



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 111 OF 2013

HUSSEIN NOOR HAJI.....1ST PLAINTIFF

RASHID MAALIM ISSACK..... 2ND PLAINTIFF

VERSUS

ABDI TARI ABKULA.....DEFENDANT

JUDGMENT

1. The Plaintiffs filed this suit vide a plaint dated 24th April 2013 claiming that they were joint owners of the piece of land known as ISL/117/98/397 otherwise designated as unsurveyed residential plot Kambi Garba/B/Isiolo measuring approximately 6 acres. As per the pleadings, the said plot was allocated to them on 23rd September 1997 vide minute 19/97 of Isiolo County Council, that the plot was surveyed and its part development plan was accordingly approved. The plaintiffs also averred that they have been in occupation since 1993 to date and have extensively developed the suit plot. It is further pleaded that the defendant started laying claim on their plot on 19th April 2012 by lodging a complaint with the County Council of Isiolo which complaint was dismissed and a ruling given in plaintiffs' favor. Being dissatisfied with the said ruling, the defendant started threatening to forcefully take possession of the suit plot.

2. The plaintiffs aver that to avoid bloodshed, it became necessary to determine ownership of the disputed land by filing this suit. They seek that judgment be entered in their favour in the following terms:-

- a) A declaration that the plaintiffs are the rightful joint owners of plot no ISL/117/98/397 otherwise known as unsurveyed residential plot Kambi Garba/B/Isiolo.*
- b) A permanent Injunction do issue restraining the Defendant his agents/servants from in any way interfering with the suit plot.*
- c) Costs of the suit plus interest.*

3. The defendant filed his defence and counter-claim dated 21st October 2013 denying all claims made by the plaintiffs. He contends that he applied for the plot, and he was allotted the same through council minutes in the year 1997 and a letter of allotment in 1998. He has fully paid up the council rent and rates as required. That he was also given a part development plan for the said plot by the physical planner dated 12th February 1997.

4. Further that vide Kenya Gazette Supplement No. 61 (Acts No. 6) of the physical planning Act 1996, he was given notification of approval of development permission on 4th November 2010 for his plot No. 117/96/74 Isiolo Town Kambi Garba and he has since been residing and developing the suit land. He averred that the plaintiffs have never set foot on the suit plot.

5. In his counter-claim, defendant averred that he was the original allottee of the suit plot and any subsequent allottee cannot have a better title. He therefore prays for the following orders in the counter claim;

- a) A revocation and/or cancellation of the allotments to the plaintiffs plot numbers GARBA/ISIOLO NO ISL/117/98/397 as the same was irregularly hived off the defendant's parcel No. ISL/117/96/74 and consequently for declaration that the defendant is the owner of plot KAMBI GARBA ISIOLO NO. ISL/117/96/74 measuring approximately 10 acres.*
- b) Costs and interest of the counter claim and any other relief deemed just and fit to grant by this Honorable Court.*

6. **PW1, Hussein Noor Haji** testified and he adopted his statement dated 24.4.2013 as his evidence. Therein, he stated that him and the 2nd plaintiff were allocated the suit land no. ISL/117/98/397 vide minute no. 19/97 by the county council of Isiolo. The land was measuring 6 acres. The defendant lodged a complaint with county council of which, the dispute was resolved in their favour. That the plaintiffs have in

their possession duly approved part development plans as well as a letter of allotment. They have been paying rates for the suit plot of which they have also paid survey fees. He contends that the suit land was trust land.

7. Pw1 produced documents to prove ownership of the disputed plot. A notice of intention to sue dated 5.11.2012 was produced as exhibit 1 on 13.9.2016. The rest of the documents were produced as exhibits on 7.2.2019 after pw1 was recalled for that purpose. These documents are; -

- a) Minutes 19/97 county council of Isiolo dated 23.9.1997
- b) Letter of allotment for the suit plot dated 4.9.1998.
- c) Letter by Shadrack Mwithalii dated 17/8/2010.
- d) Letter by Arthur K. Mbatia dated 3/5.2012.
- e) Letter by David G. Kathuraku dated 29/04/2013.
- f) PDP Plot No. ISL/117/98/397 signed on 18.8.1998.
- g) Two rate payment receipts issued by the County Council of Isiolo.
- h) Two receipts in respect of survey fees for the suit land.

8. In cross examination, pw1 stated that he resides at Kambi Garba, about 300 metres from the suit plot. That on the suit plot, he has properties including trees and a live fence. The plot was allocated to him as a residential plot in 1997.

