



REPUBLIC OF KENYA



KENYA LAW
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**Mikwa & another v Wambugu & 2 others (Environment & Land Case
E006 of 2022) [2024] KEMC 52 (KLR) (15 November 2024) (Judgment)**

Neutral citation: [2024] KEMC 52 (KLR)

**REPUBLIC OF KENYA
IN THE MARALAL LAW COURTS
ENVIRONMENT & LAND CASE E006 OF 2022
AT SITATI, SPM
NOVEMBER 15, 2024**

BETWEEN

BONIFACE MIKWA 1ST PLAINTIFF

TERESA ARUTH LOTURO 2ND PLAINTIFF

AND

BERNARD NERITU WAMBUGU 1ST DEFENDANT

COUNTY GOVERNMENT OF SAMBURU 2ND DEFENDANT

AG CHIEF OFFICER LANDS SAMBURU COUNTY GOVT 3RD DEFENDANT

JUDGMENT

1 By a plaint dated 28th March, 2022 verified by the affidavit of the joint plaintiffs who are husband and wife, the claimants sought the following reliefs:

1. A declaration that the 1st defendant's action of trespassing into the plaintiff's property being residential plot no. 186A Chang'aa area located at Maralal Township within Samburu County is unlawful and/or illegal and an order of permanent injunction restraining the 1st defendant herein either by himself, his servants, employees, agents and/or any persons working under their instructions from entering, trespassing, depositing or storing or placing construction materials, dealing with and/or any way interfering with the Plaintiff's quiet enjoyment, possession and/or ownership of the suit property being Residential Plot 186A Chang'aa area located at Maralal township within Samburu County.
2. That the Honourable Court be pleased to issue an order of mandatory injunction directed at the 1st defendant, his agents and/or agents or servants to clear and/or remove all the constructions, building materials placed and/or deposited on the Plaintiff's property being residential plot 186A Chang'aa area located at Maralal township within Samburu County and



further a order directed at the 1st defendant to restore the plaintiffs' grounds and fence that was destroyed by his actions.

3. That the Honourable court be pleased to issue an order of mandatory injunction directed at the 2nd and 3rd defendants its agents, employees and/or any other person under their instructions to recall, cancel, revoke and/or amend the erroneous ownership documents issued to the 1st defendant and to consequently issue a regular plot allotment letter to the plaintiffs in relation to the suit property being residential plot no. 186A Maralal township.
 4. An order for damages for destruction of the plaintiff's grounds, perimeter wall and/or fence and/or general damages.
 5. Costs and interest of the suit.
2. Accompanying the plaint were the following: An interlocutory application by way of a notice of motion praying for various temporary reliefs and this application was expedited with at the interlocutory stage. List and bundle of documents containing the statements of Boniface Mikwa, Teresa Aruth Loturo and Leah Salima Letuya. List and Bundle of exhibiting containing: Mappart development plan dated 8th February, 2014. Formal transfer form dated 8th APRIL, 2015. Plot allocation letter dated 26th February, 2016. Chief's letter dated 27th February, 2022. Supplementary list of witnesses dated 21st November, 2023 containing the Further Witness Statement of the 1st Plaintiff Boniface plus the witnesses' statements of Christopher Damji, Henry Mathenge and Cein Lemakara.
3. The firm of Kiriaku & Company Advocates represented the plaintiffs.
4. Upon being served with the claim, the 1st defendant lodged a Statement of Defence praying for a dismissal of the plaint and a Counterclaim dated 25th September, 2023 praying for:-
- a. A declaration that the subject plot of land number 186A situate at Chang'aa estate within Maralal township belonged to the plaintiff in this counterclaim (1st defendant in the plaint)
 - b. Costs of and incidental to the whole of this suit.
 - c. Any further or other relief that this Honourable Court may deem fit and just to grant.
5. The Counterclaim was duly verified by affidavit and was accompanied by: A bundle of documents containing Receipt of payment for beaconing fees dated 18022014 Beacon certificate dated 1822024 Formal transfer dated 842015 Plot transfer fee receipt dated 842015 Receipt dated 08042015 issued by Macharia KiRUKI & Company Advocates following payment for commissioning of plot transfer forms Plot allocation letter of 26022016 Letter from Directorate of Criminal Investigations to CEC Lands in the Samburu County Assembly dated 132022 Letter from the Chief Officer Lands Housing and Urban Development to DCI Samburu Central dated 732022 Photostat picture of the suit property.
- 1st defendant's witness statement dated 25th September, 2023.
- Witness statement of Onesmus Githinji Kinuthia dated 4th September, 2023
- Witness statement of Joel Njoroge Njehia dated 8th September, 2023
6. Kihoro Kimani & Associates Advocates represented the counterclaimant.
7. The original plaintiffs then lodged a Joint Reply to Defence and Statement of Defence to the Counterclaim.



