



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT ELDORET**

**E&L NO. 237 OF 2012**

**RURAL HOUSING ESTATE.....PLAINTIFF**

**VERSUS**

**MOHAMED GHANI.....DEFNDANT**

**AND**

**THE ADMINISTRATOR OF THE ESTATE OF**

**AHMED MALAKWEN ARAP SISIWA.....THIRD PARTY**

**JUDGMENT**

By plaint dated 1<sup>st</sup> March 2006 the plaintiff herein sued the defendant seeking for the following orders:

- a. An order of eviction from Eldoret Municipality Block 15/2309;
- b. General damages for trespass; and
- c. Costs of the suit.
  - i. Defendant's Further List of Documents dated 9<sup>th</sup> November, 2018
  - ii. Defendants' Submissions dated 22<sup>nd</sup> December, 2020

**PLAINTIFF'S CASE**

PW1 Shrikesh Gheewala a director of the Plaintiff Company testified on behalf of the Plaintiff and stated that Malakwen Sisiwa (deceased) bought the disputed parcel of land vide an agreement dated 7<sup>th</sup> March 1980 which he produced as Pex No 1

It was PW1 's further evidence that on 14<sup>th</sup> April 1980 the Company purchased the LR. 775/1 and LR 776/4/1 measuring 107 acres at a price of Kenya Shillings Fifteen Thousand per acre and produced the agreement as exhibit No. 2. That the total acreage was 129 acres and that they bought 107 acres only as the balance was meant for the sewerage.

PW1 also testified that there was a subdivision whereby the system of registration changed and two parcels were created namely Eldoret Municipality block 15/2309 and 15/2308 whose lease was done on 12<sup>th</sup> May 1981 and the same was produced as exhibit No. 4 and a certificate of lease as exhibit No. 5.

PW1 stated that the lease was renewed on 6<sup>th</sup> January 2004 and an allotment letter for Eldoret Municipality Block 15/2309 was issued with a commencement date of 1<sup>st</sup> August 2001 and a certificate of lease issued dated 23<sup>rd</sup> November 2007 which he produced as Pex. No. 6.

It was PW1's evidence that the defendant illegally entered the said parcel without their consent hence the filing of this suit for an order of eviction of the defendant. PW1 further referred the court to a previous decision touching on the said land that had been decided by Justice Nambuye J (as then she was) being Eldoret HCCC No. 124/1998 Rural Housing Estates Vs. Edward Koech and 3 others.

PW 1 testified that the Defendant is on the suit land illegally but did not know when the Defendant gained access and further that the late Malakwen did not tell the Plaintiff that he had sold the land to anyone.

On cross examination by Mr. Songok counsel for the e Defendant PW1 confirmed that they were to purchase 107 acres whilst 22 acres remained and that at paragraph 3(e) of the agreement referred to subdivisions of parcel No. 776/4/4 which became Block 15/234 66.3 acres, 776/1 became Block 15/234 65.5 acres total to 129 acres whilst the sewerage part was on Block 775/1 which was so excised.

PW1 also stated in cross examination that the reason for referring the court to the judgment in ELDORET HCCC No. 124 of 1998 is that the case was decided based on the larger land of Eldoret Municipality Block 775/1 which he stated that affects the current.

On re-examination PW 1 stated that he was called by the Land's office as there was an irregular allotment on the suit property herein and that the said irregular allotment was later cancelled. PW1 urged the court to grant the prayers in the plaint together with costs.

### **DEFENDANT'S CASE**

DW1 Mohammed Ghani gave evidence and stated that he purchased the suit land from Malakwen Arap Sisiwa vide an agreement dated 23<sup>rd</sup> July 1994 who later died in 1998 and he thereafter informed the administrator of the estate.

It was DW1's evidence that the parcel of land known as Eldoret Municipality Block 15/834 which was 20 acres after it had been surveyed and it was an exchange agreement between the Defendant and the Vendor-Malakwen. He also testified that he took immediate possession of the land after handing over several of his properties and he has been on the land since 1994.

DW1 also testified that there was a mother title that constituted many acres that Malakwen owned which was surrendered and other titles were to be issued. That in 1997 Malakwen Sisiwa applied for sub-division so that he could hand over other titles hence made an application to the Land Control Board for consent to provide for public utility which application was made on 12<sup>th</sup> June 1997 and the same was produced as Dex No. 2a & b.