9. **PW2, Rashid Maalim Issack**, adopted his statement dated 24.4.2013 as his evidence. He averred that he is the second plaintiff. He is also a business man and a herder residing in Isiolo. The suit plot is A and B Kambi/Garba which is 6 acres and some points and they settled there in 1974 and there was no one else at that time. Him and the 1st plaintiff were allocated the suit plot vide minutes ISL/117/98/397 Minute no. 19/97 by the county council of Isiolo. They then got an allotment letter and they have approved part development plans.

10. There had never been any problems until year 2012 when they wanted to subdivide the land and a complaint was filed against them by the defendant. They were even arrested and put in cells. On 15th May 2012, the town clerk of the County Council gave evidence that the land belonged to the plaintiffs and the defendant's land was elsewhere. Defendant was dissatisfied with the decision, and he started harassing the plaintiffs, prompting the latter to file this suit. They have been paying rates, they fenced the land and planted trees.

11. On cross examination he stated that he was not from the same clan with defendant. That the defendant has not built any house there, neither is the fence his, as the same was put up by the plaintiffs. The plots do not have titles. That the plaintiffs moved when conflicts arose, so they no longer stay there. He averred that Isiolo County Council could not give the plot to any other person as it had already issued the same to them. He stated that the land was trust land and that all their documents indicate that the land is 6 acres. He also stated that the land is surveyed.

12. **DW1, Abdi Tari Abkula**, the defendant adopted his statement dated 22.8.2013 as his evidence. There in, he contends that he was allocated the suit plot in 1994 by the county council of Isiolo. However, later, the 1st plaintiff connived with county council officials where he was allocated the same plot. In his oral evidence in court, Dw1 stated that he was allocated 10 acres as plot no. ISL/117/96/74 and he was duly issued with the allotment letter. He avers that plaintiffs' allotment reads ISL/98/397 so defendant's plot was the earlier allocation.

13. Dw1 further states that from 1970 the land was his father's cow pen, it was a forest and the plot was used the way herders use land. To date, his land is behind the plaintiffs land and he has all the documents to support his claim. He made his application in 1994, even to the director of physical planning and commissioner of lands Nairobi and copied letters to the Isiolo County Council, DC's office and land officer in 1996. He also went to the County Clerk of Isiolo who wrote to the commissioner of lands and the director physical planning Nairobi who said the site is vacant. The District Commissioner who was the chairman of town awarding committee of all the plots also confirmed that the suit plot was vacant.

14. He then took his application to the County Council Isiolo for approval which is NO. 5 of 1997. The approval was made vide the minutes dated 20.6.1997. He was then sent to the planning department so as to be in the plan. Beacons were put and he got his 10 acres of land.

15. Dw1 averred that he got his part development plan from the commissioner of lands and he was sent back to Nairobi for the signature of the land commissioner and director of physical planning to approve the PDP and he was issued with a certificate as well as the allotment letter. He was authorized to fence the area. He also paid the standing premium rent arrears which amounted to Kshs. 347,531 to the Isiolo County Council and Kshs. 24,105 for clearance certificate and consent and the surveyor then showed him his parcel. He paid all these sums in order to be issued with a lease. He contends that his land is on the second row and is not next to the road.

16. The 1st plaintiff approached him in 1998 and told him he is his neighbor at the front. Dw1 fenced his land and planted indigenous trees. That after 5 months a new physical planner came to the office with the 1st plaintiff. Dw1 then found out that the 1st plaintiff had cut off all his indigenous trees and he told Dw1 that he had no plot there. Dw1 went back to the office of the physical planner but he was not assisted, so he decided to go to the CID and the then physical planner fled for good. 2 months later, the 1st plaintiff came to the plot with the chief, area councilor and former DC who was the prospective buyer. When Dw1 tried approaching them, the 1st plaintiff threatened him with

physical harm.

17. Dw1 reported to the elders that his rights had been violated and the council asked each party to produce their documents of ownership. The 1st plaintiff had no documents of ownership as he only had a sketch. Dw1 was able to avail his documents of ownership and he was allowed to fence through a Kenya Gazette Supplement. Dw1 learnt that 1st plaintiff had sold his plot to the DC, which is the 6 acres that the plaintiffs are claiming.

