



Registered Trustees Redeemed Gospel Church v Ishamael & 2 others (Environment & Land Case 725 of 2011) [2024] KEELC 6515 (KLR) (8 October 2024) (Judgment)

Neutral citation: [2024] KEELC 6515 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 725 OF 2011**

JA MOGENI, J

OCTOBER 8, 2024

BETWEEN

THE REGISTERED TRUSTEES REDEEMED GOSPEL CHURCH PLAINTIFF

AND

YUSUF IBRAHIM ISHAMAEL 1ST DEFENDANT

CITY COUNCIL OF NAIROBI 2ND DEFENDANT

MINISTRY OF LANDS AND PHYSICAL PLANNING 3RD DEFENDANT

JUDGMENT

1. The Plaintiff herein brought this suit against the Defendants vide a Plaintiff dated 16/12/2011, which was amended on 21/02/2018 and further amended on 21/07/2018 and sought for Judgement against the said Defendants, jointly and severally for the following orders;
 - a. A prohibitory order or a permanent injunction prohibiting the 1st Defendant either by his nominees, servants, agents, contractors and or employees from entering and constructing any structure on LR No. 209/19728 as delineated in the Deed Plan No. 310431 dated 29th June 2010
 - b. A declaration that the suit property belongs to the Plaintiff
 - c. A declaration that the 1st Defendant cannot evict it from the suit property or a portion thereof in the absence of a Decree by a court of competent jurisdiction in its favour for the delivery of occupied by him and currently under construction.
 - d. A declaration that the Deed Plan No. 335/21, Nairobi City Council's Building Plan Reg No. FB 332 for the property known as LR No. 29/7260/223 formerly known as Plot No. ES 30 – Eastleigh and Nairobi City Council's Construction permit authority Ref: CPD/DC/Plot No. ES 30/ Mni are null and void and hereby cancelled.



- e. Orders of vacant possession, mesne profits and eviction of the 1st Defendant from the occupied portion of LR No. 209/19728 as delineated in Deed Plan No. 310431 dated 29th June,2010
 - f. An order requiring the 1st and 2nd Defendant to remove the erected structure from the Plaintiff's LR No. 209/19728 as delineated in Deed Plan No. 310431 dated 29th June 2010 or in alternative that the plaintiff does cause the said structure to be demolished and the debris removed at the defendant's cost
 - g. Costs of this suit be provided for
 - h. Any other or further relief that the Honorable Court may deem fit to grant.
2. In paragraph of the further amended plaint the plaintiff has averred that it was the allottee of LR 209/19728 as delineated in Deed Plan No 310431 dated 29/06/2010 which suit property is situated in Eastleigh, Nairobi and that the plaintiff has been in occupation of the said suit property first under a temporary permit of occupation which was granted to it by the 2nd defendant and then later pursuant to an allocation by the Commissioner of Lands.
 3. That on 22/03/2009, the plaintiff avers that the Commissioner of Lands vide his letter pf allotment Ref 209163/F/11/112 allocated the suit property to it. Through the letter dated 26/05/2009 the plaintiff accepted the allocation and so soon thereafter the official allotment and processing of a Title Deed commenced. The plaintiff further avers that the suit property is land set aside by the City Council of Nairobi for purposes of setting up a place of worship and a school but the plaintiff avers that the 1st defendant has encroached on the said property and subverted the purpose for the land.
 4. The plaintiff avers that it discovered in 2005 that a new survey plan No. 335/21 folio No. 335 Register No. 21 dated 17/11/2005 had been prepared and that it ate into the road and also decimated the allocated land by 1/2 and he lodged a complaint. Which upon investigation the City Council on 6/08/2009 cancelled the new overlapping Deed Plan and ordered the processing of the Plaintiff's title.
 5. That the 1st Defendant had obtained a title LR 29/7260/223 formerly known as Plot No. ES 30 – Eastleigh and in October 2011 he invaded a portion of the plaintiff's suit property, the portion of at the school area and started construction. The plaintiff avers that vide a letter dated 7/112011 the City Council withdrew the approval letter for the 1st defendant vide a letter referenced Disapproval of Building Plan Reg. No. FB 332 for the property LR No. 29/7260/223 and also the City Council revoked its construction permit authority and ordered the construction to be stopped.
 6. In view of the cancellation the plaintiff avers that the 1st Defendant is a trespasser to the allocated property and he has particulars of trespass as follows:
 - a. Forcefully entering the Plaintiff's property without any color of right
 - b. Entering and purporting to construct a stricter on the Plaintiff's property
 - c. Illegally invading the school compound for the Redeemed Gospel Church's Glorious Preparatory School
 - d. Purporting to be the owner of the occupied portion of LR No. 310431 dated 29th June 2010
 - e. Carrying on with the forceful and illegal construction of his structure despite
 - i. Cancellation of his fraudulent Deed Plan
 - ii. Revocation of the City Council of Nairobi's Construction permit authority Ref CPD/DC/PLOT NO. ES 30/Mni



