IN THE COURT OF APPEAL AT NAIROBI

(CORAM: W. KARANJA, GATEMBU & KORIR, JJ.A.)

CIVIL APPEAL NO. 171 OF 2018

BETWEEN

JOHN MWANGI KING'ORI……APPELLANT

AND

HUMPHREY NJURU KARANJA……1ST RESPONDENT
COUNTY GOVERNMENT OF NAIROBI……2ND RESPONDENT

(An Appeal against the Judgment and Decree of the Environment and Land Court at Nairobi ***(B.M.EBOSO, J.)*** *dated 6th April 2018 in* ***ELC Cause No. 193 of 2007)***

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JUDGMENT OF THE COURT

1. The 1st respondent, Humphrey Njuru Karanja, was the plaintiff in Nairobi **ELC Civil Case No. 193 of 2007**. By a plaint dated 25th June 2007, amended on 18th November 2009 and re-amended on 22nd November 2013, the 1st respondent sued John Mwangi King'ori and the County Government of Nairobi (the appellant and 2nd respondent respectively), seeking, *inter alia,* the following orders:

   a) a declaration that Plot Number L.R. No. 209/4401/717 (formerly

   L.R. No. 209/4401/742) Makadara Estate Nairobi belongs to the 1st respondent absolutely;

b) a permanent injunction restraining the appellant, his agents and/or servants from dealing in any way with the suit premises or from continuing with any construction of any erections, buildings or erections of any structures on the said piece of land, at all from preventing the 1st respondent from entering using and/or quiet enjoyment of the suit premises in any way;

c) an order for the demolition and removal from the suit premises by the appellant of all buildings, building materials and/or other constructions thereon at the expense of the appellant;

d) an award of general damages against the appellant for trespass of land, interference with the landscape that forms the suit premises and putting the suit premises into the same condition which it was before 1997 when he was given notice together with interests at court rates;

e) exemplary damages against the appellant together with interests at court rates;

f) Mesne profits against the appellant from 1997 until the final determination of the suit; and

g) an award of general damages against the 2nd respondent for the fraud, mistake and/or misrepresentation together with court rates and costs of the suit plus interest thereon at court rates.

2. By the re-amended plaint dated 22nd November 2013, the 1st respondent stated that on 17th June 1980, he purchased the suit property for a consideration of Kshs.38,000.00 from one Crispus Nduki Macharia (deceased) to whom the 2nd respondent had

allotted the suit property on 23rd November 1978, thereby becoming

the beneficial owner and at all times was in possession and occupation thereof. That he was issued with a lease dated 14th May 1999 from the 2nd respondent.

3. That in the year 1997, the appellant entered the suit property without the 1st respondent's consent and laid claim to the property. Following this the 2nd respondent on 21st October 1997 issued the appellant with a twenty-four hours' notice requiring him to demolish the structures erected on the suit property as they were unauthorised and not in accordance with the building plans issued to the 1st respondent. Further, that the 1st respondent gave the appellant notice to stop constructing on the suit property, yet despite these notices, the appellant continued to construct a commercial building on the suit property and blocked the 1st respondent's access to the same.

4. The basis of the appellant's claim was that the appellant had entered into the suit property without his knowledge and/or consent and constructed buildings and other structures on the suit property and has wrongfully remained in possession. It was the 1st respondent's further claim that the appellant was in the circumstances a trespasser on the suit property.

5. The 1st respondent filed a defence dated 19th July 2007, amended on 10th May 2010 and later filed a re-amended defence and

counter-claim on 3rd May 2012 in which he denied the allegations levelled against him and denied that the deceased transferred the suit property to the 1st respondent or that the 1st respondent took possession of the said property and put him to strict proof; further and in the alternative, the appellant stated that if any allocation, sale, transfer or registration took place, which was denied, that such allocation, sale, transfer or registration were unlawful and illegal.

6. According to the appellant, he was allocated L.R. No. 209/4401/742 Makadara on 5th December 1996 by the 2nd respondent and that he duly paid the rent and stand premium as demanded by the 2nd respondent; further that Plot 742 was sandwiched between Plots Nos. 741 and 743 and that he was also allocated L.R. No. 209/4401/741 and 743 by the 2nd respondent; further the appellant pleaded that he applied to the 2nd respondent for the amalgamation of L.R. Nos. 209/4401/741, 742 and 743 and that on 21st August 1998 the 2nd respondent approved the said amalgamation and he wrote to the Commissioner of Land to amend his records; he pleaded that out of the three amalgamated plots a new plot known as L.R. No. 209/4401/761 was born and that he developed the same as a single unit complex valued at Kshs.45,000,000. The appellant denied trespassing on the suit property.

7. In the counter-claim against the 1st respondent the appellant prayed for the cancellation of the register in respect of L.R. No. 209/4401/717(formerly L.R. No. 209/4401/742) and in the alternative, an indemnity against the 2nd respondent in the sum of Kshs.45,000,000 being the value of the subject plot and the complex erected thereon.

8. The 1st respondent in prosecuting his case at the Environment and Land Court (ELC) testified and called two witnesses. He stated that he bought L.R. No. 209/4401/171 from Crispin Nduki Macharia (deceased) who had been allocated the same by the 2nd respondent on 23rd November 1978. He stated that he entered into a sale agreement with the deceased on 17th June 1980 for a consideration of Kshs.38,000 which he paid in full and that he took possession of the suit land. He produced a receipt dated 22nd January 1979 bearing the sum of Kshs.8,828, being payment for the capital premium for the said plot as per the allotment letter. He testified that in 1999 the 2nd respondent issued him with a formal 99-year lease that was registered on 9th June 1999 as Title No. I.R. 80673. He testified that the appellant encroached onto the suit property and subsequently erected structures thereon.

