



M’Imathiu (Suing as the Legal Representative of the Estate of Thimangu M’Imathiu) v Jonah & Murithi (Being Sued as the Legal Representative of the Estate of Solomon K Mutugi) & 2 others (Environment & Land Case 22 of 2021) [2023] KEELC 17263 (KLR) (3 May 2023) (Judgment)

Neutral citation: [2023] KEELC 17263 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 22 OF 2021**

**CK NZILI, J
MAY 3, 2023**

BETWEEN

**TABITHA NKATHA PLAINTIFF
SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THIMANGU
M’IMATHIU**

AND

**LYDIAH KAREGI JONAH & MOSES MURITHI (BEING SUED AS
THE LEGAL REPRESENTATIVE OF THE ESTATE OF SOLOMON K
MUTUGI) 1ST DEFENDANT
JUSTUS MBAYA 2ND DEFENDANT
COUNTY GOVERNMENT OF MERU 3RD DEFENDANT**

JUDGMENT

1. The plaintiff is the legal representative of the estate of Naftally Thimangu M’Imathiu. Through a further further amended plaint dated July 12, 2022, she sued the defendants over ownership of Plot No T447 Meru. She claimed that the family of the deceased has been occupying the land since 1969 and was lawfully allotted to her by an allotment letter dated June 20, 1991. The plaintiff averred that the 3rd defendant colluded with the 1st & 2nd defendants and fraudulently issued to them with ownership documents and purported to rename the plot as LR Nos Meru Municipality Block II/736 & Meru Municipality Block II/737, without communicating any revocation of the allotment letter aforementioned or refunding her the consideration paid to it.
2. Further, the plaintiff averred that the 3rd defendant proceeded to issue allotment letters to the 1st & 2nd defendants for the plot as commercial Plot Nos C2 and C3 Meru Municipality contrary to the law on the allocation of town plots, while at the same time being unmindful of the interests of the



deceased estate or family who have been on the land for over 30 years. Therefore, the plaintiff sought the nullification of the certificate of leases in favour of the 1st and 2nd defendants, a declaration that the suit land exclusively belongs to her, a permanent order of injunction stopping any eviction, an order directing the 3rd defendant to issue a certificate of a lease for the suit land for Plot No Meru Municipality Block II/736 & 737 as described in the allotment letter dated April 26, 1991 to her and lastly an order that the 1st & 2nd defendants pay the damage that they have done to the property and the house. The further further amended plaint was accompanied by a list of witness statements and documents dated September 28, 2022.

3. The 1st defendant has opposed the suit through an amended defence dated February 1, 2023 on the basis that the plaintiff lacks locus standi, the suit is both res-judicata and time-barred and that no plot exists as Plot No 447 Meru withdrawal by the Commissioner for lands in 1991 hence any claim is overtaken by events. Further, the 1st defendant averred that he was properly and lawfully allocated LR No Meru Municipality Block II/736 and a lease issued upon compliance with the law. In addition, the 1st defendant averred that the plaintiff was a mere tenant who ought to have continued to pay the requisite rents to him, otherwise he should have distressed for rent and lawfully evicted the plaintiff from his premises. Additionally, the 1st defendant averred that his claim was founded in ELC CMCC No 46 of 2020 as duly consolidated with this matter. He sought for an eviction order of the plaintiff from the suit land.
4. The 2nd defendant opposed the suit by an amended statement of defence filed on October 14, 2022, on the basis that the plaintiff lacks capacity to bring the suit for the deceased's estate and that there was no allocation of Meru House No MCC/2/29 as Plot UN5 No 447, since it never existed in the first instance hence the reason that the letter of allotment issued to the deceased was revoked or cancelled in 1991 and communication made to that effect to the deceased, which revocation never challenged. Further, the 2nd defendant averred that he was a lawful and duly registered owner of the leasehold interests known as LR No Meru Municipality Block II/736, 737. Therefore the 2nd defendant averred that no cause of action was disclosed against him and that this court is not the right forum to adjudicate over the claim. The amended defence was accompanied by a list of witnesses and documents dated October 12, 2022.
5. The 3rd defendant opposed the suit through a defence dated October 3, 2022. It denied the alleged allocation of the plot to the plaintiff's husband in 1982, since the plaintiff and her late husband were mere tenants of its predecessors. Further, the 3rd defendant averred that its predecessor in title never authorized the Commissioner of Lands to issue the alleged letter of allotment dated April 26, 1991. Additionally, the 3rd defendant denied any alleged collusion or fraud with the 1st and 2nd defendants. It also denied issuing any ownership documents over the land to the 1st and 2nd defendants.
6. As regards paragraph 10 (a) – (e) of the plaintiff's further further amended plaint, the 3rd defendant reiterated that the plaintiff's husband was a mere tenant and not an allottee of land. It denied ever receiving any money as consideration for the allotment from the deceased and or reallocating the said plot as Plot No C2 and C3, to the 1st and 2nd defendants.
7. Moreover, the 3rd defendant averred that a mere occupational tenant did not clothe such occupation as that one of an allottee of the plot. The 3rd defendant denied any alleged allotment of the land to either the plaintiff's late husband or the 1st & 2nd defendants, who if any was done by its predecessor, they must show that they followed all the requisite legal steps to be entitled to own the alleged subject land. The defence was never accompanied by any list of witness statements or documents.



