



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ENVIRONMENTAL AND LAND DIVISION**  
**ELC CIVIL SUIT NO. 498 OF 2004**

**MUTHITHI INVESTMENTS LIMITED..... PLAINTIFF**

**VERSUS**

**ANDREW S. KYENDO ..... 1<sup>ST</sup> DEFENDANT**  
**AMINA MOHAMMED..... 2<sup>ND</sup> DEFENDANT**  
**WILLIAM K. MWANGINGI..... 3<sup>RD</sup> DEFENDANT**  
**ROSEMARY NYOKABI..... 4<sup>TH</sup> DEFENDANT**  
**JAMES BANGA..... 5<sup>TH</sup> DEFENDANT**  
**MESHACK O. AMBUKA.....6<sup>TH</sup> DEFENDANT**  
**BERNARD M. MUTTAHA.....7<sup>TH</sup> DEFENDANT**  
**W. OKEYO MBATA..... 8<sup>TH</sup> DEFENDANT**  
**J.M. KAGAI.....9<sup>TH</sup> DEFENDANT**  
**JANE WANGECI.....10<sup>TH</sup> DEFENDANT**  
**RAPHAEL K. THIMBA..... 11<sup>TH</sup> DEFENDANT**  
**MARY N. KAGO.....12<sup>TH</sup> DEFENDANT**  
**DICK OUMA OCHIENG.....13<sup>TH</sup> DEFENDANT**  
**DAVID AUMA.....14<sup>TH</sup> DEFENDANT**  
**PATRICK NDIRANGU.....15<sup>TH</sup> DEFENDANT**  
**SAID ALI ABU.....16<sup>TH</sup> DEFENDANT**

SAMUEL NGATIA..... 17<sup>TH</sup> DEFENDANT  
JAMES NJOROGE.....18<sup>TH</sup> DEFENDANT  
MARY NDUKU KIOKO..... 19<sup>TH</sup> DEFENDANT  
MAINA MUTAHI..... 20<sup>TH</sup> DEFENDANT  
JOHN MWAURA WAINAINA.....21<sup>ST</sup> DEFENDANT  
MUDIA MUCHEMI.....22<sup>ND</sup> DEFENDANT  
NAMAN OGEMBO OGWENO .....23<sup>RD</sup> DEFENDANT

### JUDGMENT

The Plaintiff vide a plaint dated 14<sup>th</sup> May 2004 against the 23 Defendants named in this suit prays for judgment against the Defendants jointly and severally for:-

- a. An order of eviction of the Defendants, their servants, agents, tenants, licensees or any person whatsoever from the plaintiff's parcel of Land Reference NO.23917 Nairobi.
- b. A permanent injunction restraining the Defendants by themselves, their agents, servants tenants, licences and/or any person whatsoever from being remaining entering in continuing in occupation erecting, constructing or continuing with the construction of any structures whatsoever on the plaintiff's parcel of Land Reference **NO.23917** Nairobi.

(c) General damages for trespass.

- d. Costs of the suit with interest thereon.
- e. Any other relief as this Honourable court may deem just to grant.

The plaintiff by the plaint avers that by a consent order issued by the High court on 8<sup>th</sup> February 2000 in **HCCC NO. 457 of 1999 City Council of Nairobi –vs- Commissioner of Lands, Gamex Shelter Hunters Ltd and Muthithi Investments Ltd**, all the right title and interest in the property known as **Land Reference NO. 23917** Nairobi was vested in the plaintiff herein which company was the 3<sup>rd</sup> Defendant in the aforementioned suit. The plaintiff further avers that pursuant to and in order to give effect to the order issued by the High Court in **HCCC No. 457 of 1999** aforesated the plaintiff executed a lease with the City Council of Nairobi dated 5<sup>th</sup> February 2001 over the property **L.R. NO. 23917** Nairobi wherein it was granted a leasehold interest over the same for a term of 99 years from 8<sup>th</sup> February 2000.

The lease in favour of the plaintiff was registered on 17<sup>th</sup> September 2001 as title **I.R. 87206/1**. The plaintiff subsequently obtained subdivision approval and development of the said property into a housing estate. The plaintiff however avers that the Defendants entered into and continued to remain in the suit property and continued to erect structures in the said plaintiff's property without any colour of right or authority and thus have continued to frustrate and prevent the plaintiff from utilizing the suit property in the manner the plaintiff intended and therefore occasioning damage to the plaintiff and hence the institution of the present suit.

The 1<sup>st</sup> to the 12<sup>th</sup> Defendants filed a defence dated 16<sup>th</sup> June 2004 which defence was ordered struck out pursuant to a ruling delivered on 17<sup>th</sup> June 2005 by **Hon. Lady Justice Mugo** following an application on behalf of the plaintiff to have the defence struck out. Thus there is already a judgment as against the 1<sup>st</sup> to 12<sup>th</sup> Defendants. The 13<sup>th</sup> to 23<sup>rd</sup> Defendants filed their defence on 18<sup>th</sup> January 2005 and inter alia they aver that they were not party to **HCCC NO. 457 of 1999** and further deny that there was any executed

lease in favour of the plaintiff by the City Council of Nairobi. The Defendants deny the plaintiff had any approval to deal with the suit property as alleged. The Defendants state they are lawfully in occupation of the suit premises they having acquired the same legally for valuable consideration. They in the premises aver that the plaintiff cannot be entitled to the prayers it seeks and prays for the plaintiff's suit to be dismissed with costs.