Subsequently DW1 stated that he got a consent but the title was not issued as at the time the letter of allotment was issued, the Malakwen had passed on and it had come out in his name. DW1 produced the letter of allotment as Dex No. 3 a & b which indicated that the land belonged to Sisiwa.

DW1 further testified that the suit plot Eldoret Municipality Block 15/2309 which was hived out from the mother title is in the name of the Plaintiff- Rural Housing Estates Ltd and that the green card showing that the plaintiff is the registered owner which he produced as Dex No. 4.

It was his evidence that the first registered owner as per the green card is Rural Housing Estates Ltd and that it is odd as the first registered owner is not indicated on the green card and that he had lodged a caution on 15<sup>th</sup> July 2008 claiming purchaser's interest.

DW1 further testified that the plaintiff Rural Housing Estates Ltd also obtained an letter of allotment in 2004, 3 years after a letter of allotment had been given to Malakwen Arap Sisiwa, which is dated 6<sup>th</sup> January 2004 which DW1 produced as Dex No. 5.

It was DW1's testimony that the Plaintiff made a complaint to the Lands office vide a letter dated 22<sup>nd</sup> December 2003 in which they were claiming to own the land and subsequently the letter of allotment to Malakwen was thereafter cancelled and another one issued to the Plaintiff on 6<sup>th</sup> January 2004. He also produced a series of letters exchanged between the Plaintiff and the Lands Office requesting among others that the letter of allotment issued to the late Malakwen be cancelled.

That the total number of acres involved in the agreement dated 7<sup>th</sup> March 1980 was 129 acres of which 107 acres which was the homestead of Malakwen Sisiwa was to be transferred back to him after sub-division had been done.

Further that the 22 acres belonged to the vendor and the surveyor had surveyed the same and returned the portion to Malakwen of which the plaintiff has never occupied that portion.

DW1 stated that the discrepancy of 22 acres is due to the survey which was done as they removed the public utility leaving a balance of 20 acres. DW1 therefore urged the court to cancel the Plaintiff's title over Eldoret Municipality Block 15/ 2309 and the suit property reverts to the 3<sup>rd</sup> Party for onward transmission to himself.

On cross examination by counsel for the plaintiff DW1 reiterated his evidence in chief and closed the defence case.

### **THIRD PARTY'S EVIDENCE**

Third party Musa Kipkemboi Kitur testified and confirmed that he was aware that the late Malakwen sold 107 acres of land to the Plaintiff vide the Agreement dated 7<sup>th</sup> March, 1980 and that it was a term of the Agreement that the 22 acres on which the late Malakwen's homestead was located would not form part of the interests being transferred to the Plaintiff.

He went on to clarify that the late Malakwen's homestead was part of the 22 acres that was sub-divided into LR NO. 775/1 and 776/4/1 which portions were subsequently sub-divided to provide for the construction of a sewerage system following the successful completion of the compulsory acquisition process.

Mr. Kipkemboi Kitur also confirmed the Defendant and the late Malakwen had entered into an Exchange Agreement dated 23<sup>rd</sup> July, 1994. He stated further that the Plaintiff had fraudulently acquired the late Malakwen's land that had been purchased by the Defendant and that the

CID had investigated the issue at some point.

Mr. Kipkemboi Kitur produced the following documents on behalf of the 3<sup>rd</sup> Party:

- a. A grant and a certificate of confirmation of grant produced as exhibit 1 & 2
- b. An Agreement dated 1<sup>st</sup> July, 1963 between Margaretha Erasmus and Settlement Fund Trust (SFT) produced as exhibit 3
- c. An Agreement prepared in 1963 between SFT and Malakwen exhibit 4
- d. An Application for consent for subdivision lodged by the late Malakwen exhibit 5
- e. An Indenture between SFT and the late Malakwen exhibit 6
- f. Gazette Notice no 1548 dated 21<sup>st</sup> May, 1978 (*sic*) for compulsory acquisition addressed to the late Malakwen, exhibit 7
- g. Letter of Award and Compensation in favour of the late Malakwen dated 3<sup>rd</sup> May, 1976 of Kshs. 149,244.10 as exhibit 8
- h. A proposed sub-division plan in favour of the late Malakwen dated 2<sup>nd</sup> March, 1979 for LR No. 775/1 and 776/ 4/1, exhibit 9
- i. Letters from Ministry of Lands copied to the late Malakwen dated 10<sup>th</sup> May, 1979 and 10<sup>th</sup> April, 1979 communicating the decisions made with regard to the subdivision application made by the late Malakwen produced as exhibit 10 & 11
- j. A letter dated 10<sup>th</sup> April, 1980 from the Plaintiff confirming their intention to exercise the option of purchasing L.R No. 775/1 and 776/4/1 and forwarding a cheque of Kshs. 160,500.00 to the late Malakwen, exhibit 12.
- k. An Agreement dated 7<sup>th</sup> March, 1980 between the Plaintiff and the late Malakwen as exhibit 13.