18. In support of his case, Dw1 produced the following documents as his exhibits;-

- a) Minutes of works, town, planning and market committee dated 20/6/1997, Dexh-1.
- b) Rate payment receipt dated 15.4.2013, Dexh-2.
- c) Application for development dated 3.11.2010, Dexh- 3
- d) Notification of approval/Developmet permission dated 3.11.2010, Dexh-4.
- e) The receipt for shs 24,000 for clearance and consent dated 22/7/2008, Dexh5.
- f) Letter by the clerk Isiolo County council dated 26/10/2010, Dexh- 6.
- g) PDP Plot No. ISL/117/96/74 dated 12.2.1997, Dexh-7.
- h) No marking for exhibit 8.
- i) Receipt for the sum of shs 347, 531 dated 12.1.2007 Dexh- 9.
- j) Consent of county treasurer to the defendant, Dexh-10.
- k) Application for a plot dated 27/6/1996, 28/06/1996, 20/8/1996 and 28/8/1996, Dexh-11.

19. On cross examination, Dw1 stated that he entered the land in 1970 but he started getting documentation 1988. He was shown the plot after getting his letter of allotment. Survey was done and the documents were taken to the survey of Kenya. He got all his documents from various offices and there are beacons on his land though he did not get a beacon certificate. Dw1 added that it was the plaintiff who encroached on his land in the year 2010. He averred that he has the original pdp and documents showing the exact location of his land which is an industrial unsurveyed plot. The committee of land authorized an enforcement officer to go to the site.

20. **DW2, Ali Sulleiman** adopted his statement dated 22.8.2013 as his evidence. He contends that he is aware that 1st plaintiff had a plot measuring 3 acres which is separate from the suit plot, and he sold the said plot to one Ibrahim Maalim Abdulahi. Dw2, is even the one who facilitated the said sale. The purchaser had wanted to buy the adjacent plot, but 1st plaintiff had stated that the same belongs to defendant. This was in year 2008.

21. He reiterated these averments in his oral evidence in court. He added that the land of the defendant was behind that of the plaintiffs. The 1st plaintiff ganged up with councilor Yarar to grab defendant's land, and it is this councilor who has helped the 1st plaintiff to acquire these documents, since the latter did not have any documents when he sold the land.

22. On cross examination Dw2 stated that he has stayed on the land from 1969 to 1978 when he relocated. He was able to identify defendant's name in P-exhibit 2. He again stated that 1st plaintiff sold his plot to Ibrahim, but there was no agreement and the sale was done informally though there was a hand written document as he was present. Dw2 is aware that 1st plaintiff also sub divided the land into 4 portions, though he has no evidence of such sub division.

23. **DW3, Abdi Kadie Guyo** also adopted his statement dated 22.8.2013 as his evidence. He has introduced himself as an enforcement officer with the County Government of Isiolo. He had received a complaint from defendant who claimed that some people had encroached on his land which is approximately 10 acres. He summoned the parties vide a letter dated 26.10.2010 in order to arbitrate on the matter. However, the plaintiffs did not turn up.

24. Dw3 avers that he conducted investigations which revealed that the defendant was the owner of the suit plot, while there were no documents to show that plaintiffs owned the land.

25. On cross examination, Dw3 stated that he has been an enforcement officer since 24.10.2007 till year 2018, and he was the author of defence exhibit 6. He averred that when he set out to arbitrate the dispute, defendant availed his supporting documents while plaintiff went to higher authorities. As per his letter dated 26/10/2010 both parties were not to do anything on the suit plot and the letter acted as an enforcement notice. The preliminary investigations referred to in the said letter required both parties to avail documents. He was then to cross check the said documents with their records in the office to see if the documents provided tallied with the county records. In this case, only one party complied and brought plot ownership documents and the records in the office tallied with what the defendant brought. So the defendant Abdi was the legitimate owner of the plot.

26. He also visited the suit plot. He contends that the documents of defendant were issued earlier. He averred that the plot number referred to in the letter is for plot No. unsurveyed Kambi Garba Isiolo ISL/117/96/74. The reference to **96** is when the pdp was drawn and **74** is the pdp number, while **117** represents the departmental reference number. He further stated that in plaintiffs' exhibit 7, the number in pdp is ISL/117/98/397. He added that he was not in agreement with the contention that as per the said pdp the land parcel 397 belongs to the plaintiff.

27. Dw3 also stated that he signed the letter (Dexh-6) on behalf of the county clerk but he is the one who wrote the same as it was directly in line with his work.

28. On cross examination by the court, Dw3 stated that the disputed land is approximately 10 acres.

29. **DW4, Tura Roba** adopted his statement dated on 22.8.2013 as his evidence. There in, he stated that he is a neighbour of defendant who was allocated the suit land in year 1994. That he was present when the land was surveyed and beacons were erected. He averred that 1st plaintiff connived with others to defraud the defendant his land.