THE PLAINTIFF'S CASE

- 8 The matter initially had gone for formal proof hearing wherein the plaintiff had obtained a judgement in his favour but on 21st August, 2023 the parties by consent set-side the said judgement with thrown away costs being paid. The matter then started de novo.
- 9 PW1 BONIFACE MIKWA adopted his written witness statement dated 28032022. In that statement he told the court that sometimes in 2015 the 1st defendant approached the plaintiffs and offered to purchase the subject plot at Kshs 300, 000 but the parties did not finalize their agreement on the consideration and no purchase price was paid to them. The transaction was also prevented by the lack of consent by the 2nd plaintiff who is a spouse to the 1st plaintiff. He added that in spite of the non-payment of the consideration the 2st defendant still went ahead and colluded with the 2nd and 3rd defendant officials to process the registration documents in favour of the 1st defendant. He stated further that he attempted to stop the 1st defendant's trespass and illegal possession through the local Chief and the County Govt. officers but the issue was not resolved.
- 10 In his further witness statement filed on 5th December, 2023 he told the court in summary that he and his wife took possession of the suit land in the year 2000 from their larger Mathenge family but they never got any documentation from the now defunct Samburu County Council to regularize ownership in-spite of possession. Later, in the year 2013 he became friends with the 1st defendant who then negotiated with him to purchase 1 out of the 2 plots in the site. The proposition by the 1st defendant was for the 1st plaintiff to process the entire batch of plots but then a direct transfer be made to the 1st defendant by the County Govt. and this was done in spite of the failure by the 1st defendant to pay the purchase price to the plaintiffs. He added that the 2nd plaintiff declined to consent to the transfer and further that the 1st defendant used forgery to acquire ownership by the fake signature of the 2nd plaintiff.
- 11 In his further statement, he said that the church was built by the 1st defendant on rental terms with the 1st plaintiff as the landlord and the 1st defendant as the tenant but at no time did the plaintiffs sell it to the 1st defendant. He added that the issue of the chicken business was of no relevant since he used to sell chicken and eggs to many clients including the 1st defendant.
- 12 In cross-examination, the following came to light:No sale agreement was executed between the plaintiffs and the 1st defendant.He admitted that at one point he sold the plot to the 1st defendant but his wife who is now the 2nd plaintiff objected to it so he discontinued the sale transaction.He admitted that there was an oral agreement to sell but this was not effected.He admitted he had no proof of the land being transferred to him from his grandfather. He said that he had no succession documents to prove any transmission by court from his grandfather to himself.He admitted that he no allotment letter to prove his ownership of the suit plots.He confirmed that he signed the transfer forms for the 1st Defendant.He pointed out that his complaint was against the 1st defendant only and had no issues with the 2nd and 3rd defendant.He clarified that there was a sale agreement done at the home of the 1st defendant and the County Govt. did not sign on the sale agreement as a party and no advocate was involved in drawing it up.
- 13 In re-examination, he admitted that he signed the transfer documents but not for any consideration received from the 1st defendant. He added that the transfer to the 1st defendant was irregular since he had not received the sale price. He affirmed that the chief's letter was a historical document to explain the background to the alleged sale.



- 14 PW2 TERESA LOTURO adopted her witness statement dated 28032022. By it she narrated an account similar to PW1 testifying that she withheld her consent to the transaction. She stated that no consideration was paid to them as alleged by the 1st defendant.

In cross-examination, she stated that:

There was no document proving her ownership of the plot. She confirmed that the transfer was signed by her husband (1st plaintiff) with her knowledge.

In re-examination, she affirmed that her husband signed on the transfer document. She added that her details appeared on the same but she did not sign on the document. She pointed out that no cash at all was paid to them by the 1st defendant to complete the exchange. She clarified that the responsible body for allotment of plots was the County Govt.

- 14 PW3 HENRY MATHENGE son to the plaintiffs adopted his witness statement dated 21112023 and the further one filed on 5th December, 2023. In summary, he told the court as he grew up his parents kept assuring him that the space occupied by the 1st defendant was their family property which the 1st defendant would surrender so that PW3 and his siblings could take possession and construct their own houses.

In cross-examination, the following came to light:

PW3 was the son to PW1 and PW2 and admitted that his allegation that he used to cultivate the land in question was unsupported by any evidence. He admitted that he was aware that his father wanted to sell a plot but he did not indicate the plot number. He pointed out that it was true that his father was a chicken farmer and he assisted him to sell eggs but he provided no proof of this.