The hearing of this case was substantially conducted before **Hon. Lady Justice Sitati**. **Pw1** the sole witness of the plaintiff testified before Hon. **Justice Sitati** and **DW1** also testified in chief before her and was partially cross-examined but cross-examination was completed before me on 22/5/2013 though the witness was further recalled on 24/7/2013 to produce some documents on behalf of the defence.

**Mr. Peter Thirima Ndungu Pw1** gave evidence on behalf of the plaintiff. He stated that he was the project manager of the plaintiff's company that was engaged in real estate development and sale of property. The witness testified that the suit premises the subject matter of the present suit had initially been the subject of a sale transaction between the plaintiff and **Gamex Shelter Hunters Ltd** but which transaction had fallen through owing to the institution of a suit in the High Court by the City Council of Nairobi vide **HCCC NO. 457 of 1999** as against the **Commissioner of Lands, Gamex Shelter Hunters Ltd and Muthithi Investment Ltd** where the City Council claimed it was the bona fide owner and proprietor of the suit premises.

**Pw1** testified that the suit (**HCCC NO. 457 of 1999**) was settled by consent as between the parties and produced in evidence the letter of consent settling the matter dated 1/2/2000 as **PEX1** and the duly extracted formal order setting out the terms of the settlement marked as **PEX2**. The letter of consent setting out the terms of the settlement was duly signed by the Advocates for the City Council of Nairobi the 3<sup>rd</sup> Defendants and the Attorney General. The said letter was in the following terms:-

**“ We would be obliged if you would record the following consent:-**

**By consent the suit herein be marked as withdrawn and the counterclaim be marked as settled on the following terms:**

- 1. The suit property herein being L.R.NO.23917 Nairobi be and is hereby vested upon the 3<sup>rd</sup> Defendant.**
- 2. Each party to bear its own costs”.**

The formal/order was extracted and issued on 8<sup>th</sup> day of February 2000. The witness testified that following the settlement of the suit in the earlier suit the City Council of Nairobi issued a lease for a term of 99 years from the date of the consent over the suit premises to the plaintiff herein and that the lease was consequently registered at the Lands office on 17<sup>th</sup> September 2001 as **I.R. NO.872067/1** after the plaintiff paid all the necessary dues including the stamp duty. The registered lease was produced in evidence as **PEX3**. It was the plaintiff's evidence that they intended to develop a housing estate for sale on the suit premises and in that regard the plaintiff sought and obtained the necessary approvals for the subdivision from the City Council as per the subdivision Plan (**sketch**) contained in the plaintiff's bundle of documents duly endorsed with City Council's approval stamp on 21/3/2000. The plaintiff further testified that they had been paying rates to the City Council as the rateable owners of the suit premises and produced various receipts on account of rates payments in evidence. The plaintiff further produced in evidence receipts for rent payments in respect of the suit premises.

**Pw1** testified that during the year 2005 some persons started encroachment on the suit land and started erecting illegal and unauthorized structures prompting the City Council of Nairobi to issue an **“Enforcement Notice”** dated 28<sup>th</sup> April 2005. The notice indicated that there were:-

- i. Illegal subdivision of land contrary to approved subdivision plan by the City Council.**
- ii. Illegal building structures without approval by the City Council.**

**The notice required the following action to be undertaken-**

- i. Stop further illegal developments**
- ii. Submit subdivision and building plans for approval by the Nairobi City Council.**
- iii. Demolish the building structures.**

The witness testified that upon receipt of the enforcement notice they referred the same to their Advocates to enable them to pursue the matter of the removal of the intruders/trespassers through the court.

In regard to the claim by the Defendants and their filed defence the witness testified that the Defendants claim is based on a purported letter of allotment dated 15<sup>th</sup> June 1998 referenced **TC/ZMW/9/446/98**. The allotment is stated to be in respect of plot NO. **L.R. NO.11344/R**. The letter of allotment was addressed to **Andrew Kyego, Bernard Maina & Meshack Ambuka** as **Trustee of Embakasi Njiru United Self Help Group**. The witness stated that the plot allegedly allocated to the Defendants **L.R. NO.11344/R** is different from the plaintiff's property **L.R. NO.23917**. The witness explained that upon hearing of the Defendants alleged letter of allotment they requested their lawyers to verify its authenticity and that the said Advocates contacted the City Council in writing who vide a response in writing vide their letter dated 15<sup>th</sup> April 2009 signed by **Mr. R.M. Kibinda**, Director of Planning stated that the said allotment letter was not genuine and that it did not originate from their office. This letter was produced in evidence.

The witness further testified that the City Council of Nairobi denied having received the sums of **Kshs.460,000/-** and **Kshs.315,300/-** which the Defendants claimed to have paid to the City Council pursuant to the letter of allotment.

The plaintiff testified that by reason of the invasion of their property by the Defendants and their agents they have not been able to develop the suit land as they had envisaged. The plaintiff's witness **pw1** testified that had they been able to execute the development they would have spent about **Kshs.978,280,000/-** to put up the residential units that they intended to construct being **224** 3 bedroom units which they would have sold at about **Kshs.4 million** each, **464** 2 bedroom units which would have been sold at about **Kshs.2.5 million** and that overall they would have had a gross revenue of about **Kshs.2.1 billion** and would therefore have made profit of between **Kshs.500 million to Kshs. 1 billion**.