- iii. Disapproval of Building Plan Reg No. FB 332 for the property known as LR No. 29/7260/223 formerly known as PLOT No. ES 30- Eastleigh
 - iv. Orders of the City Council of Nairobi to stop construction
7. Orders of the City Council of Nairobi to remove the erected structure.
 8. listed grounds (a) to (e) particularizing the trespass. He further avers that the 1st defendant has carried on the construction notwithstanding the revocation.
 9. The 1st Defendant filed a statement of defence dated 5/06/2014 in which he had prayed that the plaintiff's suit be dismissed with costs. The defence was amended vide an amended defence and counter-claim dated 29/03/2018.
 10. In his amended defence and the counter claim the 1st defendant admitted the descriptive parts of the Amended Plaintiff dated 21/02/2018. At paragraph 6 the 1st defendant denied vehemently the averment in the Amended Plaintiff at paragraph 6 that the suit property had been set aside by the defunct 2nd defendant for purposes of worship and school and he denies having encroached on the said property.
 11. The 1st defendant avers that the Survey Plan No. 335/21 dated 17/11/2005 was regularly and legally prepared for the 1st defendant and that the survey plan did not eat into the road and neither did it decimate the plaintiff's alleged allocated land. He contends that all legal procedures were followed in his acquisition of title LR 209/7260/223 formerly known as Plot No. ES-30 and building plans were also approved by the defunct 2nd defendant in 2008. That due to failure to complete the building within the time stipulated the same plans were re-submitted by the 1st defendant for re-approval on 18/06/2011.
 12. It is the contention of the 1st defendant that he is in occupation of LR 209/7260/223 and LR 209/19728 and that he has been in occupation since 2004 and acquired title on 12/02/2009 which is indefeasible and he has substantially developed residential houses. At the same time he states that he has charged the property to Chase Bank (K) Limited for Kshs 15 million and stands to suffer irreparable damage and or loss if the prayers sought by the plaintiff are granted. He thus prays that the plaintiff's suit to be dismissed.
 13. At the same time the 1st defendant has filed a counter-claim stating that he purchased the suit property from one Sophia Wambui who had been allotted the suit property by the defunct 2nd defendant vide an allotment letter dated 13/12/1995. That upon the 1st defendant acquiring the suit property the defunct 2nd defendant surrendered the suit property to the Commissioner of Lands for processing of Title vide a letter dated 25/11/2007 and the title was thereafter issued in the 1st defendant's name.
 14. That the 1st defendant lodged building plans in 2008 and resubmitted in 2011 and continued to with developments on the suit property. However, despite enjoying quiet possession the 1st defendant became aware in 2011 that the plaintiff had lodged a complaint with the defunct 2nd defendant alleging that the 1st defendant was trespassing on the suit property by putting up illegal developments on LR 209/19728.
 15. That the defunct 2nd defendant notified the 1st defendant of disapproval of his building plans on 07/11/2011 and the 1st defendant sought an injunction against the defunct 2nd defendant by filing Nairobi ELC Civil Cause No. 727 of 2011 not knowing that on 16/12/2011 the plaintiff had also filed a suit seeking injunction relief against him and the defunct 2nd defendant vide the instant suit and two others which were subsequently withdrawn.



16. The 1st defendant claims that the plaintiff and the defunct 2nd defendant and/or its successor have denied him quiet possession by trespassing on the suit property. He listed the following as particulars of the said trespass and harassment:
- a. Entering upon and purporting that the suit property LR 209/7260/223 is part and parcel of LR 209/19728
 - b. Illegal revocation by the defunct 2nd Defendant and/or its successor of the 1st Defendant's building plans for developments on the suit property
 - c. Recommendation to the Commissioner of Lands by the Plaintiff and the defunct 2nd Defendant and/or its successor for the revocation of the 1st Defendant's Title to the suit property
 - d. Issuance of an illegal directive by the defunct 2nd Defendant and/or its successor for the demolition of the developments on the 1st Defendant's suit property
17. The 1st Defendant therefore prays for judgment against the plaintiff and the defunct 2nd defendant and/or its successor the County Government of Nairobi jointly and severally for:
- a. A declaration that the existence of the suit property i.e LR 209/7260/223 vide allotment letter dated 13/12/1995 from the defunct 2nd Defendant to Sophia Wambui and subsequently Deed Plan No 335/21 and Grant No. LR 116269 is legal
 - b. A declaration that the suit property i.e LR 209/7260/223 is legally registered to the 1st Defendant
 - c. A declaration that the notice issued on 07/11/2011 by the defunct 2nd Defendant disapproving the 1st Defendant's Building plan Reg No. FB 332 for the suit property i.e LR 209/7260/223 and further instructing the 1st Defendant to stop further construction and removal of all the erected structures is illegal, null and void
 - d. An order of permanent injunction restraining the Plaintiff and the defunct 2nd Defendant and/or its successor the County Government of Nairobi, their agents and or servant from trespassing upon, demolishing structures on, evicting the 1st Defendant from, alienating the suit property i.e LR 209/7260/223 and in any way whatsoever interfering with the 1st Defendant's quiet and peaceful possession of the suit property i.e LR 209/7260/223
 - e. Costs of this counter claim Alternative to a), b), c) and d) above;
 - f. Full indemnity against the defunct 2nd Defendant and/or its successor the County Government of Nairobi for the loss and damage incurred by the 1st Defendant as a result of the 1st Defendants' reliance of the allotment letter dated 13/12/1995 from the defunct 2nd Defendant to Sophia Wambui and subsequently Deed Plan No 335/21, Grant No IR 116269 and Building Plan Reg No. FB 332;
 - g. Any other or further relief that the Honorable Court may deem fit and just to grant to the 1st Defendant in the circumstances.
18. The 2nd defendant also filed its defence dated 23/08/2022 and denied all the averments in the plaint.
19. In response to the 1st defendant's filed a defence and amended written statement of defence and counter claim dated 29/03/2018, the 2nd defendant filed a defence dated 17/04/2018 and denied all averments in the amended defence and counterclaim. The 2nd defendant denies that the 1st defendant is the