9. In cross-examination, he informed the court that he became aware of the cancellation of the allotment letter issued to Crispin Nduki

Macharia (deceased) by the 2nd respondent in 2003. He stated that the fraud was against the 2nd respondent for allocating the same plot to two people while he has a Title for the plot. He stated that he was aware that the appellant had encroached on his plot in 1997/1998 which is in the middle of his two plots. He stated that when he bought the plot it was No. 742 but now it was L.R. 717 and that it is exactly the same plot given another name and description and is of the same size. He stated that according to the documents he was shown in court the plot was allocated to the appellant on 5th December 1996.

10. Esther Wanjuki Nduki (PW2) told the court that she was the wife of Charles Nduki also Crispin Nduki who died on 24th December 1987. She stated that she used to work with the 2nd respondent at the Public Health Department until 2003 when she retired. She stated that when the suit plot was allocated to her husband, he showed her the allotment letter, and also informed her when he sold the plot to the 1st respondent.

11. Moses Muriithi Njuguna (PW3) stated that he was a valuer. The testified that he went to Plot No. 717 and noted that there was a building on the plot which traversed other plots. It was his testimony that his instructions were to undertake an open market

value as an improved site and not the buildings and that he valued the plot as worth Kshs.5.6 million.

12. On his part, the appellant testified and called two witnesses. He told the court that the allocation of L.R. No. 209/4401/717 formerly known as L.R. No. 209/4401/742 to Crispin Nduki Macharia (deceased) was revoked on 14th February 1985 and that he was allocated L.R. No. 209/4401/742 by the 2nd respondent on 5th December 1996 which plot was sandwiched between plot 741 and 743 which were allocated to him. He stated that by his application to the 2nd respondent he caused the same to be amalgamated with two other pieces of land which the 2nd respondent had also allocated to him being L.R. No. 209/4401/716 and L.R. No. 209/4401/718 (formerly L.R. No. 209/4401/741 and

L.R. No. 209/4401/743. He stated that he was in possession of the three amalgamated pieces of land which had become L.R. No. 209/4401/761 after amalgamation and had erected permanent structures thereon.

13. On cross examination, the appellant stated that he was the Mayor of Nairobi City Council from 1994 to 1996 and before then, a councillor of the City Council from 1992. He stated that he started developing the plot in 1997 and he gave out the plans later because there was an existing development which was being amalgamated

with another plot. He stated that there were notices from the 2nd respondent to stop unauthorised construction, but he never received the notices as he had approved plans and that there was no need for the notices. He stated that the plans were approved in 1982 because there were three plots and that the allotment in 1996 was joined to another existing allotment and structures.

14. George Mathu testified as DW2. He stated that he was a valuation surveyor and that on 24th April 2012 he received instructions to carry out the valuation in respect of L.R. No. 209/4401/761; that he carried out the valuation and when on site there was a construction and the property was one plot. He stated that at the time the building was up to the 4th floor with walling and windows remaining to be installed. He stated that there was also a 5th floor under construction. He stated that the 1st and 2nd floors had some tenants and the 3rd floor was habitable. He stated that the valuation of the entire property including the unfinished portion was Kshs.45,000,000. He stated that the value of the land was Kshs.5,000,000 and the development was Kshs.40,000,000.

15. On cross-examination, he stated that when he went to the site, he had the amalgamation letter of the three plots and that he was given the allocation letters for plot 741 and 742 but that he did not have the allotment letter for the third plot.

16. John Mwangi Mwaniki (DW3), testified that he was at the time the Senior Land Surveyor in charge of verification of survey plans at the Ministry of Lands Nairobi. He told the court that L.R. No. 209/4401/761 was as a result of amalgamation of three plots being

L.R. Nos. 209/4401/716, 717 and 718. He stated that the amalgamation was achieved through a survey carried out by the City Council authentication in 2003. He stated that a survey was undertaken to amalgamate the 3 plots by the City Council Surveyor one Mr. J.O. Oyatta. He stated that the deed plan used for the amalgamated 3 plots being L.R. No. 209/4401/761 was deed plan No. 248120.

17. In cross-examination he stated that he had seen deed plan No.

212836 with respect to L.R. No. 209/4401/717 supporting a title in the name of Humphrey Karanja. He stated that he did not know in whose names plot 716 and 718 were registered to and it was only the 2nd respondent that could decide the registration status and, further, that it was the 2nd respondent that had asked that the 3 plots be amalgamated.

18. The witness clarified that as long as a deed plan is registered it cannot be cancelled and is still valid and that the deed plan for plot 717 was still valid. He stated that deed plan No. 212836 was still valid and the measurement can be determined from the deed

plan.

He stated that once a plot is amalgamated with others the remedy lies with the person who amalgamated the plots and, in this case, it was the 2nd respondent.

