

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELCLC NO. E153 OF 2024

HANNINGTON JARED SUCHI

PLAINTIFF

VERSUS

DAVID MAINA GATHINJI

DEFENDANT

JUDGEMENT

1. The Plaintiff commenced this suit vide a plaint dated 5th April 2024 and amended pursuant to a Consent Order issued on 2nd October 2025. His case is that he is the registered proprietor of **Nairobi/Block 187/3204**, formerly **Kayole Plot Number A4-618**, hereinafter referred to as the 'suit plot', a parcel he initially let to the Defendant who later filed **CMCC No. 3089 of 2006**, claiming that he had bought it from him. He averred that the said case was dismissed on 30th June 2015 but the

Defendant is still in possession and occupation of the suit plot as a trespasser.

2. He prays for judgement against the Defendant for:

a) An order of ejectment evicting and physically removing the Defendant from the property known as Nairobi/Block 187/3204 which was formerly Kayole Plot Number A4-618.

b) An order for granting the Plaintiff mesne profits at the rate of kshs.10, 000/= per month from 1st July 2015 until the Defendant's ejectment from the suit property.

c) Costs of this suit.

d) Interest on any sum found due at court rates.

e) Any other or further relief deemed appropriate.

3. The Defendant filed a statement of defence in which he contended that he is the registered proprietor of the parcel in dispute, which he purchased from the Plaintiff at Kshs. 880,000/= between 2005 to 2012.

4. The matter proceeded for hearing where each party called one witness.

Evidence of the Plaintiff

5. The Plaintiff testified as PW1. He stated that he owns the suit plot and that he initially entered into a Tenancy Agreement with the Defendant who in the course of the year 2006 falsely claimed that he had purchased it from him. To this end, the Defendant instituted **Nairobi CMCC No. 3089 of 2006** against him seeking to compel him to transfer the parcel to him but the suit was dismissed vide judgment dated 30th June 2015. He averred that the Plaintiff was paying Kshs. 10,000/= per month in rent but he now occupies the suit plot without paying and he has refused to vacate voluntarily. He produced his list and bundle of documents dated 5th April 2024 as P. Exhibit No. 1-7.

6. During cross-examination, PW1 acknowledged that he initially engaged the Defendant when he rented a space developed with temporary structures on the suit plot, which he used to

run a school. On the sale agreements allegedly executed between the Defendant and himself, he explained that they lapsed before the Defendant could honour them and reiterated that in **CMCC No. 3089 of 2006**, the Court acknowledged him as owner of suit plot. He also revealed that he processed a Lease to the plot.

7. In re-examination, PW1 pointed out that he did not execute a transfer to the Defendant.

Evidence of the Defendant

8. The Defendant testified as DW1. He explained that his relationship with the Plaintiff started in 2002 when they entered into a Tenancy Agreement dated 14th March 2002 through which he became the Plaintiff's tenant, paying rent for the use of four (4) temporary structures constructed by the Plaintiff as classrooms to be used by his students, since he was running a school called Blue Sky Academy on the adjacent parcel.

9. It was his testimony that, after several discussions, he entered into an agreement for sale with the Plaintiff in 2005 in which it was agreed that he would purchase the suit plot at Kshs.400,000/-. Further, that the said agreement was varied by a subsequent sale agreement in which they agreed that the purchase price would be kshs.700,000/= . He claimed that in total, he has paid the Plaintiff Kshs. 880,0000/= and has invested heavily on the said plot as per his valuation report.
10. He testified that the Plaintiff allowed him to pay any outstanding charges on the suit plot to Nairobi City County and subsequently obtain registration in his name and in 2017, he was issued with a Lease, and used the said suit plot as security to take a loan.
11. He produced his list and bundle of documents dated 16th August 2024 as D. Exhibit 1-19.
12. In cross-examination, DW1 stated that he complied with the terms of the first sale agreement between them dated 11th August 2010 and the second one of 14th March 2005, but the

Plaintiff wrote him a letter dated 29th March 2006 (D. Ex 3) through his lawyers rescinding the said agreements and refused to receive his cheques. He contended that as a consequence, he sued the Plaintiff in **CMCC No. 3089 of 2006** but the case was dismissed.

13. He pointed out that on the ground, he has four (4) plots which refer to the same number and that he adhered to all the channels to acquire the suit plot and even went to Nairobi City County who certified the suit plot as his.
14. Parties thereafter filed written submissions.