- registered proprietor of the suit property and also it denies that the 1st defendant purchased the suit property or that the suit property had been allotted prior to his purchase of the suit property to any third party.
20. The 2nd defendant avers from their records any transaction by the 1st defendant relating to the suit property were revoked and/stopped some time in November 2011 following the discovery by the erstwhile City Council of misrepresentation of information during the time of approval of the said Building Plans.
 21. It is the 2nd defendant's contention that some time in or about July 2009 it came to their notice that Deed Plans for LR Nos 209/7260/175, 176, 177, 178, 179,180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195,196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211,212,213,214, 215, 216, 217, 218, 219, 220, 221, 222, 224, 228 and 229 were lost and the City Council advised the Commissioner of Lands.
 22. That the 1st defendant filed HCC No. 727 of 2011 seeking an injunction against the 2nd defendant after being served by the 2nd defendant with an enforcement notice since it is the duty of the 2nd defendant to consider and approve all development applications and grant permissions ensuring proper execution and implementation of approved physical development plans
 23. The 2nd defendant avers that the 1st defendant not being the owner of the suit property cannot claim plead trespass and thus denies the particulars of trespass and/or harassment as alleged at paragraph 27 a) to d) of the counter claim.
 24. The 2nd defendant avers on a without prejudice basis that if there was any liability owed to the 1st defendant it would have to be ascertained by the Intergovernmental Relations Technical Committee after it concludes its audit of the assets and liabilities of the defunct 2nd defendant. Further the 2nd defendant avers that it is not in the place of the Honorable Court to find that liabilities must naturally continue against the County Government.
 25. The 2nd defendant thus implores the Honorable Court to dismiss the 1st defendant's counter claim against the 2nd defendant with costs.
 26. The Interested Party also filed a statement of defence dated 17/03/2023 in which it stated that the suit property was allocated to the Plaintiff vide a letter of Allotment Ref 209163/F/II/112 dated 22nd May 2009 in respect of Uns. Religious and Educational Plot – Nairobi and the allottee accepted and made payment and an official receipt Serial No. 1269752 dated 28th May, 2009.
 27. The Interested Party (herein after IP) filed a statement of defence dated 17/03/2023 and avers that the from their records a Deed Plan No. 310431 dated 29th June 2010 for new Grant survey was issued in respect of parcel LR No. 209/19728 and upon being issued it was registered as IR 1396171/1 on 25th October 2010 for a term of 99 year with effect from 1st June 2009. This was issued on the special condition that the land and buildings are to be used only for religious and educational purposes.
 28. In regard to the survey records the IP stated that from their records Cadastral Survey Plan F/R 498/191 was prepared by S.G Mwangi Licensed Surveyor under the authority letter Ref. 209163/F/II/112 dated 22nd May 2009 which survey was in respect of Parcel No. LR 209/19728. That the survey was examined, approved and authenticated by the Director of Survey on 29th April, 2010.
 29. The IP avers that the Deed Plan No. 310431 dated 29th June, 2010 was issued in respect of LR 209/19728 as a New Grant Deed Plan for the suit land measuring 0.328 Ha. That in respect of the suit property and in line with section 5 (2) of the Physical Planning Act Cap 286 the Director of City



Planning was required to a part development plan for alienation purposes and publish it under section 26(1) of the Act and upon publishing a notice of completion of a development plan in Form PPA 3 invite members of the public to make representations in or objections to the plan in writing. That this was done under Gazette Notice No. 3068 dated 29/04/2003 in compliance with the Act and a similar notice published in the Daily Nation and Taifa Leo.

30. That the Director would then adopt the plan prepared and published by the City Planning and would assign a reference number before submission to the Minister for approval and this was done and it was forwarded with a certified plan to the Minister for approval on 30/06/2025.
31. The plan was assigned a new number Ref 42/13/2003/01 after being subjected to normal statutory procedures of preparation, publication for comments, approval by Minister and assignment of an approved development plan. Thus the suit property was given an approved plan Ref 42/13/2003/01 of No. 264 for existing religious and education purposes – Redeemed Gospel Church has never been revoked or modified under Section 27 as read with Section 22 of the Act.
32. The 2nd defendant filed a response to the Interested Party’s Defence dated 6/06/2023 and joint issues with each and every allegation in the Interested Party’s Statement of Defence and puts the Interested Party to strict proof.
33. The 2nd defendant joins issues and denies paragraph 3 (a-m) of the Interested Party’s Statement of Defence.

Plaintiff’s Case

34. This case commenced hearing on 26/07/2023 having failed to proceed on 12/10/2022 when the Counsel for the 1st defendant stated that they had been served late by the 2nd defendant, it was then slated for 21/11/2022 but the parties sought an adjournment to allow them work on their trial bundles. They requested to withdraw both Volume 1 and 2 of the bundles filed. The new date given by the court to the parties was 5/12/2022, but again on this date the parties failed to proceed because the plaintiff had not served the Interested Party through the Attorney General’s office.
35. The plaintiff was condemned to pay Court Adjournment Fees and a new date to have the matter heard was given being 22/03/2023. On this new date the Interested Party had not served the parties to the suit and therefore the date was vacated and the new hearing date given as 26/07/2023.
36. The hearing finally commenced on 26/07/2023 when PW1- Albert Marangu Kanatha testified that he served with Plaintiff as a senior pastor. He adopted his undated witness statement and produced his list of documents. It was his testimony that the suit property was open an unsurveyed. That there were plots marked as shown in the documents at page 57 of the plaintiff’s bundle. He testified that they requested for the space marked as FR No. 115/22. He testified that the plaintiff applied for Temporary Occupation Licence (herein TOL) as seen on page 55 dated 25/10/1997 vide the letter from the City Council of Nairobi.
37. That the TOL had conditions which required that the plaintiff does not put up permanent buildings since the land had not been surveyed. It was his contention that the plot the plaintiff was allocated has not been allocated to the 1st defendant. Further that on pages 101-106 of the plaintiff’s bundle there is correspondence from City Council cancelling the purported allocations of 1995 and the respective deed plans.
38. He testified that in 2001 July the plaintiff applied to be allocated the plot they were already occupying permanently. Through the Nairobi City Council Part Development Plan of 2003 following an



advertisement in the daily newspapers on 2/05/2003 and also in the Kenya Gazette of 29/04/2003 the plaintiff was allocated the suit property after following due process.

