



**Mbugua v Kanyi & another; Okado (Interested Party) (Environment & Land  
Case 250 of 2018) [2023] KEELC 18162 (KLR) (8 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18162 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 250 OF 2018**

**LN MBUGUA, J  
JUNE 8, 2023**

**BETWEEN**

**SALOME WAIRIMU MBUGUA ..... PLAINTIFF**

**AND**

**ESTHER NYOKABI KANYI ..... 1<sup>ST</sup> DEFENDANT**

**NAIROBI CITY COUNTY ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**JAMES PATRICK OKADO ..... INTERESTED PARTY**

**JUDGMENT**

1. This suit was instituted vide a plaint dated 25.5.2018, where the Plaintiff contends that she is the proprietor of all that parcel of land known as plot No.185 Jamhuri Phase 11 Nairobi which was transferred to her by her father, one James Waweru the original allottee from Nairobi City Council. She claims to have developed the suit premises by building a 3 bedroomed mainsonattes and 3 units of 2 bedroom residential apartments. It is her case that recent investigations have revealed that she occupies plot No.184 Jamhuri estate owned by the Interested Party while the 1<sup>st</sup> Defendant is unlawfully and fraudulently occupying what should be her plot, namely plot No. 185.
2. The plaintiff therefore seeks the following orders;
  - a. A declaration that the Plaintiff is the legal and rightful owner of Plot No 185 Jamhuri Phase II.
  - b. Eviction of the 1<sup>st</sup> Defendant from Plot No 185 Jamhuri Phase II and demolition of all the illegal structures erected thereon with the supervision of Kibera Police Station.
  - c. The plaintiff and the interested party James Patrick Okando to rectify and amend the allotment of Plot No 184 and 185 Jamhuri phase II respectively with the 2<sup>nd</sup> defendant; with the plaintiff



retaining plot 184 Jamhuri phase II while the interested party's to take plot no. 185 Jamhuri phase II.

- d. The court to issue an injunction against the 2<sup>nd</sup> defendant from demolishing the Plaintiffs developments on plot 184 Jamhuri phase II.
  - e. Cost of the suit.
3. The 1<sup>st</sup> Defendant filed a statement of defence dated 23.10.2018 in opposition to the Plaintiff's claim. She denies the allegations leveled against her and contends that she is the legitimate allottee of Plot No. 185 Jamhuri Phase II.
  4. The 2<sup>nd</sup> Defendant's statement of defence dated 20.2.2020 contains denials of the Plaintiffs averments as set out in her plaint.
  5. The Interested Party did not file any pleadings.

### **The Evidence**

6. The Plaintiff's case was advanced by 3 witnesses where she testified as PW1. She adopted her witness statement dated 1.4.2019 as her evidence. She also produced the documents contained in her bundle dated 3.4.2019 as P. Exhibit 1-19 except document no.18 which is a memo dated 20.9.2017 at page 43-44 of the said bundle.
7. In her witness statement, PW1 stated that she is a daughter to James Mbugua Waweru (now deceased) who worked as a planner with the defunct City Council of Nairobi. She contends that her late father was allocated plot No. 185 vide the allotment letter dated 13.2.1992 by the then Nairobi City Commission. He duly paid ksh.10,800/= being stand premium as demanded.
8. On or about 8.5.1992, her late father received a memo from the Chief Land Surveyor informing him to get in touch with the surveyor in charge of the project, one Mr. Makokha to be shown the beacons, which exercise was to be done on 25.5.1992. Consequently, James Mbugua Waweru (deceased) paid ksh.5,700/= being survey fees for the plot and he was shown the beacons and he took possession of the plot. Thereafter, he constructed a 3 bedroomed mainsonatte house and in 1997, he gifted the plot to the plaintiff. He actualized the gift by his letter dated 6.2.1998 addressed to the director, City planning informing him of his intention to transfer the plot to her.
9. His request to transfer the plot to her was approved and she was thereafter issued with an allotment letter dated 27.2.1998 which was endorsed with an indication that it was a transfer from James Mbugua Waweru (deceased). She then paid ksh.3,600/= to Nairobi City Council being legal fees and other charges.
10. On 30.9.1998, Pw1 executed a lease agreement with the City Council of Nairobi and the said lease was duly registered. Thereafter, she developed 3 2- bedroom apartments with requisite approvals and licences from Nairobi City Council. She was however surprised when on 17.5.2018, the 2<sup>nd</sup> Defendant served her with an enforcement notice to demolish her buildings and also ordered her tenants to vacate the premises within 14 days.
11. Thereafter, she was informed of an ownership dispute raised by another allottee who was claiming ownership of c plot 184. Based on the complaint, the 2<sup>nd</sup> Defendant requested parties to submit their ownership documents.
12. On 22.2.2019, her Advocates M/s Murage Juma & Company Advocates wrote a letter to the 2<sup>nd</sup> Defendant requesting for the investigation report in respect of the issues raised and in response, the