It was further Mr. Kitur's testimony that Rural Housing the plaintiff built houses but never went to the Land Control Board and that there was a case with National Land Commission because the government had placed a caveat on the land. Mr Kitur stated that the Defendant's plot is Eldoret Municipality Block 15/334 and that the Plaintiff used fraudulent means to acquire the land.

3<sup>rd</sup> Party PW2 Abulahi Kipkosgei Sisiwa testified on behalf of the 3<sup>rd</sup> Party and stated that while he was of school going age he remembers that the Defendant used to live in the homestead next to Rural Housing Estate.

Mr. Kipkosgei Sisiwa further stated that he was aware of the existence of the Agreement transferring 107 acres of land that existed between the Plaintiff and the late Malakwen leaving out a 22acre parcel of land which was to be transferred back to the late Malakwen as the late Malakwen's homestead was located on the 22 acres. He testified that the late Malakwen's homestead was given to the Defendant in exchange for a saw mill.

Mr. Kipkosgei Sisiwa explained that at some point, the late Malakwen's RTA titles were converted to RLA titles such that the late Malakwen's properties were then referred to as Block 15/233, 15/235 and 15/236. He also noted regrettably that the caveats on the late Malakwen's RTA titles were not indicated on the RLA records following the conversion exercise.

On 16<sup>th</sup> November, 2020 Charles Kipkurui Ngetich (3<sup>rd</sup> PW 3) a Deputy Chief Registrar at Ministry of Lands and Physical Planning attended Court to testify at the instance of the 3<sup>rd</sup> Party. During examination in chief he stated that the owner of the suit property herein is the late Malakwen as he purchased the same for Kshs. 8,000.00 in 1964.

The Deputy Chief Registrar testified that the late Malakwen purchased parcel No. 2684 GLA as is indicated in entry No. 26 registered in volume H9. In entry No. 27, the late Malakwen mortgaged the suit property herein to SFT in order to be advanced a loan of Kshs. 72,000.00 on 8<sup>th</sup> December, 1964. On 8<sup>th</sup> December, 1964 the late Malakwen purchased the parcel of land as is noted in entry No. 28. He testified that the late Malakwen then borrowed money as is noted in entry No. 27.

The Deputy Chief Registrar testified that there is a government caveat dated 7<sup>th</sup> September, 1978 claiming ownership of a portion of the suit property by virtue of compulsory acquisition. He further stated that there was no conversion exercise that had been done on the suit property as had been alleged and he produced a copy of the title as exhibit 4

During cross examination the Deputy Chief Registrar stated that the title of the suit property bears the name of the late Malakwen and not the Plaintiff's name. He stated that the titles bearing the name of the Plaintiff were registered un-procedurally as there was no conversion and such titles do not form part of the records held by Ministry of Lands. He reiterated that the original title over the suit property is still with the Chief Land Registrar and that being the case, the title bearing the name of the Plaintiff is a forgery. He confirmed that there is no gazette notice annulling the caveat registered in favour of the government on 7<sup>th</sup> September, 1978.

The Deputy Chief Registrar testified that the suit property herein belongs to the late Malakwen and that no documents are contained in the official records to show that the RIM was amended from Ministry of Lands offices and if any such amendment was conducted there would

be an entry showing that a conversion of titles was done and that there is a need to surrender the old title.

Counsel filed submissions

### **PLAINTIFF'S SUBMISSIONS**

Counsel for the plaintiff listed the following issues for determination by the court:

- a. Whether the Plaintiff is the owner of parcel of land Eldoret Municipality Block 15/2309
- b. Whether the Plaintiff has satisfied the court for an order of eviction
- c. Whether the plaintiff should be awarded damages for trespass.
- d. Who should pay for the costs of the suit.
- e. Whether the Plaintiff is the rightful owner of parcel of land known as Eldoret Municipality Block 15/2309.