8. Through a reply to the amended defences dated February 13, 2023, the plaintiff denied the contents of all the amended defences in so far as the allegations that her letter of allotment was irregular or that the deceased had not complied with the requirements and conditions of the allocation and her claim is overtaken by events.
9. The plaintiff averred that the 1st defendant's claim in the consolidated suit with her case lacked merits and should be dismissed. As regards the 2nd defendant's amended defence, the plaintiff denied that lack of capacity or that Plot No 447 never existed or that the allotment letter had been cancelled or revoked.
10. In an application dated August 22, 2022, the 1st defendant's case no Meru CMCC ELC 46 of 2020 was transferred and consolidated with this suit. Leave was also granted to the plaintiff and the defendants file a further further amended plaint and amend their defence to reflect the above changes.
11. At the hearing, the plaintiff testified as PW 1. She adopted her witness statement dated September 28, 2022. She produced a copy of the death certificate of her late husband as P Exh No (1), a letter of grant ad litem colligenda bona dated November 27, 1998 as P Exh No (2), an extract of the minutes allocating the plot dated June 11, 1993 as P Exh No (3) (a) (b) and (c), a letter dated 25.3.1991 as P Exh No (4), a letter of allotment dated April 26, 1991 as P Exh No (5) (a), a receipt thereof as P Exh No 5 (b), a letter dated June 25, 1991 from the Commissioner of Lands as P Exh No (6), a letter dated 6.8.1992 from the clerk of the 3rd defendant as P Exh No 7 (a), an order dated March 22, 1996 in Meru HCC No 18 of 1996 as P Exh No (8), a schedule of immovable property as P Exh No (9), a ruling dated 21.3.1996 as P Exh No (10), a letter dated 3.4.1998 from the plaintiff to the clerk of the 3rd defendant as P Exh No (II), a letter dated 20.11.1998 as P Exh No (12), a letter dated 11.8.2003 from the 3rd defendant to the plaintiff as P Exh No (13), a letter dated 9.3.2005 from the county treasurer to the plaintiff as P Exh No 14, a letter dated 17.3.2006 from the county clerk to the plaintiff as P Exh No (15) and lastly, a letter dated October 22, 2006 from the county clerk to the plaintiff as P Exh No (16).
12. Regarding the advertisement of the re-allocation, PW 1 told the court that neither a notice was served upon her nor did she become aware of the same until she moved to court. Further, PW 1 said that she was not aware that the particulars of the plot had changed at the time of the reallocation. She termed the reallocation as irregularly done, otherwise, the 3rd defendant would not have been receiving rent and rates from her if at all the plot did not belong to her. PW1 admitted receiving P Exh. No 12 which alleged that her tenancy had expired. She insisted that even if the plot had been due for reallocation, the 3rd defendant should to have given her a priority due to her long occupation and the payments made as required in the letter of allotment.
13. Asked by the 2nd defendant why P Exh No 3 (a) and (b) appeared different, PW 1 said that the names of her children were initially the allottees to the land but later on replaced with the names of her husband. Her evidence was that any alleged withdrawal or cancellation of the allotment letter was irregular and unlawful for lack of notification otherwise her late husband would have objected to it. PW 1 denied receiving the letter dated 25.6.1991, given that she was not the addressee but which only came to her knowledge before this court. Further, PW 1 told the court that the reallocation was also purportedly done by a group of councillors who unlawfully allocated themselves the said plots.
14. Cross-examined by the 3rd defendant's advocates, PW 1 admitted that her late husband was a sitting councillor between 1966 – 1992 and that at one time he was the council chairman and that the suit land was his official residence of the chairman. Regarding P Exh No 7 (a) PW 1 told the court that the 3rd defendant had acknowledged that the letter of cancellation was irregularly for lack of a notice of withdrawal, consultative, and for lack of a council resolution to that effect. PW 1 insisted that she was first in time to apply for the plot and to occupy it. She denied having fallen into any rent arrears



- or receiving a rent demand note from the 3rd defendant. PW 1 said that the 1st & 2nd defendants were sitting councillors at the time the reallocation was made going by the minutes before the court.
15. PW 1 acknowledged that at one time the Ministry of Health had condemned the houses on the suit premises as inhabitable, though her house was never demolished unlike others she said that she was occupying the house until the 1st & 2nd defendants reportedly came to fence it, which moves she resisted and obtained a court order to stop the intended eviction.
 16. Njagi Ngentu was PW 2; He described himself a retired officer with the 3rd defendant between 1959 to 2000. His evidence as per his witness statement dated 28.9.2022 was that the deceased was lawfully allocated the plot in the area before his own allocation of an adjacent plot on 2 July 1, 1995. PW 2 insisted that the deceased was a genuine allottee, even though he processed his allotment papers late. PW 2 told the court that a threat had also been made to re-possess his own plot, which he vehemently resisted, hence the retention of his name as an allottee until a certificate of the lease was issued to him.
 17. DW 1, who is a legal representative of the 1st defendant adopted his witness statement dated February 1, 2022 alongside that of his late father as his evidence in chief. He produced the minutes of allocation extract No 40 of 1995 as D Exh No (1), a letter dated 6.9.1995 by the District Planning Officer to the Commissioner of Lands as D Exh No (2), a letter dated 15.9.1995 as D Exh No (3), an approval for the plots letter dated 14.3.1995 relating to the advertisement of the plots as D Exh No (4), a part development plan as D Exh No 5 (a) and (b), a letter dated 20.9.1997 formalizing the transfer of the plot as D Exh No (6), a letter dated 20.3.1995, as D Exh No (7), minutes of the 3rd defendant's full council meeting dated 21.7.1995 as D Exh No (8), an allotment letter dated 28.12.1995 as D Exh No (9), whose conditions were complied with by his late father, a letter dated 15.8.1997 forwarding the lease to his late father as D Exh No (10), a letter dated 17.1.1996 written by his late father to the Commissioner of Lands as D Exh No (11), a copy of a banker's cheque for Kshs.25,870 dated 15.1.1996 as D Exh No (12) a receipt for the payments to the Commissioner of Lands as D Exh No (13), a report dated 2.2.1996 from the District Land Surveyor as D Exh No (14), an assessment report for the property by the Ministry of public works as D Exh No 15, receipts for payments of Kshs.40,000/= and Kshs.10,000 for the plot as D Exh No 16 (a) & (b), a letter dated 21.3.2000 as D Exh No (17), a beacon certificate as a D Exh No (18); a copy of the certificate of lease issued to him on 22.8.1997 as D Exh No (19) a letter dated 20.11.1998 regarding a change of tenancy ownership from the county clerk as D Exh No (20), as and lastly, a receipt for the rates payments as D Exh No 21 (a) & (c). He urged the court to find that his late father had been allocated the plot regularly and that he was entitled to the reliefs sought in the defence and counterclaim, since the allocation was never challenged by the plaintiff.
 18. In cross-examination by the 2nd defendant, DW 1 admitted that the defendants were sitting councillors to the predecessor of the 3rd defendant at the time of the allocation in 1992 – 1997. DW 1 denied however that there was an irregularity towards the 1st & 2nd defendants reallocating the plots to themselves, since already the letter of allotment to the plaintiff had been lawfully revoked and an advertisement of the reallocations made.
 19. DW 1 testified that his late father was issued with the certificate of the lease while the plaintiff's late husband was still alive but did not challenge the same until it was too late. DW 1 could however not confirm if the advertisement was widely made to the members of the public. DW 1 also admitted lacking an application for the plot, which his late father had made before he was allocated the plot. DW 1 also confirmed that several sitting members of the county council at the time were allocated plots as indicated in the minutes of the full council held on 21.7.1995.
 20. Further, DW 1 said that it was the court orders, following the plaintiff's suit in 1998, which stopped him from taking up vacant possession of the plot. He also admitted that at the time of the allocation, his