- 2<sup>nd</sup> Defendant's director of Criminal Investigations responded via a letter of 1.3.2019 stating that the matter was investigated of which the conclusion thereof was that she, ( the plaintiff) owns plot 185 while the Interested Party owns plot 184. Further, there was a recommendation that the 1<sup>st</sup> Defendant should be evicted from plot 185.
13. Pw1 reiterated that her father never sold the suit plot to the 1<sup>st</sup> defendant at any given time. She desires that the 1<sup>st</sup> defendant be ordered to vacate the suit premises so that she can exchange her plot with the interested party.
  14. On cross-examination by counsel for the 1<sup>st</sup> defendant, Pw1 stated that the whole of Jamhuri Phase II estate belongs to Nairobi City County, thus it is the only entity that had the mandate to subdivide the land and allocate the same.
  15. Referred to the allotment letter dated 27.2.1998 at page 28 of her bundle, Pw1 stated that it was signed by Z. Wandera who also signed the allotment letter at dated 27.2.1992 at page 6 of the 1<sup>st</sup> Defendant's bundle but the signatures are not similar. She further confirmed that the interested party too has a similar letter of allotment letter dated 17.9.1992 at page 21 of his( Interested Part's) bundle. She added that two of the signatures in the three allotments letters are similar but one is different.
  16. Pw1 further stated that her late father relied on the City Counsel Surveyor, Mr. Makokha who showed him the beacons to the suit plot, thus he developed plot No.184 believing that he was developing plot 185.
  17. PW1 also stated that they have been in physical occupation of the suit plot since 1992 and that they were required to pay annual rent of ksh.1800/= per year which they paid, though she has not exhibited payments receipts; adding that she continued paying the rent until year 2017 when this dispute arose.
  18. Upon cross-examination by counsel for the 2<sup>nd</sup> defendant, PW1 stated that P. Exhibit 15 is an enforcement notice relating to the construction on Nairobi Block 63/517 plot 184 and it does not deal with the issue of ownership. She further stated that she is not familiar with the law relating to physical planning and does not know about liaison committees.
  19. On re-examination, PW1 reiterated her averments set forth in cross-examination. She also stated that her father built where he was shown and no one complained when they were building. She added that she did not personally interact with Zipporah Wandera but she was with her father when the suit property was transferred to her and even if there was an error between plot 184 and 185,she has been in plot 185 since 1997.
  20. PW2, one Paul Muriithi Wachira introduced himself as the DCI Regional Coordinator, Rift Valley. He stated that in year 2017, he was seconded to the Nairobi City County Government as Director- Investigations & information Analysis Department.
  21. In April 2017, he received a letter from the Chief Lands Officer dated 24.4.2017 requesting investigations into ownership of plot 184 and 185 Jamhuri Phase II Estate. They carried out investigations and on 20.9.2017, he generated an internal memo Ref: IIA/1/2/VOLX VII/227/MJN addressed to the chief officer lands, containing their findings and recommendations. He produced the memo as P-Exhibit No. 18.
  22. He stated that in summary, their findings were that the 1<sup>st</sup> Defendant had unlawfully developed plot No. 185 as she could not provide ownership documents relating to the said plot. They also established that one Alexander Kamenyi was allocated plot No. 184 and he had sold the said plot to one James Patrick Okado, the Interested Party.



