



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC SUIT NO. 252 OF 2012**

**AUGUSTINE NGOTHO THUO.....PLAINTIFF**

**- VERSUS -**

**JAMES MAINA THUITA.....1<sup>ST</sup> DEFENDANT**

**EMBAKASI RANCHING CO. LTD.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

The plaintiff brought this suit against the defendants on 10<sup>th</sup> May, 2012 through a plaint dated 9<sup>th</sup> May, 2012. The plaintiff averred that in or about 1976 he purchased from the 2<sup>nd</sup> defendant a parcel of land known as plot No. F630 situated at Ruai, Nairobi (hereinafter referred to as “the suit property”) at an agreed price which he paid in full by installments. The plaintiff averred that after completing the payment of the purchase price, the 2<sup>nd</sup> defendant issued him with a share certificate and an allotment letter for the suit property dated 25<sup>th</sup> January, 1984.

The plaintiff averred that the 2<sup>nd</sup> defendant had a duty to process and issue him with a title deed for the suit property within a reasonable time. The plaintiff averred that the 2<sup>nd</sup> defendant refused to transfer and process a title deed in his favour in respect of the suit property despite numerous requests made upon it to do so. The plaintiff averred that he came to discover that the 2<sup>nd</sup> defendant had illegally and fraudulently re-allocated the suit property to the 1<sup>st</sup> defendant without the plaintiff’s consent or approval. The plaintiff averred that following the said illegal and unlawful re-allocation of the suit property to the 1<sup>st</sup> defendant, the 1<sup>st</sup> defendant entered the suit property without his permission and destroyed 20 posts on the perimeter fence that he had put up around the suit property.

The plaintiff averred that the 1<sup>st</sup> defendant intended to illegally and unlawfully occupy the suit property. The plaintiff averred that the defendants’ actions aforesaid were illegal, fraudulent and malicious and constituted a breach of the contract that the plaintiff had entered into with the 2<sup>nd</sup> defendant in respect of the suit property.

The plaintiff sought judgment against the defendants for; a permanent injunction restraining the defendants from entering, trespassing, occupying, cultivating, selling and/or interfering in any manner whatsoever with the suit property, a declaration that the purported transfer of the suit property by the 2<sup>nd</sup> defendant to the 1<sup>st</sup> defendant was illegal null and void, cancellation of the letter of allotment and/or title deed issued in favour of the 1<sup>st</sup> defendant and damages.

The 1<sup>st</sup> defendant filed a statement of defence on 18<sup>th</sup> June, 2012. The 1<sup>st</sup> defendant denied that he trespassed on the suit property or was involved in any illegal or fraudulent dealings in relation to the suit property. The 1<sup>st</sup> defendant averred that he was a bona fide shareholder of the 2<sup>nd</sup> defendant holding share certificate No. 882 for two (2) shares which entitled him to two (2) original plots and two (2) bonus plots which he paid for and was allocated as follows;

Plot No. P 5745 (L.R No. 105/1070)

Plot No. P 5745B (L.R No.105/1071)

Plot No. P 5746 (L.R No. 105/1072)

Plot No. P 5746B (L.R No.105/1073)

The 1<sup>st</sup> defendant averred that he had been in active possession of the four (4) parcels of land that were allocated to him by the 2<sup>nd</sup> defendant

and was in the process of being issued with title deeds in respect thereof after the 2<sup>nd</sup> defendant executed instruments of transfer in his favour in 2004.

The 2<sup>nd</sup> defendant did not enter appearance. At the trial, the plaintiff (PW1) adopted his witness statement dated 4<sup>th</sup> April, 2012 as his evidence in chief and produced the documents attached to his list of documents dated 9<sup>th</sup> May, 2012 as exhibits. The plaintiff told the court that he was the owner of the suit property which he acquired from the 2<sup>nd</sup> defendant in 1976. He stated that he bought a share in the 2<sup>nd</sup> defendant and was issued with a share certificate No. 4233 on 1<sup>st</sup> August, 1978 after paying for the same through the 2<sup>nd</sup> defendant's advocates. He stated that he thereafter paid survey fees and was issued with an allotment letter on 28<sup>th</sup> November, 1983. He stated further that after paying civil engineering fees in the sum of Kshs. 3,500/= which was the final payment, the 2<sup>nd</sup> defendant took him to the site in 1984 and showed him the beacons for the suit property. He stated that he was in a group of other shareholders of the 2<sup>nd</sup> defendant and that he was shown the beacons of the suit property by the 2<sup>nd</sup> defendant's surveyor. He stated that during the site visit, he was with his wife Agnes Mumbi Ngotho and that after being shown the beacons of the suit property, he took possession and put hedges on the boundaries of the property.