late father was aware of the plaintiff's occupation of the plot as a council tenant without more, hence the reason that a letter was made to the plaintiff notifying her of the changes over the ownership. DW 1 told the court that the plaintiff had unfortunately paid for the plot to the Commissioner of Lands five years after the issuance of an allotment letter, which was too late. DW1 said that his late father could not be faulted for any failures or mistakes of the 3rd defendant in the manner the initial allotment letter was revoked or cancelled including the non – involvement of a special allotment committee on top of the full council meeting. DW 1 could not see anything wrong with the 1st & 2nd defendants sitting in a full council meeting that was allocating the plots, otherwise no objection had been received from the plaintiff's late husband who had failed to meet the special terms of the allotment letter dated 26.4.1991 before the revocation. DW 1 said that at the time the plaintiff purported to regularize her payments for the plot on 5.1.1996, the letter of allotment stood cancelled.

21. DW 2 was the 2nd defendant who adopted his written statement dated 12.10.2022 as his evidence in chief. He produced a certificate of lease dated 22.8.1997 as D Exh No (22), an allotment letter dated December 20, 1995 as D Exh (23), a beacons certificate as D Exh No (24), a copy of the green card for Meru Municipality Block II as D Exh (25) minutes for the allocation of the plot as D Exh No (26) and a bundle of letters dated June 25, 1991, September 15, 1995, September 6, 1995, November 20, 1998 and July 11, 1991 as D Exh No 27 – 31 respectively. He admitted that he was a sitting councillor in 1995, at a time that the plaintiff's late husband had ceased being both a councillor the then council chairman. DW 2 further told the court that there was nothing wrong with the allocations of the plot(s) since a letter of allotment in favour of the plaintiff's late husband had already been revoked or cancelled for non-compliance by the Commissioner of Lands. He termed his allocation and issuance of a certificate of lease as both regular and lawful.
22. Similarly, DW 2 acknowledged that did not produce his application for the plot before the court as well as any evidence for the payment of the application fee. DW 2 admitted also that D Exh No 25 had a restriction registered against it indicating the land as a public utility plot; His evidence was that the land initially used to be reserved for the county council staff quarters.
23. In cross-examination, DW 2 admitted that his documentary evidence lacked the Town Planning and Trade Committee minutes and the initial map. He denied the alleged disapproval of his plot allocation in 1991. DW 2 admitted that the beacon certificate was at variance with the original map for the area. Regarding the restriction registered on the land, DW 3 said that he had moved the court in Petition No 2 of 2015, following which it was removed. He did not produce a copy of the decree in that petition. His testimony was that the 3rd defendant had never objected to his allotment or issuance of the certificate of title.
24. At the close of the defence case, parties were directed to put in written submissions. The plaintiff through her written submissions dated 6.4.2023 submitted that her late husband was lawfully allocated Plot No T.447 Meru Municipality now described by the defendants as L.R Meru Municipality Block II/736 and 737 duly paid the requisite fee, has occupied the suit premises since 1970 and never received any notification over the alleged nullification or revocation of the allotment letter, before the plot could change status and be available for reallocation to the 1st and 2nd defendants, as commercial plot No C2 & C3 in December 28th & 20th 1995.
25. The plaintiff submitted that the issues for the court's determination are whether her late husband was allocated the suit land; whether the plots were legally allocated to the 1st & 2nd defendants and lastly; who was the bonafide owner of the suit premises?
26. As to the law applicable in the allocation of the plot, the plaintiff submitted that the allocation initially went through the Town Planning Markets and Housing Committee meeting which was held on 21 &



- October 22, 1982 whose minutes were subsequently confirmed by a full council meeting on December 21, 2019. thereafter an allotment letter was issued at a time when her late husband was sickly.
27. Relying on *Rukaya Ali Mohamed vs David Gikonyo Nambacha and another* Kisumu HCCA/9/2004, the plaintiff submitted once an allotment letter was issued and an allottee met the conditions therein, such land would be unavailable for re-allocation, unless challenged by an allotting authority or was acquired through fraud, mistake, illegally or against public policy and through misrepresentation. Similarly, the plaintiff relied on *M'Ikiara M'Rinkaya & Another vs Gibert Kabeere M'Mbijiwe* (1982 – 1989) 1 KAR 196, where the court held that in a double allocation scenario, the first in time prevails, for there was no power to allot the property again.
 28. As to who is the bonafide owner, the plaintiff submitted that the alleged revocation of her allotment letter was not only irregular but ineffective. She relied on *Cheshire Fifoot and Furmston's Law of Contract* 6th Edition on page 75 on the proposition that a revocation of an offer unless communicated to the offerer, no matter the change of mind of the offeror, was ineffective. To this end, the plaintiff submitted that the 1st & 2nd defendants failed to show that a proper procedure of revocation was followed before they could be issued with the letters of allotment, more so when the law required that Commissioner of Lands could only do so upon a direction by the 3rd defendant. The plaintiff submitted that no minutes or gazette notices were produced by the 1st & 2nd defendants to show compliance with the law. Reliance was placed on *Mbau Saw Mills Ltd vs AG* (2014) eKLR where the court held that such a purported transfer whether or not approved by the committee was void ab initio.
 29. On whether the 1st & 2nd defendants were legally allocated the plots, the plaintiff submitted that the standard procedure to allocate property within municipalities was at the time vested in the Presidency and the Commissioner of Land as per Sections 3 & 9 of the *Government Lands Act*, upon advice from the respective municipal council. The plaintiff submitted that the council would in the first instance visit the area or carry out a fact-finding mission to satisfy itself that the land was first of all government land and secondly, if it was available for disposition. Thereafter, a PDP would be drawn up and approved by the Commissioner of Lands. Thirdly, the Commissioner of Lands would under Section 11 *Government Lands Act* put in conditions to determine any special covenants, the period of the division of the term and the annual rent payable for each period.
 30. The fourth step according to the plaintiff would be the gazettment of the plots to be sold at least four weeks before the sale by auction. On this, the plaintiff submitted that under Section 13 of the *Government Lands Act*, the notice was required to indicate the number of plots situated in the area, the upset price, terms of the lease, rent payable, building conditions and any attaching special covenants.
 31. The plaintiff submitted that the fifth to the seventh step under Section 15 of the Government Lands Act was to auction the plots to the highest bidder, the issuance of an allotment letter to the allottee and lastly; after an allottee had complied with the terms and conditions in the allotment letter, a cadastral survey, would be prepared and authentication and approval by the Director of the Surveys. Thereafter there would be an issuance of a beacon certificate.
 32. The plaintiff submitted that the 1st & 2nd defendants failed to follow the above key steps instead the plaintiff submitted they sat on 2July 1, 1995 and awarded themselves the plots. Further, the plaintiff submitted that a purported notice for advertisement was illegitimate, as the plots to be advertised were not listed and therefore such a meeting amounted to a land-grabbing exercise.
 33. Reliance was placed on *Daudi Kiptugen vs Commissioner of Land* (2015) eKLR, on the proposition that acquisition of title cannot be construed only as an end result for the process to acquire it was equally material.