- 15 PW4 CHRISTOPHER DAMJI adopted his witness statement filed on 5th December, 2023 as his testimony. In summary, he told the court that he was a brother to the 1st plaintiff and he used to cultivate the lower part of the subject land before formal demarcation was done. He said that in 2012 a main road was created cutting through the original parcel thereby giving rise to 2 distinct plots. The 1st plaintiff took one of the 2 distinct plots and then leased a portion of it to the 1st defendant who leased a portion to construct a church.

- 16 In cross-examination, he disowned his written statements in toto saying that he had never recorded any witness statement.

- 17 In re-examination, he admitted that the written witness statement which he had just rejected actually bore his own signature.

At that stage, the plaintiffs closed their case.

THE 1ST DEFENDANT'S COUNTER-CLAIMANT'S CASE

- 18 DW1 BERNARD NDERITU adopted his witness statement dated 4th September, 2023. In summary, he told the court that sometimes in 2013 the 2 plaintiffs approached him for financial assistance for a broiler chicken project and he duly lent the funds. As time went on, the plaintiffs indicated that he was constructing a house and if he assisted them they would show him an un-alienated land adjacent to theirs so that he could occupy and possess it. The plaintiffs informed him that their own land was un-alienated and un-beaconed and that if he assisted them to process their documents, he would be shown the un-alienated land so that he possesses the same. In his testimony, he told the court that he complied and was duly shown the adjacent un-alienated land. He then visited the County Govt. offices and confirmed that the land was un-alienated and commenced processes to acquire the same.



- 19 He further stated that he paid for the survey and beaconing process resulting in 2 plots 186A and 186B. he stated that due to the political undercurrents, he agreed that the 2 plots be first registered in the name of the plaintiff who would then transfer it to him since as a Kikuyu he was not an indigenous tribe and would find it difficult to be allotted the same as an original allottee. He added that afterwards the plaintiffs wrote a transfer form indicating that he had lent them cash totalling Kshs 300, 000= and the transfer form was witnessed by the 1st plaintiff's wife and Onesmus Githinji and the signing was in the presence of Macharia Kiruki & Company Advocates whereupon the plaintiffs followed up on the issuance of the allotment letter and collected the same before handing it over to the 1st defendant.
- 20 In his further statement, he added that the county govt. in 2020 conducted a formal survey and demarcation of the town resulting into 2plots – one for the 1st plaintiff and one for the 1st defendant. In support of his case, he produced all the above-listed documents as D.Ex.1-12.

In cross-examination, the following came to light:

There was only plot 186A belonging to the counterclaimant. Plot 186B was non-existent on the ground although it was pleaded in the counterclaim at SUBPARA graph 11. In the PDP Map the plot for the plaintiffs was no. 187A. No sale agreement was drafted between the counterclaimant and the plaintiff since he used the formal transfer to serve the purpose of a sale agreement and transfer to effect the change of ownership. The transfer document was signed by the transferor and transferee in the presence of an advocate. The National Land Commission had not signed on the transfer document. The Chief Officer Lands signed on the transfer during which time the 1st Plaintiff disclosed that he had no documents as the original indigenous allottee. He denied knowledge that Bernard Lesurmat the then Chief Officer was convicted on abuse of office charges. The receipt dated 8/4/2015 showed that Boniface (the 1st plaintiff) was the one who had paid the transfer fees. The original allottee was Boniface who was tilling the land in question. The cash Kshs 300, 000 was paid directly to the 2 plaintiffs in their house in the absence of any witnesses. He had been giving the plaintiffs some cash over a period of time but formalized the transaction by the transfer document. He regarded the various payments to the plaintiffs as loans. The transfer was signed when both the plaintiff and his wife were present before the advocate. The PDP showed that 1 year prior to the PDP he had already acquired the land in question. He then built up a church on it and lived with his family on the land. He admitted that he had no wife and children but regarded the congregants as his "family."

- 21 In re-examination, he told the court that 186A was his plot while 187A belonged to the 1st plaintiff. He affirmed that Onesmus Githinji signed as his witness while the wife of the 1st plaintiff signed as his witness. He clarified that the transfer form is a standard form issued by the County Govt. and that both the seller and purchaser were required to physically present themselves to the county for signature but in this case the 1st plaintiff collected the same and had them all sign before the advocate. He explained that the Kshs 300, 000 was the cumulative debt lent to the plaintiffs. He said that the County Govt. wrote a letter to DCI affirming that he was an owner. He added that the beaconing exercise was done in the presence of both the counterclaimant and the 2 plaintiffs who witnessed the demarcation of boundaries. Consequently, he constructed a church building with the participation of the plaintiffs and possessed the same to date.
- 22 DW2 ONESMUS GITHINJI adopted his witness statement as his evidence. In summary, he told the court that he witnessed the signing of the transfer document between the plaintiffs and the 1st defendant in the present case. He witnessed that the 1st defendant constructed a church on the plot.