19. The Environment and Land Court, (ELC) (B.M. Eboso, J.) upon evaluating the pleadings and evidence tendered before the court, determined that the question that arose for determination was which of the two people namely; Humphrey Njuru Karanja and John Mwangi King'ori, the 1st respondent and the appellant respectively, was the lawful holder/owner of a leasehold interest in the suit property being Plot L.R. No. 209/4401/717 (formerly L.R. No. 209/4401/742) Makadara Estate Nairobi. The learned Judge held that it was common ground that the suit property was allocated to Crispus Nduki Macharia (deceased) in 1978 and that the suit property was previously designated as LR No. 209/4401/742 but upon resurvey by the 2nd respondent the land reference changed to L.R. No. 209/4401/717. The learned Judge found that there was evidence of an agreement of sale between Crispus Nduki Macharia (deceased) and the 1st respondent dated 17th June 1980 where the deceased sold the suit property to the 1st respondent. Further the Judge found that there was evidence that in December 1999 the 2nd respondent's Director of Social Services and Housing sanctioned transfer of the suit property to

the 1st respondent and caused a leasehold title to be registered in the

name of the 1st respondent which was issued to the 1st respondent as Title No. 80673.

20. The learned Judge also found that on his part the appellant, who served as a councillor and mayor at the City Council of Nairobi, procured an allocation letter in respect of the suit property and contended that the entire allocation scheme in which Crispus Nduki Macharia (deceased) was allocated the suit property was cancelled in 1985, and that subsequently the 2nd respondent allocated him the suit property in December 1996. The Learned Judge noted that the Council Minutes that cancelled the allocation and the Gazette notice containing the decision which cancelled the allocation were not availed in court. The Judge also noted that there was evidence that the appellant ignored notices and protestations from both the 1st and 2nd respondents and he proceeded to erect structures on the suit property. The Judge further noted that the 2nd respondent which holds all the records relating to the suit property did not present any evidence in the suit.

21. The Judge found that it was not in dispute that the 1st respondent holds a registered leasehold title to the suit property; and that the lease was executed by both the 1st and 2nd respondents, which fact was not contested by the 2nd respondent; the Judge held that the prevailing jurisprudence is that where there are more than one

letter of allotment and one has culminated in the processing and registration of title, the registered title would prevail provided the holder is able to give a satisfactory account of the process leading to the acquisition of title.

22. The Judge further found that the contention by the appellant that the suit property was amalgamated with two other pieces of land he acquired through allotment would not have been properly feasible without a surrender of the 1st respondent's title and deed plan which were already in existence prior to 2003 when the amalgamation is said to have been done. The Judge thus found that the 1st respondent was the legitimate leasehold proprietor of the suit property L.R. No. 209/4401/717 (formerly L.R. No.209/4401/742 and that the amalgamation of the suit property with other properties by the appellant and 2nd respondent was and remained a nullity because the suit property was not available for allotment to the appellant and/or amalgamation by the respondents. Based on this finding the learned Judge rejected the appellant's prayers (a) and (b) in the counterclaim.

23. With regards to the appellant's prayer for compensation, the Judge found that the appellant had not presented evidence on the circumstances under which the allotment letter was issued to him in respect to the suit property that had been long allotted way back

in 1978; further, that there was evidence that the same year the allotment letter was purportedly issued to the appellant, he served as a councillor and mayor in the Council of Nairobi and that his role as councillor and mayor was to oversee the affairs of the Council and that while holding a public office he procured the impugned allotment letter. The Judge went on to find that compensating the appellant would be condemning the Kenyan taxpayer to shoulder that burden and would also amount to sanctioning the irregular allotment.

24. The Judge further rejected the 1st respondent's prayers for general and exemplary damages and *mesne* profits because of the inordinate and unexplained delay of 10 years on the part of the 1st respondent in processing title to the suit property, and in taking steps to develop the suit property and held that it was the delay that made it possible for the appellant to procure the irregular allotment letter from the 2nd respondent in 1996, and the 1st

encroachment of the property in 1997. Accordingly, judgment was entered for the 1st respondent as follows: -

> ***"a) Humphrey Njuru Karanja, 1st respondent is hereby declared to be the legitimate leasehold proprietor of the 99-year lease in LR No. 209/4401/717(formerly L.R. No.209/4401/742 situated at Makadara Estate, Nairobi.***
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> ***b) A permanent injunction is hereby issued restraining the appellant together with his***

agents and servants against dealing in any way

or against interfering with the 1st respondent's quiet enjoyment of the suit property.

c) The appellant shall demolish and/or remove all structures erected by him on the suit property. In default the 1st respondent shall be at liberty to remove them at a cost to be borne by the appellant.

d) Order (c) above will be suspended for a period of 120 days to allow the appellant the opportunity to engage the 1st respondent with a view to purchasing the 1st respondent's leasehold interest in the suit property taking into account the fact that the structures currently on the suit property were erected by the appellant on the basis of the irregular letter of allotment procured by the appellant from the 2nd respondent on 5th December 1996.

e) The 1st respondent shall have costs of this suit to be borne in equal proportion by the two respondents."

25. Dissatisfied with the judgment, the appellant lodged the instant appeal on the grounds, *inter alia,* that the learned Judge erred in law and in fact in that: he relied on the lease dated 15th May 1999

to determine the ownership of plot L.R. No. 209/4401/717 and decided that the said plot belonged to the 1st respondent when he knew or ought to have known that the said lease was not founded on a valid legal process as the letter allotting the suit plot to Crispus Nduki Macharia had been cancelled by the then 2nd respondent and both the 1st respondent and the said Crispus Nduki Macharia had breached the terms and conditions of the letter of allotment; he considered that plot L.R. 209/4401/742

later L.R. 209/4401/717,

was allocated to Crispus Nduki Macharia; that he paid the requisite premium to the City Council of Nairobi and the agreement to sell the said plot to the 1st respondent failed to consider whether there was a breach of the terms and conditions of the letter of allotment; and whether the agreement and, therefore, the sale was valid without the 2nd respondent's consent and consequently misled himself and finally reached wrong conclusions; he failed to consider