39. It was his testimony that after cancellation of survey pan FR No. 335/21 the deed plans relating to the survey plan were all cancelled as shown at pages 111 and 126. He also stated that there is no road between the plot of the 1st defendant and the plaintiff's plot. PW1- testified that the plaintiff's allotment letter was issued by Ministry of Lands because Nairobi City Council had for four (4) years following the PDP failed to issue the allotment letter and so the plaintiff sought the assistance of the Ministry of Local Government. He further stated that according to the survey plan the encroachment of the 1st defendant is about 10 metres on their land as shown on the survey plan on page 77.
40. PW2 – Jeconiah Wambua Musembi, adopted his witness statement contained in the plaintiff's bundle at page 33-35. He testified that he joined the church in January 1997 and that the plaintiff got a TOL which was based on the unsurveyed land. The plaintiff made an application for allotment in 2001. He testified that by the time the letter at page 101 was written the plaintiff had received its letter of allotment in May 2009. That the plaintiff got its title in 2012 but that the 1st defendant got the Part Development Plan (PDP) upon a cancelled deed plan. .
41. He testified that the survey plan for Folio 335/21 is dated 1995 and allotment letter was also dated 1995. It was his contention that a plot is given out of an approved PDP and survey is done before the plot is allotted. He testified that there was no sewer line between the plaintiff's plot and the 1st defendant's plot and also there is no wayleave of a power-line.
42. Upon further cross-examination he testified that the plaintiff made an application in 1997 to the City Council of Nairobi and they were allocated a TOL. The plaintiff's allotment letter is dated 22/05/2009 with 0.3257 hectare and the PDP referred to in relation to the suit property is Ref 42/13/2003/01. It was his testimony that they paid for the charges on 28/05/2009 and the title was issued in 2009 Grant No. IR 139617 and there is an attached Deed Plan dated 29/06/2010. The said title has never been cancelled nor the deed plan. That the plaintiff is in possession and is utilizing the entire acreage.
43. It was his testimony upon further cross-examination that they were in court because part of the suit property has been encroached. When asked why the plaintiff sued the Ministry of Lands, it was his testimony that they sued the Ministry of Lands because the documents being used by the 1st defendant are claimed to come from the Ministry and City Council who are the holders of the Land Records. Therefore, the plaintiff wanted the two to authenticate the records.

Defence Case

44. Yusuf Ibrahim Ismail the Defendant testified as DW1 and adopted his witnesses statement and asked that his list of documents to be adopted as his exhibits containing 21 documents.
45. On cross examination, by Counsel for the plaintiff Mr Mureithi, he stated that his property is LR 209/7260/224 which he was given by Ministry of Lands and the survey plan number is FR 335/21 dated 24/09/2007. It was his testimony that when he was constructing the City Council stopped his construction once and that he was not aware that his title was cancelled and neither was he asked to return the title deed that he had been issued with.
46. Upon further cross-examination by Counsel for 1st defendant Mrs Lamwenya, he testified that he was not allotted the suit property but that he bought the said parcel of land from one who was allotted the parcel in 1995. That he did a search then they entered into a sale agreement and he got a title in 2009. He testified that he started constructing on the suit property before getting title and that whereas the



- County Government of Nairobi gave him notice to stop construction he appealed and he was given a go ahead. He testified that he never sued the county government.
47. The Counsel for the Interested Party Mr. Kamau, cross-examined DW1 and he testified that he bought his plot from Sophia Wambui and that he bought two plots in 1995 each costing Kshs. 500,000. He however stated that he did not have any document to show in evidence that he paid for the two plots except for the sale agreement that he signed.
 48. It was his testimony that he was not aware whether Sophia Wambui who he bought the parcel of land from paid the money she was required to pay within 30 days as the allotment letter stated. He further testified that the Sale Agreement that he had produced at page 33 was prepared by a lawyer whom he did not know. Further the said premium receipt is dated 23/12/2004.
 49. He testified that he had not produced a search document and that he was buying Plot ES-30 which he believed had been surveyed as per the document he produced at page 36. He was subsequently issued with title in 2009. He informed the court that he went to pick his own title which is at page 40 and whereas it speaks about surrender, he stated that he did not know about the surrender, since he paid the loan and the title was discharged.
 50. When he was re-examined he started that the charge was for 5/08/2013 and the discharge was for 18/08/2015 and that Sophia the one who sold the parcel to him was not claiming anything from him. He stated that he was not aware that the title was cancelled. Further that he was not claiming anything from the plaintiff. He concluded his testimony by stating that there is a road and wayleave and that there are plots around him and that he had not encroached. With this the 1st defendant closed his case.
 51. At this point the Counsel for the 2nd defendant sought an adjournment to allow his witness to attend court since he was indisposed and the adjournment was granted on condition that the Counsel should file evidence of the indisposition. The matter resumed for hearing on 28/11/2023.
 52. DW2- Benson Ndegwa stated that he works for Nairobi City Council and he adopted his witness statement as his evidence in chief and a list of documents which is contained at page 11 of the bundle containing 23 documents as exhibits.
 53. On cross-examination he testified that the letter dated 24/07/2009 in the bundle listed the lost deed plans and that the defunct 2nd defendant advised the Commissioner of Lands not to register any leases relating to those lost deeds. That the plot owned by the 1st defendant is reflected on the said list. That the reason for the advise to the Commissioner of Lands is that there was double allocation.
 54. He testified that he could not confirm whether the lost deed plans were found since they were issued by Survey of Kenya. On further cross-examination by the Counsel for the 1st defendant, he testified that the suit property was part of a scheme started in 1992 though the 1st letter of allotment was issued in 1995. According to the witness the plaintiff was not a beneficiary in the Part Development Plan (PDP) of Eastleigh. Further that plaintiff never went to the defunct 2nd defendant for the allocation of a public space on a temporary basis and that the county never generated a PDP and by 1997 the plots were already built.
 55. He testified that the 2nd defendant never regularized the new PDP from the Ministry of Lands and the map at page 190 of the bundle shows Temporary Church building is a road. That if he was to implement the PDP produced by the plaintiff, it will block the entire road and the plots including the 1st defendant's plot. It was his testimony that between the church and the plots there is a 12 meter wide road for sewer and power and the access has been blocked by the church including the way leave.