30. During his oral testimony in court, Dw4 stated that he knew the plaintiffs as they were neighbours and they used to be on the suit land, which they were utilizing without any documentation as it was empty. After two months the defendant claimed the land was his which they disputed and took the dispute to survey where the survey people showed them the beacons and it was after this that he decided to leave the land in 2011. They also had a meeting with the DO who had said that the land belonged to the defendant.

31. Dw4 also stated that the letter dated 26/10/10 (D.exhibit- 6) which is from the council was addressed to them as they were still on the land and they were told to produce documents and they had none so they were told to leave.

32. On cross examination, Dw4 averred that he currently resides in Kambi Garba and the defendant was given the land in 1994 which was before they went there in 2010. He left in 2011. They only occupied the land as it was bushy and not because the county council had given them the land. He added that he left the land in 2011 after the defendant paid him and the plaintiff Kshs. 185,000 as costs to leave the land but he did not have a receipt to the said effect.

33. The plaintiffs submitted that the purported application by the defendant to acquire the land was never produced before this court and as such, the purported council approval is a sham. Further, defendant's witness testified that the land was allocated in 1994 but the documents produced show that council approved allocation in 1997 and such a contradiction defeats the ends of justice.

34. On the other hand the plaintiffs have proved that they were validly allocated the suit land by the town planning committee in 1997 and they subsequently acquired approved part development plans on 25.8.1998. That vide the county council's letter dated 15th May 2012, it was proven that the suit plot belongs to them (plaintiffs). Further the plaintiffs have produced sub division scheme plan and rates payment receipts. They submitted that they are the owners of parcel ISL/117/98/397 otherwise known as unsurveyed residential plot Kambi/B/Garba allotted in 1997.

35. The plaintiffs also submitted that the two plots, the one claimed by plaintiffs and the one claimed by the defendant are different and distinct and they urge the court to find that the plaintiffs are the owners of plot No. ISL/117/98/397. They relied on the case of **Titus Mutisya Muse V Francis Ichamui M'Mwenda [2020]eKLR.**

36. The defence submitted that defendant is the owner of parcel ISL/117/96/74 as he acquired the same when he applied and was allocated the property through the council minutes, he also has a PDP given by the physical planner, a letter of allotment, an approval of development permission and has paid all rates and rents. That he is in possession and there are no developments advanced by the plaintiff as alleged. That the parties to the suit are claiming the same property with different numbers and that this issue was canvassed during litigation when the court required the physical planner Isiolo to compile a report on the disputed property and they could not comment on the plaintiffs plot as they could not trace any records on the same.

37. Further, the court ordered the physical planner Nairobi and the National Land Commission to produce a report on the ownership of the plots and vide a letter dated 14th January 2020 they said that they only have details in respect to the defendant's land and had no records of any other allocation.

38. That the defendant has not only proven the metamorphosis of the ownership of the property but also its historic ownership and the same has been corroborated by witnesses and evidence. The law provides that once land has been allotted to an individual, that land is no longer available for alienation to a 3rd party and as such the allocation of the suit land to the plaintiff is an illegality. He submitted that he was allocated the land by following legally recognized procedures and the fact that the county government of Isiolo has been receiving rents and rates is proof that the allocation was done regularly. Defendant therefore urges the court to allow his counter-claim and dismiss the plaintiffs' suit with costs.

39. In support of his case, defendant relied on the provisions of Section 26 of the Land Registration Act as well as the case of **Milan Kumar Shah & 2 Others vs. City Council of Nairobi and Another** to buttress the point that a letter of allotment is a kin to acquiring a certificate of title.

Determination

40. The dispute herein appears to be a typical case of double allocation of land, an issue which is quite prevalent in the County Government of Isiolo. Thus the issue for determination is; **who is the owner of the suitland identified by the plaintiff as plot NO ISL/117/98/397 otherwise designated as unsurveyed residential plot Kambi Garba/B/Isiolo also identified by the defendant as plot NO ISL/117/96/94**

designated as **Unsurveyed industrial plot no. Kambi Garba Isiolo.**

Reports of experts

41. Ordinarily, the opinion of the experts do guide the court in arriving at a rational and logical reasoning in navigating the murky waters of double allocation. In this case, the defence case was closed on 21.3.2019 and for the next 2 or so years, the matter marked time in limbo while awaiting the input of the experts! Sadly, and for reasons which the court will pen down, the opinions of the experts, primarily the report dated 20.7.2018 and the letter dated 19.12.2019 were either hopeless, useless or inapplicable.