He stated that the suit property was a corner plot and that he did not develop the same. He stated that the 2<sup>nd</sup> defendant later asked shareholders to go to their office to assist in the processing of title deeds for the plots that had been allocated to them. When he visited the 2<sup>nd</sup> defendant's office, he was taken to the site for the second time on 19<sup>th</sup> March, 2009 after paying Kshs.2,000/=.

The plaintiff stated further that in 1994, he was allocated a bonus plot known as F 630 B by the 2<sup>nd</sup> defendant and that before he was allocated the bonus plot, the 2<sup>nd</sup> defendant confirmed from its records that he was the owner of Plot No. F630(the suit property). The plaintiff stated that the 2<sup>nd</sup> defendant was to issue him with the title documents for the suit property which it failed to do despite several demands and visits to the 2<sup>nd</sup> defendant's office. He stated that he became suspicious that the 2<sup>nd</sup> defendant was hiding some information from him and in 2010, he decided to put a fence made of cedar posts and barbed wire around the suit property. After doing this, the 1<sup>st</sup> defendant came and pulled down the fence. He thereafter met the 1<sup>st</sup> defendant at Ruai Chief's office where the incident was reported. At the Chief's office, the 1<sup>st</sup> defendant produced an instrument of lease in respect of L.R No. Block 105/1070 which he claimed had been executed in his favour by the 2<sup>nd</sup> defendant in respect of the suit property.

The plaintiff stated that while he was holding ownership documents for the suit property going back to 1970s, the 2<sup>nd</sup> defendant purported to re-allocate the suit property to the 1<sup>st</sup> defendant. He stated that the chief advised that the dispute be determined by the court as it concerned double allocation of land. The plaintiff stated that the re-allocation of the suit property by the 2<sup>nd</sup> defendant to the 1<sup>st</sup> defendant was fraudulent and reeked of collusion between the defendants. He stated that there was no evidence that the 1<sup>st</sup> defendant purchased the suit property as he had not produced a sale agreement. He stated that the parcel of land which was being claimed by the 1<sup>st</sup> defendant as Plot No. P 5745 (L.R No. 105/1070) was his Plot No. F 630 (the suit property) on the ground. He stated that plots with reference "P" were different from those with reference "F". He stated that the 1<sup>st</sup> defendant should look for his plot elsewhere. He urged the court to grant the reliefs sought in his plaint. The plaintiff stated that he was entitled to damages since had suffered a lot after being denied the use of the suit property on which he had planned to construct a family home.

The plaintiff's witness was his wife, Veronica Mumbi Ngotho (PW2). PW2 adopted her witness statement dated 31<sup>st</sup> July, 2013 as part of her evidence in chief. She confirmed that the plaintiff had put up a fence around the suit property and that the same was demolished by the agents of the 1<sup>st</sup> defendant named Nganga and Mathew. In cross-examination, PW2 stated that he was present in 1984 when the plaintiff was shown the beacons for the suit property. PW2 stated further that they went for the subsequent site visits so that they could be issued with a parcel number for the suit property and that they were neither issued with a parcel number nor the title for the suit property. PW2 stated that the 2<sup>nd</sup> defendant kept asking them to go back for the same.