On the first issue on whether the Plaintiff is the owner of parcel of land Eldoret Municipality Block 15/2309, counsel submitted that from the pleadings filed in court by both the Plaintiff, Defendant and the Third Parties, there is no dispute that the plaintiff purchased the suit land from the third party (Malakwen Arap Sisiwa) as per the sale agreement. Further that the issue of the 22 acres is a settled issue vide the judgment of Justice Nambuye (as she then was) in Eldoret HCCC No. 124 of 1998 Rural Housing Estates Limited Vs. Edward Koech and three others. That the said judgement has never been appealed against. That the third parties were well aware that the whole land was sold to the Plaintiff and there was conversion.

Counsel therefore submitted that the Plaintiff having produced a title deed to the land and the search thereon the plaintiff is entitled to orders of eviction.

Counsel submitted that the judgement in Eldoret HCCC No. 124 of 1998 Rural Housing Estates Limited Vs. Edward Koech and three others a case that related to the similar block of land essential rendered this case as res judicata and cited Section 7 of the Civil Procedure Act which provides:-

"No Court shall to<sup>y</sup> any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

Counsel also submitted on the plaintiff's right to property under Article 40 of the Constitution which Provides:-

(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—  
(a) of any description; and (b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the State or any person—

a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).

(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—

a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that— (i) requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in or right over or a right of access to a court of law.

(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.

(5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.

(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

Counsel urged the court to find that the plaintiff is the registered owner of the suit property hence protected by the law.

On the issue as to whether the plaintiff should be awarded damages for trespass counsel relied on Section 3 (1) of the trespass Act Cap 294 provides that:

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

Counsel relied on the case of **Philip Ayaya Aluchio Vs. Crispinus Ngayo [2014] eKLR**, where it was held;-

*"The plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage? It has been held that the measure of damages for trespass is the difference in the value of the plaintiffs property immediately after the trespass or the costs of restoration, whichever is less See Hostler - VS — Green Park Development Co. 986 S. W 2d 500 (No. App. 1999)."*

Similarly Counsel cited the case of **Nakuru Industries Limited v S S Mehta & Sons [2016] eKLR** where the court held as follows:

*"A similar situation pertains in the present case. The exact value of the land before and after the trespass is not proved. However, I have found the defendants did trespass onto the plaintiff's land and conduct some excavation. For this reason I award the defendant damages in the amount of Ksh.500,000/= (five hundred thousand only) plus interest and costs of this suit from the date of this judgment until payment in full. "*

In the case of **Willesden Investments Limited vs. Kenya Hotel properties limited NBI I-I-C.C. NO. 367 of 2000**, the court stated that;

*"There is no mathematical or scientific formula in these types of cases and that the guiding factors are the circumstances in each case. It is my considered view that K.Sh. 10 000 000 is a reasonable award for general damages".*

Counsel therefore urged the court to award the plaintiff damages of Kshs. 50,000,000/- based on the fact that the land is situate in town and the defendant has utilized the said parcel of land for long. Counsel further urged the court to allow the plaintiff's claim and dismiss the defendant's counter claim with costs.

#### **DEFENDANT'S SUBMISSIONS**

Counsel for the defendant reiterated the evidence of the defendant and relied on the documents produced and submitted that the Plaintiff's case is devoid of merit as it has failed to prove its case on a balance of probabilities as by law required. Mr Songok submitted that the Defendant has proved his entitlement to the property in question hence the plaintiff's case should be dismissed with costs to the defendant and his counterclaim be allowed as prayed.

#### **THIRD PARTY'S SUBMISSIONS**

Counsel for the third party also reiterated the evidence by the parties and relied on the documents produced and listed several issues for determination by the court. It was counsel's submission that the plaintiff acquired the suit land irregularly as confirmed by the witnesses and the Deputy Chief Land Registrar as the original title was never surrendered. Further that the Registrar confirmed that the plaintiff's title is a forgery.

Mr Kiboi counsel for the 3<sup>rd</sup> party urged the court to dismiss the plaintiff's case with costs to the 3<sup>rd</sup> party.