34. The plaintiff urged the court to find that under Sections 26 (1) & 80 of the *Land Registration Act*, a title acquired illegally, unprocedural, under misrepresentation or through a corrupt scheme was impeachable as held in *Nancy Wanjiru Kunyiba vs Samuel Njoroge Kamau* (2018) eKLR.
35. The 1st defendant in written submissions dated April 12, 2023 stated that in cross-examination of PW 1, she admitted that her late husband failed to comply with the conditions of the allotment letter in 30, days after which the land was re-surveyed and allocated to him. Further, the 1st defendant submitted that PW 1 in cross-examination by the other defendants appeared unsure of the plot size, its number and whether the allottee was either her children or her late husband. On that end, the 1st defendant submitted that the claim should fail for the revocation was valid out of non-compliance. Additionally, the 1st defendant submitted that PW 1 acknowledged not only the revocation, the mandate of the Commissioner of lands, but also that an advertisement was done, without her knowledge, yet she produced a notice of cancellation dated June 25, 1991 as her exhibit.
36. As to PW 1 & PW 2's evidence, the 1st defendant submitted that the plaintiff lacked a certificate of lease for plot No T 447 Meru Municipality and that she appeared unsure of the size of the plot she was claiming, his plot whose size was defined.
37. Moreover, the 1st defendant urged the court to find that given the inconsistencies in the plaintiff's claim and coupled with the fact that he has proved his claim against the plaintiff by producing a certificate of lease, was minutes which show him as the allottee and not the plaintiff and notice that no report was made by the plaintiff over the alleged fraud, a finding should be made that her claim has failed and proceed to allow the counterclaim. Reliance was placed on *Zakayo Bargoiyet vs Gathoni & 2 others* (2016) eKLR and *James Mugo Manyara vs Pharis Mungathia* (2020) eKLR.
38. The 2nd defendant by written submissions dated 19.4.2023 set out three issues for the court's determination. The 1st issue was whether the plaintiff has locus standi to file the suit. It was submitted that P Exh No 2 are limited letters of administration colligenda bona issued on November 27, 1998 under Section 67 (1) of the *Law of Succession Act*. In his view, the 2nd defendant submitted that P Exh No (2) confers no right to the plaintiff to sue for the estate of her deceased husband since in law it only her only rights are to collect and receive property, unlike a limited grant ad litem issued under Section 54 of the Act. It was therefore submitted that the suit was incompetent, defective and ought to be struck out with costs.
39. The 2nd issue set out was whether the plaintiff has proved her claim against the 2nd defendant to the required standard as regards collusion in acquisition with the 3rd defendant.
40. The 2nd defendant submitted that prayers numbers 3 & 5 of the plaint cannot be granted by this court since the plot does not exist in law and secondly because the certificate of lease was issued by the Commissioner of Lands now defunct and not the 3rd defendant. In any case, the 2nd defendant submitted that the manner of challenging the nullification and or the reallocation of the plot should have been through a judicial review and not by way of the plaint. Further, the 2nd defendant submitted that the decision to revoke and reallocate the land still stood and has not been challenged or nullified by way of a judicial review.
41. To this end, the 2nd defendant submitted that the nullification or revocation decision(s) extinguished Plot No T447 and unless overturned the prayers sought in the plaint could not be granted or would be in vain more particularly when the entity to implement the prayers sought has not been made a party to this suit.