In cross-examination, he told the court that:



He was not present when the Kshs 300, 000 was being paid to the plaintiffs by the counterclaimant. DW1 only witnessed the transfer document when it was being signed by the 2 plaintiffs and the counterclaimant.

- 23 DW3 JOEL NJOROGENJIHIA adopted his witness statement dated 08/09/2023. In summary he told the court that DW1 was the possessor.

On being cross-examined, DW3 told the court that he did not see any sale agreement but he saw the beacon certificate when DW1 showed it to him. DW3 confirmed that he did not witness the payment of the Kshs 300, 000.

In re-examination, the witness clarified that the 1st defendant showed him the beacon certificate, receipts of payment and the transfer document but he did not witness the sale agreement. He told the court that the County Govt. affirmed that the 1st defendant was the owner.

At the end of his testimony, the defence counterclaimant closed his case. The parties then went for written submissions.

THE PLAINTIFF'S WRITTEN SUBMISSIONS

- 24 As of close of business preceding the delivery of this judgement, the plaintiffs had not lodged any written submissions in support of their case.

THE 1ST DEFENDANT'S SUBMISSIONS

- 25 On their part, the 1st defendant lodged written submissions dated 8th October, 2024. He highlighted his pleadings and exhibits produced and submitted that the plaintiffs had not produced any documents to prove ownership of the subject parcel of land. He contended that the alleged destruction of their property had not been proven and should be dismissed. He further submitted that there was no proof that the 1st defendant's ownership documents were un-procedurally acquired and there was no proof of fraud or corruption as alleged. He affirmed that both plaintiffs signed on the transfer documents and the allegation that the 2nd plaintiff had not consented was untrue.

- 26 In his further submission, the 1st defendant told the court the plaintiffs had produced a plot allocation letter dated 26/02/2016 which he himself had also produced proving his ownership of the subject plot. He placed reliance on the County Govt. Letter to the DCI affirming that the 1st defendant was a lawful owner. Reliance was further placed on the following authorities: *Kibusia Arap Konga –v- Evans Obonyo Obiero & Another (2017)eKLR* – where it was held that sections 24, 25 and 26 of the *Land Registration Act 2012* envisages the vesting of absolute ownership of land to the person in whose name the property is registered together with all rights and privileges appurtenant thereto and that the rights of a proprietor should be protected as evidenced by the certificate of title unless acquired fraudulently or illegally. *Stephen Mburu & 4 Others –v- Comat Merchants Ltd & Anor (2012)eKLR (Kimondo J.)* where the Judge held that from a legal stand-point a letter of allotment is not a title to property but is a transient document and is often a right of offer to take property. He submitted that at this transition phase, the allotment letter in his name should serve the purpose of affirming that he was the prima facie owner.

- 27 The duty of this Honourable Court is to determine the dispute at hand. In making this determination, the court noted that there were some undisputed and some disputed issues.

UNDISPUTED ISSUES

1. The plaintiffs are husband and wife.



2. The parcel of land(s) in litigation is government land which was then under the custodianship of the Samburu County Govt.
3. There is no written sale agreement between the parties but a formal transfer was drawn up.
4. The 1st plaintiff and his wife conceded that the 1st plaintiff signed on the transfer document together with the 1st defendant counterclaimant.
5. The alleged payment of Kshs 300, 000 was not made in a one batch payment.
6. There are 2 plots adjacent to each other with different numbers.
7. There is a church building standing on parcel 186A.
8. The plaintiffs do not have any allotment document in their possession to prove being the original allottees of the parcels in question.
9. The 1st defendant has an allotment letter for plot 186A Maralal township issued to him by the County Govt.
10. The 1st defendant is in active possession of plot 186A Maralal township.

The following are the main disputed issues:

DISPUTED ISSUES

- 28 The only disputed issue is who legally owned the contested plots in the locus in quo?