that the letter of allotment of plot LR No. 209/4401/717 to Crispus Nduki Macharia dated 23rd November 1978 had been cancelled by the 2nd respondent by its letter dated 14th February 1985; in that he trashed the cancellation of the allotment of Plot No. L.R. 209/4401/742 to Crispus Nduki Macharia by raising the argument that the minutes of the council meeting which cancelled the allocation and the gazette notice which contained the decision to cancel the allocation were not availed to court; in that he totally failed to make a finding that plot 742 was properly allocated to the appellant by the 2nd respondent and that the appellant paid the requisite premium, and that he had followed the due process; in dismissing the appellant's counter-claim against the 2nd respondent, without sufficient evidence adduced before him; in that he failed to consider evidence of DW3, John Mwangi Mwaniki that plot L.R No. 209/4401/717 formerly plot No. 742 was valid; that he gave the suit

property L.R. No. 209/ 4401/717 to the 1st

respondent on the basis of impugned lease and ordered demolition of the appellants building when he knew or ought to have known that the said lease was based on fraud and a cancelled letter of allotment; and in that he failed to find the 2nd respondent liable to compensate the appellant and dismissed the appellant's counter- claim when the evidence before him was that the 2nd respondent had allocated plot 742 to the appellant, had approved the building plans and had in fact approved the amalgamation of the three plots.

26. The 1st respondent lodged a notice of cross appeal dated 22nd July 2018 seeking the variation and reversal of paragraph 27 of the judgment and sought an award of general, exemplary damages and *mesne* profits against the appellant and the 2nd respondent.

27. At the hearing of the appeal, learned counsel, Mr Mwangi Chege appeared for the appellant, Mr. Evans Gaturu appeared for the 1st respondent while Ms. Gladys Matunda appeared for the 2nd respondent. Counsel relied on their respective written submissions and briefly orally highlighted the same.

28. On grounds 1, 2, 3 and 4 of the memorandum of appeal on the issues relating to the root of the lease and the process of acquiring the same, it was submitted that the root of title in matters involving allocation of land starts with the letter of allocation to Crispus Macharia dated 23rd November1978 which

was an offer to allocate

L.R. No. 209/4401/742 later No. L.R. 209/4401/717 (the suit property) and was subject to the Nairobi Council's approval and acceptance of the terms of the offer. It was submitted that it was not shown that Crispus complied with clause 2 (a) and (b) of that allocation letter, but that to the contrary the evidence before court is that he did not submit building plans to the 2nd respondent as required and that indeed the 1st respondent admitted in cross- examination that he too did not submit or obtain approved plans from the 2nd respondent even after he bought the plot in 1980, and further admitted in cross-examination that he is the one who paid the capital payment and had the name of Nduki Macharia placed in the receipts for allocation on advise of the conveyance department.

29. It was submitted that from the evidence it is clear that Crispus Nduki Macharia did not meet the conditions of the letter of offer and that if the conditions of the letter of offer were breached or not complied with, it cannot be said that the lease obtained by the 1st respondent on 14th May1999 is valid. Reliance was placed in ***William Rerimoi Lagat -vs- Dickson Kiprop Kebut (2023) KEELC 18432(KLR).***

30. It was submitted that it was also not shown that Crispus Nduki Macharia accepted the offer or that he paid the capital payment of

Kshs.8,828 within the 14 days as required by the letter of offer. It was contended that the 1st respondent paid for the capital payment and survey fees and other payments in the name of Crispus N. Macharia which was fraud perpetrated by the 1st respondent. According to counsel, the trial Judge addressed the issue of cancellation of the allocation of plot 209/4401/742 to Crispus N. Macharia in a dismissive manner and that he dismissed the issue asserting that the council meeting and the gazette notice cancelling the allocation were not valid despite the fact that the 2nd respondent has in its letter written to its chief counsel and produced by the 1st respondent confirmed that the allocation and the entire scheme had been cancelled.

31. It was submitted that the appellant produced a letter of cancellation of the said allocation dated 14th February 1985 and that no objection was raised to the production of the said cancellation letter. It was contended that a letter written both to the appellant and the 1st respondent by the 2nd respondent confirmed that the whole scheme was cancelled in 1985. It was contended that the 1st respondent admitted in cross-examination that he became aware of the cancellation in 2003 and that there is no evidence in the record that there was any other allocation that was made to Crispus N. Macharia or to the 1st respondent upon which a valid lease could be registered or issued.

32. Further it was submitted that from the evidence of PW2, Esther Wanjuki Nduki, Crispus N. Macharia died on 24th December 1987. It was stated that there was no evidence that she took out letters of administration as no grant was produced hence she had no evidence that she had the capacity to transfer the deceased interest to the 1st respondent. It was submitted that the trial Judge did not investigate or indeed evaluate and analyse the evidence before him to enable him make a fair and just determination as he simply said that Crispus N. Macharia had paid the capital payment and had sold the suit property to the 1st respondent who held a certificate of lease under **section 23** of the **Registration of Titles Act** (repealed) now **section 26** of the **Land Registration Act.**

33. Further, it was submitted that this Court has held time without number that to hold a title or a lease certificate in one's name is not sufficient as the holder must prove the root of the title and that the process the holder went through to obtain that title was regular and lawful. Reliance was placed on ***Munyu Maina -vs- Hiram Gathiha Maina [2013] eKLR.*** It was contended that in the instant

case Crispus Nduki Macharia did not meet the conditions of the letter of offer, the allocation and the entire scheme was cancelled and that the 1st respondent dishonestly and

fraudulently paid the capital payment and survey fees in the name of Crispus Nduki Macharia in conspiracy with the 2nd respondent officials and that

neither he or Crispus N. Macharia obtained consent to transfer the letter of offer to the 1st respondent and that as it turned out the 1st respondent obtained the lease certificate irregularly in conspiracy with the 2nd respondent's officials. It was stated that the trial Judge should have held that the registration of the impugned lease was irregular and should have allowed the appellant's counter-claim.