Submissions

15. The Plaintiff submitted that under section 26 of the Land Registration Act, his Certificate of Title is conclusive evidence of his proprietorship of the suit plot, unless there is evidence of fraud/illegality and the Defendant did not anchor his case on those grounds. He argued that the Lease presented by the Defendant is a forgery because it is not supported by legitimate documents including evidence of a valid sale

agreement and evidence of payment of the purchase price. He urged the Court to award mesne profits of Kshs.10, 000/= per month since the Defendant has been in unlawful occupation as a trespasser from 30th June 2025.

16. The Defendant file his written submissions on 12th February, 2026 without leave of Court. However, in the interest of justice, I have considered them. The Defendant in his submissions contends that he is the registered proprietor of the suit plot and has a Lease including absolute rights over it. He insists that the Plaintiff is not entitled to the Orders as sought in the Plaint as he failed to discharge the burden of proof to confirm ownership of the suit plot. Further, that eviction cannot be granted without proof of legal rights. To buttress his averments, he relied on the case of **Gakenya Ngumi v Erick Kotut & 4 Others (2022) eKLR.**

Analysis and Determination

17. Upon consideration of the pleadings, testimonies of the witnesses, exhibits and rivalling submissions, the following are the issues for determination:

- **Who between the Plaintiff and the Defendant has a legitimate claim to Nairobi/Block 187/3204, formerly Kayole Plot Number A4-618.**
- **Whether the Defendant's continued occupation of the suit plot amounts to trespass.**
- **Whether the Plaintiff is entitled to mesne profits.**

18. This Court discerns that the dispute herein commenced on 30th June 2015 after judgement was issued in **CMCC No. 3089 of 2006** dismissing a suit filed by the Defendant herein, who had sued the Plaintiff herein, seeking specific performance of sale agreements dated 11th August 2010, 14th March 2005 and 22nd February 2006 on the basis that he frustrated those agreements. After delivery of the impugned judgement, the Defendant refused to vacate the suit plot and seeks to rely on the aforementioned agreements to claim

ownership of the said suit plot, for which he now has an alleged Lease registered as **LR 11344/1165**.

19. On his part, the Plaintiff contended that he was allocated **Kayole Plot Number A4-618** and that he has since been issued with a Certificate of Lease, being **Nairobi/Block 187/3204** and seeks for the Court to declare the Defendant a trespasser and to evict him.

20. During cross examination PW1 confirmed that he initially engaged the Defendant when he rented a space developed with temporary structures on the suit plot, which he used to run a school. PW1 explained that they entered into Sale Agreements with the Defendant which lapsed before the Defendant could honour them. It emerged that the Defendant had actually sued the Plaintiff in **Nairobi CMCC No. 3089 of 2006** wherein the said Court acknowledged the Plaintiff as owner of suit plot. Which then brings me to the question that if the Plaintiff herein was acknowledged as owner of suit plot,

how then did the Defendant manage to procure a Lease as claimed.

21. DW1 who was the Defendant insisted that he has a Lease over the suit plot, which he purchased from the Plaintiff. During cross examination, he was emphatic that he has a title to the suit plot, which he has developed.

22. In essence, the Court has been presented with two titles bearing different registration numbers, both of which are alleged to relate to the suit plot. Each party has given an account of how their respective Lease was acquired. The Court is therefore called upon to interrogate the evidence on record and determine which of the two Leases is genuine, as only one lawful title can subsist in respect of the suit plot. In the foregoing, the Court will then need to interrogate the root of both titles.

23. On root of title, Section 26 of the Land Registration Act provides that:

“(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except

(a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

24. On root of title, the Court of Appeal held as follows in the case of *Munyu Maina v Hiram Gathiha Maina [2013] eKLR;*

“We state that when a registered proprietor root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in

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challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

25. Further, the Supreme Court held as follows in **Dina Management Limited v County Government of Mombasa & 5 others [2023] KESC 30 (KLR):**

“Indeed, the title or lease is an end product of a process. If the process that was followed prior to issuance of the title did not comply with the law, then such a title cannot be held as indefeasible...”

26. On perusal of the exhibits tendered by the respective parties herein, I note vide a letter dated the 25th April, 2015 from the Nairobi City County, it confirmed that as per their records, the Plaintiff was the owner of the suit plot A4 - 618 Kayole. Further, there is a Lease registered on the 1st November,

2020 and a Certificate of Lease dated 1st November, 2020 in the Plaintiff's name.