23. They further established that the Interested Party and the Plaintiff are the bonafide owners of plot Nos. 184 and 185 respectively. They recommended that the 2 legitimate owners seek civil redress. They also recommended that the 1<sup>st</sup> Defendant be evicted from plot 185 and be charged with obtaining registration fraudulently and altering false documents but he does not know if the recommendations were implemented.
24. Upon cross-examination by counsel for the 1<sup>st</sup> defendant, Pw2 stated that the allotment letter dated 27.2.1992 at page 6 of the 1<sup>st</sup> Defendant's list of documents is issued by Nairobi City Commission, but he does not know if the same was in the investigation file and he no longer has the said file. He added that there were several other investigators working under him so he is not in a position to confirm whether he saw the said letter of allotment.
25. He knew that Z.M Wandera was the Town Clerk of Nairobi City. He could not tell if the signatures on the letters of allotment issued to the plaintiff and to the 1<sup>st</sup> defendant emanated from the same person, namely Z.M Wandera.
26. Referred to the letter dated 14.9.2009 from the City Council of Nairobi addressed to the Chief Land Registrar and signed by Mr. Katsoleh, he stated that he could not comment on it. He pointed out that P. Exhibit 18 which he authored was based on the documentations in the investigation file, but he did not have the said file which contains statements and relevant documents.
27. Referred to the document at page 17-21 of the 1<sup>st</sup> Defendant's bundle, which include receipts in the name of the 1<sup>st</sup> Defendant for plot No.185, he stated that they are indicated as having emanated from the City Council of Nairobi and without the investigation file, he is not able to confirm whether they were availed at the time of investigations.
28. PW2 also stated that he is familiar with the process of land allocation. He pointed out that it starts with an application and it is followed by a letter of offer, then a letter of allotment is generated. He added that the Plaintiff and the 1<sup>st</sup> Defendant were both issued with letters of allotment. He can see the letter dated 27.2.1992 issued to the 1<sup>st</sup> Defendant and the one at page 28 of the Plaintiff's bundle issued to the Plaintiff, but he cannot tell if either of them is a forgery without the investigation file and he cannot recall if he directed a forensic audit to be conducted. He further stated that the county surveyor is the right person to point out beacons of the plots in Jamhuri estate.
29. Upon re-examination, PW2 stated that the investigation file will not change his recommendations.
30. PW3, one Joseph Keitany introduced himself as an employee of Nairobi City Government working in the department of investigations. He adopted his witness statement dated 25.2.2021 (it is a actually dated 26.2.2021) as his evidence. He produced the 32 documents contained in his list of documents dated 16.6.2021 as P. Exhibit 1-32.
31. His testimony is that him and his colleague Julius Obwago were assigned to investigate a case in respect of plots 184 and 185 Jamhuri estate Phase 11, following a request from the Chief Officer Lands via a memo to Director of investigations.
32. They then opened an inquiry file 041/2017 and they recorded statements from the then complainant who is the Interested Party herein James Okado who presented ownership documents for plot 184. They also went to the site of the dispute where they found the developer of the plot 184 who happens to be the Plaintiff herein. She too presented ownership document's but for plot No.185 Jamhuri Phase II and she recorded a statement. They also summoned the 1<sup>st</sup> Defendant who recorded her statement and presented her ownership documents. They established that the plaintiff herein had developed plot 184 while the 1<sup>st</sup> defendant had developed plot 185.