34. With regards to grounds 5, 6, 7, 8, 9, 10 and 11, it was submitted that on 5th December1996, the 2nd respondent allocated the suit property to the appellant and that on 19th November 1997 the appellant paid the stand premium and the annual rent in the sum of Kshs.21,000.00. That there was no delimitation of time in regard to the payment. Further, that upon payment of the stand premium and the annual rent, the conditions of the offer were fulfilled or complied with as there were no other conditions. It was contended that the trial Judge dismissed that allocation on the basis that the plot had been allocated to Crispus N. Macharia in 1978.

35. Learned counsel faulted the trial Judge for finding that the appellant had allocated himself the suit plot, by exploiting his position as the mayor and councillor of the 2nd respondent without any evidence tendered to that effect. It was submitted that the allocation of the subject plot to the appellant was regular and lawful as there was no evidence led to the contrary

and as such that the

2nd respondent had rightfully and within the law allocated the suit property to the appellant.

36. It was submitted that L.R. No. 209/4401/742 was sandwiched between plots 209/4401/741 and 209/4401/743. That the appellant owned 209/4401/741 and 209/4401/743 and that as he was now allocated plot 209/4401/742, he applied to the 2nd respondent for amalgamation of the three plots. That the minutes of the town planning committee indicated that the amalgamation was approved and the notification of approval was issued. Further it was submitted that the evidence of DW3 J.M. Mwaniki, a senior land surveyor from the Government Department of Surveyors stated that the three plots had been officially amalgamated and a deed plan No. 248120 issued by the director of survey.

37. Counsel submitted that the appellant adduced evidence that upon amalgamation he developed a building that traversed the three plots L.R. No. 209/4401/716, 717 and 718 as a single unit, a development that was approved by the 2nd respondent. It was stated that the building covered 209/4401/717 as the same was sandwiched between plots 716 and 718 and that DW2, G.T. Mathu valued the buildings at Kshs.40,000,000.00 and the land at Kshs.5,000,000.00

38. Further it was submitted that the trial Judge casually dismissed the appellant's counter-claim and in the circumstances the appellant was gravely injured. We were urged to allow the appeal.

39. With regards to the cross-appeal, it was submitted that no attempt was made by the 1st respondent to prove general and exemplary damages and *mesne* profits. It was submitted that the trial Judge declined to award the same and gave reasons that the 1st respondent had taken a long time to bring the case before court. It was stated that in any event as it has been demonstrated the 1st respondent did not acquire a valid lease as the root of the lease and the process of obtaining it was flawed. We were urged to dismiss the 1st respondent's cross-appeal.

40. Opposing the appeal, learned counsel for the 1st respondent reiterated the evidence already on record in respect of the 1st respondent's purchase of the land from Chrispin Nduki. It was submitted that, contrary to what was submitted by the appellant, the scheme was not cancelled but was suspended by the Nairobi City Council and that at the time of suspension all the owners of the sub-leases were informed but that after the suspension was lifted, all the original allottees were re-allocated their plots and the 1st respondent's Plot L.R. No. 209/4401/742 was re-allocated L.R. No. 209/4401/717.

41. Further it was submitted that when the appellant became the mayor of Nairobi City Council in 1996, he allocated himself L.R. No. 209/4401/741 and 743 which were re-allocated as L.R. No. 209/4401/716 and 718 and the 1st respondents Plot No. 742 sandwiched between plot 741 and 743.

42. It was submitted that the 1st respondent was issued with a deed plan in respect to L.R. No. 209/4401/717 formerly L.R. No. 209/4401/742 on 9th June 1999 but that the appellant continued intermeddling with the same. It was submitted that despite the amalgamation of the three plots, the deed plan in respect to plot 717 was still valid and that the appellant used his influence when he was mayor to have the same allocated to him.

43. With regards to the cross-appeal, it was submitted that the Judge's findings on the same was unfair, unjust, illegal and irregular and/or oppressive and it amounted to a total miscarriage of justice to the 1st respondent. That the same ought to be varied, and reversed with an order awarding the 1st respondent general and exemplary damages and *mesne* profits as the 1st respondent took the earliest opportunity to claim them when he filed the suit on 25th June 2007, amended on 18th November 2009 and re-amended on 22nd November 2013, in which he gave the particulars of the same. That as at 23rd January 2015, the total was Kshs.32,400,000.00.

We were urged to allow the cross-appeal and to dismiss the appellant's appeal with costs and interest.

44. On her part, learned counsel for the 2nd respondent submitted with regards to grounds 1, 2, 3 and 4 that the trial court did not err in relying on the letter of allotment issued to the 1st respondent and eventually the resultant lease.

45. With regards to grounds 5, 6, 7, 8, 9, 10 and 11 it was submitted that the appellant alleged that he was allocated an un-surveyed plot on 5th December 1996 and yet that it was already surveyed and allocated a number and he paid the premiums on 19th November 1997 beyond the accepted fifteen days. Further, that the allotment lacks the normal conditions for allotment, therefore, not genuine in the circumstances. It was submitted that the trial court was right in holding that the 1st respondent used his influence as mayor to have the suit property allocated to him.