DETERMINATION

DISPUTED ISSUE : OWNERSHIP OF THE CONTESTED PLOTS IN MARALAL TOWN

- 29 The plaintiffs did not produce any certified Allotment letter but the PDP which the 1st defendant produced showed that there were only 2 plots in the locus in quo: plot 186A and plot 187A. This is supported by the cross-examination of DW1 where it came to light that only 2 plots existed in the locality: plot 186A registered in the name of the 1st defendant while plot 187A were registered in the 1st plaintiff's name.
- 30 On the one hand, the contest by the plaintiffs is that they owned both plots 186A and 186B while on the other hand the 1st defendant claims that 186A is his and that the 2 plaintiffs owned 186B only hence the dispute. Following the cross-examinations of PW1, PW2 and DW1 it is the finding of this court that the real subject plots in dispute were PLOTS 186A Maralal town and PLOT 187A Maralal town.
- 31 From the tested evidence of the cross-examinations of PW1 and PW2, the court is further satisfied that the parties had prolonged negotiations and dealings between themselves. Their clear intention was for the 1st defendant to acquire ownership of the subject plot measuring about 50x100 feet from the plaintiffs. At the time the plaintiffs were negotiating and dealing with the 1st defendant, the 2 plaintiffs were only in active occupation and possession of the land without any formal documentation to buttress their claim to ownership. In other words, the plaintiffs transacted with the 1st defendant when they had no single document of ownership. Their only claim to ownership was active possession but beyond that they had no legal document.
- 32 The foregoing is well supported from the product of the cross-examination of the 2 plaintiffs and the 1st defendant. At the time of the plaintiffs' joint possession, the land was un-surveyed and un-



alienated government land. It was the 2 plaintiffs who invited the 1st defendant in or around 2013 to take possession of the adjacent land in exchange for various monetary benefits which resulted in the recording of the transfer document. When the land was later surveyed and adjudicated upon by the County Government in 2015 and 2016 2 plots became of the survey: 186A and 187A. After the survey, the 1st defendant was issued with an allotment letter together with a beacon certificate for plot 186A. There is no evidence to show that the plaintiffs collected their allotment letter and beacon certificate for 187A.

33 In the court's view, this scenario called into play the law applicable for acquisition of government land which was then vested in the County of Town Councils. In the present case, the subject land was trust land vested in the then Maralal Town Council which was empowered to allot plots to local residents for various purposes. This was relevant because the plaintiffs claimed that their possession started in 2000 having allegedly acquired the same from the larger Mathenge family who had occupied the plot from 1965. The 1st defendant came into view around 2013/2014.

34 The general rule on land transactions is to be found in section 3(3) of the *Law of Contract Act* cap 23 which provides as follows:

3. Certain contracts to be in writing.

(1)...

(2)...

(3). No suit shall be brought upon a contract for the disposition of an interest in land unless

(a) the contract upon which the suit is founded –

(i). is in writing

(ii). Is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party.

35 In the present case, no express sale agreement was recorded. Instead, as testified by both sides of the contest, the parties recorded a "Formal Transfer" which they regarded as serving twin purposes: sale and transfer. The common and expressed intention of the parties was clear: to have the 1st defendant acquire a 50x100 feet un-surveyed and unregistered plot which was partly being occupied by the plaintiffs in exchange for monetary extensions. In the court's view, the maxim equity considers that which ought to be done as done was applicable. The Court of Appeal dealt with a similar principle in *KIPLAGAT KOTUT -V- ROSE JEBOR KIPNGOK (Civil Appeal 31 of 2015)* (2019)KECA 921 KLR (AM Githinji & A. Mohamed JJ.A.):

30. In the instant appeal, what was the intention of the parties? The appellant and respondent entered into a sale agreement over the suit property; the purchase price was paid; the respondent put the appellant into possession of the property; both parties acted on the sale agreement and altered their respective positions. As correctly held by the trial judge, the respondent cannot renege on the agreement; the doctrine of proprietary estoppel bars her from doing so. In our considered view, the intention of the parties was to buy and sell the suit property. The appellant was to purchase, the respondent was to sell. Inescapably, the facts of this case bring to fore the maxim that equity treats as done that which ought to be done. The function of the maxim was given in *Re Anstis* [1886] 31 Ch D 596 where it was stated if parties have entered into a contract that is specifically enforceable, equity will treat the contract as



having been performed. The maxim is often relevant where land is transferred between parties but formalities have not been observed. In such a situation, the legal title will remain with the vendor and the purchaser will have a recognized title in equity. Thus, the vendor is holding the property on a constructive trust for the purchaser.”

36 It is the finding of this Honourable Court that in the light of section 3(3) of the Law of Contract and the maxim of equity expressed above, the formal transfer document served the intended twin purpose of sale agreement and a transfer document. This brought into question the plaintiffs denial of their receipt of Kshs 300, 000 as consideration.