42. On the evidence produced by the plaintiff to sustain her case, the 2nd defendant submitted that he was wrongly sued since the plaintiff's Plot No T447 was taken up by the 1st defendant and issued with title number LR No Meru Municipality Block II/736. Therefore, and his L.R No Meru Municipality/Block II/737 whose acreage was different, separate and distinct from what belongs to the 1st defendant and which the plaintiff was now claiming as belonging to her.
43. The 2nd defendant submitted that the court should take judicial notice of Petition No 2 of 2015 which dealt with the validity of the leases granted to him and the 1st defendant and a consent order issued to the effect that his lease was valid. Given this order the 2nd defendant submitted that the 3rd defendant cannot raise their validity by way of written submissions in absence of any pleadings to that effect.
44. Lastly the 2nd defendant submitted that no evidence of any collusion with the 3rd defendant was produced and since the plaintiff failed to challenge the decision to revoke or reallocate the plot until four years down the line, despite being aware of it going by the letter dated 6.8.1992, equity does not favour the indolent but the vigilant. Further, the 2nd defendant submitted that the 3rd defendant was all aware of the revocation through a letter dated 25.6.1991, which forms part of the plaintiff's list of documents. Therefore, since there was no evidence to show that either the plaintiff or the 3rd defendant replied to the same or challenged it, the two parties were estopped in law from denying it. Additionally, the 2nd defendant submitted that the plaintiff's own witness one Ngentu confirmed that the plaintiff's husband now deceased was aware of the said letters but declined to challenge them up following the same.
45. In conclusion, the 2nd defendant urged the court to find that he was not involved in any wrongdoing in the manner the revocation and the re-allocation was undertaken, and was subsequently registered as the owner.
46. On its part, the 3rd defendant through written submissions dated April 12, 2023 urged the court to find that when the Commissioner of Land attempted to revoke the plaintiff's letters of allotment, the allocating authority had confirmed that the earlier allocation was proper and had not been cancelled. The 3rd defendant urged the court to find that the property was properly allocated to the plaintiff and was therefore not available for any re-allocation to either 1st or the 2nd defendant. Reliance was placed on *M'Mugwika M'Rugongo vs Settlement Fund Trustees and another* (2022) eKLR and *Adan Hassan & another vs Ali (suing on his own behalf and that of F.A – Mino)* (2020) eKLR.
47. Further, the 3rd defendant submitted that the exhibits produced by the 1st and 2nd defendants had shown that the two were duly elected councilors as at July 21, 1995, who allocated to themselves the two plots out of an alleged gazettement and on a valued sale, which gazettement or advertisement was supplied to this court to back such averments.
48. Based on Section 80 of the *Land Registration Act* and the 3rd defendant also submitted that the court has powers to rectify the register on titles held by the 1st and 2nd defendants who unfortunately allocated to themselves land an already validly allocated land to the plaintiff. Reliance was placed on *Alice Chemutai Ruto vs Nickson Kipkurui Korir & others* (2015) eKLR.
49. The court has carefully gone through the pleadings, evidence tendered, written submissions and the law. The issues commending themselves for the court's determination are:
- i. If the plaintiff has capacity to institute this suit for and on behalf of the late Thimangu M'Imathiu



- ii. If the plaintiff pleaded and proved fraud, collusion, illegality and impropriety in the manner that Plot No T447 was repossessed, revoked, re-planned, re-allocated and registered in the names of 1st & 2nd defendants.
 - iii. If the parties are entitled to the reliefs sought.
50. This suit was filed by the plaintiff on 15.12.1998 on behalf of her deceased husband, said to have been the 1st allottee of Plot No UNS 447 Meru. In support of the pleadings, PW 1 produced a death certificate and a copy of a grant of letters of administration ad colligenda bona issued in Meru H.C Succession Misc. No 61 of 1998 pursuant to Section 67 (1) of the *Law of Succession Act* and Form No P & A 47. The two exhibits were produced as P Exh's No (1) & (2).
 51. The 2nd defendant takes the view that the plaintiff lacks the capacity to institute a suit for the recovery of the suitland since a grant of the nature of P Exh No2 cannot be used to institute the suit.
 52. In the case of Peter Owade Ogwang vs Jared Obiero Ouya (2014) eKLR, the court was called upon to determine if a grant of letters of administration ad colligenda bona vests a party the capacity to institute a claim on behalf of a deceased's estate. The court held that such a grant could not be relied upon in suing or prosecuting a case as an administrator of the estate of the deceased. The trial court had made a finding that a grant of administration ad colligenda bona was only meant for collecting and preserving such an estate and that an administrator could not sue based on such a grant.
 53. Temporary grants ad litem are normally granted under Section 54 of the *Law of Succession Act* and Rule 14 of *Probate & Administration Rules*. Section 72 of the *Interpretation and General Provisions Act* (Cap 2) provides that where a document purports to be in a certain prescribed form, it shall not be void by reason of deviation therefrom in so far as its substance was not affected or otherwise calculated to mislead. In both *Shabir Ali Jusab vs Anaar Osman Gamrai & another* (2009) eKLR and *Microsoft Corporation Vs Mitsumi Computer Garage Ltd* (2001) KLR 470 the court held that a deviation or a lapse in form and or procedure do not go to the root of jurisdiction or amount to any prejudice to the opposite party. The Court of Appeal in County *Government of Nyeri and another vs Cecilia Wangechi Ndugu* (2015) eKLR observed that the interpretation of any document involves identifying the intention of the drafter based on the precise word(s) used in its factual context, the aim and the purpose.
 54. In *Julian Adoyo Ongunga and another vs Francis Kiberenge Bondeva (sing as the administrator of the estate of Fanuel Evans Amudavi Deceased)* (2016) eKLR, the court said that there were instances where a grant of administration ad colligenda bona could be tailored in a manner as to allow for the institution of an action and wherefore, the court should focus on the contents and the wording of that grant. This was the position also taken in *Morjaria vs Abdalla* (1984) eKLR, where the grant was taken as constituting a valid grant under Rule 14 thereof since it was specifically limited to the purpose only of representing the appellant in the appeal. The words were taken as a constituting a valid grant.
 55. In this suit, P Exh No 2 does not include the words limited to prosecuting this suit. In *Rajesh Pranvinjivan Chundasama vs Sailesh Pranjivan Chudasama* (2014) eKLR, the court held that a litigant is clothed with locus standi upon obtaining a limited grant or a full grant in case of an intestate succession. In *Julian Adoyo Ongunga (supra)*, the court said that the impact of a party in a suit without locus standi was the same as a court acting without jurisdiction, hence would amount to a nullity.
 56. Additionally, in *Morjaria vs Abdalla (supra)* the court held that the appointment of a person ad colligenda bona could not possibly include the right to stand in the shoes of the deceased for the purpose of instituting an action since there was a specific provision under Paragraph 14 of the 5th



Schedule to the [Law of Succession Act](#) designed for the purpose of filling a suit for recovery of assets or liabilities for the estate of a deceased.