42. I will start with the report dated 20.7.2018 which emanates from physical planning officer, Isiolo County. This report was not prepared through a court sanctioned process. It is alleged in that report that the court gave orders on 27.5.2018 for the report to be availed. There is however no such an order. What happened is that on 22.2.2018, counsel for defendant applied to have summons requiring attendance to the physical planner and the lands officer in the County Government of Isiolo as expert witnesses. The court allowed this application and gave directions for summons to issue as prayed.

43. The subsequent proceedings where the court was waiting for a report were not anchored on an express order of the court. What more, the report itself was inconclusive as it recommended the director of physical planning and the National Land commission to file a report instead!

44. As regards the document from NLC dated 19.12.2019, the same is not a report. It is a letter written in reference to:

“the letter from Maraka and Kamara Advocates Ref No. Cc/IM/AI of July 4th 2019 requesting authentication of the documents referred to above”.

45. After the parties were dissatisfied with the report from the physical planner of Isiolo County Government, the court proceeded to give orders on 9.10.2018 as follows;

“It is hereby ordered that the Director of physical planning Nairobi and NLC proceeds to go on the ground and to file a report regarding the dispute”.

46. Subsequently on 21.3.2019, the court gave further directions as follows;

“The orders of 9.10.2018 directing the Director of physical planning and NLC to act is to be extracted by plaintiff’s advocates and the same to be served upon the officers”

47. On 14.5.2019 a further order was made that;

“The order of 21. 3. 2019 to have an addendum to include the two pdps which are ISL/117/98/397 and the one known as ISL/117/96/74. Defence counsel to extract the order and to ensure it is served”.

48. It follows that the defence advocates did not extract the orders of the court and instead wrote letters to NLC. Secondly the initial order of 9.10.2018 made reference to a report which was to have the input of the two entities that is the Director of physical planning and the National Land Commission. The letter from NLC has no input of the director of physical planning. Thirdly, there was no compliance with the scene visit.

49. Finally, the wording and format of the document from NLC indicates that this is a letter from the acting secretary /CEO of NLC to the County Co-ordinator National Land Commission Isiolo. The document is therefore not a report as envisaged in the orders of the court and the court shall not rely on the same in the determination of the dispute.

50. Thus my conclusion is that the expertise which could have gone a long way in resolving the dispute herein is missing.

Competing interests

51. The apposite litigants have competing interests over the suit land which is not registered. It is apparent that each party is claiming ownership of the suit land by virtue of acquisition via allotment of the land by the defunct county council of Isiolo. For the plaintiffs, they have availed minutes of the Town planning and Market Committee dated 23.9.1997, culminating in the letter of allotment dated 4.9.1998. They availed approved pdps and have a letter of 3.5.2012(Pexh-5) from district physical planner which states that plaintiffs are the owners of the suit land. The plaintiffs are also rate payers.

52. Likewise, defendant has availed minutes of 20.6.1997 which approved allocation of the suit land to him. He was then issued with a letter of allotment dated 3.7.1998. He acquired a pdp of 12.2.1997 and him too is a rate payer.

53. The plaintiffs have advanced a claim that the plot of the defendant is in a different site but no tangible proof was tabled before this court to support this averment. Each party is terming the claim of the other as baseless.

54. At this juncture, I must point out that this is a classic case of the mess perpetuated by the predecessor of the Isiolo County Government, the defunct County council of Isiolo which appears to have been dishing out land in a pedestrian manner. For instance, in this particular case, the suit parcel was given different numbers and was also identified as a residential plot for the plaintiff and as an industrial plot for the

defendant! The reality is that the plot is one and the same and there is not the slightest indication that the plots could be in separate areas.

55. Each party appears to have been buoyed by the support of certain officials in the former county council to buttress their claims. For the plaintiff, he has the letter P.exhibit- 5 authored by the then physical planner to confirm that he is the owner of the land. Likewise, the defendant has Dw3 who authored the letter produced as D.exhibit- 6 and who states that defendant is the owner of the suit parcels. However, letters cannot be used as prove of ownership unless they are backed by the records of the allotting authority. None of the two documents (P.exhibit- 5 and D.exhibit-6) can be construed as evidence of ownership.

56. The county council of Isiolo was succeeded by the County Government which took over the obligations of the previous entity. Thus the testimony of Dw3 can only have probative value if it was to emanate from the allotting authority, which in the current era happens to be the County Government of Isiolo. In the instant case, Dw3 did not demonstrate that he had any such mandate from the County government to give testimony regarding its records of the suit land nor did Dw3 avail such records.