27. The Defendant did not provide a proper explanation on how he managed to process a Lease and title for the suit plot which he had never been allocated. Even though the Defendant contends that he purchased the suit plot, paid the purchase price of Kshs.880,000, is in possession thereof and has developed it, hence he is entitled to it, the Court has to decipher if he legally acquired his Lease.

28. It is trite that for a party to claim ownership of land, it has to demonstrate that the root of his title is unfettered. At this juncture, it will be important to decipher whether the Plaintiff or Defendant legally procured their respective titles to the suit plot. Looking at the evidence presented by each party, it is clear that the Defendant never had a Letter of Allotment for the suit plot. Further, that even though there were Sale Agreements between the Plaintiff and Defendant, the same were rescinded on the 24th March, 2006. DW1 even admitted

that after the rescinding of the Sale Agreements, the Plaintiff even refused to receive his cheques. I note the Defendant had also been paying rent to the Plaintiff for the demised premises and complained of the arbitrary increment of the said rent when he sued the Plaintiff herein in the aforementioned suit. It is hence intriguing on how he managed to procure his alleged Lease without involving the Plaintiff.

29. As for the Plaintiff, he managed to demonstrate that he was the original allottee of the suit plot. It is worth noting that even the trial Magistrate in the aforementioned Civil Case which was instituted by the Defendant herein against the Plaintiff, actually confirmed that the Plaintiff is the owner of the suit plot. The Defendant produced a Lease dated 11th October, 2017 with the Nairobi County Government and what I wonder is how he managed to procure the same without an Allotment letter.

30. In the case of **Ali Gadaffi & another v Francis Muhia Mutungu & 2 others [2017] eKLR** Olola J held as follows:

'where land has been allocated, the same land cannot be reallocated unless the first allocation is validly and lawfully cancelled. There can never be any allocation unless the land is an unalienated land. Consequently, when the Appellant was allocated the land on 27th April 1998, he acquired a legal interest which could not and was not defeated by the purported subsequent allocation to the 2nd Respondent, on 6th May 1998. As at 27th April 1998, there was a commitment made on Plot 96. Kaloleni and it was therefore not available to the 2nd respondent for allotment. As Warsame J (as he then was) observed in Rukiya Ali Mohamed (Supra), the authority who issued the 2nd Respondent's letter of allotment had no such powers to grant the same. It was an illegal transaction, it amounts to no allotment and in total there was no benefit, no interest, and no legal right which could be derived from an act which amounted to nothing.' Emphasis Mine

31. While in the case of **Rukaya Ali Mohamed Versus David Gikonyo Nambacha & Another (Kisumu HCCS No. 9 of 2009)** Warsame J (as he then was) held that:

“Once (an) allotment letter is issued and the allottee meets the conditions therein, the land in question is no longer available for allotment since a letter of allotment confers (an) absolute right of ownership or proprietorship unless it is challenged by the allotting authority or is acquired through fraud, mistake or misrepresentation, or that the allotment was outrightly illegal or it was against the public interest.” Emphasis Mine

32. See also the case of **Caroget Investment Limited V Aster Holdings Limited & 4 others [2019] eKLR.**

33. Based on the facts before me while associating myself with the decisions cited above, I find that once the suit plot was allotted to the Plaintiff, the said plot was no longer available for alienation and allocation to the Defendant unless the previous Letter of Allotment issued to the Plaintiff was

expressly and legally cancelled and the monies paid refunded to him, or unless the Plaintiff effected a Transfer to the Defendant, which has not been demonstrated. In the foregoing, I hold that the Plaintiff indeed held a registrable interest over the suit plot.

34. The next point we need to deal with is if the Plaintiff held a registrable interest on the suit plot, then can the Defendant's Lease and Certificate of Lease be deemed as valid. Insofar as the Defendant was issued with a Certificate of Lease for the suit plot on 11th October, 2017, but having failed to demonstrate how he acquired it without valid Letters of Allotment nor transfer from the Plaintiff to him, nor proof that the Plaintiff's Letters of Allotment had been cancelled.

35. It is my considered view that by virtue of the Plaintiff holding the Letters of Allotment, this indeed confirmed his proprietary rights over the suit plot in accordance with the provisions of Section 7 (a) of the Land Act, which provides that land can be acquired through allocation. Further, on perusal of the Deed

Plan which the Defendant produced as an Exhibit, it is actually dated 10th August, 2020 which is post the date of the Defendant's Lease. Since I have already held that the suit plot was no longer available for allocation to the Defendant, then I find that the Defendant's title cannot stand since its root is fettered. I hence find that the Plaintiff has a legitimate claim to Nairobi/Block 187/3204, formerly Kayole Plot Number A4-618.