The witness also stated 2 nursery schools and a shopping complex would also have been constructed and would have been sold for **Kshs.30 million** and **Kshs.50 million** respectively.

During cross-examination the witness conceded that **L.R. NO.11344** was the mother title and that the suit land **L.R. NO. 23917** lies within **L.R. NO. 11344**. The witness confirmed that the suit property was subdivided by the City Council and leased to the plaintiff. The witness stated that no formal letter of allotment was given to the plaintiff in respect of the land and did not know whether **Gamex Shelter Hunters Ltd** who sold the property to the plaintiff had been issued a letter of allotment by the City Council. The witness testified that the strangers started invading the suit premises from about 1999 and the plaintiff could not evict them because they were hostile and hence the institution of the present suit to obtain their eviction.

The Defendants for their part called two witnesses **Bernard Maina Mutahi DW1** and **John Ndirangu DW2**. DW1 reiterated that the Defendants were allocated the suit land by the City Council of Nairobi vide the letter of allotment dated 15<sup>th</sup> June 1998 and maintained that the lease purportedly issued to the plaintiff and on which they rely to claim ownership of the suit premises was not genuine as it had not been signed by the **Mayor John Ndirangu** and thus claimed that the suit land still belonged to the City Council. The witness stated that the Defendants had satisfied the terms of the allocation as set out in the letter of allotment. The witness admitted they did not make the requisite payments as per the letter of allotment within the 30 days period provided as the payments were made in 1999 and 2000.

Dw1 testified that the letter of allotment indicated that the land allocated to them was **L.R.NO.11344/R** and that this is the land their members moved into and started effecting developments. He maintained

that the land was different from **L.R. NO.23917** that the plaintiff claims. **Dw1** stated that the Defendants denied the existence of the lease in favour of the plaintiff because **John Ndirangu Dw2** who was then the Mayor denied having signed it.

**Dw2 John Ndirangu Kariuki** currently the member of Parliament for Embakasi Central testified that as at February 2001 when the lease in favour of the plaintiff was executed he was the mayor of Nairobi. He denied he is the one who signed the lease maintaining that the signature appearing on the lease and ascribed to him as the mayor was not his. The witness stated that he became aware of the allotment of the land to the Defendants when he became mayor in 1999. According to the witness the Director of City Planning and Architecture would not have the authority to write a letter such as the one dated 15/4/2009 which was disowning the letter of allotment issued to the Defendants. Equally the witness stated that the Chief Valuer of the City Council would not be expected to have a record of the letters of allotment and therefore the letter of 16/4/2009 (**EX12**) by the Ag.Chief Valuer, **Mr. Ayieko** could be misleading. The witness stated he could not verify the payment receipts by the Defendants that the City Treasurer had disowned as having been issued by the Council

The witness however maintained that the parcel of land **L.R.NO.11344/R** allocated to the Defendants and **L.R.NO.23917** now registered in the plaintiff's name was one and the same parcel of land. The witness acknowledged there was a consent order entered into in **HCCC NO. 457** of 1999 where the City Council was a party as the plaintiff and the plaintiff in the present suit and two others were the Defendants. The consent order entered in that suit vested the suit property in the plaintiff herein. The lease that vested the property in the plaintiff is shown to have been signed by the mayor and the Town Clerk but the witness stated he could not tell if it had been sealed with the seal of the Council as required.

The parties filed written submissions in support of their respective positions in the matter as directed by the court. The plaintiff filed their initial submissions on 30<sup>th</sup> May 2013 and supplementary submissions on 16<sup>th</sup> August 2013 while the Defendants filed their submissions on 30<sup>th</sup> September 2013. While the plaintiff reiterates the facts of the case and the evidence led by the plaintiff in support of its case the thrust of their submission is that the plaintiff holds an indefeasible title to the suit property that was regularly obtained and that the Defendants have no legal right to the property. The plaintiff submits that the consent order in **HCCC 457** of 1999 exhibited as PEX2 which decreed and vested the suit property in the plaintiff has never been vacated, set aside and/or varied and that the same was given effect to leading to the plaintiff being registered as the proprietor of a leasehold interest over **L.R. NO.23917** for a term of 99 years the 8<sup>th</sup> day of February 2000. The plaintiff submits that by virtue of registration of the lease in favour of the plaintiff the plaintiff became entitled to absolute rights of proprietorship as under the law provided and the plaintiff's title is indefeasible except on grounds of fraud or misrepresentation to which the plaintiff is proved to have been a party.

The plaintiff submits that the Defendants have not proved any fraud on the part of the plaintiff and that the Defendants had not at any rate pleaded and particularized fraud on the part of the plaintiff's as required under the law and thus the Defendants cannot in this suit and on the basis of the pleadings before the court purport to challenge the plaintiff's title to the suit premises on grounds of fraud. The plaintiff further submit that the letter of allotment that the Defendants rely upon to claim ownership of the plaintiff's suit property has been disowned by the City Council and further the same relates to a different parcel of land **L.R.NO.11344/R** while the plaintiff's land is **L.R.NO.23917**

The Plaintiff further submitted that the allotment letter that the Defendants rely on was to a welfare group who are not a party to these proceedings. It is contended that the Welfare Group if it considered it had a proprietary interest in the suit premises ought to have applied to be enjoined to these proceedings and that therefore the Defendants cannot rely on the said letter of allotment to defeat the plaintiff's claim herein.