In his evidence, the 1<sup>st</sup> defendant, James Maina Thuita (DW1) adopted his witness statement dated 10<sup>th</sup> June, 2012 as part of his evidence in chief. He also produced a copy of share certificate No. 882 dated 7<sup>th</sup> August, 1995 and a receipt for Kshs. 12,000/= dated 10<sup>th</sup> August, 1995 as Defence Exh.1 and Defence Exh. 2 respectively. He told the court that he was a shareholder of the 2<sup>nd</sup> defendant in which he held six (6) shares. He stated that the dispute with the plaintiff concerned two (2) shares he held in the 2<sup>nd</sup> defendant under share certificate No. 882 dated 7<sup>th</sup> August, 1995. He stated that the two (2) shares entitled him to two (2) main plots and two (2) bonus plots. The 1<sup>st</sup> defendant stated that for the two (2) shares he had in the 2<sup>nd</sup> defendant he was allocated two (2) main plots namely, Plot No. P 5745 and Plot No. P 5746 by the 2<sup>nd</sup> defendant which had been given parcel numbers, 105/1070 and 105/1071 respectively. He stated that for the two (2) shares, he was allocated two (2) bonus plots namely, Plot No. P 5745 B and plot No. 5746B. He stated that he was allocated the said plots in August, 1995 but he did not visit the site until later, around 2004. He stated that he was taken to the site after he paid Kshs.2,000/= for the beacon certificate and a further sum of kshs.10,000/= for beacon replacement. He produced the receipts for these payments as exhibits.

The 1<sup>st</sup> defendant stated that he first went to the site on 11<sup>th</sup> March, 2004 and the beacons for the plots could not be seen clearly. He stated that this explained why he made payment for beacon replacement. He stated that when he went to the site, the land in dispute was not fenced neither was it developed. He stated that he fenced the land using posts but the fence was brought down by stone miners and cattle grazers. He stated that he planted a live edge around the suit property that was still in existence.

The 1<sup>st</sup> defendant stated that he did not have a problem with his four plots until much later. He stated that he paid Kshs.16,000/= to the 2<sup>nd</sup> defendant for the titles for the four plots and additional sum of Kshs.24,000/= for the leases. He stated that after making the payment, the 2<sup>nd</sup> defendant issued him with the instruments of transfer of leases for the plots. He stated that for the plot in dispute, he was given transfer of lease in respect of L.R No. 105/1070 which was signed by the 2<sup>nd</sup> defendant's directors. He stated that he was also given consent to transfer by the 2<sup>nd</sup> defendant which documents he took to the Ministry of Lands for processing of titles. The 1<sup>st</sup> defendant produced the transfer of lease in respect of the land in dispute and consent to transfer as exhibits. He stated that a lease in his favour in respect of the disputed

property had been processed and that he was to receive his title from the 2<sup>nd</sup> defendant who had not collected the same from the Ministry of lands for unknown reasons.

He stated that when he was taken to the site of the disputed parcel of land, the chairman of the 2<sup>nd</sup> defendant and the 2<sup>nd</sup> defendant's surveyor signed at the back of his share certificate as an indication that the plots that were allocated to him had been transferred to him. He stated that there was nothing at the back of the plaintiff's share certificate showing that he was allocated the suit property or any other plot.

The 1<sup>st</sup> defendant stated that in 2012 he got information that someone had deposited black cotton soil on and fenced a portion of Plot No. 105/1070. He stated that he reported the incident to the 2<sup>nd</sup> defendant who told him that it was not aware of the person who had entered the property and committed the said acts. He stated that when he went to report the incident to the area chief, he was away and he did not get assistance from his office. The 1<sup>st</sup> defendant stated that to enable him know who had fenced the plot, he knocked down four (4) posts that had been used in the fencing of the property to see if the person who had fenced the property could appear. He stated that this is what prompted the plaintiff to show up. He stated that he met the plaintiff at the area chief's office and the chief advised them to seek assistance from the 2<sup>nd</sup> defendant which advice the plaintiff ignored and filed the present suit. The 1<sup>st</sup> defendant denied that he was a trespasser on the suit property. He stated that he acquired the property in dispute legally. He stated that when he was allocated the plot in dispute, the same was not occupied.