#### **ANALYSIS AND DETERMINATION**

The issues for determination in this case are:

- a) whether the plaintiff has capacity to sue;
- b) Whether the late Malakwen legitimately acquired proprietary interest in LR No. 775/1 and LR No. 776/4/1;
- c) Whether any interests in LR No. 775/1 and LR No. 776/4/1 were transferred to the Plaintiff and the Defendant by the late Malakwen;
- d) Whether the Plaintiff is entitled to the eviction orders and the damages on trespass orders sought;
- e) Which party should bear the costs of this suit.

On the first issue as to whether the plaintiff has capacity to sue, the Defendant submitted that the Plaintiff has no *locus standi* to file the instant suit as at the time this suit was filed, the Plaintiff did not file a Board Resolution authorizing the filing of this claim, however that on

19<sup>th</sup> February 2020, PW 1 was recalled to produce a Board Resolution passed on 2<sup>nd</sup> March, 2006 authorizing the filing of this suit as **Pexh 8**.

In the case of **LEO INVESTMENTS LTD V TRIDENT INSURANCE COMPANY LTD (2014) eKLR** the Court was of the following considered view:

*Of course, if a suit is filed without a resolution of a corporation, it may attract some consequences. The mere failure to file the same with the plaintiff does not invalidate the suit. I associate myself with the decision of Kimaru, J in **Republic vs. Registrar General and 13 Others Misc. Application No. 67 of 2005 [2005] eKLR** and hold that the position in law is that such a resolution by the Board of Directors of a company may be filed anytime before the suit is fixed for hearing as there is no requirement that the same be filed at the same time as the suit. Its absence, is therefore, not fatal to the suit.*

It is trite that an incorporated person is a legal person in the eyes of the law as was held in the case of **Assia Pharmaceuticals vs. Nairobi Veterinary Centre Ltd. Nairobi (Milimani) HCCC No. 391 of 2000**:

*“It is settled law that where a suit is to be instituted for and on behalf of a company there should be a company resolution to that effect.....As regards litigation by an incorporated company, the directors are as a rule, the persons who have the authority to act for the company; but in the absence of any contract to the contrary in the articles of association, the majority of the members of the company are entitled to decide even to the extent of overruling the directors, whether an action in the name of the company should be commenced or allowed to proceed. The secretary of the company cannot institute proceedings in the name of the company in the absence of express authority to do so; but proceedings started without proper authority may subsequently be ratified.”*

An action commenced without a Board resolution is capable of being ratified and it would therefore not be in the interest of justice to dismiss this suit on the ground merely that there was no authority. In the circumstances, the Defendant’s argument on this front fails as the Plaintiff filed a Board Resolution and the same was produced in Court as indicated above

On the second issue as to whether the Late Malakwen Sisiwa legitimately acquired proprietary interest in LR NO. 775/1 and LR NO. 776/4/1, all the parties do not dispute the fact that the late Malakwen had acquired proprietary interest in the L.R NO. 775/1 measuring 63.5 acres and L.R NO. 776/4/1 measuring 66.3 Acres. An Assignment Agreement between Maria Margaretha Erasmus and Settlement Fund Trust (SFT) dated 1<sup>st</sup> July, 1963 was produced as exhibit 3. That in 1964 the late Malakwen sought to borrow a sum of Kshs. 72,000.00 from the SFT vide a duly executed Deed to facilitate his purchase L.R NO. 773/1, 775/1, 776/4/1 and 776/4/2. Further that in the same year an Indenture was duly executed between SFT and the late Malakwen and the same was produced as exhibit 6.

When the government sought to compulsorily acquire a portion of the suit property herein, the late Malakwen’s consent for such acquisition was sought and he received the compensation award noting that he was duly recognized as the rightful owner of the portion of the suit land that was being compulsorily acquired vide a letter of award which was produced as exhibit 8.

The Deputy Land Registrar who was a crucial witness in this case gave highlights of the history of these parcels of land as per the records in their custody as the sole custodians of land records. This evidence was very useful to the court.

The Deputy Chief Registrar testified that the late Malakwen purchased parcel No. 2684 GLA as is indicated in entry No. 26 registered in volume H9. In entry No. 27, the late Malakwen mortgaged the suit property herein to SFT in order to be advanced a loan of Kshs. 72,000.00 on 8<sup>th</sup> December, 1964. On 8<sup>th</sup> December, 1964 the late Malakwen purchased the parcel of land as is noted in entry No. 28. He testified that the late Malakwen then borrowed money as is noted in entry No. 27.