46. With regards to the counter-claim it was submitted that whereas the appellant valued the three plots to be Kshs.5,000,000.00 and the developments at Kshs.40,000,000.00, as supported by the evidence of DW1, it was contended that the appellant is not entitled to Kshs.45,000,000.00 as per the valuation report produced. This is because the value represents the total of the three plots and the disputed plot is one of the plots valued at

approximately

Kshs.15,000,000.00. Further, that the appellant having encroached upon and built on a plot that was not his is not entitled to be indemnified for his wrongful act. We were urged to uphold the judgment of the ELC.

47. With regards to the cross-appeal, it was submitted that the 1st respondent is not entitled to an award of general damages against the 2nd respondent for the fraud, mistake and/or representation. That since the time of the purchase of the suit property up to the time of testifying in court, the 1st respondent had not submitted any building plans to show that he was ready to construct and, therefore, earn an income. It was contended that in the absence of that the 1st respondent is not entitled to general damages as prayed.

48. We were urged to dismiss both the appeal and cross-appeal with costs to the 2nd respondent.

49. We have considered the record of appeal, the grounds on which the appeal is anchored, the rival submissions and the applicable law. Our mandate on a first appeal as set out in **Rule 31(1)(a)** of the **Rules** of this Court is to reappraise the evidence and to draw our own conclusions. This mandate was succinctly set out by the predecessor of this Court in ***Peters -vs- Sunday Post Limited***

[1958] EA 424, where the Court stated that:

> ***"Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide."***

50. Having considered the record placed before us, the rival written and oral submissions of learned counsel, the cited authorities and the law, we discern the following as the main issues that commend themselves to us for determination, namely:

    (i) who as between the appellant and the 1st respondent has established the root of title and has indefeasible proprietary right over the suit property;

    (ii) whether the learned Judge was correct in allowing the 1st respondent's claim and dismissing the appellant's counterclaim;

    (iii) whether the learned Judge was correct in not allowing the 1st respondent's claim for general and exemplary damages and mesne profits and,

    (iv) finally, what orders we ought to make in determination of the appeal, including orders on costs?

51. To determine the question as to who has the right of claim over the suit property, we begin by appreciating the principle enunciated by this Court in its decision in ***Chief Land Registrar & 4 others -vs- Nathan Tirop Koech & 4 others [2018] eKLR*** where the Court observed that:

> ***"Land ownership and land rights is both a historical and emotive subject in Kenya. A right to hold property is a constitutional right as well as a human right and no person can be deprived of his property except in accordance with the provisions of the Constitution or Statute. The condition precedent to taking away anyone's property is that the authority must ensure compliance with the Constitution and Statutory provisions."***

52. This, among other judicial decisions, underscores the sanctity of title to immovable property subject, however, to the provision of **Article 40(6)** of the **Constitution**, **section 23** of the **Registration of Titles Act** (now Repealed), and **section 26** of the **Land Registration Act, 2012.**

53. The sanctity of title to property under **Article 40** of *the* **Constitution** was enunciated in the Supreme Court decision in ***Rutongot Farm Ltd -vs- Kenya Forest Service & 3 others [2018] eKLR,*** where the Court held that:

> ***"… once proprietary interest has been lawfully acquired, the guarantee to protection of the right to property under Article 40 of the Constitution is then***

expressed in the terms that no person shall be arbitrarily deprived of property. The same guarantee existed in Section 75 of

the repealed Constitution. Which was the applicable law when the cause of action herein arose."

54. The sequence of events leading to the 1st respondent's Certificate of lease begins with the issuance of an allotment letter to Crispin Nduki Macharia (deceased) in respect to Plot L.R. No. 209/4401/742 by the 2nd respondent on 23rd November1978. Subsequently the deceased through a sale agreement dated 17th June 1980 for a consideration of Kshs.38,000.00 sold the suit property to the 1st respondent. There was no contestation on those two issues. The 1st respondent became the beneficial owner of the property pending its transfer to him by the 2nd respondent.

55. According to the 1st respondent, the project was suspended at some point. When the suspension was lifted, the plot was resurveyed and given a new number from 742 to 171. Subsequently, after the said process, the 2nd respondent issued the 1st respondent with a 99- year lease that was registered on 9th June 1999 as Title No. I.R. 80673. He produced the Conveyance registered as Title No. I.R. 80673 at the Government Lands Registry, Nairobi. He said that at no time was he ever sent a letter revoking the letter of allotment issued to Chrispin Nduki Macharia.

56. On the other hand, the appellant's evidence was that the allocation of L.R. No. 209/4401/171 formerly known as L.R. No.

209/4401/742 to Crispin Nduki Macharia (deceased) was revoked on 14th February 1985 and that he was allocated L.R. No. 209/4401/742 by the 2nd respondent on 5th December 1996, a plot that was sandwiched between plot 741 and 743 which had been allocated to him by the 2nd respondent. He stated that by his application to the 2nd respondent he caused the same to be amalgamated with L.R. No. 209/4401/716 and L.R. No. 209/4401/718 (formerly L.R. No. 209/4401/741 and L.R. No. 209/4401/743) which he had been allocated by the 2nd respondent. He stated that he was in possession of the three amalgamated pieces of land which had become L.R. No. 209/4401/761.