The 1<sup>st</sup> defendant's witness was Jack Kamau Wachira (DW2). DW2 told the court that he was a registered surveyor. He told the court that he had been working for the 2<sup>nd</sup> defendant on a contract basis as a surveyor since 2003. He stated that he was aware of the dispute between the plaintiff and the 1<sup>st</sup> defendant. He confirmed that the share certificate No. 4233 dated 1<sup>st</sup> August, 1987 that was issued to the plaintiff by the 2<sup>nd</sup> defendant was genuine and entitled the plaintiff to one plot measuring  $\frac{1}{4}$  of an acre. DW2 stated that if the plaintiff paid Kshs. 6,000/= he was entitled to one (1) bonus plot. He stated that the plaintiff paid the said amount and was allocated a bonus plot. He stated that in 2009, the plaintiff paid for a site visit so that he could be shown the plot that was allocated to him. He accompanied the plaintiff to the site on 19<sup>th</sup> March, 2009. He stated that the plaintiff was to be shown a plot in Map 7 and that he was not shown a plot as his plot was not on the plot allocation map. He stated that the surveyor who allocated the suit property to the plaintiff did not enter the allocation number in the allocation map. He stated that when the allocation was being done, the back of the share certificate was to be signed by a surveyor and a director of the 2<sup>nd</sup> defendant.

DW2 stated that the writings at the back of the plaintiff's share certificate show that he was allocated a bonus plot and not the original plot. He stated that when he took the plaintiff for a site visit, the plot that the plaintiff showed him as his plot was not occupied. He stated that the plaintiff visited the 2<sup>nd</sup> defendant's office on several occasions thereafter and on 2<sup>nd</sup> July, 2009, he was given another surveyor, a Mr. Nyika to take him for another site visit. He stated that Mr. Nyika made a report that the plaintiff was to be shown another plot. He stated that there was no record that the plaintiff was shown another plot. He stated that he did not find Plot No. F 630 (the suit property) in the allocation Map 7. He produced an extract of Map 7 as an exhibit. DW2 confirmed that the 1<sup>st</sup> defendant had two (2) shares in the 2<sup>nd</sup> defendant that he purchased from one, Eliud Karanja Kigotho in 1995 and which entitled him to two (2) original plots and two (2) bonus plots if he paid for the same. He stated that the 1<sup>st</sup> defendant came to the 2<sup>nd</sup> defendant's office in 2007 and was given parcel numbers which were endorsed by him (DW2) and a director of the 2<sup>nd</sup> defendant. He stated that to be given a parcel number, the 1<sup>st</sup> defendant must have been allocated the plot by the 2<sup>nd</sup> defendant's board of directors. He stated that the plot in dispute was Plot No. P 5745 (Land Parcel No. 105/1070). He stated that this is the parcel of land which the plaintiff showed him during the site visit and which the plaintiff claimed to be Plot No. F 630 (suit property). He stated that the plaintiff and the 1<sup>st</sup> defendant were claiming the same parcel of land on the ground. He stated that the 1<sup>st</sup> defendant came to the 2<sup>nd</sup> defendant's office in 2007 and the 2<sup>nd</sup> defendant's board showed him the plot in dispute and the back of his share certificate was signed by a director of 2<sup>nd</sup> defendant and a surveyor. He stated that a transfer was subsequently effected by the 2<sup>nd</sup> defendant in favour of the 1<sup>st</sup> defendant on 12<sup>th</sup> May, 2008 in respect of the disputed property. He stated that according to the 2<sup>nd</sup> defendant, land parcel No. 105/1070 was owned by the 1<sup>st</sup> defendant and that he was not aware if a lease had been processed in favour of the 1<sup>st</sup> defendant.

In cross-examination, DW2 stated that he did not know what became of the plaintiff's Plot No. F 630 (suit property). He stated that the plot was lying "somewhere in the scheme". He stated that the 2<sup>nd</sup> defendant's board of directors directed that the plaintiff be allocated another plot since the plot that the plaintiff showed the surveyors during the site visits had been allocated to someone else. He stated that it was the 2<sup>nd</sup> defendant's fault not to enter the plot in the allocation map in favour of the plaintiff. He stated that the plaintiff's share certificate was confirmed by the 2<sup>nd</sup> defendant to be genuine. He stated that there were no records showing that the plaintiff was shown the suit property. He confirmed that to be allocated a bonus plot, a member had to have an original plot and that the plaintiff was allocated a bonus plot.