57. In this suit the plaintiff filed the suit after her husband had passed on. The letters of grant ad colligenda bona was issued on November 27, 1998. Even though the plaintiff described herself as a legal representative of the estate of the deceased, the grant she possessed did not make her as such. The 2nd defendant took up the issue in his defence dated January 18, 1999, that the plaintiff disclosed no cause of action against him. The plaintiff did not take any remedial action to regularize her appearance and or seek to convert the letter of grant ad colligenda bona into a limited grant ad litem. The words in the P Exh No 2 are self-explanatory and do not specify the prosecution of this suit as one of the roles that the document clothes the plaintiff to undertake. My finding is that the plaintiff lacks the requisite capacity to institute a suit for the recovery of suit land.
58. The next issue is whether the plaintiff has pleaded any irregularity, fraud and collusion on the part of the defendants in the manner that an allocation of Plot No 1447 was recalled, revoked, re-planned, re-allocated and registered under the names of the 1st & 2nd defendants. Alongside this is also the issue whether the Plot No T447 on both paper and on the ground is the same as LR No Meru Municipality Block II/736 and 737.
59. It is trite law that fraud, collusion, illegality and irregularities must be specifically pleaded and proved. This is contained in Order 2 Rules 10 of the [Civil Procedure Rules](#). In [Ariithi Highway Developers Ltd vs West End Butchery & 6 others](#) (2015) eKLR, the court held that fraud must be pleaded specifically and proved with tangible evidence. The same case obtained in [Gladys Wanjiru Ngacha vs Teresia Chepsaant and others](#) (2013) eKLR, that the proof of fraud must be on a balance above the ordinary proof on a balance of probabilities since it borders on criminality.
60. In the case of [Redcliff Holdings Ltd vs Registrar of Titles & Others](#) (2017) eKLR, the issues revolved around an alleged irregular and illegal allocation of public land previously reserved for a government ministry based on the failure to follow the proper procedure in the allocation of public land. The issue was not per se on double allocation but whether the land was available for allocation for any private development. Another issue was whether the matter was best to be served through judicial review. The court said that Article 40 of [the Constitution](#) only protected the rights of a property which is acquired lawfully. The court cited with approval [Mureithi & 20 others vs AG and others](#) (2006) 1 KLR 443, that a mere fact that one has a title deed did not mean that such a title could not be questioned.
61. In this suit, the plaintiff has testified that her late husband was the initial allottee of the land, was taken ill and hence could not meet the terms of the allotment letter on time, until at a later date. She testified that he was not notified of the intended revocation, withdrawal, re-allocation and the registration of his plot in favour of the 1st & 2nd defendants. She termed the re-allocation and registration in favour of the 1st & 2nd defendants as void, null and tainted with illegalities, fraud and collusion with the 3rd defendant. On the other hand, the 1st & 2nd defendants averred that the revocation, re-planning, re-allocation and registration of the parcels to them was above board, legal, and regular and hence they hold indefeasible titles to the land. The 3rd defendant averred that there was no gazetteement produced, the land remains public land validly allocated to the plaintiff and that the titles deed held by the 1st & 2nd defendants were not foolproof since the involvement of the 3rd defendant was missing.
62. The onus was on the plaintiff to plead and prove the alleged fraud, collusion, illegality and impropriety on the part of the defendants, jointly and severally. The plaint dated December 15, 1998 at paragraph 10 and the amended plaint dated November 7, 2001 pleaded the issues of fraud, illegality and impropriety. In the further further amended plaint dated September 28, 2022 at paragraph 10 the particulars of fraud, illegality and impropriety are included. The further further amended plaint left



- out the key prayer for declaring the alleged allocation and registration in favour of the 1st & 2nd defendants as null, void and illegal.
63. Instead the plaintiff also sought for a permanent injunction, an order directing the 3rd defendant to issue her with a certificate of lease and for the 1st & 2nd defendants to repay the damages done on her house at LR No Meru Municipality Block (II) 736 & 737 as described in the allotment letter issued on April 26, 1991 as Plot No T 447 Meru Municipality. The pleading appears different from the initial complaints and was filed in non-compliance with the law on pleadings.
 64. The plaintiff in the discharge of her evidentiary burden produced extract of minutes of allocation letter dated February 25, 1991, letter of allotment dated April 6, 1991 and receipts for payment dated September 26, 1997, April 3, 1998, November 30, 1998, August 11, 2003, March 9, 2005, March 17, 2006 and October 23, 2006 as P Exh No's 1, 2, 3 (a-c), 4, 5 (a), (b), 6, 7 (a), (b), 9, 10, 11, 12, 13, 14, 15 & 16 respectively.
 65. Exh Nos 3 (a) (b) (c) & 5 (a) were not produced by their makers and nor were they certified by the 3rd defendant. The originals to the said documents were also not produced before court. P Exh No 4 was not produced by the makers P Exh No 6 was illegible and bore no certification.
 66. Exh No 7 (a) & (b) were not certified nor were they produced by their makers. The relevance of P Exh No (8) – 10 to this suit was not been clarified. P Exh No 9 was not certified nor was there a clarification on when it was received by the 3rd defendant. The plaintiff also was unable to tell the court when she received P Exh No 12. P Exh 13 is dated August 11, 2003, yet the plaintiff's pleading alleged she had been in occupation of the suit premises since 1969. The letter did not also mention the suit premises and so was P Exh Nos 14.15 & 16.
 67. The law relating to allocation and the clear distinction of the powers granted by the statute to the Commissioner of Lands vis a vis the powers of county councils was discussed by the court in *Lea Magoma Ongai v AG* (2015) eKLR. The court said that before the enactment of the 2010 *Constitution*, trust land was regulated by the *Trust Land Act* (Cap 288) as read together with Sections 115 (1) of the Retired *Constitution*. Section 117 thereof empowered the county council to set apart any area of trust land within its jurisdiction for use and occupation by any person, which in its opinion was likely to benefit the residents of the area under Section 13 of Cap 288. Section 53 of the *Trust Land Act* gave the Commissioner of Land the power to administer trust land as an agent of the county council with powers *inter alia* to execute on behalf of the county council, grants, leases, licenses and other documents relating to trust land.
 68. Section 13 (2) of the *Trust Land Act* provides that the setting of a part of any land by a county council must be approved through a resolution passed by the majority of the members of the council. The Commissioner of Lands in discharge of its duties under the *Act* was to act in accordance with the directions of the county councils.
 69. As regard, double allocation or forfeiture of an allocated plot, the court in *Nancy Wanjira Gathuri vs David Ndugu Mburu and another* (2019) eKLR, in *Bubaki Investment Co. Ltd vs Nation Land commissioner & 2 others* (2015) eKLR, held that a mere payment of charges was not sufficient proof of an acceptance, as a written acceptance of the letter of allotment was required. The court also held that a letter of allotment could be deemed to be effluxed by the lapse of time, if there was no acceptance. Further, the court said that where the offer had a specified time within which it had to be accepted, no communication for the revocation would be necessary for it would simply stand revoked at the expiry of the specified time. See *Philma Farm Produce and Suppliers vs AG and 6 others* (2012) eKLR and *Gabriel S. Chepkwony vs Gedion Nzioki Mbili & another* (2018) eKLR.