57. According to the appellant, before commencing construction on the three plots, he submitted plans to the 2nd respondent and that the same were approved and that at no time did the 2nd respondent issue him with notices to stop the construction as alleged by the 1st respondent. He stated that he was allocated Plots Nos. 741 and 743 and later Plot No. 742 that was sandwiched between his two plots upon cancelation of the letter of allotment in respect to plot no 742 allocated to Crispus Macharia (deceased). He stated that he paid the required stand premium for the plots and that his application for amalgamation of the three plots was approved by the 2nd respondent.

58. John Mwangi Mwaniki testified that he was at the time the Senior Land Surveyor in charge of verification of survey plans at the Ministry of Lands Nairobi. He testified that L.R. No. 209/4401/761 was as a result of amalgamation of three plots being L.R. No. 209/4401/716, 717 and 71. He stated that the amalgamation was achieved through a survey carried out by the City Council authentication in 2003. He stated that a survey was undertaken to amalgamate the 3 plots by the City Council Surveyor one Mr. J.

O. Oyatta. He stated that the deed plan used for the amalgamated 3 plots being L.R. No. 209/4401/761 was deed plan No. 248120.

59. Before the court, he testified that: he had seen Deed Plan No.

212836 with respect to L.R. No. 209/4401/717 supporting a title in the name of Humphrey Karanja. He stated that he did not know in whose names plot 716 and 718 were registered and it was only the 2nd respondent that could decide the registration status, and further that it was the 2nd respondent that had asked that the 3 plots be amalgamated.

60. Further he stated that as long as a deed plan is registered it cannot be cancelled and is still valid and that the deed plan for plot 717 was still valid. He stated that deed plan No. 212836 for plot 717 issued on 22nd December1997 was still valid and the

measurement can be determined from the deed plan. He stated that once a plot

is amalgamated with others the remedy lies with the person who amalgamated the plots and, in this case, it was the 2nd respondent. By the time the 2nd respondent approved the amalgamation of the 3 properties, the 1st respondent already held the lease to his plot and it could not, therefore, be amalgamated with any other properties belonging to other people.

61. We have set out *in extenso,* the evidence as presented by the various witnesses. The lease agreement entered into between the 1st respondent and the 2nd respondent in respect to L.R. No. 209/4401/717 and issued as Title No. I.R. 80673 was registered on 9th June1999 more particularly delineated on the Deed Plan No. 212836. It is clear that the particulars of the property tallies with the very property which was confirmed by the certificate of search to belong to the 1st respondent on 24th May 2012. No doubt, therefore, the land being claimed by both the appellant and the 1st respondent was one and the same and it was clear that the 1st respondent had a valid registered lease issued by the 2nd respondent and with an existing Deed Plan No. 212836 issued on 22nd December 1997. We agree with the finding by the learned Judge that:

> ***"The lease which culminated in the registration of the plaintiff as a leasehold proprietor of the suit property was executed by the plaintiff and the 2nd defendant. The 1st defendant has not contested this fact. The***

prevailing jurisprudence is that

where there are more than one letter of allotment and one has culminated in the processing and registration of title the registered title would prevail provided the holder is able to give a satisfactory account of the process leading to acquisition of the title."

62. It was clear from the evidence in court by the appellant that his claim to the ownership of the suit property is pegged on the letter of allotment issued to him on 5th December 1996 and the alleged letter of cancellation of the letter of allotment issued to Crispus Macharia (deceased) on 23rd November 1978 by the 2nd respondent. He explained that upon the cancellation he was allocated the suit property by the 2nd respondent and that was the reason why he took possession and proceeded with the construction on the suit property despite an order to stop by the 2nd respondent. He stated that he did not receive the said notices to stop constructing on the suit property and, further that the notice was to stop an unauthorized structure and his structures had been approved and hence not unauthorized by the 2nd respondent as he had submitted his building plans.

63. The learned Judge found, as a fact that:

"there is common ground that the suit property was allocated to the late Crispus Nduki Macharia in 1978. There is also common ground that the suit property was previously designated as L.R. No. 209/4401/742 but upon resurvey by the 2nd defendant the LR No. changed to L.R. No. 209/4401/717. The plaintiff produced a City

Council of Nairobi official receipt dated 22/1/1979 bearing the sum of Kshs.8,828/= which was the stand premium and related charges that required to be paid by the late Crispus N. Macharia under the letter of allotment dated 23/11/1978.

There is also evidence of an agreement of sale between the late Crispus N. Macharia and the plaintiff dated 17/6/1980 pursuant to which the deceased sold to the plaintiff the suit property. Similarly, there is evidence that subsequently in December 1999 the 2nd defendant's director of social services and housing sanctioned transfer of the suit property to the plaintiff. Lastly there is evidence that in 1997 the 2nd defendant caused a leasehold title to be registered in the name of the plaintiff and the same was issued to the plaintiff as Title Number 80673."

64. Do we have any reason or justification to depart from the above finding of fact by the trial court? Is there any credible evidence on record that would lead to a contrary conclusion? Several decisions of this Court have addressed this issue. In ***Kiruga - vs- Kiruga &***

Another Nai Civil Appeal No E303 of 2024 Page 36 of 48 [1988]

KLR 348: the Court, (Apaloo, JA,) expressed himself as follows;

"An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the Judge can be said to be plainly wrong. It is a strong thing for an appellate court to differ, from the finding, on question of facts, of the Judge who tried the case and who had the advantage of seeing and hearing the witnesses. An appellate court has indeed the jurisdiction to review

the evidence in order to determine whether the conclusion originally reached upon evidence should stand. But this is jurisdiction, which

should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion."