Additionally the plaintiffs submit that the allottees of the letter of allotment did not comply with the conditions thereto and consequently the offer lapsed. Specifically the plaintiffs contend that the Defendants have not demonstrated that they accepted the letter of allotment and made the requisite payments within 30 days from the date of the letter of allotment as required under the terms and

conditions of the letter of allotment. The plaintiff placing reliance on the case of **Philma Farm Produce and Supplies & 4 others –vs- The Attorney General & 6 others H.C Petition NO. 194 of 2011** where **D.S Majanja Judge** held that where a letter of allotment had lapsed by reason of failure to comply with the conditions thereto the same could not be revived by making payment and urges the court to find and hold that the letter of allotment relied upon by the Defendants had lapsed and that the Defendants cannot have any proprietary interest on the suit property on the basis of the said letter of allotment. The plaintiff further urges the court to hold and find that the interest conferred by the letter of allotment cannot operate to override the interest of the registered owner and places reliance on the case of **Lilian Waithera Gachuki –vs- David Shikuku Mzee (2005) e KLR** to support that proposition.

The 13<sup>th</sup> to 23<sup>rd</sup> Defendants for their part in their submission claim that the parcel of land described as **L.R. NO.23917**, Nairobi by the Plaintiff is in actual fact the same as **L.R. NO. 11344/R** which they state was allotted to a group known as **Embakasi Njiru United Self Help Group**. The Defendants submit following the allotment they subdivided the plot of land and allocated subplots to their members. The Defendants submit that they paid the requisite stand premium and rates and the council accepted the payments and have never complained that the same were paid late and submit the plaintiff cannot complain on behalf of the City Council who at any rate are not party to the suit. The Defendants reiterates the evidence given by DW2 the former Mayor of Nairobi that the lease was not appropriately executed and that it was a forgery.

The Defendants contend there was a valid offer of allotment which they duly accepted and made the necessary payments and were therefore lawfully in possession of the suit land as the beneficial owners. The Defendants submit that there was a binding contract between the Defendants and the City Council of Nairobi over the suit parcel of land and that the plaintiffs claim is premised on a forged and a fraudulent lease which ought to be annulled. It is the Defendants submissions that the land allotted to the Defendants being **L.R. NO. 11344/R** was the remainder of the original land after subdivision and thus the plaintiff was allocated the same land. The Defendants assert they have occupied and developed the suit land since 1998 when the same was allocated to them as the legal owners and urge the plaintiff's claim to be dismissed.

I have hereinabove set out the brief facts of the case and a brief summary of the evidence by the parties and the submissions made on behalf of the parties by counsel. On the basis of the pleadings, fact and the evidence the following issues stand out to be determined by the court.

- i. **Whether the plaintiff is the registered owner of title L.R. NO.23917 Nairobi and if so whether the lease issued over the property in favour of the plaintiff on 8<sup>th</sup> February 2000 for a term of 99 years by the City Council of Nairobi was valid and whether the same was validly executed?**
- ii. **Whether the consent order issued on 8<sup>th</sup> February 2000 in High court Civil case No.457 of 1999 City Council of Nairobi –vs- Commissioner of Lands and 2 others vested ownership of L.R. NO.23917 Nairobi in the plaintiff and if so whether the said order has ever been vacated, varied and/or set aside?.**
- iii. **Whether the 13<sup>th</sup> to 23<sup>rd</sup> Defendants were allocated L.R. NO. 11344/R by City Council of Nairobi and if so where this land is located and whether it is the same land claimed by the plaintiff L.R.NO.23917 Nairobi.**
- iv. **Whether the Defendants are in unlawful occupation of the plaintiff's land L.R.NO.23917 or are in occupation of L.R.NO.11344/R which was allocated to them.**
- v. **What reliefs/orders should the court make and who bears the costs of the suit.**

The basic facts of this matter are really not in dispute. It is not disputed that there was a High Court Civil case NO.457 of 1999 where the City Council was the plaintiff and the plaintiff herein and 2 other parties were Defendants and that the suit was settled by consent of the parties in that suit. The Defendants were not parties to the suit but the subject land that they claim to have been allocated and which is the subject matter in the present suit was vested in the plaintiff. The letter of consent signed by all the parties to the suit was produced by Pw1 as **PEX1** while the formal extracted order was admitted in evidence as **PEX2**. The first order as per the consent was clear and precise and was in the following words:-

**“The suit property herein being L.R.NO.23917 Nairobi be and is hereby vested upon the 3<sup>rd</sup> Defendant”.**

The 3<sup>rd</sup> Defendant in the suit was **Muthithi Investment Ltd** the plaintiff in the present suit. The land decreed to be vested was clearly defined as **L.R.NO.23917 Nairobi**. The formal order was extracted and it is apparent that the order of the court was given effect to as by the lease dated 5<sup>th</sup> February 2001 produced as **P.EX3** the preamble of the lease provides under (a) and (b) as follows:-