70. Exh No 5 (a) referred to an unsurveyed Plot No 447 Meru Municipality. The letter of allotment was issued under the provisions of the *Government Lands Act* (Cap 280) repealed and the title was to be issued under the *Registered Land Act* (Cap 300). The power to allocate Government Land Under Cap 280 (now repealed) vested with the President but was delegated to the Commissioner of Lands subject to the provisions of the Act.
71. While addressing the above provisions in *Salome Warware vs George Muna & another* (2015) eKLR, the court said that the requirements on the allocation of land were that once a plot had been re-allocated a procedure for either cancellation or forfeiture of the allocation before the same was allocated to a second person had to be followed. The court in *Benja Properties Ltd vs Syedna Mohamed Burbannudin Sahed & others* (2015) eKLR also held that once a plot was allocated requisite fees paid and the taking up possession had occurred the plot was no longer available for any re-allocation. Similarly, in *Wreck Motor Enterprises vs Commissioner of Land & 3 others* (1997), the court held that where there were two competing titles, the one earlier registered took priority. The same position obtained in *Gitwany Investment Ltd vs Tajmal Ltd and 3 others* (2006) eKLR, that the first in time prevailed unless there was an irregularity, unprocedural impropriety, fraud or mistake. Equity dictates that when two equities are equal the first in time prevails. See *Rukaya Ali Mohamed (supra)* cited in *R vs City Council of Nrb exparte Christopher Mwangi Kioi* (2014) eKLR.
72. In this suit the onus was on both the plaintiff and the 1st & 2nd defendants to prove their respective claims to this land that the correct procedure to acquire it was followed. No record was availed from the 3rd defendant in a duly authenticated manner or from independent witness, that the party's respective names were appearing in the register of plots allocation held by the 3rd defendant's predecessor in title. In *Mbau Saw Mills Ltd vs AG & 2 others* (2014) eKLR, the court held that an allotment letter did not confer any proprietary rights to a person unless there was acceptance and the payment of the standard premium and the ground rent. The same position was reiterated in *Bubaki Investment Co. Ltd vs National Land Commission & 2 others* (2015) eKLR that after the letter of offer was extended and or expired, no offer to accept the letter of allotment was existing at the time the petitioner made the payments. The court further held that the petitioner ought to have sought and obtained a renewal of the offer and or an extension of the period within which to accept the offer.
73. In this suit, the plaintiff has not produced any document to show that after the expiry of the 30 days set out in the allotment letter, she ever applied for either an extension of time to comply or the renewal of the letter of offer whichever came first. The letter of allotment was dated April 26, 1991. Payments indicated therein were paid by the plaintiff on January 5, 1996, which was close to four years after the letter of offer had expired on May 26, 1991.
74. There was no evidence tendered by the plaintiff that at the time she made payments to the Commissioner of Lands on January 5, 1996, the issuing authority had confirmed to her that the offer letter was still valid and that the suit premises remained at the status that they were at the time the letter of allotment had been made. Similarly, at the time the payments were made, the allottee was still alive and it does not appear that he had sought for and given an explanation to the allotting authority, that notwithstanding, the inordinate delay he still deserved a re-consideration perhaps on humanitarian grounds. By this time the offer had already expired through effluxion of time. Unless there was an extension of time and willingness to still accept her payments, the plaintiff cannot be said to have complied with the said letter of offer. The plaintiff simply appears to have assumed that all that was needed was a payment of the amount already long overdue. There was also no indication as to whether the plaintiff made a follow-up after making payments in order to regularize the allotment, both with the 3rd defendant and the Commissioner of Lands.



75. Again, there was no indication if the plaintiff had before effecting the payments conducted due diligence with the 3rd defendant or the Commissioner of Lands to establish if the suit property was still available for allocation.
76. There was no indication that upon the payments, the plaintiff followed up the issuance of the lease which includes a survey the preparation of the lease document forwarding of the executed lease and the cadastral map to the Chief Land Registrar for both the registration and issuance of a lease either in 1996, 1997 and by the time this suit was filed on 1December 5, 1998.
77. In the absence of the foregoing, the plaintiff waived and or abandoned her land rights to fate. This would therefore amount to a waiver by conduct as held in *Bunning vs Wright* (1972) 2 ALL ER 987.
78. The 3rd defendant has supported the plaintiff's claim in its submissions which were at variance with its own defence. The 3rd defendant did not make the matter better for it failed to avail any documents within its database as a successor to the county council of Meru Central, either in support of the plaintiff or the defendants and if not so, on why the court should find the procedures leading to the allocation valid, genuine and legal or otherwise for either of the protagonists to this suit. From the record of court, the state of affairs herein obviously created by the predecessor to the 3rd defendant. One would have expected a more responsive approach to this case by the 3rd defendant to clarify the status of the land, in its books in the manner that the land was allocated or re-allocated.
79. As to whether the plot occupied by the plaintiff was the same as what is claimed by the 1st & 2nd defendants, the plaintiff also failed to discharge the burden as to the exact locality of the suit land she claims against the backdrop of the re-planning, the reallocation of new parcel numbers and the eventual registration in favour of the 1st & 2nd defendants. No County Land Surveyors or the Land Registrar reports and or documents were produced by either the plaintiff or the defendants to pinpoint the exact locality, size(s), overlap(s), superimposition and the nature of developments made by the plaintiff on the suit land.
80. Due to the foregoing inconsistencies, missing links, lack of clarity and a clear paper trail, my finding is that the plaintiff has failed to prove her claim to the required standards even if the court were to find her with capacity to sue in this suit.
81. Coming to the defendants, defence parties filed agreed issues dated 10.6.2008. Among the issues were whether the 1st & 2nd defendants were lawfully allocated the two plots hence extinguishing the previous allocations and whether it was lawful for the 3rd defendant to re-allocate them an alleged already allocated plot under the occupation of the plaintiff.
82. D Exh No (1) produced in support of the 1st defendants defence and counterclaim was not only illegible but was also unauthenticated. D Exh Nos (2), (3), (4), (5), (6), (7), (8), (9), (10), (11), (12), (13), (14), (15), (16), (a), (17) & (18) were never certified, authenticated or produced by their makers. The 3rd defendant who is the successor to the County Council of Meru and the National Land Commission, were not called as witnesses or asked to authenticate and or certify the 1st and 2nd defendant's documents as emanating from either their offices or their predecessor(s) in the title.
83. It is trite law as held in *Wreck Motor (supra)* and *Dr. Joseph M.K Arap M.K Arap Ngok vs Justice Moiwo Ole Keiwua & 4 others* C.A No 60 of 1997 that when a certificate of title, is under attack, the paper trail towards its acquisition comes into play and every aspect relating to the manner to allotment comes under scrutiny. It was not enough for the 1st & 2nd defendants to plead regularity, legality and indefeasibility of their certificates of title without proof. D Exh No 21 (a), (b) & (c) were issued by the Municipal Council of Meru and not the County Council of Meru the same was the case in D Exh Nos