33. They then contacted the Chief Officer Urban Planning to confirm the ownership of the two plots, of which they got a confirmation that plot 184 was allocated to James Okado whereas plot 185 was allocated to J.M. Waweu. They also established that the lease document in custody of the 1<sup>st</sup> defendant did not emanate from the 2<sup>nd</sup> defendant.
34. The report generated by Pw3 is to be found at page 88 of the bundle of documents produced by Pw3.
35. Upon cross-examination by counsel for the 1<sup>st</sup> defendant, Pw3 stated that he can confirm that the allotment issued to the Interested Party is genuine. Referred to the letter of allotment at page 6 & 7 of the 1<sup>st</sup> Defendant's list of documents filed on 14.6.2019, he stated that he is not sure whether it emanates from Nairobi City Council. He contends that the signature on the said allotment letter to the 1<sup>st</sup> defendant doesn't belong to Wandera, the Town Clerk. He however added that he is not a hand writing expert or a document examiner thus he is not able to tell which of the 2 documents is valid.
36. He further stated that while the office of the Town Clerk which held records is no longer there, it was taken over by the custodian of records - Urban Planning who confirmed to the investigators that as per the records, plot 184 and 185 were allocated to the Interested party and Mr. James Waweru (deceased) respectively.
37. The 1<sup>st</sup> Defendant's case was advanced by herself Esther Nyokabi Kanyi, testifying as DW1. She adopted her witness statement dated 22.5.2019 was adopted as her evidence. She also produced the 8 documents in her list dated 18.10.2018 as D Exhibits 1-8.
38. In her statement, Dw1 claims to be the lawful owner of Plot No. 185 Jamhuri Phase II having been allocated the same by the 2<sup>nd</sup> Defendant herein vide a letter dated 27.2.1992. She further stated that though she was not directly involved in its purchase, her late husband was.
39. She stated that she paid the requisite dues and thereafter sought approval of her building plans from the 2<sup>nd</sup> Defendant. She was granted the approval and she proceeded to develop the suit plot without interruption from the Plaintiff and the Interested Party.
40. Upon cross-examination by counsel for the plaintiff, Dw1 stated that even though she was allocated plot No. 185 in 1992 as stated in her witness statement, she only found the allotment letter in respect to the suit land after her husbands' demise. She admitted that in her witness statement, she did not include her husband's name, the year he died and his birth certificate. She only began processing all the other documents relating to the suit plot 185 in year 2001 after her husband's death.
41. Referred to the allotment letter at page 6 and 7 of her bundle of documents, she stated that accepting the offer of allotment would mean complying with the conditions thereon, but she found no evidence of payment of the stand premium. She added that she did not find a transfer from Mr. JM Waweru (deceased) to her. She added that she did not know JM Waweru and that her husband never told her about the allocation of the suit property to Waweru and she personally never applied to be allocated the suit plot.
42. Referred to the lease at page 9 - 11 of her bundle dated 13.6.2019, she stated that while it states, "Signed by the lessee in presence of..." there is no signature of advocates and there is no stamp of person certifying it. It also has no date and signature of the Land Registrar. It does not indicate date of payment and does not indicate stamp duty payment either. DW1 also stated that she has no idea as to how the plot was acquired.



43. When re-examined, DW1 stated that the allotment letter at page 6 of her trial bundle is what was given to her husband by the 2<sup>nd</sup> Defendant. All she did was ask the 2<sup>nd</sup> Defendant to process her lease. She was issued with receipts at page 21 of her bundle after making the requisite payments.
44. The 2<sup>nd</sup> defendant adopted the evidence of Pw3 as their evidence.
45. The Interested Party had filed a memorandum of appearance on 19.6.2018. He also filed a bundle of documents on 23.1.2020 but did not tender any evidence.