65. Therefore, as held by Hancox, JA., in ***Mohammed Mahmoud Jabane -vs- Highstone Butty Tongoi Olenja [1986] KLR 661;***

[1986-1989] EA 183:

> ***"The appellate Court only interferes with the trial Court's findings of fact if it is shown that he took into account facts or factors which he should have not taken into account, or that he failed to take into account matters of which he should have taken into account, that he misapprehended the effect of the evidence or that he demonstrably acted on wrong principles in reaching the findings he did."***

66. The abstract of folio held by the Government Land Registry, Nairobi, which was produced in evidence by the 1st respondent reveals the transaction affecting the suit property. It shows that it was registered on 9th June1999 at 16.15hrs. Clearly, there was evidence on record on which the learned Judge could and did find that Crispus Macharia (deceased) from whom the 1st respondent bought the plot was on 9th June 1999 registered as the owner and proprietor of L.R. No. 209/4401/717.

67. There was a letter produced before the trial court, which purported to cancel the letter of allotment issued to Crispus Macharia. The learned Judge, however, found that there was no

evidence of the meeting and the minutes taken at such meeting where the decision

to revoke the letter of allotment was made were availed to court. There was also no evidence availed to the trial court to demonstrate that the 1st respondent was accorded a hearing before such a letter was written. We, like the trial court, are not persuaded on the veracity of the said letter. In any event, if the 2nd respondent had revoked the said allocation, how would it go ahead and sanction the resurveying process and issuance of the Certificate of lease to the 1st respondent?

68. A further consideration of the evidence begs the question as to whether the appellant, even though allegedly issued with an allotment letter with regard to the suit property, had perfected the same. As rightly submitted by Ms. Matunda, learned counsel for the 2nd respondent in her oral highlights, the appellant did not even produce an acceptance letter to demonstrate that he had, in the first instance, received the allotment letter and accepted the same. It is trite law that in order for an allotment letter to become operative, the allottee was required to comply with the conditions of allotment set out in the letter.

69. In the case of ***Dr. Joseph N. K. Arap Ng'ok -vs- Justice Moijo Ole Keiyua & 4 others Civil Appeal No. 60 of1997*** this, Court held:

> ***"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 offeror 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."

70. In the case of ***Torino Enterprises Ltd -vs- Attorney General***

[2023] KESC 79 (KLR), the Supreme Court held that:

> ***"It is settled law that an allotment letter is incapable of conferring interest in land, being nothing more than an offer, awaiting the fulfilment of conditions stipulated therein…Suffice it to say that an Allottee, in whose name the allotment letter is issued, must perfect the same by fulfilling the conditions therein. These conditions include but are not limited to, the payment of a stand premium and ground rent within prescribed timelines. But even after the perfection of an allotment letter through the fulfilment of the conditions stipulated therein, an allottee cannot pass valid title to a third party unless and until he acquires title to the land through registration under the applicable law. It is the act of registration that confers a transferable title to the registered proprietor, and not the possession of an allotment letter."***

71. The above excerpt is clear that, since the appellant did not comply with the conditions of the allotment letter, he did not acquire title to the subject land. Our reanalysis of the evidence would lead us to conclude, as did the learned Judge, that the appellant failed to acquire title to the subject land as there was already a title issued in respect to the suit property. It is trite that it is a valid and legally acquired title that confers ownership rights to land, and not the

letter of allotment. We have no basis for interfering with that finding by the trial Judge.

72. Turning to the element of fraud as alleged by the appellant. **The Black's Law Dictionary, 8th Edition** at **page 131** defines **"fraud"** as *'a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his/her detriment.'*

73. The law is clear as buttressed in the case of ***Vijay Morjaria -vs-***

***Nansingh Madhusingh Darbar & Another* [2000] eKLR,** where

Tunoi, JA. (as he then was) stated as follows:

> ***"It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts."*** (emphasis ours).

74. From the evidence on record, it is clear that the appellant only makes allegations of fraud and has been unable to substantiate the same, and as such the appellant's evidence falls far short of proving any fraud. The appellant has failed to discharge the burden of proof and standard of proof required of him. The allegations of fraud and irregularity as averred by the appellant

herein thus fall by the way side.

75. We find no merit in this appeal.

76. As regards the cross-appeal by the 1st respondent, the complaint is that the learned Judge erred in failing to award him general and exemplary damages as well as *mesne* profits.

77. The award of damages is an exercise at the discretion of the trial court which an appellate court should defer to. In the instant appeal, the trial court did not award damages as it found that there was inordinate and unexplained delay on the part of the 1st respondent in processing the title and also in taking steps to develop the suit property which made it possible for the appellant to procure the irregular allotment letter from the 2nd respondent in 1996 and encroachment of the suit property in 1997 and that it took the 1st respondent ten years to bring the suit and because of his indolence the court rejected his prayer for damages.

78. Like the trial court, we note that the 1st respondent took ten years to bring this claim against the appellant after finding out about the appellants encroachment and in so doing was indolent and hence not entitled to an award of damages for trespass. In light of the totality of the above assessment and reasoning on the rival positions on this issue, we find no merit in the 1st respondent's complaint that the learned trial Judge failed to award him general

and exemplary damages and *mesne* profits. The 1st respondent's cross-appeal fails.

79. In light of our finding above, we find no merit in both the appeal and the cross-appeal, which we hereby dismiss. The costs of the appeal are awarded to the 1st respondent. The cross-appeal is dismissed with no order as to costs. It is so order

Dated and delivered at Nairobi, this 6th day of March 2026
W. KARANJA

.....
JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb, C.Arb.

.....
JUDGE OF APPEAL

W. KORIR

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed _

DEPUTY

REGISTRAR.