56. It was his testimony that the title and the PDP by the plaintiff should be amended so that it does not overlap on the wayleave and the other plots. He stated that whereas he hears that the title to the church was issued in 2012, the church is a trespasser.
57. The witness was cross-examined by the Counsel for the Interested Party and stated that he was a trained accountant but that he did administrative courses and that he was not a registered planner and he had no qualifications as a surveyor and neither was he a licensed surveyor. He also stated that he did not have a work identification card to prove that he worked for Nairobi City County in the capacity he alleged to work in.
58. He testified that he was familiar with the property LR 209/7260 which according to him initially belonged to Nairobi City County. That the land was allotted to the County by Ministry of Lands in early 1950s for sewer treatment works. That there was a change of user when there was a decommissioning of the sewer treatment works in 1987-88.
59. It was his testimony that the county decided to subdivide and allocate to individuals the said land and the cadastral map number 335/21 shows about 56 plots. He stated that the allotment letter at page 15 show that the plot was allotted to Waweru Kimani which was transferred to Pastor Marangu on 24/04/2003 but that he was not aware whether a lease was generated nor certificate of title issued. He stated that he was not aware whether the lost deed plans were ever located nor was he aware about the preparation of any PDP. In re-examination when asked why he was producing documents he did not know anything about nor did he prepare them he stated that he was producing them because he was in charge of all counties allocated properties and he was privy to all PDPs done prior to allocation of properties. With this the Counsel for the 2nd defendant moved to close the defunct 2nd defendant's case.
60. The next witness to testify was a director working since 1989 with the Ministry of Lands Planning Works, Housing and Urban Development DW3- Gordon Odeka Ochieng. He adopted his witness statement and in cross-examination referred the court to the Temporary Operation Licence and that at paragraph 13 of the Interested Party's witness statement he indicates that there was a PDP. It is his testimony that at paragraph 18 of his witness statement he has stated the 1st defendant's claim appears to be based on a sub-division scheme and that Nairobi City Council has since disowned the survey plan that created the 1st defendant's suit property. That the documents at pages 103-106 are the ones that form the substratum of paragraph 24 of the witness statement.
61. When cross-examined further by the counsel for the 1st defendant, he clarified that the content at page 103 does not refer to any cancellation of the deed plan or the sub-division and that at page 105 of the affidavit he has stated that the documents are lost or misplaced. It was his testimony that SG Mwangi at paragraph 5 of the document at page 24 recommends that the FR 335/21 should be maintained in view of the investment and that at paragraph 6 he recommends that survey plan FR 498/191 for the church to be cancelled. He testified that in his witness statement he stated what was not correct and that is that LR 209/19728 is the one overlapping LR 209/7260/223. He stated that he knows that it overlaps other public utilities but that he has not gone to the ground to prove his assertions.
62. He testified that the Memorandum of Registration of the Transfer at page 3 of his bundle shows that the 1st defendant's title was issued in pursuance of a surrender but that the one at page 2 of the bundle does not indicate surrender. That the title of the church does not indicate it is a surrender. He therefore testified that he made a recommendation that the title to the church should not have been processed since it does not only overlap the 1st defendant's land but other properties and way leaves. Therefore, it is his recommendation that the church's title should be amended to correct the overlap,



63. Upon further cross-examination he stated that the title for the church was registered on 25/10/2012 and not as stated at paragraph 17 and it was executed on 16/10/2012. When re-examined, he stated that the title was registered on 25/10/2012 so the reference he has referred to at paragraph 17 is inaccurate and that he was not aware that the cadastral map was cancelled nor that the deed plans were also cancelled.
64. DW4- Timothy Waiya Mwangi testified that he was the deputy director of Physical Planning at the Ministry of Lands and that he has worked for the Ministry for 37 years and thus conversant with the matter at hand. He adopted his witness statement and sought to have his list of documents dated 17/03/2023 bearing 17 documents to be adopted although he testified that he will produce only documents 1-14.
65. On cross-examination he stated that issuance of a PDP is depended upon the land regime. He stated that in the instant matter the land was under GLA and section 9 of the Government Act (GLA Repealed) allows the Commissioner of Lands to allocate plots and the procedure is that the Commissioner of Lands requests the Director of Physical Planning to visit the ground and then he prepares a base map.
66. He testified that section 3 of the Physical Planning Act defines a PDP as a plan prepared for alienation of government land and for immediate implementation of government projects. That under the Physical Planning Act the advertisement for that plan would be placed in the newspapers and gazetted. These would then be displayed in the Chief's office or any other public office and members of the public had 60 days to file any reports. That after the 60 days the director printed 4 copies and sought approval from the Ministry with evidence of steps taken.
67. If satisfied the Minister signed and forwarded the documents to the Director of Physical Planning so as to assign an approved number and to enter the plan in the register and it is the approved plan which would be used by the Commissioner of Lands to issue a Letter of Allotment. Thus the letter at page 101 of the Interested Party's Bundle dated 17/03/2023 for the last paragraph to make sense section 27 has to be read together with section 22 because if there were to be changes then the director had to go through the same process.
68. On cross-examination by Counsel for the 1st defendant, DW-4 testified that the 1st or 2nd PDP is not the issue since the Ministry is to confirm if Folio No. 264 was authentic or not. He stated that they undertook their assignment and therefore he only focused on the PDP for the church. He testified that a licensed surveyor cannot prepare a PDP it is only the Director of Physical Planning who can delegate this assignment and that a PDP has to be specific with reference. That Section 27 of the PPA provides that a PDP forms the basis of survey.
69. That members of the public should have utilized the provided 60 days to raise objections by the time the PDP was published in the newspaper on 2/05/2006 and on 29/04/2003 in the Kenya Gazette Notice No. 3068 and in the Chief's Office and City Hall. He further stated that the Ministry of Lands, Director of Surveys as seen in the document at page 112 asked the Director of Surveys Metropolitan services who confirmed the existence of the deed plans and continued to process titles and he asked them to correct the anomaly.
70. He further testified that the letter at page 113 is from Director of Survey but it was never sent to the Director of Physical Planning and that they never did due diligence because correspondence from Director of Survey was never copied to them in the Directorate of Physical Planning. He stated that he just worked on documentation and never went to the ground to see what was on the ground.