### **Submissions**

46. The submissions of the plaintiff are dated 3.3.2023 where they address the following issues;
  - a. Whether the Plaintiff is the lawful owner and allottee of plot No.185 Jamhuri Phase II.
  - b. Whether the 1<sup>st</sup> Defendant has a lawful claim and was allocated plot No. 185 Jamhuri Phase II by the 2<sup>nd</sup> Defendant?.
  - c. Whether the registration documents of the 1<sup>st</sup> Defendant (if any) were lawfully procured?.
  - d. Whether the Court should issue an eviction order against the 1<sup>st</sup> Defendant?.
  - e. Whether the Plaintiff and the Interested Party should be allowed to exchange their plots with the Plaintiff retaining plot No. 184 Jamhuri Phase 11, while the Interested Party takes Plot No. 185 Jamhuri Phase II.
  - f. Who should pay costs?
47. It is the Plaintiff's submission that she is the lawful owner of Plot No. 185. She points out that the plot was allocated to her father James Mbugua Waweru (now deceased) vide a letter of allotment dated 13.2.1992 and in turn, her father gifted and transferred the same to her.
48. It is her submission that the 2<sup>nd</sup> Defendant as the lessor and custodian of records concerning and relating to allotment and ownership of the subject property have confirmed that she, plaintiff is the bonafide owner of plot 185 Jamhuri Phase 11 and that Plot No.184 belongs to the interested party.
49. On the issue as to whether the 1<sup>st</sup> Defendant has a lawful claim over Plot No. 185 Jamhuri Phase II, it was submitted that the 1<sup>st</sup> Defendant claim is pegged on the letter of allotment dated 27.2.1992 of which she has not tendered evidence of its acquisition. She adds that since the plot had already been allocated to her late father, it was not available for allocation to any other person.
50. The Plaintiff also submits that the 1<sup>st</sup> Defendant's case was marred with inconsistencies and raises more questions than answers. On the issue of fraud, she submits that the 2<sup>nd</sup> Defendant confirmed that the 1<sup>st</sup> Defendants documents were forgeries, therefore she has no legal claim over plot 185.
51. It was also submitted that Plaintiff's late father was shown plot No.185, thus he developed it believing that it was plot No. 184. She adds that the Interested Party who is the owner of Plot No. 184 has not developed it and has not contested exchanging it with plot 185, thus the orders sought should be granted.
52. The cases relied on by the plaintiff are; *Mbau Saw Mills Ltd v Attorney General for and on behalf of the Commissioner of Lands & 2 others* [2014] eKLR, *Lucy Nchebeere v Rose Ndululu Musee & Another* [2021] eKLR, *Ali Mohamed Dagane (Granted Power of Attorney by Abdullahi Muhumed Dagane, Suing on behalf of the Estate of Mohamed Haji Dagane) v Hakar Abshir & 3 others* [2021] eKLR and *M.A koinange v Joyce Ganchuku & 2 others* [2015] eKLR.



53. The submissions of the 1<sup>st</sup> defendant are dated 17.4.2023 where they address the following issues;
- a. Whether the 2<sup>nd</sup> Defendant had the legal authority to allocate plots, and specifically the suit property, that lay within its area of jurisdiction.
  - b. Whether the 1<sup>st</sup> defendant was allocated the suit property by the 2<sup>nd</sup> Defendant.
  - c. Whether the 1<sup>st</sup> Defendant is the lawful owner of the suit property.
  - d. Whether the Plaintiff is entitled to the orders sought.
54. It is the 1<sup>st</sup> Defendant's submission that as at the year 1992 when her late husband was allocated the suit property by the 2<sup>nd</sup> Defendant, the same was still within the 2<sup>nd</sup> Defendant's jurisdiction and it had the legal authority to dispose it under the provisions of the Local government Act, Cap 265 which was applicable at the time.
55. She further submits that no complaint has ever been lodged to date as against Zippora wandera, the Town Clerk who issued the allotment letter dated 27.2.1992 in regard to the suit property. She adds that no criminal complaint has ever been filed against her and that the 2<sup>nd</sup> Defendant has statutorily engaged her for over 20 years by accepting fees and approving her building plans.
56. She submits that she cannot be said to be a trespasser while having legal ownership documents to the suit property, duly issued by the 2<sup>nd</sup> Defendants. She further submits that no elements of fraud were proven against her and that the Interested Party did not file any claim against her.
57. The 1<sup>st</sup> defendant relies on the cases of; Vijay Morjaria v Nansingh Madhusingh Darbar & Another [2000] eKLR as well as the case of Kinyanjui Kamau v George Kamau [2015] eKLR.
58. The Interested Party and the 2<sup>nd</sup> Defendant did not file any written submissions.