- a. **The Council has caused the said piece of land to be subdivided into separate portions and is desirous of leasing one of the portions known as Land reference 23917.**
- b. **In consideration of court order in Civil Suit number 457 of 1999 in the High Court of Kenya at Nairobi the Council hereby leases unto the lessee Land Reference Number 23917 measuring 8.143 Hectares.**

The lessee under the lease was **Muthithi Investments Limited** (the plaintiff herein). This lease is shown to have been executed by the lessee and on behalf of the City Council as the lessor by the mayor and the Town Clerk. **Dw2 John Ndirangu** who was the Mayor then stated he could not remember signing the lease and upon cross-examination maintained that he did not sign the lease and the signature ascribed to him was not his. It is on this account the Defendants are alleging there was forgery and fraud and thus the purported lease was a nullity. I do not understand the Defendants to be challenging the validity of the court order issued on 8<sup>th</sup> February 2000. In my view it is the court order that vested the property in the plaintiff and the lease was but an instrument to give effect to the court order. Even without the lease the plaintiff would in my opinion be entitled to claim ownership of the suit land **L.R.NO.23917 Nairobi** on the basis of this said court order. Unless the court order was reviewed, vacated varied or set aside this would remain the position. The City Council of Nairobi who were the legal owners of the suit land were party to the consent recorded by the court and would be bound by the consent.

The Defendants after they came to learn about the consent order that vested the suit property in the plaintiff did not challenge the order and/or apply for the same to be reviewed as they would have been entitled to do. The effect of the defendants inaction as regards the consent order is that the order remains valid and effectual and anything that was done in furtherance of the same would be held valid and effectual. Section 80 of the Civil Procedure Act Cap 21 Laws of Kenya permits any person who considers himself aggrieved by a decree or order of the court to apply for a review of the judgment or order from the court that passed the judgment or made the order.

Section 80 of the Civil Procedure Act the procedure Act provides thus:-

**80. Any person who considers himself aggrieved-**

**(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred or**

**(b) by a decree or order from which no appeal is allowed by this Act,**

**May apply for a review of judgment to the court which passed the decree or made the order and the court may make such order thereon as it thinks fit.**

Order 45 of the Civil Procedure Rules also makes a similar provision for review of judgment and/or orders and provides the grounds on which a review may be granted.

In my view the Defendants cannot impugn the consent order recorded in the earlier suit in these proceedings and have not at any rate sought to do so and they have contented themselves by merely stating they were not a party in the proceedings where the consent order was made. The import of the consent order was that it vested the suit property **L.R.NO.23917 Nairobi** in the plaintiff and this remains uncontested.

Flowing from the consent order the City Council of Nairobi granted a lease over the suit property to the plaintiff and prima facie the lease was duly executed by all the parties and duly registered. There is evidence that stamp Duty on the lease was paid together with land rates and land rent. The lease was registered as **I.R.NO.87206/1** on 17<sup>th</sup> September 2001 and a certificate of search issued by the Registrar of Titles on 11/4/2008 certifies that the lease is so registered.

Although the Defendants at the hearing endeavoured to show that the lease was procured through fraudulent means I dare say that they indeed fell way off the mark since by their pleadings they had not pleaded any fraud on the part of the plaintiff and in particular did not give any particulars of the alleged fraud. It is obligatory under order 2 Rule 10 of the civil Procedure Rules as was the case under the previous order V1 Rule 8 of the Civil Procedure Rules which was applicable at the time the present suit was filed for a party who pleads fraud to give the particulars of the allegations constituting the fraud to enable the other party to appreciate the precise nature and extent of the allegations so as to be able to respond to and/or answer the allegations of fraud. The present order 2 Rule 10 which is a complete replica of the previous order VI rule 8 provides thus:-

**10. (i) subject to subrule (2) every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including with prejudice to the generality of the foregoing.**

**(a) Particulars of any misrepresentation, fraud, breach of trust, willful default or undue influence on which the party pleading relies, and**

**(b) Where a party, pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of the mind except knowledge particulars of the facts on which the party relies.**

The Defendants did not give any particulars of the alleged fraud in their statement of defence and it is submitted by the plaintiff that this renders the Defendants statement of defence incompetent to challenge the plaintiff's claim of ownership of the suit property. The plaintiff has referred the court to the decision by **Hon. Justice L. Kimaru** in the case of **Thomas Onserio Ongubo –vs- Laban Masinjik, (2006)eKLR** when the judge in striking out a defence based on an allegation of fraud in acquisition of title stated thus:-

**“in the instant case, the Defendant is resisting the plaintiff's claim based on what he states was a promise given to him that he would be allocated the suit land”.**

**“His defence was that the plaintiff purchased the said parcel of land and got himself registered under dubious circumstances Although the Defendant has said that the plaintiff was fraudulently registered as the owner of the suit land, no such averment of fraud was made in his defence neither was the said alleged fraud particularized as required by law. What I have before me is a registered owner whose title has not been challenged and who wants to secure possession from an illegal occupant of his land”.**

Indeed even in the present suit **Hon.Lady Justice M. Mugo** in striking out the defence of the 1<sup>st</sup> to 12<sup>th</sup> Defendants observed thus:-

**“ Moreover, the said defence does not particularize the alleged fraud as required under order V1 Rule (1) (a). in the premises I find that this application succeeds”.**

Defendants 13<sup>th</sup> to 23<sup>rd</sup> ought to have taken a cue from this observation but apparently did not and they allowed their deficient statement of defence to stay on record upto the hearing and it is no wonder they are now faced with the present challenge.