37 On this issue, the averment by the plaintiffs that they received no cash is rejected because the transfer document spoke clearly and directly about the payment of the Kshs 300, 000 as consideration. It is a well settled principle of law that oral extrinsic evidence shall not be admitted to defeat the clear terms of a written document. This was discussed in This rule was considered in the authority of UNIVERSAL EDUCATION TRUST FUND –v- MONICA CHOPETA (2012)eKLR the High Court had this to say:

“It is also clear that the defendant cannot seek to present extrinsic evidence when her relationship with the plaintiff is already spelt out in the written agreement. In the book by Treitel entitled ‘Law of Contract’, the learned author discussed parole evidence rule as follows:

38 The parole evidence rule states that evidence cannot be admitted (or even if admitted cannot be used) to add to, vary or contradict a written contract. In relation to contracts, the rule means that, where a contract has been reduced to writing, neither party can rely on extrinsic terms alleged to have been agreed i.e. on evidence not contained in the document, although the rule is generally stated as applying to parole evidence, it applies just as much as to other forms of extrinsic evidence. Of course, if a contractual document incorporates another document by reference, evidence of the second document is admissible, but the rule prevents a party from relying on evidence that is extrinsic to both documents.”

The learned Judge went on to hold:

The defendant is forbidden by that rule from introducing, as she does in her defence and counterclaim, verbal representation to alter written agreement. This was also the holding in MUTHUURI –V- NATIONAL INDUSTRIAL CREDIT BANK LTD (2003)KLR 145.”

On this legal principle, the Court of Appeal in the authority of 748 Air Services Limited v Theuri Munyi [2017] KECA 419 (KLR) (J Wakiaga, RN Nambuye, GK Oenga JJ.A.) held as follows:

We are well aware of the parole evidence rule which prohibits the adduction of extrinsic evidence to alter the terms of a written contract between parties. In the case of Prudential Assurance Company of Kenya Ltd vs Jutley & Another [2005] eKLR the following passage from Odgers Construction of Deeds and Statutes (5th Edn) at p.106 was cited stating thus:

“It is a familiar rule of law that no parole evidence is admissible to contradict, vary or alter the terms of the deed or any written instrument. The rule applies as well to deeds as to contracts in writing. Although the rule is expressed to relate to parole evidence, it does in fact apply to all forms of extrinsic evidence”.



In Halsbury's Laws of England (4th Edn) vol. 9 (1) at SUBPARA 622, it is further stated as follows in respect of the rule:

“Where the intention of parties has in fact been reduced to writing, under the so called parole evidence rule, it is generally not permissible to adduce extrinsic evidence, whether oral or written, either to show the intention, or to contradict, vary or add to the terms of the document, including implied terms”.

39 It appears that this money (Kshs 300, 000) was sufficient inducement to the plaintiffs not to claim the un-surveyed and unregistered land although in the minds of the parties the plaintiffs were selling the unregistered land which they were then in active possession. Whatever the case, the plaintiffs had no stronger capacity to transact beyond that of an active occupier and possessor without legal documentation.

40 On what was the related applicable law for transacting in government land, this Honourable Court obtained guidance from the authority of *Ali Mohamed Dagane (Granted Power of Attorney by Abdullahi Muhumed Dagane, suing on behalf of the Estate of Mohamed Haji Dagane) versus Hakar Abshir, Abdullahi Ibrahim Gure, Shaye Abdi Kusow & Sambul Ali Bulugho* [2021] KEELC 3604 (KLR) (E.C. Cherono j.) where the learned Judge extensively explained the process for allotment of town plots in the pre-2010 Constitutional dispensation:

41 This court in the case of *Mako Abdi Dolal v Ali Duane & 2 others* [2019] eKLR noted that prior to the promulgation of the 2010 Constitution and the 2012 amendments to the body of Land Laws in Kenya, disposition of government land was governed by the Government Lands Act (Repealed). Section 4 of the Act provided as follows:

“All conveyances, leases and licenses of or for the occupation of Government Lands, and all proceedings, notices and documents under this Act, made, taken, issued or drawn, shall serve as otherwise provided, be deemed to be made, taken, issued or drawn under and subject to the provisions of this Act.”

42 Power to dispose of public land was vested in two entities: The President and the Commissioner of Lands, under Sections 3 and 9 respectively. The process of the disposition of government land followed the following procedure: First, the respective municipal council in which the land to be disposed was situate had the mandate of advising the Commissioner of Lands on which portions of land could be disposed. This step would have required the responsible council to visit the area or to carry out a fact-finding mission to satisfy itself that the land was first of all government land and second that it was indeed available for disposition. See *Harison Mwangi Nyota v Naivasha Municipal Council & 20 others* [2019] eKLR

“...The question that the plaintiff seemed to raise is what role the Municipal Council of Naivasha had in the issuance of allotment letters to the defendants in 1992. According to DW1, an employee of the 1st defendant, the local authority (1st defendant) has to recommend that the land is available for allocation before an allotment letter can issue. DW13 also told the court that the Council oversees all developments in its jurisdiction and allocates land on advisory basis for the Commissioner. It seems that even if the 1st defendant issued the letters dated 1121992, it was mere advisory to the Commissioner of Lands. The allotment of the land had to be ratified by the Commissioner for Lands. It is obvious even from the communication between the Municipal Council and the Office of the Commissioner of



Lands that the Council played an important role in identifying what land was available for purposes of alienation.”