36. On the issue of rectification of register in respect to the Defendant's illegally acquired Certificate of Lease I wish to make reference to section 80 of the Land Registration Act that provides thus:

'(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified to affect the title of a proprietor who is in possession and

had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.'

37. In the case of **Ali Wanje Ziro v Abdulbasit Abeid Said & another [2022] eKLR** the Judge held that:

'The law is clear that, the Certificate of Title issued by the Registrar upon registration shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge except - On the ground of fraud or misrepresentation to which the person is proved to be a party; or Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.'

38. Based on the facts as presented while relying on the legal provisions cited and decisions quoted, I find that the Plaintiff

is indeed the owner of the suit plot and will proceed to uphold his Certificate of Lease and Lease Document. I find that the Defendant's Lease is not legitimate and will proceed to cancel it as it was acquired unprocedurally and illegally. I further find that the Defendant's continued occupation of the demised premises without a valid Tenancy Agreement, noting that the Sale Agreements had been rescinded, actually amounts to continued trespass.

Whether the Plaintiff is entitled to mesne profits.

- 39.** The Plaintiff has sought for mesne profits at the rate of Kshs. 10,000/= per month from 1st July, 2015, from the Defendant, for the continued occupation of the demised premises.
- 40.** On claim for mesne profits, Section 2 of the Civil Procedure Act defines Mesne profits as follows:

“Those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits,

but does not include profits due to improvements made by the person in wrongful possession”

41. In Rajan Shah T/A Rajan S. Shah & Partners v Bipin P.

Shah [2016] eKLR, the Court stated as follows:

“As a rule, therefore, liability to pay mesne profits goes with actual possession of the land. That is to say, generally, the person in wrongful possession and enjoyment of the immovable property is liable for mesne profits...” Emphasis added

42. DW1 confirmed that initially they entered into a Tenancy Agreement dated 14th March 2002 through which he became the Plaintiff’s tenant, paying rent for the use of four (4) temporary structures constructed by the Plaintiff as classrooms to be used by his students. DW1 claimed that subsequently, they entered into an agreement for sale with the Plaintiff in 2005 in which it was agreed that he would purchase the suit plot at Kshs. 400, 000/-. Further, that the said agreement was varied by a subsequent sale agreement

in which they agreed that the purchase price would be kshs.700,000/=. He claimed that in total, he has paid the Plaintiff Kshs.880,0000/= and has invested heavily on the plot. From the testimony before Court, it emerges that it is the Defendant who is on the suit plot. Further, from the finding in the aforementioned related Civil Case, the Court while dismissing the Defendant's suit, found that the increment of rent to Kshs.10,000/= per month for the demised premises was not arbitrary. Since the Defendant never filed a Counterclaim to claim that the purchase price he paid should be offset against the rent he has failed to pay, I will be unable to do so. I however opine that the Defendant is free to file a suit to claim the refund of the monies he paid the Plaintiff.

43. In the foregoing, I find that the Plaintiff has proved his claim for mesne profits and will direct the Defendant to pay the

Plaintiff mesne profits of Kshs.10,000/= per month from the 1st July, 2015 to date, until payment in full.

44. Who should bear the costs of the suit? Since the Plaintiff is the inconvenienced party, I find that he is entitled to costs.

45. It is against the foregoing that I find that the Plaintiff has proved his case on a balance of probability and will proceed to enter judgement in his favour and make the following orders:

a. An order of ejectment is hereby issued evicting and physically removing the Defendant from the property known as Nairobi/Block 187/3204 which was formerly Kayole Plot Number A4-618, after Ninety (90) days from the date hereof.

b. An order be and is hereby issued granting the Plaintiff mesne profits at the rate of kshs.10,000/= per month from 1st July 2015 until the Defendant's ejectment from the suit property.

c. Interest on (b) above at court rates from the date of

this judgement until payment in full.
d. Costs of the suit is awarded to the Plaintiff.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS
16TH DAY OF FEBRUARY, 2026**

CHRISTINE OCHIENG
JUDGE

In the presence of:

Ombete for Plaintiff

Ms Mugo for Defendant

Court Assistant: Joan