Order VI rule 8 (I) (a) now order 2 Rule 10 is couched in mandatory terms and my view is that any pleading that fails to comply with that mandatory requirement in as far as it relates to those matters that the provision requires to be particularized would be defective and therefore incompetent and would be

liable to be struck off. The Defendants in the instant case did not particularize the allegations of fraud attributed to the plaintiff and there was therefore no basis upon which they could prove fraud and/or any basis on which the plaintiff could respond to the allegations without being furnished with the particulars. The court therefore finds and holds that the claim of fraud by the Defendants as against the plaintiff is unsubstantiated and not proved and the same is disallowed. I am fortified in this holding by the decision of the Supreme Court of Uganda in **Lubega –vs- Barclays Bank (U) Ltd (1990-1994) EA 294** where the court held as follows:-

**“As far as fraud is concerned the requirement to plead the particulars of the alleged fraud is as was pointed out by this court in Okello –vs- Uganda National Examination Board, Civil Appeal NO. 12 of 1987--- the above rule is mandatory to my mind failure to plead and particularize fraud is a fundamental defect and not an irregularity curable by evidence or otherwise”.**

As concerns the evidence of DW2 that he could not recollect signing the lease or that he did not sign the lease the court finds this evidence suspect. This witness was the Mayor of the Nairobi City Council when this lease was executed and even though he ceased to be mayor subsequently he must have become aware of the lease that he is shown to have executed either during his stint as Mayor and/or subsequently as councilor. There is no indication that he raised any issue with the City Council in regard to the lease and/or made any complaint to the police that his signature had been forged. As observed above the issuance of the lease by the City Council to the plaintiff was in furtherance of the consent court order that the City Council had entered into in the previous suit **HCCC NO. 457 OF 1999**. There is no evidence that the City Council has at any time denied issuing the lease. Apart from the signature by DW2 as Mayor the lease was also executed by the Town Clerk and there is further internal correspondence that the City Council acknowledged the lease. There is in my view the possibility that DW2 took the position that he took for political expediency bearing in mind that the suit parcel of land falls within his constituency.

I am in the premises satisfied that indeed the City Council issued the subject lease. It is not enough for Dw2 to take the witness stand and state that he could not recollect signing the lease or that he was not the one who signed the signature that he now disputes. If the position was that he was not the one who signed the signature attributed to him the court in order to form an opinion required an expert opinion as to whether the contested signature was signed by DW2 or somebody else and I thus agree with the submission by the plaintiff’s counsel that the Defendants ought to have under the provisions of section 48 of the Evidence Act Cap 80 Laws of Kenya furnished an expert’s opinion as to whether the signature on the lease was that of DW2 or somebody else. As it is now the court is not in a position to form an opinion on the issue of the genuineness of the signature or otherwise. To the extent that the City Council has not disputed the genuineness of the lease I am inclined to accept that the lease was appropriately executed and consequently registered as attested by the certificate of official search.

In the circumstances and having regard to the foregoing I would in answer to issue number (i) hold that the plaintiff is duly registered as owner of **L.R. NO. 23917** and that the lease issued to the plaintiff on 8<sup>th</sup> February 2000 over the subject land was valid and that the same was validly executed.

In regard to issue number (ii) as per the evidence the consent order issued by the court on 8<sup>th</sup> February 2000 in **HCCC NO.457 of 1999** vested ownership of **L.R.NO.2317** Nairobi in the plaintiff. This order has never been vacated, varied and/or set aside and that the same was given effect to when the City Council of Nairobi issued the plaintiff a lease over **L.R.NO.23917** for a term of 99 years from the 8<sup>th</sup> day of February 2000. This lease was duly registered at the Lands Office as **I.R.NO.87206/1** on 17<sup>th</sup> September 2001 constituting the plaintiff the registered absolute proprietor of the suit property in terms of section 23(1) of the Registration of Titles Act, Cap 281 of the Laws of Kenya (now repealed).

Section 23(1) of the Registration of Titles Act (repealed) provided thus:-

**“The certificate of title issued by the registrar of a purchaser to 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**

**therein 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”.**

The plaintiff has been shown to be the registered owner of the leasehold interest over the suit property and I have elsewhere held in this judgment that the Defendants have not established any fraud as against the plaintiff in procuring the registration of the property in their favour. Consequently the plaintiff is the holder of an absolute and indefeasible title and his property rights deserve to be protected in accordance with the law. In a recent decision of this court delivered on 29<sup>th</sup> April 2013 in Nairobi **HCCC NO. 1339 of 2004 Southdowns Developers Ltd –VS- Haithar Haji Abdi & Another** while dealing with a somewhat similar situation as in the present case I rendered myself thus:-

**“In the instant case, the plaintiff has been decreed in the earlier decision referred to by Hon. Justice Waki to be entitled to ownership of this property and to the extent that the plaintiff became registered as the proprietor the plaintiff became entitled to the rights conferred under section 23 (1) of Cap 281. As the registered owner the plaintiff undoubtedly became entitled to possession of its property and the continued possession of the suit property by the Defendants can only be as trespassers. In the premises I find and hold that the Defendants are trespassers in the plaintiff’s property as from the date that the transfer was registered in favour of the plaintiff.”**