After the close of evidence, the parties made closing submissions in writing. The plaintiff filed his submission on 31<sup>st</sup> January, 2019 while the 1<sup>st</sup> defendant filed his submissions in reply on 23<sup>rd</sup> April, 2019. I have considered the pleadings and the evidence adduced by the parties in support of their respective cases. I have also considered the submissions and the cases cited in support thereof. The parties did not agree on the issues for determination by the court. From the pleading the following in my view are the issues that arise for determination in this case;

1. Whether the plaintiff acquired a parcel of land known as Plot No. F 630 (the suit property) from the 2<sup>nd</sup> defendant.
2. Whether the 2<sup>nd</sup> defendant refused to transfer and process a title deed in favour of the plaintiff in respect of the said parcel of land.
3. Whether the 2<sup>nd</sup> defendant illegally and fraudulently re-allocated the suit property to the 1<sup>st</sup> defendant.
4. Whether the 1<sup>st</sup> defendant trespassed on the suit property and damaged the plaintiff's fence.

5. Whether the plaintiff is entitled to the reliefs sought in the plaint.

Whether the plaintiff acquired a parcel of land known as Plot No. F 630 (the suit property) from the 2<sup>nd</sup> defendant.

The plaintiff placed before the court evidence that was not controverted by the defendants that he was a shareholder of the 2<sup>nd</sup> defendant and that he started paying for the share and other related expenses as far back as 30<sup>th</sup> July, 1976. The plaintiff was issued by the 2<sup>nd</sup> defendant with a share certificate on 1<sup>st</sup> August, 1978 (See, P. Exh. 6). He was also issued with a letter of allotment on 28<sup>th</sup> November, 1984. The receipts for the payments that were made by the plaintiff to the 2<sup>nd</sup> defendant and the letter of allotment showed that the plaintiff was allotted Plot No. F 630 (the suit property). See, plaintiff's exhibits 3, 4, 5, 7 and 9).

The plaintiff further led uncontroverted evidence that the share that he held in the 2<sup>nd</sup> defendant entitled him to one (1) original plot and a bonus plot provided he paid additional sum of Kshs. 6,000/=. It was common ground that a bonus plot was only allocated to members who owned original plots. It was also common ground that the plaintiff paid a sum of Kshs. 6,000/= (See, P. Exh. 7) and was allocated a bonus plot known as Plot No. F 630B in respect of which there was no dispute (See, P. Exh. 8). The 2<sup>nd</sup> defendant was served with summons. The 2<sup>nd</sup> defendant did not enter appearance and interlocutory judgment was entered against it on 9<sup>th</sup> October, 2012. All the factual averments in the plaint and the evidence that was adduced by the plaintiff against the 2<sup>nd</sup> defendant were not challenged. I am satisfied from the evidence on record that the plaintiff paid for and was allocated the suit property by the 2<sup>nd</sup> defendant.

Whether the 2<sup>nd</sup> defendant refused to transfer and process a title deed in favour of the plaintiff in respect of the suit property.

From the evidence before the court, it is clear that the plaintiff visited the 2<sup>nd</sup> defendant's office on several occasions to be allocated a parcel number for the suit property and to have the property transferred to him. It is also clear from the evidence on record that the 2<sup>nd</sup> defendant refused without any reasonable explanation to give the plaintiff a parcel number for the suit property and to execute a transfer in his favour. P. Exh. 9 shows the number of trips that the plaintiff made to the 2<sup>nd</sup> defendant's office before he filed the present suit. As I have stated earlier, the 2<sup>nd</sup> defendant did not defend the suit. It did not therefore proffer any explanation for its actions aforesaid. The plaintiff's contention that the 2<sup>nd</sup> defendant refused to give him a parcel number for the suit property and to transfer the property to him because the 2<sup>nd</sup> defendant had re-allocated the property to the 1<sup>st</sup> defendant was not controverted by the 2<sup>nd</sup> defendant. It is my finding and I so hold that as at the time the plaintiff brought this suit, the 2<sup>nd</sup> defendant had refused to give him a parcel number for the suit property and to transfer the property to him.

Whether the 2<sup>nd</sup> defendant illegally and fraudulently re-allocated the suit \_\_\_\_\_ property to the 1<sup>st</sup> defendant.