### **Determination**

59. The issues falling for determination are;
- a. Who owns Plot No. 185 Phase II Jamhuri Estate?
  - b. Whether the court can grant an order swapping ownership of Plot 185 with 184 ?
60. This case surrounds mix-up of plots at the point of allocation and beacon marking coupled with fraud. The Plaintiff's case is that she owns plot 185 but occupies plot 184 whose legal owner is the Interested Party. On the other hand, the 1<sup>st</sup> Defendant claims ownership of and occupies plot 185.

### **Ownership of plot185**

61. The provisions of Section 107 of the *Evidence Act* stipulate that:
- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
  - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person"



62. The Court of Appeal in the case of Palace Investments Limited v Geoffrey Kariuki Mwenda & another [2015] eKLR stated that:

“Denning J. in Miller –vs- Minister of Pensions [1947] 2 ALL ER 372 discussing the burden of proof had this to say:-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: ‘We think its more probable than not’, the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow”.

63. In Samson S. Maitai & another V. African Safari Club Limited & Another [2010] eKLR, the court stated as follows in relation to proof.

“Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute.”

64. What the above case law and the applicable statutory provisions portends is that the burden of proving that the plaintiff has an interests in the suit land, plot 185 capable of being protected by the court lies with the plaintiff.

65. PW1 led evidence that her late father James Mbugua Waweru was allocated plot 185 vide the allotment letter dated 13.2.1992. In Mbau Saw Mills Ltd v Attorney General for and on behalf of the Commissioner of Lands) & 2 others [2014] eKLR, it was held that;

“....This court holds that a letter of allotment does not confer any property rights to a person unless there is acceptance and payment of the stand premium and ground rent.....”

66. There is evidence that Plaintiff’s late father complied with the conditions of the allotment letter by paying stand premium as exhibited by the receipt dated 3.3.1992 issued by the 2<sup>nd</sup> Defendant. The same is at page 24 of plaintiff’s bundle of documents. PW1 further led evidence that her late father was shown the beacons to plot 185. He developed the land and in 1997, he gifted it to the Plaintiff. To this end, the plaintiff has availed the letter dated 6.2.1998 requesting the Director, City Planning and Architecture to transfer the plot to the plaintiff. The transfer was actualized by an allotment letter dated 27.2.1998 addressed to the Plaintiff and endorsed, “transferred from J.M Waweru...”

67. The allotting authority is the 2<sup>nd</sup> defendant whose officers namely Pw2 and 3 have joined ranks in affirming the claim of the plaintiff. If the 2<sup>nd</sup> Defendant who purportedly issued the 1<sup>st</sup> Defendant with an allotment letter states that the said allotment is not genuine, then this court cannot say otherwise. In Nancy Wanjiru Kunyihia v Samuel Njoroge Kamau Nakuru (2018) eKLR the court stated that;

“If the Municipal Council of Nakuru (now the County Government of Nakuru), the holder of the head lease, states that it has never issued a lease in respect of this land, and there is no record of any lease having been so issued, how can this court hold that there was actually a lease granted to Samwel Kamau Mwangi ?“

68. This far, the plaintiff has proved her case of entitlement to parcel 185 as she has given a plausible and consistent account of the root of her claim to parcel 185.