- 43 The second step would be for the part development plan to be drawn up and approved by the Commissioner of Lands. See *Nelson Kazungu Chai & 9 Others vs. Pwani University College* (2014) eKLR

“It is trite law that under the repealed Government Lands Act, a Part Development Plan must be drawn and approved by the Commissioner of Lands or the Minister of Lands before any unalienated Government land could be allocated. After a Part Development Plan (PDP) has been drawn, a letter of allotment based on the approved Part Development Plan is then issued to the allottee.”

- 44 The third step involved the determination of certain matters by the Commissioner of Lands which matters are listed under Section 11 of the Government Lands Act (Repealed). The matters to be determined include the upset price at which the lease of the plot would be sold, the conditions to be inserted into the lease; the determination of any attaching special covenants and the period into which the term is to be divided and the annual rent payable in respect of each period.

- 45 The fourth step would be for the gazette of the plots to be sold, at least four weeks prior to the sale of the plots by auction under Section 13 of the Government Lands Act (Repealed). The notice was required to indicate the number of plots situate in an area; the upset price in respect of every plot; the term of the lease and rent payable, building conditions and any attaching special covenants.

- 46 The fifth step would be for the sale of the plots by public auction to the highest bidder. Section 15 of the Government Lands Act (Repealed).

- 47 The sixth step would be for the issuance of an allotment letter to the allottee. An allotment letter has been held not to be capable of conferring an interest in land, being nothing more than an offer, awaiting the fulfilment of the conditions stipulated therein by the offeree. See the decisions in: *Gladys Wanjiru Ngacha v Teresa Chepsaat & 4 others* 1821992 (Nyeri); and in *Dr. Joseph N.K. Arap Ng'ok v Justice Moijo Ole Keiyua & 4 others* C.A.601997 where the Court of Appeal held as follows:

“It has been held severally that a letter of allotment per se is nothing but invitation to treat. It does not constitute a contract between the offerer and the offeree and does not confer interest in land at all. It cannot thus be used to defeat a title of a person who is the registered proprietor of the said parcel of land.”

- 48 In order for an allotment letter to become operative, the allottee was required to comply with the conditions set out therein including the payment of stand premium and ground rent within the prescribed period. See the decision in: *Mbau Saw Mills Ltd v Attorney General for and on behalf of the Commissioner of Lands & 2 others* [2014] eKLR

“I have considered the evidence on record and the submission of the parties and do find that a letter of allotment was issued to Mr. Joseph K. Mugambi on 21101971 with a condition to accept the offer within 30 days. He did not do so and thereafter the offer lapsed 30 days after it was made in accordance with the allotment letter. Having failed to accept the offer as stipulated in the letter of allotment Mr. J.K. Mugambi did not acquire interest in the unsurveyed lorry depot and therefore had no interest to transfer to the plaintiff. This court holds that a letter of allotment does not confer any property rights to a person unless there is acceptance and payment of the stand premium and ground rent. In the letter dated 1761988 which was written about 17 years after the allotment letter was issued, the Commissioner of



Lands confirmed that the plot was allocated to Joseph M. Mugambi in 1971 for lorry depot. However, the plot had neither been paid for nor an acceptance of the offer in the allotment letter made. The implication of this letter was that the allottee had not complied with the terms of the allotment letter and therefore the offer had lapsed. The offer having lapsed, the allottee Mr. Joseph M. Mugambi did not have any interest to transfer to the plaintiff and therefore all transactions between the allottee and the plaintiff were a nullity in law.”

49 The allotment letter also must have attached to it a part development plan (PDP). See the decision in *African Line Transport Co. Ltd Vs The Hon .AG, Mombasa HCCC No.276 of 2013* where Njagi J held as follows:

“...Secondly, all the defence witnesses were unanimous that in the normal course of events, planning comes first, then surveying follows. A letter of allotment is invariably accompanied by a PDP with a definite number.”

50 And again, in *Nelson Kazungu Chai & 9 Others vs. Pwani University College (2014) eKLR*

“Worth noting as well is that no Part Development Plan was produced to back the Appellants’ claim that due process had been followed as alleged.”