It was not disputed that the parcel of land that the plaintiff referred to as Plot No. F 630 (suit property) and the 1<sup>st</sup> defendant as Plot No. P 5745 (105/1070) is one and the same land on the ground. The plaintiff led evidence that in 1984, he and other shareholders of the 2<sup>nd</sup> defendant were taken to the site and he was shown the suit property on the ground as the parcel of land that had been allocated to him. He stated that he was accompanied by his wife (PW2) in the trip. The plaintiff stated that after being shown the beacons of the suit property he took possession thereof and put up a fence. The 2<sup>nd</sup> defendant did not defend the suit and as such did not give evidence. The evidence given by the plaintiff that he was taken to the site and shown the location and beacons of the suit property by the 2<sup>nd</sup> defendant was not controverted. DW2 who was one of 2<sup>nd</sup> defendant's surveyors who gave evidence on behalf of the 1<sup>st</sup> defendant did not testify on behalf of the 2<sup>nd</sup> defendant which did not defend the suit. He was also not working with the 2<sup>nd</sup> defendant in 1984 when the plaintiff was taken to the site having joined the company in 2003.

I have no reason to disagree with the evidence that was given by the 1<sup>st</sup> defendant and his witness (DW2) on how the allocation of plots was being undertaken by the 2<sup>nd</sup> defendant in particular, the signing of the share certificate at the back by a director of the 2<sup>nd</sup> defendant and a surveyor who were involved in the allocation. I am however satisfied by the explanation that was given by the plaintiff as to why a director and a surveyor of the 2<sup>nd</sup> defendant did not sign at the back of his share certificate. The plaintiff told the court that when they were taken to the site in 1984, their share certificates were left in the 2<sup>nd</sup> defendant's office and that a director and a surveyor of the 2<sup>nd</sup> defendant were to sign the same on return from the site and that this was not done with respect to his share certificate. I am satisfied with the evidence given by the plaintiff that was corroborated by PW2 that they were shown the suit property on the ground. I can see no reason why the plaintiff would have laid a claim to the disputed property and not any other if it had not been shown to him as Plot No. F 630 (suit property). I am in agreement with the plaintiff's submission that the 2<sup>nd</sup> defendant having allocated the suit property to the plaintiff who accepted the allotment and made the necessary payment, the property was not available for allocation to any other person. The allocation of the suit property to the 1<sup>st</sup> defendant in 1995, 11 years after the suit property had been allocated to the plaintiff was therefore irregular and unlawful.

I am not persuaded from the evidence on record that the allocation of the suit property to the 1<sup>st</sup> defendant was fraudulent and that the 1<sup>st</sup> defendant colluded with the 2<sup>nd</sup> defendant in the process leading to the allocation. That does not however regularise the otherwise irregular and illegal process through which the plaintiff's parcel of land was allocated again to the 1<sup>st</sup> defendant. It is my finding therefore that what the 2<sup>nd</sup> defendant allocated to the 1<sup>st</sup> defendant as Plot No. P 5745 (105/1070) was the same parcel of land that had already been allocated to the plaintiff by the 2<sup>nd</sup> defendant as Plot No. F630 and that the said allocation to the 1<sup>st</sup> defendant was illegal.

Whether the 1<sup>st</sup> defendant trespassed on the suit property and damaged the plaintiff's fence.

I have held above that the allocation of the suit property to the 1<sup>st</sup> defendant by the 2<sup>nd</sup> defendant was illegal. The property was not available to the 2<sup>nd</sup> defendant for allocation as it had already been allocated to the plaintiff. The allocation of the property to the 1<sup>st</sup> defendant was in the circumstances null and void. An illegal allocation of the suit property by the 2<sup>nd</sup> defendant to the 1<sup>st</sup> defendant could not confer upon the

1<sup>st</sup> defendant any lawful interest in the suit property. As I have stated above, there is no evidence that the 1<sup>st</sup> defendant was involved in any fraud in the process of acquiring the suit property. The 1<sup>st</sup> defendant may have acquired the property innocently for value. As at the time the plaintiff filed this suit, the suit property had not been registered in the name of the 1<sup>st</sup> defendant and the court granted a temporary injunction restraining any further dealing with the property pending the hearing of the suit. The interests which both the plaintiff and the 1<sup>st</sup> defendant had in the suit property as at the time the suit was filed were beneficial in nature. The law is settled that where there are equal equities, the first in time shall prevail. The plaintiff's interest in the suit property which was first in time must therefore prevail against that of the 1<sup>st</sup> defendant which came several years after the plaintiff had acquired his interest in the property.