The Deputy Chief Registrar testified that there is a government caveat dated 7<sup>th</sup> September, 1978 claiming ownership of a portion of the suit property by virtue of compulsory acquisition. He further stated that there was no conversion exercise that had been done on the suit property as had been alleged and he produced a copy of the title as exhibit 4

During cross examination the Deputy Chief Registrar stated that the title of the suit property bears the name of the late Malakwen and not the Plaintiff’s name. He stated that the titles bearing the name of the Plaintiff were registered un-procedurally as there was no conversion and such titles do not form part of the records held by Ministry of Lands. He reiterated that the original title over the suit property is still with the Chief Land Registrar and that being the case, the title bearing the name of the Plaintiff is a forgery. He confirmed that there is no gazette notice annulling the caveat registered in favour of the government on 7<sup>th</sup> September, 1978.

The Deputy Chief Registrar testified that the suit property herein belongs to the late Malakwen and that no documents are contained in the official records to show that the RIM was amended from Ministry of Lands offices and if any such amendment was conducted there would be an entry showing that a conversion of titles was done and that there is a need to surrender the old title.

The Court of Appeal in **PHILEMON L. WAMBIA V GAITANO LUSITSA MUKOFU & 2 OTHERS [2019] eKLR** quoted with approval the case of **Solomon Omwega Omache & Another –V- Zackery O. Ayieko & 2 Others (2016) eKLR** where it was stated that the court has the duty to uphold the sanctity of the record at the Lands office.

In this suit, Two (2) Letters of Allotment over Eldoret Municipality Block 15/ 2309 were issued to two independent parties. The Allotment Letter dated 9<sup>th</sup> August, 2001 was issued in favour of the late Malakwen and it was produced as **Dexh 3 (b)** while the Plaintiff sought to place reliance on an Allotment Letter dated 6<sup>th</sup> January, 2004 and produced as **Pexh 6**.

The Court of Appeal in **BENJA PROPERTIES LIMITED -V- SYEDNA MOHAMMED BURHANNUDIN SAHED & 4 OTHERS**

[2015] eKLR, stated that an allotment of an interest in land is a transaction *in rem* attaching to and running with a specific parcel of land.

It is on record that once an Allotment Letter was issued to the late Malakwen, he duly complied with the terms and conditions set out in the letter to enable him to exercise the option of purchasing the suit property. Any subsequent allotment letter on the aforementioned parcel of land does not was not valid as the subject property was no longer available for allotment.

At all material times, the Plaintiff was aware that the suit property herein had been duly allotted to the late Malakwen in 2001. Although PW 1 purports that he was issued with an Allotment Letter in 2004 following the cancellation of the late Malakwen's Allotment Letter, he has not furnished this Court with any written evidence to support the position that the Allotment Letter issued in 2001 to the late Malakwen had been lawfully cancelled. It should be noted further that the Deputy Land Registrar did not have a copy of the purported Allotment Letter that had allegedly been issued in favour of the Plaintiff in the official records held by the Ministry of Lands.

The Deputy Land Registrar produced a copy of the Certificate of Lease bearing the name of the late Malakwen as **3<sup>rd</sup> Party Exhibit No. 4** while PW 1 produced a Certificate of Lease bearing the Plaintiff's name issued on 23<sup>rd</sup> November, 2007 produced as **Pexh 6**. It is noteworthy that the Deputy Land Registrar stated that the Certificate of Lease that the Plaintiff adduced in Court must have been acquired un-procedurally as there is no record of its existence in the government official records.

The Court of Appeal in **PHILEMON L. WAMBIA V GAITANO LUSITSA MUKOFU & 2 OTHERS [2019] eKLR** quoted the persuasive decision of **Gitwany Investment Limited -v- Tajmal Limited & 2 others, (2006) eKLR**, with approval as follows:

*[46]... the title given to Gitwany in the first instance and which I have held to be absolute and indefeasible as regards the suit land is the earlier grant and in the words of the Court of Appeal in Wreck Motors Enterprises vs. commissioner of Lands, C.A. No. 71/1997 (unreported) – is the “grant [that] takes priority. The land is alienated already.” This decision was again upheld in Faraj Maharus vs. J.B. Martin glass Industries and 3 others C.A 130/2003 (unreported). 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 for land, then if both are apparently and in the fact to them, issued regularly and procedurally without fraud save for the mistake, then the first in time must prevail. It must prevail because without cancellation of the original title, it retains its sanctity...*