51 The seventh step, which comes after the allottee has complied with the conditions set out in the allotment letter is the cadastral survey, its authentication and approval by the Director of Surveys and the issuance of a beacon certificate. The survey process precipitates the issuance of land reference numbers and finally the issuance of a certificate of lease. *Nelson Kazungu Chai & 9 Others vs. Pwani University College (2014) eKLR* the court held as follows:

‘It is only after the issuance of the letter of allotment, and the compliance of the terms therein, that a cadastral survey can be conducted for the purpose of issuance of a Certificate of Lease. This procedural survey was confirmed by the Surveyor, PW3. The process was also reinstated in the case of *African Line Transport Co. Ltd Vs The Hon .AG, Mombasa HCCC No.276 of 2013* where Njagi J held as follows:

52 Secondly, all the defence witnesses were unanimous that in the normal course of events, planning comes first, then surveying follows. A letter of allotment is invariably accompanied by a PDP with a definite number. These are then taken to the department of survey, who undertake the surveying. Once the surveying is complete, it is then referred to the Director of Surveys for authentication and approval. Thereafter, a land reference number is issued in respect of the plot.”

54 Having evaluated in detail the necessary steps to be followed, it is emergent that a litigant basing their interest in land on the foundation of an allotment letter must provide the following proof: First, the allotment letter from the Commissioner of Lands; Secondly, and attached to the allotment letter, a part development plan; Thirdly, proof that they complied with the conditions set out in the allotment letter, primarily that the stand premium and ground rent were paid, within the specified timeline. It would also help a litigant’s case, although this may not be mandatory based on the stage of the transaction, to have a certified beacon certificate.”

55 From the foregoing legal principles, it is clear that the plaintiffs did not follow the procedures to enable them acquire legal ownership of 186A but on the other hand the 1st defendant complied with the laid down procedures and acquired plot 186A with the participation of the 2 plaintiffs and the court government. The outcome of the survey and beaconing exercises gave rise to 2 plots: plot 186A for the 1st defendant and plot 187A for the joint plaintiffs.



56 In the result, the court finds as a fact that the 1st defendant acquired plot 186A legally and procedurally from the County Government which was the overall custodian of the land. He came into possession of the land at the invitation of the plaintiffs and thereafter complied with the process for acquisition of government land. When the survey was completed, he was issued with the allotment letter by the County Govt. on the strength of the intention by the plaintiffs that the 1st defendant was the legitimate owner of the adjacent land which later became 186A. As both plaintiffs admitted during cross-examinations, the plaintiffs recorded the direct transfer document in favour of the 1st defendant.

CONCLUSION

57 The result of the foregoing analysis is that the plaintiffs have failed to prove their legitimate claim over plot 186A. The evidence strongly supports the ownership of Plot 187A by the 2 plaintiffs while the 1st defendant is the true owner of plot 186A.

In the result, the court makes the following final orders:

1. The plaintiffs' suit claiming plot 186A is dismissed with costs for lack of proof of ownership and for lack of proof of trespass by the 1st defendant into the plaintiffs' ownership.
2. Consequent upon order (1) above, a declaration be and is hereby issued that the plaintiffs Boniface Mikwa and Teresa Aruth Loturo are the legal allottees and joint owners of plot 187A which is adjacent to plot 186A.
3. A declaration be and is hereby issued that the 1st defendant Bernard Nderitu Wambugu is the lawful allottee and owner of plot 186A which is adjacent to 186A as per the approved Part Development Plan.
4. Consequent to orders 2 and 3 above, a permanent injunction be and is hereby issued in favour of the plaintiffs Boniface and Teresa against the 1st defendant restraining the 1st defendant herein either by himself, his servants, employees, agents and/or any persons working under their instructions from entering, trespassing, depositing or storing or placing construction materials, dealing with and/or any way interfering with the Plaintiffs' quiet enjoyment, possession and/or ownership of the suit property being Residential Plot 187A Chang'aa area as per the approved Part Development Plan located at Maralal township within Samburu County.
5. Concomitant with orders 2, 3 and 4 above, a permanent injunction be and is hereby issued in favour of the 1st defendant Bernard Nderitu against the joint Plaintiffs' Boniface and Teresa restraining the joint Plaintiffs Boniface and Teresa herein either by themselves, their servants, employees, agents and/or any persons working under their instructions from entering, trespassing, depositing or storing or placing construction materials, dealing with and/or any way interfering with the Plaintiffs' quiet enjoyment, possession and/or ownership of the suit property being Residential Plot 186A Chang'aa area as per the approved Part Development Plan located at Maralal township within Samburu County.
6. Costs and interest of the suit awarded to the 1st defendant who successfully proved his counterclaim.

It is so ordered. Right of appeal is 30 days.

DATED, READ AND SIGNED AT MARALAL THIS 15TH DAY OF NOVEMBER, 2024

HON.T.A. SITATI



SENIOR PRINCIPAL MAGISTRATE

Maralal Law Courts

Present

Leparsanti Court Assistant

Plaintiffs

1st Defendant

Mr. Kihoro Kimani Adv For The 1st Defendant