57. Further, the parties appear to place a lot of emphasize on the fact that they have in their possession approved pdps. However, as rightly submitted by the plaintiffs, pdps are not prove of ownership. This court rendered itself on this issue in the case of Titus Musya Musee v Francis Ichamui M'Mwenda [2020] eKLR as follows:-

“Physical Development Plans(PDPs), also commonly known as Part Development Plans are planning tools, used for general purposes of determining land use in a particular area of the city, municipality or council (read county). Thus the PDPs cannot solely be used to confer or determine rights in the land. The land ought to have been surveyed in order to generate survey maps such that the specific portion of the land for each claimant is discernible from a map and on the ground.”

58. In the light of the foregoing analysis, can the court wring its hands in despair? Certainly not. This court is duty bound to render a decision weighing the evidence of each party as against the opponent. To this end, the court will define the import of allocation of land through minutes as well as through a letter of allotment.

59. In the County Council of Meru & 2 others v P.C.E.A thro’ the Registered Trustees [2020] eKLR, I held that;

“Minutes alone do not confer any proprietary interest in land. This is because minutes are an expression of an intention to allocate land. The commitment to actualize the intent to allocate is manifested in the issuance of the letter of allotment from the allotting authority. Demarcation of the parcel of land in question is then carried out through the process of survey. Thus the resolution of the council as captured in the minutes must be put into effect in order to give rise to a bundle of rights in land capable of being protected.”

60. Thus the minutes which the parties are relying upon are nothing but an expression of the intention to allocate land. Luckily for both parties, the commitment to allocate the land was manifested in the issuance of allotment letters to both parties. But again, an allotment letter does not confer rights of proprietorship.

61. In the case of Stephen Mburu & 4 Others vs Comat Merchants Ltd & Anor [2012] eKLR, Kimondo J held that:

“... from a legal standpoint, a letter of allotment is not a title to property. It is a transient and [is] often a right or offer to take property”

62. In the case of 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.”

63. The letters of allotments issued to both parties appear to be the defining factors in determining who is the legitimate owner of the land. To start with defendant appears to have paid the required stand premium in respect of the allotment amounting to Kshs.347,531 as well as the sum of shs.24,100 for clearance and consent to pave way for the issuance of the lease. The payments were not paid as per the stipulated timelines given in the letter of allotment, but the bottom line is that the allotting authority accepted the payments and issued receipts to that effect see- Dexh9 and 5.

64. On the other hand, there is no evidence to indicate that the plaintiffs made attempts to meet the conditions set forth in the letter of allotment by paying the stand premium and the ensuing charges. Thus the claim of defendant already ranks higher than that of the plaintiff in so far as the allotment letters are concerned.

65. Secondly, I find that defendant’s letter of allotment is dated 3.7.1998, while that of the plaintiffs is dated 4.9.1998. Thus the letter of allotment for the defendant is the earlier one. In Gitwany Investment Limited V Tajmal Limited & 3 Others [2006] eKLR, the court stated that ;

“Like equity keeps teaching us, the first in time prevails so that in the event such as this one where, by a mistake that is admitted, the Commissioner of Lands issues two titles in respect of the same parcel of land, then if both are apparently and on the face of them, issued regularly and procedurally without fraud save for the mistake, then the first in time must prevail”

66. It follows that even if there was no fraud or collusion in the issuance of the letter of allotment to the plaintiffs, the fact remains that the earlier allotment to the defendant remained in force as it had not been cancelled.

Conclusion

67. It is clear from the evidence tendered herein that the plaintiffs' ownership of the suit plot has not been proven and I do dismiss the plaintiffs' suit. I do opine that defendant is the owner of plot No ISL/117/96/74. I proceed to allow the counter claim of the defendant. However, the defendant did not prove the allegations of fraud or the irregularity and illegality of the plaintiffs' allotment letter to the suit plot. As I have already stated earlier in this judgment, the conundrum was perpetuated by the officers of the defunct county council of Isiolo who are not parties to this suit. Against this back ground, I direct that each party bears their own costs of the suit.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 5TH DAY OF MAY, 2021 IN PRESENCE OF:

C/A: Kananu

Ms. Kiramana holding brief for Makaka for defendant

Ms. Gitonga for Mbaabu M'Inoti for plaintiffs

HON. LUCY. N. MBUGUA

ELC JUDGE