The title issued bearing the name of the late Malakwen was issued before the title that bear the Plaintiff's name. I find that the initial title in the late Malakwen's name prevails and it is entitled to the protection of section 23(1) of the Land Registration Act which provides as follows:

*The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.*

In **AHMED IBRAHIM SULEIMAN AND ANOTHER -V- NOOR KHAMISI SURUR (2013) eKLR** the Court stated that a party that has been registered as proprietor and that has been issued with a Certificate of Lease is entitled to the protection of the law.

In view of the foregoing, I hold the view that the late Malakwen legitimately acquired proprietary rights over LR NO. 775/1 AND LR NO. 776/4/1 and as such he had good title.

On the third issue as to whether any interests in LR. No.. 775/1 and LR. No.. 776/4/1 were transferred to the plaintiff and the defendant by the late Malakwen, as was stated above, the late Malakwen offered to sell 107 acres out of the 129 acres of LR NO. 775/1 and LR NO. 776/4/1 to the Plaintiff vide an Agreement dated 7<sup>th</sup> March, 1980. The aforesaid offer Agreement outlined the option to purchase was to be available up to 17<sup>th</sup> April, 1980 when the said option would lapse. The option to purchase was to be exercised on the following terms and conditions:

- a. The purchase price per acre shall be Kshs. 15,000.00 which shall be paid as to 10% upon executing the option and the balance upon the late Malakwen supplying a valid transfer of the said piece of land in favour of the Plaintiff;
- b. The Plaintiff shall at their expense have all the conditions of subdivision fulfilled and they shall have a full and proper survey carried out and title deeds issued for each plot.
- c. The Plaintiff upon compliance of the (b) above offer to re-sell to the late Malakwen all plots from No. 178-217 inclusive at Kshs. 15,000.00 per Acre plus the actual costs of survey, road marking and other incidental expenses relating to obtaining subdivision and title deed of such plots.
- d. If the late Malakwen failed to accept the offer of re-sale and if he failed to pay the full Purchase price and other expenses as stated in clause (c) within 2 months of such offer having been made, then the offer would be deemed to have lapsed and the late Malakwen shall forfeit his rights;
- e. The balance of the said parcel of land being 22 Acres shall belong to late Malakwen and should the sum be transferred to the Plaintiff then the Plaintiff shall at the request of the late Malakwen, re-transfer the same to the late Malakwen.
- d. All measurements shall be subject to verification by survey.

The key component of the agreement for purposes of this case is the clause that deals with the re transfer of the 22 acres to the Late Malakwen which was part of his homestead.

On 12<sup>th</sup> December, 2018 the Defendant testified stating that vide an Exchange Agreement dated 23<sup>rd</sup> July, 1994 and produced as Dexh 1. The Agreement was entered into between himself and the late Malakwen wherein he gave his vehicles and machines in exchange for 20 acres on Eldoret Municipality Block 15/334 which parcel of land contained the late Malakwen's homestead, a cattle dip and barns. The Defendant took possession of the parcel of land in 1994.

From the foregoing, I am persuaded that both the Plaintiff and the Defendant have interests in LR NO. 775/1 and LR NO. 776/4/1. The Plaintiff has entitlements to 107 acres while the Defendant is entitled to 20 acres.

On the issue as to whether the plaintiff is entitled to an order of eviction and damages for trespass, from the evidence presented by the parties more specifically by the 3<sup>rd</sup> party and the Deputy Chief Registrar it is apparent that the plaintiff is not the lawful owner of the suit land. He therefore has no proprietary interest in the suit land. The remedy of trespass is therefore not available for the plaintiff.

According to the Black's Law Dictionary 8<sup>th</sup> Edition at Page 1541 trespass is defined as an unlawful act committed against the property of another especially wrongful entry on another's property

Having found that the plaintiff has no proprietary interest in the suit land, it follows that it is also not entitled to damages for trespass.

The plaintiff's suit is therefore dismissed with costs to the defendant and the third party and the defendant's counterclaim is allowed as prayed with costs.

**DATED and DELIVERED at ELDORET this 16<sup>th</sup> DAY OF JUNE, 2021**

**M. A. ODENY**

**JUDGE**