There is uncontroverted evidence that the plaintiff had fenced the suit property and that the 1<sup>st</sup> defendant entered the property through his agents and demolished part of the fence. This fact was admitted by the 1<sup>st</sup> defendant in evidence. Trespass is defined as any intrusion by a person on the land in possession of another without any lawful excuse. I have held that the 1<sup>st</sup> defendant had no lawful interest in the suit property. It follows therefore that he had no right to enter the suit property. His entry into the property and destruction of the plaintiff's fence was therefore without any lawful excuse. Having entered the suit property without the plaintiff's consent or lawful excuse, the 1<sup>st</sup> defendant was a trespasser on the property and I so hold.

Whether the plaintiff is entitled to the reliefs sought in the plaint.

The plaintiff has proved that he is the lawful owner of the suit property and that the same was unlawfully allocated to the 1<sup>st</sup> defendant by the 2<sup>nd</sup> defendant. The plaintiff has also established that the 1<sup>st</sup> defendant trespassed on the property and caused destruction of his fence. The plaintiff has proved further that the 2<sup>nd</sup> defendant has refused to transfer the suit property to him without any lawful cause. I am satisfied that the plaintiff is entitled to the injunctive reliefs and declarations sought in the plaint. I am not satisfied however that the plaintiff is entitled to the damages sought under paragraphs 7 and 9 of the plaint. The damages sought in paragraph 7 of the plaint are in the name of special damages. The same were not specifically pleaded with the necessary particulars and were not proved. As concerns the damages sought under paragraph 9 of the plaint, the same were for breach of contract. Again this head of damages was not proved. The plaintiff did not plead and prove that he suffered damages arising directly from the 2<sup>nd</sup> defendant's breach of contract. In his submissions, the plaintiff submitted that he was entitled to general damages in the form of mesne profits for having been denied the right to use and develop the suit property. The plaintiff assessed general damages due to him for loss of use at Kshs. 10,000,000/=. This claim was also not proved. There is no evidence that the plaintiff was prevented either by the 1<sup>st</sup> or 2<sup>nd</sup> defendant from using or developing the suit property before he came to court. There is also no evidence that any of the defendants had occupied the suit property and denied the plaintiff the use or enjoyment thereof. The claim for mesne profits has no basis in the circumstances. The only damages that I would have awarded the plaintiff if the same had been pleaded is for the 1<sup>st</sup> defendant's trespass. Since the same was not pleaded, I will not award the same.

On the issue of costs, costs generally follow the event and the same is at the discretion of the court. In this case, the plaintiff has succeeded in his claim against the defendants and as such he is entitled to the costs of the suit. However, since this suit would have been avoided if the 2<sup>nd</sup> defendant had not engaged in double allocation of the suit property, the 2<sup>nd</sup> defendant shall bear the plaintiff's costs.

Conclusion:

In conclusion, I hereby enter judgment for the plaintiff against the defendants jointly and severally for;

- i. A permanent injunction restraining the defendants whether by themselves, their servants or authorised agents and/or any other person claiming under them from entering, trespassing, occupying, possessing, cultivating and/or interfering in any manner whatsoever with all that property known as Plot No. F 630 situated at Ruai, Nairobi and/or from building, constructing or putting any structure on the property.
- ii. A permanent injunction is issued restraining the defendants whether by themselves, their servants or authorised agents and/or any other person claiming under them from selling, leasing, transferring, subdividing or alienating all that property known as Plot No. Plot No. F 630 situated at Ruai, Nairobi.
- iii. A declaration that the purported transfer of Plot No. Plot No. F 630 situated at Ruai, Nairobi by the 2<sup>nd</sup> defendant to the 1<sup>st</sup> defendant is illegal, null and void.
- iv. Any letter of allotment and/or title deed issued to the 1<sup>st</sup> defendant in respect of Plot No. Plot No. F 630 situated at Ruai, Nairobi is cancelled.
- v. Costs of the suit to be paid by the 2<sup>nd</sup> defendant.

**Dated and delivered at Nairobi this 30<sup>th</sup> Day of January, 2020**

**S. OKONG'O**

**JUDGE**

**Judgment read in open court in the presence of**

Mr. Ouma h/b for Mr. Ireri for the plaintiff

N/A for the 1<sup>st</sup> defendant

N/A for the 2<sup>nd</sup> defendant

C. Nyokabi-Court Assistant