15/2026.

c. The Defendants shall have 90 days within which to vacate the Plaintiff's parcels of land known as Eldoret Municipality Block15/2026. Failure to abide by this order, the Plaintiff shall be at liberty to evict the Defendants from the said parcels of land without further reference to this court.

d. No order as to costs.

DATED, SIGNED AND DELIVERED IN ELDORET THIS 15TH DAY OF OCTOBER, 2024.

E. OBAGA

JUDGE

In the virtual presence of: -

M/s Chesoo for Plaintiff.

Mr. Matekwa for Mr. Mwinamo for 5th, 23rd to 29th Defendants.

Court Assistant – Laban

E. OBAGA

JUDGE

15TH OCTOBER, 2024.