71. On further cross-examination he referred to the process of directorate of physical planning and stated that in his view the Director of Physical Planning did not make any mistakes in the PDP preparation. He also stated that the PDP in respect to the suit property was generated by City Hall.
72. DW-5 Wilfred Muchai Kabui testified and stated that he is an assistant director of survey and that he has worked in the department of survey for 29 years. He stated that he is a registered surveyor number 204 of 2012 and adopted his witness statement dated 28/02/2024 and he also adopted his list of documents dated 17-03-2023 and he produced documents 15 to 17 in the list as his exhibits he also produced a supplementary list dated 13/02/2024 which has 33 documents which he produced.
73. He stated upon cross-examination that his office received the documents in the plaintiff's bundle and that the parcels in the bundle are the same as those at paragraph 16 of his statements and that their final word is as per paragraph 18 and 19 of the witness statement. On cross examination by the Counsel of the 2nd defendant he stated that the Survey map in respect of cadastral plan no. 335/21 was prepared before survey in respect of survey LR No. 207/7260/223 in cadastral plan FR 498/191.
74. It was his testimony that the two parcels No. LR 209/19728 and LR 209/7260/223 do not share a boundary and there is no road between them and they do not share a common boundary, but one overlaps because of replanning and cancellation of FR No. 335/21. That the later FR No. 335/21 is a survey pan but not a deed plan or a PDP. At Pages 103 of the Plaintiff's bundle the Commissioner is advised not to register numbers of survey processes referred to in the said letter.
75. The witness testified that Gordon Ochieng who testified as DW3 is not the Chief Land Registrar and he is an officer in the department of Land Administration and he cannot speak to the issue of titling of land. On re-examination, he clarified that the letter at pages 21 to 22 there is a letter written internally to the Deputy Director of Surveys of Nairobi Metropolitan. That the said letter confirmed that the director of survey continued making and issuing the deed plans. The map at page 45 of Interested Party's bundle was certified on 13/02/2024. That this particular cadastral map is not cancelled and that if it were it should have indicated cancelled.
76. He testified that at paragraph 25 of Gordon Ochieng's witness statement there was no confirmation that the deed plans had been cancelled. That the director of survey cannot cancel a deed plan that has been used for registration of title
77. IP – Witness Mr Charles Kipkurui Ngetich – Deputy Chief Land Registrar adopted his witness statement dated 24/11/2023 and a supplementary list with 5 documents. Upon being cross-examined he stated that LR No. 209/7260/223 at page 9 of his documents has no letter of allotment to support the issuance of the title.
78. It was his testimony that the titles at pages 6-9 and the ones at pages 10-13 are two different titles, the acreage differ, LR Numbers are different and the deed plans (survey plans) also differ and so it cannot be the same approval. The 2 are separate titles for separate parcels.
79. He stated that he was not aware that there was communication to cancel a survey plan and if there was then this should have been sent to Survey of Kenya and Land Administration. Since if cancellation was requested by Nairobi City County then it would go to Survey not Chief Land Registrar's Office. With this the Interested Party closed its case.
80. The granted parties time to file the submissions and a ruling date was reserved.



Analysis and Determination

81. Upon the close of the hearing, the advocates for the various parties namely, the Plaintiff, the Defendants and the Interested Party, sought time to file and exchange written submissions.
82. The plaintiff filed submissions dated 6/06/2024 and has laid claim to the suit property alleging to have been allocated the property known as LR No. 209/19728 for religious and educational purposes as per the grant I.R 139617 dated 16/10/2012. The plaintiff claims to have been allocated first a temporary occupation licence (TOL) in 1995 under section 40 of the Government Land Act (now repealed).
83. That vide a letter from Nairobi City Council dated 21/10/1997 by the Town Clerk the plaintiff was allocated the suit property under a TOL as from 1/11/1997 pursuant to the attendant conditions.
84. The 1st defendant filed their submissions at the same time the 2nd defendant and Interested Party filed their submissions.
85. I have evaluated the pleadings, oral and documentary evidence as well as the rival submissions and the following issues arise for determination:
- i. What is the status of a TOL?
 - ii. Whether L.R No. LR 209/19728 and L.R No.209/7260/223 are duly and legally registered suit properties?
 - iii. If the answer to (ii) is in the affirmative, who is the lawful owner of the suit property?
 - iv. Cost
86. On the Temporary Occupation License (T.O.L) it is defined under section 2 of the Land Act as:
- “a permission by the Commissioner in respect of public land or a proprietor in respect of private or community land or a lease which allows the licensee to do some act in relation to the land comprised in the lease which would otherwise be a trespass, but does not include an easement or a profit”
87. As the custodian of unoccupied government land in Kenya, the Commissioner of Lands was empowered by the Government Lands Act (Cap 280, Laws of Kenya, now repealed), to grant and revoke Temporary Occupation Licences. Section 40 of the Act provided –
- “40(1) Licences to occupy unalienated Government land for temporary purposes may be granted by the Commissioner;
 - (2) Unless it is expressly provided under this section shall continue for one year and thenceforth until the expiration of any three months’ notice to quit.
PROVIDED that the notice to quit may be served upon the licensees at any time after the expiration of nine months from the date of the licence.”
 - (3) The rent payable under a licence under this section, the period and the agreements and conditions of the licence shall be such as may be prescribed by rules under this Act or as may be determined by the Commissioner.