The court of Appeal in the case of **Dr. N.K. Arap Ngok –vs- Justice Moiwo Ole Keiwa & 5 others in CA 60 of 1997** (unreported) summed up what the effect of registration of title under section 23(1) of the Registration of Titles Act (now repealed) is when they held thus:-

**“Section 23(1) of the Act gives an absolute and indefeasible title to the owner of the property. the title of such an owner can only be subject to challenge on ground of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of the title bestowed upon the title holder under the Act. It is our law and the law takes precedence over all other equitable rights of title. Otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy”.**

To my mind the position in regard to sanctity of title has not changed even with the enactment of the new Land Laws and the 2010 constitution. Sections 25(1) and 26(1) of the Land Registration Act NO. 3 of 2012 reasserts the sanctity of title and reaffirms that the title of a registered proprietor is absolute and indefeasible and can only be challenged on the limited grounds of fraud or misrepresentation or if it is proved that the title was acquired illegally or unprocedurally or through a corrupt scheme. Article 40 of the Constitution guarantees and protects property rights and the only exception where protection of property is waived under the constitution is under Article 40(6) where the property is found to have been unlawfully acquired. The plaintiff in the present case has illustrated that his acquisition of the property the subject of the suit was regular and procedural and thus the same deserves the protection of the law.

As regards issue number (iii) it is the Defendants claim that they were allocated **L.R. NO. 11344/R** vide the letter of allotment dated 15<sup>th</sup> June 1998 which they also claim to be the same as **L.R.NO. 23917** registered in the name of the plaintiff. The letter of allotment dated 15<sup>th</sup> June 1998 is addressed to **Andrew Kyego & 2 others** as Trustee of **Embakasi Njiru United Self Help Group**. The letter of allotment in the opening paragraph states thus:-

**“I have the honour to inform you that the City Council offers you plot NO. L.R. NO.11344/R in the above mentioned scheme subject to your written acceptance of the following conditions and to the payment of the charges prescribed as hereunder”.**

The offer letter refers to a scheme that is not named and/or identified and further the allotment letter did not attach a sketch plan (PDP) to identify the plot location. Dw1 testified that the allocated plot was never surveyed and therefore no deed plan was produced. The witness further stated the land they were allocated was the remainder after the original land was subdivided. Other than the general statement by the Defendants that the land they were allocated was the same land that the plaintiff claims to own **L.R. NO.23917** there was no evidence of that fact.

The undisputable fact is that L.R. NO.23917 was surveyed and a Deed Plan NO.218858 issued on 26<sup>th</sup> June 1998 was attached to the lease issued to the plaintiff and therefore the property the plaintiff claims is appropriately delineated and is identifiable as per the Deed Plan. **L.R. NO.23917** cannot be the same as **L.R.NO.11344/R** that the Defendants claim. **L.R. NO.11344/R** has no Deed Plan and is therefore unidentifiable. No Survey plan has been produced by the Defendants to show the layout and/or location of the property and the letter of allotment without a survey plan and/or sketch plan (PDP) is virtually of no use as the land purported to be allocated cannot be identified. In answer to issue number (iii) I would state that on the basis of the letter of allotment it is not possible to positively state where **L.R. NO.11344/R** is located on the ground. There is no evidence that any surveyor or officer of the Nairobi City Council who are alleged to have allocated the property pointed out the dimensions of this land to the allottees. Thus it is my finding and holding that the alleged **L.R.NO.11344/R** allocated to the defendants cannot and is not the same land claimed by the plaintiff **L.R. NO. 23917** Nairobi. Indeed it is not lost to the court that there is evidence to the effect that senior officers from the City Council who would otherwise have had knowledge of the letter of allotment to the defendants have disowned it claiming the same did not emanate from the Council. The Defendants did not point to any resolution of the council that approved the allocation as would have been expected to be the case if the allotment had been approved by the Council.

The Town clerk who would have been expected to have had notice of the alleged letter of allotment is the very same person who signed the lease to the plaintiff over the suit land following the consent order recorded in court. It is inconceivable that the Town Clerk would have signed the lease in favour of the plaintiff over **L.R NO.23917** if indeed this was the same land in respect of which an allotment had been made to the defendants.

In regard to issue number (iv) I have already held that the plaintiff is validly registered as proprietor of **L.R. NO. 23917** and as such is entitled to enjoy the rights of proprietorship as conferred under section 25(1) of the Land Registration Act **NO.3 of 2012**. Pw1 testified that it was the intention of the plaintiff to develop a housing estate on the parcel of land but that they were prevented from doing so because the suit land was invaded by the defendants and/or their agents who started constructing illegal structures on the suit land which prompted the City Council of Nairobi to issue an enforcement notice requiring the illegal structures to be demolished since they were constructed without any approval from the Council. The enforcement notice was issued by the City Council under the Physical Planning Act Cap 286 Laws of Kenya section 30 upon the plaintiff as the registered owner of the property on 28<sup>th</sup> April 2005.