69. On the other hand, the 1<sup>st</sup> Defendant's claim to the suit land is pegged on the allotment letter dated 27.2.1992. It is issued to her and endorsed 'transferred from JM Waweru...' whom she doesn't know! She also knows not why the letter is endorsed as a transfer from JM Waweru.
70. DW1, also led evidence that she just found the allotment letter in her name after her husband's death; that is when she started processing her title. She had no clue as to how the plot was acquired. She stated that she did not apply for allocation of the plot. There is no mention of her husband in the allotment letter, indeed, she doesn't give the identity of her husband even in her statement. Thus there is no nexus of how the plot came to be in Dw1's name.
71. What more, Dw1 doesn't know that the letter of allotment was conditional; the allottee was required to pay stand premium within 30 days and she did not find evidence of payment of such stand premium.
72. Further the lease at page 9-11 of the 1<sup>st</sup> Defendant's document is not properly executed and registered, of which DW1 has admitted that much.
73. I find that the 1<sup>st</sup> defendant has not rebutted the evidence of the plaintiff in relation to claim of ownership of plot 185. I do find that Plot 185 was allocated to JM Waweru in 1992 and after he complied with the conditions of the allotment letter, plot 185 was not available for allocation to anyone else.
74. In Republic v City Council of Nairobi & 3 Others (2014) eKLR, Odunga, J. had this to say about land that has already been allotted:
- “once allotment letter is issued and the allottee meets the conditions therein, the land in question is no longer available for allotment since a letter of allotment confers absolute right of ownership unless it is challenged by the allotting authority or is acquired through fraud, mistake or misrepresentation or that the allotment was out rightly illegal or it was against public interest. In other words, where land has been allocated, the same land cannot be reallocated unless the first allocation is validly and lawfully cancelled.”
75. It is also pertinent to note that once the letter of allotment issued to 1<sup>st</sup> defendant was challenged, then the claimant (1<sup>st</sup> defendant) was required to avail evidence of its root. In the case of Munyu Maina vs. Hiram Gathiha Maina Civil Appeal No. 239 of 2004, the court stated that:
- “when a registered proprietor's root of title is under challenge, it is not enough to dangle the instrument of title as proof of ownership. It is the instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances...”
76. In the case at hand, the 1<sup>st</sup> defendant merely stumbled upon the letter of allotment after the death of her husband; something akin to a wind fall.

### **Swapping of Plots**

77. On the issue of swapping plots, PW1 led evidence that her late father who was originally allocated plot 185 occupies plot 184 since he was shown the beacons for that particular plot. PW2 and 3 gave evidence relating to the investigations conducted by the 2<sup>nd</sup> defendant which concluded that plot 184 is owned by the interested party, while plot 185 is owned by the plaintiff; see P. Exhibit 18.



78. The Interested Party who is the lawful owner of plot 184 did not object to the Plaintiff's prayer for swapping of the plots. This is informed by the fact that the Plaintiff has developed plot 184 as evidenced by the photographs contained in her trial bundle and produced as exhibits herein. The Interested Party has not made developments on Plot No.184 and will not be prejudiced.
79. Further, it is noted that the interested party is aware of these proceedings as he even filed a memorandum of appearance dated 19.6.2018 as well as a bundle of documents on 23.1.2020. Thus an order of swapping of the plots is merited.

### **Relief**

80. In conclusion, I proceed to give the following orders;
- i. An order is hereby issued declaring the plaintiff as the legal owner of plot 185 Jamhuri Phase 11.
  - ii. An order is hereby issued for the Eviction of the 1<sup>st</sup> defendant from plot 185 Jamuhuri phase 11 and the demolition of all the structures erected thereon with the supervision of Kibera police station. This order is to take effect after the 30<sup>th</sup> day from the date of delivery of this judgment so as to give the 1<sup>st</sup> defendant an opportunity to leave plot 185 harmoniously.
  - iii. The plaintiff and the Interested Party James Patrick Okando are to rectify and amend the allotment of Plot No 184 and 185 Jamhuri phase 11 respectively with the 2<sup>nd</sup> defendant; such that the plaintiff shall retain plot 184 Jamhuri phase 11 while the Interested Party shall take plot no. 185 Jamhuri phase 11.
  - iv. The 1<sup>st</sup> defendant is condemned to pay costs of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF JUNE, 2023 THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**

**In the presence of:-**

Juma for the Plaintiff

Mwangi Mugo holding brief for Mr. Njugi for 1<sup>st</sup> Defendant