- (4) The benefit of a licence under this section may, with the consent of the Commissioner, be transferred by the licensee, and the transfer and the consent thereto shall be endorsed on the license.

88. Under the mandatory provisions of section 40 the government is required to give notice to the licensee to terminate the license. A license issued under section 40 may also be forfeited under section 42 for failure on the part of licensee to meet the conditions stated in the licence. Section 42 of the GLA provides as follows:-

“If the rent payable under a licence granted under section 40 is unpaid for one month after it became due, or if any tax or taxes imposed upon the land, or upon the huts erected on the land, or upon the licensee, are unpaid for two months after they became due, or if the occupant of the land fails to keep the land in a reasonably clean condition, the Commissioner may declare his licence to be forfeited.”

89. It is the Plaintiff's case that it was granted a TOL dated 21/10/1997 by the Town Clerk which became operational from 1/11/1997 and attendant conditions enumerated in the said letter. That later vide a letter dated 9/10/2002 the Director of City Planning Department wrote to Director of Physical Planning forwarding a PDP amendment to approve part developed proposed site for Religious and Educational purpose located at Eastleigh Section III –CP/FP/Zone 2/054/08/02 which was eventually gazetted vide gazette number 3068.

90. In its testimony the plaintiff averred that the letter from the Director of Physical Planning dated 4/07/2006 states that PDP Ref CP/FP/Zone2/054/02 for the proposed site for religious and educational purpose for scrutiny was subjected to the normal approval process and approved by the Ministry for Lands on 30th June 2005. From the same letter I noted that the director states that his office is not aware of the PDP which is the subject of survey Folio 335, Register No. 21 which ignored the existing plot for the church and school. The letter also stated that since it was communicated by City Council and approved by the Minister for Lands, then the allocation is not to be interfered with until a process of renegotiation and consensus has taken place and agreed upon by all.

91. The TOL for the plaintiff therefore was never extinguished or renegotiated.

92. The second question is whether L.R No. LR 209/19728 and L.R No.209/7260/223 are duly and legally registered suit properties.

93. It is the plaintiff's case that the title of the plaintiff L.R No. 209/19728 was based on a Part Development Plan No. 42/13/2003/01 prepared by the Directorate of Physical Planning of the Ministry of Lands and Settlement. This PDP was prepared as a result of an earlier proposal by the Directorate of City Planning, City Council of Nairobi under their plan number CP/ZONE 2/054/08/02. The plaintiff was issued with a letter of allotment based on the PDP by the Commissioner of Lands vide the letter dated 22/05/2009 Ref 209163/F/II/112.

94. The plaintiff caused the land to be surveyed and as a result, the title LR 209/19728 was processed as per Survey Plan F/R 498/191 and Deed Plan No. 310431 was issued and the New Grant (Title) was processed by the Commissioner of Lands and it was executed on 16/10/2012 and registered on 25/10/2009.

95. On the part of the 1st defendant, he claimed to have bought the suit property from an allottee Sophia Wambui vide the allotment letter dated 13/12/1995. The suit property LR 209/7260 was through sale agreement dated 23/12/2004 sold to the 1st defendant for Kshs. 500,000. Curiously though the



- Beacon Certificate produced at page 35 of the 1st defendant's bundle is also dated 13/12/1995 and it is written in the name of the 1st defendant. The same beacon certificate does not bear a PDP number nor a survey plan F/R number and the entries are left black and the date is also stated to be 5/9/2005.
96. It cannot be that the plot was allocated to Sophia in 1995 and the beacon certificate was produced in the name of the 1st defendant in 1995 because the sale agreement produced shows that it was entered into in 2004.
97. Gordon Ochieng DW3 stated that LR 209/7260/223 appears to overlap on to LR 209/19728 and that it was registered pursuant to a surrender of LR 209/7260 but the City Council disowned it and recommended for cancellation of Survey Plan No. FR 335/21 which created the 1st defendant's parcel. From the evidence presented by Wilfred Muchae, DW5, the Cadastral Survey of Parcel LR 209/19728 as contained in Cadastral Plan Number F/R No. 498/1919 overlaps onto the Geographical space of parcel LR 209/7260/223 and part of a road as contained in Cadastral Plan Number F/R No. 335/21 and the overlap was said to be occasioned by re-planning of the subject area based on the Approved Part Development Plan Number 264 Ref No. 42/13/2003/01 as approved by the Minister for Lands and Settlement on 30/06/2005.
98. DW5 informed the court that following the replanning there was a recommendation of the cancellation of the survey records contained in Cadastral Plan Number F/R No. 335/21 in respect of the survey of LR No. 209/7260/175 to LR No. 209/7260/232 as the said survey was based on unapproved part development plan. It was his testimony that the net effect of the recommendation of the cancellation of the survey records as stated above means that the New Grant Survey of Parcel of Land Number LR 209/19728 as contained in Cadastral Plan Number F/R No. 498/191 – survey comps. No. 58557 supersedes the survey of LR 209/7260/175 – LR 209/7260/232 contained in the Cadastral Plan Number F/R No. 335/21 survey comps. No. 53293.
99. In essence the 1st defendant's parcel was cancelled and that is why the City Council wrote and also cancelled the approved plans to stop further construction on the suit property. There was a lot of correspondence between the Ministry of Lands and the 2nd defunct defendant and Nairobi Metropolitan Services. The letter dated 7/04/2022 Ref NLMSC/C/1/VOL I/141 refers to cancellation of F/R 335/21 because it was based on unapproved PDP and it recommends that F/R 498/191 be sustained.
100. Now, while I note the effort made by the 1st defendant to show that his title is valid, I note that the person who sold the land to him seems not to have honored the conditions provided in the allotment letter dated 13/12/1995 within the 30 days provided. The stand premium seems to have paid on 17/08/2004 as per the document at page 27 of the 1st defendant's bundle. The allotment letter also stated that the allottee was to get the allotment subject to her written acceptance and the 1st defendant never presented this acceptance letter.
101. The document at page 27 indicates that the property being referred to is LR No.209/7260/R and the same applies to the receipt presented at page 30 of the 1st defendant's bundle. The Court of Appeal in the case of Waterfront Holdings Limited v Kandie & 2 others (Civil Appeal 88 of 2019) [2023] KECA 1223 (KLR), held that