The Defendants admit in their evidence that they entered into possession of the suit land and caused the same to be subdivided whereupon they allocated their members subplots on which they started to effect developments. The Defendants place reliance on the alleged letter of allotment as giving them authority to enter and occupy the suit land. As I have stated above the letter of allotment purported to allot plot **L.R.NO.11344/R** whose location on the ground was not shown. The land on which the defendants entered and commenced to put up developments was the land that was leased out to the plaintiff pursuant to the court order being **L.R. NO. 23917** Nairobi. To the extent that the plaintiff is the registered owner of this land the entry possession and occupation of the same by the Defendants was unlawful. In my view even if the defendants had a letter of allotment of the same property the letter of allotment until there was acceptance and compliance with the terms of the allotment remained just an intention on the part of the City Council which the council could rescind. Further on the basis of competing interests the interest of the holder of a validly registered title would be superior to that of the holder of a letter of allotment over the same property even if the letter of allotment may have been issued earlier than the title.

The plaintiff referred the court to a ruling in the case of **Lilian Waithera Gachuhi –vs- David Shikuku Mzee (2005) e KLR** where the Judge in a ruling delivered on 13<sup>th</sup> July 2005 stated thus:-

**“I have no doubt that legally, a letter of allotment is an intention by the Government to allocate land. It is not a title. Therefore, a letter of allotment cannot be used to defeat title of a person who has been registered as the proprietor of the land.....”.**

I equally would state that where it is established a valid title has been issued and the proprietor registered

as the proprietor of the land a letter of allotment cannot dislodge that title. In a recent ruling of this court delivered on 2<sup>nd</sup> May 2014 in the case of **Njuwangu Holdings Ltd –vs- Langata KPA Nairobi & 5 others (ELC NO. 139 OF 2013)** the court considered the status of a letter of allotment vis-à-vis a registered title. In the suit I rendered myself as follows:-

**“As matters now stand the plaintiff who has a registered title over the suit property has a superior title to that of the 1<sup>st</sup> Defendant who only holds a letter of allotment. I am in agreement with the decision of the court of Appeal in the case of Satya Investments Ltd –Vs- J.K. Mbugua Civil Appeal NO. 164 of 2004, where the court held that a temporary occupation licence could not override a registered title under the Registration of Titles Act Cap 281 Laws of Kenya (repealed). Equally it is my view that a letter of allotment cannot override a duly registered title under the Act and where there is a registered title and a letter of allotment over the same property barring any fraud on the part of the party holding the registered title, a letter of allotment must of necessity give way. The rights of a party who holds the registered title have crystallized as opposed to those of the party holding a letter of allotment which are yet to crystalize.**

Thus it is my finding and holding that the Defendants are in illegal and unlawful occupation of the Plaintiff’s Land Parcel **L.R. NO.23917** Nairobi and are therefore trespassers and they ought to vacate and deliver vacant possession of the suit premises to the plaintiff.

The plaintiff has in its plaint claimed general damages for trespass under prayer (c) of the plaint.

Pw1 during his testimony gave evidence as to what use the plaintiff intended to put the suit premises and testified that it was intended to develop a housing estate where houses of varying categories would be constructed and sold to members of the public. It was the witnesses evidence that the gross project cost would have been about **Kshs.2.1 billion** but the plaintiff expected to make a profit of between **Kshs.500,000,000/- to Kshs.1 billion** after sale of the houses, the nursery school and the shopping complex. Admittedly these damages were speculative and I am not satisfied they can be said to have been proved. Apart from a proposed subdivision scheme which had not received final approval from the City Council there were no architectural plans and drawings of the proposed development. Without these it is not possible to see and appreciate how the cost of the construction could be assessed.

In my assessment the project was at its conception stage and it had not been developed to such a stage as to be capable of being costed and that would explain why there were no bills of quantities and/or architectural drawings. I would therefore decline to consider any damages under the speculative head.

As regards general damages it is a fact that the defendants have taken possession and are in occupation of portions of the plaintiffs property (if not the whole property) and have prevented the plaintiff from utilizing or making use of its property. Once the fact of trespass is established damages are awardable as a matter of course. I have held that the Defendants are in trespass on the plaintiffs parcel of land and having regard to the circumstances of this case I assess damages for trespass against all the Defendants jointly and severally in the sum of **Kshs.1,000,000/-** to compensate the plaintiffs for being prevented by the defendants from utilizing its parcel of land.

The upshot is that I find and hold that the plaintiff has proved its case against the Defendants jointly and severally on a balance of probabilities and I accordingly enter judgment against the Defendants jointly and severally and make the following orders:-

- i. **That the Defendants, their agents and/or servants are ordered to vacate and deliver vacant possession of the suit property L.R.NO.23917 Nairobi to the Plaintiff within Ninety (90) days from the date of this judgment failing which an eviction order to issue on application.**
- ii. **A permanent injunction restraining the Defendants by themselves, their agents, servants, tenants, licencees and/or any person whatsoever from being remaining entering in continuing in occupation, erecting, constructing or continuing with construction of any structures whatsoever on the plaintiff’s parcel of land, land Reference NO.23917 Nairobi be and is hereby issued.**

- iii. **The plaintiff is awarded Kshs.1,000,000/- as general damages for trespass together with interest at court rates from the date of judgment.**
- iv. **Costs of the suit with interest at court rates.**

Judgment dated, signed and delivered at Nairobi this 2<sup>ND</sup> day of **MAY** 2014.

**J. M. MUTUNGI**

**JUDGE**

**In presence of:**

.....**For the Plaintiff**

.....**For the Defendants**