- 1, 2, 3, 4, 8, 14, 15, 16 (a), (b) & 17. There was also no indication if any part development plans were prepared, gazetted and or published in line with the law with respect to the 1st & 2nd defendants' parcels of land. As regards the 2nd defendant, D Exh No 23, 24, 26, 28, 29, 30 & 31 were not authenticated, certified and produced by their makers. Additionally, and more importantly, D Exh No 25 was a copy of the records showing that a restriction was registered by the Chief Land Registrar on 22.8.1997, on account of the property being public utility land. The copy of the records was certified by the Land Registrar on 21.8.2000. The inference to be drawn means that at the time of the certification, the restriction had not been lifted. The 1st and 2nd defendants never produced before this court duly lease, which approved and signed by the 3rd defendant or its predecessor in title prior to the issuance of the certificate of titles produced before this court.
84. D Exh No (4) was not published as per the law by way of an advertisement. It lacked the particulars of plots which were to be disposed off. D Exh Nos (2) & (3) were unclear on when they were received at the Commissioner of Lands office and any approvals made. There was also no indication that Part Development Plan No 167/95/19 contained in D Exh. (2) was ever gazetted. The approval for the change of user and the approval of the subdivisions of the estate did not indicate whether it was ever allowed by the Commissioner of Lands and if so a go-ahead granted by the Permanent Secretary Ministry of Lands. D Exh No (5) lacked an approval date, the development plan number and an authenticated certification from the Commissioner of Lands. Its maker(s) were also not called upon to testify in respect to its contents particularly on the 1st & 2nd defendants parcels of land. D Exh No (6) was neither certified nor was there an indication on when it was received by both the Commissioner of Lands and the 3rd defendant. D Exh No (7) did not include the Registry Index Map and the amended survey plan. There was also no indication by the 1st & 2nd defendants there was a site visit to authenticate the status of the suit land, prior to the re-allocation, re-planning, sub-divisions and the issuance of certificates of title in favour of the 1st & 2nd defendants. No physical planner was called by the 1st & 2nd defendants to locate the parcels of land on the ground and to shed light on whether it was the same locality that the plaintiff was occupying.
85. In *Joseph Mutua Zakayo vs County Government of Makueni & others 2020 (eKLR)*, the court said that it found it unbelievable that the allocations made in 1998 were yet to be captured on the county's digital system as regards the allocation, yet a verification of the site had allegedly been done by a committee subsequent to the confirmation of ownership by the full council. The court said that the lapse of the offer was waived by the County Government's conduct when it accepted the demanded payments.
86. In this suit, the 1st nor 2nd defendants failed to produce any evidence of the regularization of their parcel numbers with the 3rd defendant including payment of the requisite annual rents and rates. All their correspondence end with the date of 1999 from the Municipal Council of Meru, yet the certificates of title held by them indicate that the head lessor was the 3rd defendant. The term(s) and year of the lease was also missing on the certificate of lease produced as D Exh No (19).
87. In the case of *Samuel D Omwenga Agwenyi vs National Lands Commission & others (2019) eKLR* the court cited with approval *Republic vs NLC exparte Holborn Properties Ltd (2016) eKLR*, on the proposition that the National Lands Commission had power to review titles privately held initially falling under public land. In *Republic vs County Council of Nairobi & 3 others (2014) eKLR*, the court said that an allotment letter may be challenged by an allocating authority if it was illegal or issued against public interest. In *Charles Munge vs Nairobi City County Council Government & 3 others (2022) eKLR*, the court said that a title document confers the holder lawful and legitimate rights thereto so long as it was issued in accordance with the law.



88. In this suit I am unable to find the certificates of lease(s) held and issued to the 1st and 2nd defendants as falling within the procedures stipulated under the law. The plaintiff in reply to defence and defence to the counterclaim has challenged them on account of their processing, legality and propriety. The rebuttable presumption of legality, regularity and propriety has not been sustained by the 1st & 2nd defendants against the onslaught by the plaintiff.
89. The upshot is I find the plaintiffs suit unsustainable, the counterclaim lacking merits and proceed to uphold the defence to the counterclaim by finding that the LR No Meru Municipality Block II/736 and 737 were illegally allocated, surveyed and registered in the names of the 1st & 2nd defendants. The two certificates of leases are hereby recalled and revoked in accordance with section 80 of the [Land Registration Act](#). The land shall revert to the 3rd defendant as the head lessor to be dealt with as per the law.
90. Each party shall bear their own costs.
91. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU
THIS 3RD DAY OF MAY 2023**

HON. C. NZILI

ELC JUDGE

In presence of

C.A John Paul

Miss Gikundi for the plaintiff

Mr. Anampiu for the 1st defendant

Miss Nelima for 2nd defendant

Mwirigi Kaburu for 3rd defendant