“Just as in the previous case, the issue as to whether the stand premium for the first allotment was paid or not was not an issue. However, this Court in Swaleh Mohamed Waziri & 3 Others v Houd Mohmoud Athman & Another [2020] eKLR held that:-“...an allottee having been allotted land by the Commissioner of Lands and duly paid all the stand



premiums and other related charges, is considered to have acquired rights over such land, which thereafter rendered it unavailable for allocation to other persons or entities.”

102. There is therefore no difficulty in situations where an allottee has duly paid the stand premiums and related charges and the title documents issued. In those circumstances, the allottee, now the registered proprietor, acquires all the rights to that land hence removing the land from the ambit of further allotment. That position is also reflected in the case of *Dr. Joseph N K Arap N’gok v Justice Moiyo Ole Keiwua & Others Civil Application No. Nairobi 60 of 1997* where the court held that title to landed property can only come into existence after the issuance of the letter of allotment meeting the conditions stated therein and actual issuance thereafter of title documents pursuant to the provisions under which the property is held.
103. It follows therefore the legal position is not that once issued, the letter of allotment lasts indefinitely. There must be an acceptance of the offer to allot the land by the allottee fulfilling the conditions specified for the said allotment. I do therefore associate myself with the finding of the court in the case of *Fidelity Commercial Bank Limited v Kenya Grange Vehicle Industries Limited [2017] eKLR* where it stated that:
- “It is elementary learning that for there to be a contract, there has to be an acceptance of an offer on the same terms of the offer and such acceptance must be unconditional, unequivocal and absolute, accompanied by consideration.”
104. The debate pertaining to whether or not a letter of allotment whose terms have not been complied with and/or adhered to, survives the expiry of the stipulated timelines was addressed, highlighted and elaborated upon by the Supreme Court of Kenya, in the case of *Torino Enterprises Limited v Attorney General (Petition 5 (E006) of 2022) [2023] KESC 79 (KLR)* the court stated and held thus:
- “So, can an Allotment Letter pass good title? It is settled law that an Allotment Letter is incapable of conferring interest in land, being nothing more than an offer, awaiting the fulfilment of conditions stipulated therein...”
105. Thus the 1st defendant’s title suffered his first defeat by the virtue of the fact that the Letter of Allotment he is relying on could not and has not conferred title by virtue of the failure to fulfil the conditions therein. Sophia Wambui could not confer title therefrom. Unlike the plaintiff whose letter of allotment is dated 22/05/2009 and the acceptance and payment of the amount requested was done on 28/05/2009 which is within the stipulated 30 days.
106. To my mind, the letter of allotment which was issued to and in favor of Sophia Wambui and later transferred via sale to the 1st Defendant herein lapsed and thus became extinct and hence same could not underpin/anchor the purported Certificate of Title/Grant that was issued in the year 2009.
107. I will not belabor other issues touching on title because I have said enough. I therefore move to make the finding on the second issue that the plaintiff is the duly registered owner of LR 209/19728. The 1st defendant it has emerged is holding a title that was cancelled by the same Nairobi City Council that had offered it to Sophia Wambui who also did not have a valid title since the Allotment letter was based on unapproved PDP and all the other issues mentioned above negate the existence of the said title. Thus the claim of the 1st defendant presented in the Counter-claim fails.
108. On costs, the plaintiff made a claim for mesne profits which are special costs but which were not pleaded and I therefore decline to award the mesne profits.



Final Disposition

- i. A permanent injunction is hereby issued prohibiting the 1st defendant either by his nominees, servants, agents, contractors and or employees from entering and constructing any structure on LR No. 209/19728 as delineated in the Deed Plan No. 310431 dated 29th June 2010
- ii. A declaration that the suit property LR No. 209/19728 as delineated in the Deed Plan No. 310431 dated 29th June 2010 belongs to the Plaintiff
- iii. A declaration be and is hereby issued that the 1st Defendant cannot evict the plaintiff from the suit property or a portion thereof in the absence of a Decree by a court of competent jurisdiction in its favour for the delivery of occupied by him and currently under construction.
- iv. A declaration be and is hereby issued that the Deed Plan No. 335/21, Nairobi City Council’s Building Plan Reg. No. FB 332 for the property known as LR No. 29/7260/223 formerly known as Plot No. ES 30 – Eastleigh and Nairobi City Council’s Construction permit authority Ref: CPD/DC/PLOT NO. ES 30/ Mni are null and void and hereby cancelled.
- v. An order is hereby issued of vacant possession and eviction of the 1st Defendant from the occupied portion of LR No. 209/19728 as delineated in Deed Plan No. 310431 dated 29th June,2010
- vi. An order is hereby issued requiring the 1st Defendant to remove the erected structure from the Plaintiff’s LR No. 209/19728 as delineated in Deed Plan No. 310431 dated 29th June 2010 within 60 days of delivery of this judgment failure to which the plaintiff can move to demolish the said structures and the debris to be removed at the defendant’s cost
- vii. Costs of this suit are awarded to the plaintiff to be paid by the 1st defendant

It is so ordered

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 8TH DAY OF OCTOBER 2024.

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**MOGENI J
JUDGE**

In the virtual presence of: -
Ms. Umazi for 2nd Defendant
Mr. Kamau for Interested Party
No appearance for Plaintiff and 1st Defendant
Caroline Sagina - Court Assistant

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**MOGENI J
JUDGE**

