



REPUBLIC OF KENYA

IN THE ELC OF KENYA AT NYAHURURU

ELC NO 324 OF 2017

NANCY WANJIRA GATHURI.....PLAINTIFF

VERSUS

DAVID NDUNGU MBURU.....1st DEFENDANT /RESPONDENT

SAMUEL KAHIA GIATHI.....2nd DEFENDANT /RESPONDENT

JUDGEMENT

1. The Plaintiff filed suit against the Defendant s vide her Plaint dated the 8th March 2017 wherein she sought for orders that;
 - i. A declaration that the Plaintiff is the bona fide owner of all that land known as Plot No. K-34 Opposite Hospital Juakali –Ol-Kalou situated within Juakali in Ol Kalou.
 - ii. A permanent injunction restraining the first and second Defendant s whether by themselves, their servants and agents from dealing, trespassing, constructing, erecting and/or interfering whatsoever with plot No. K-34 Opposite Hospital Juakali –Ol-Kalou
 - iii. Cost of the suit and interest thereof from the date of filing the suit herein.
 - iv. Any other relief that the honourable court may deem fit to grant.
2. Alongside the said suit, the Plaintiff filed an application seeking for interim orders against the Defendant s wherein on the 9th March 2017 temporal injunctive orders were issued pending the hearing and determination of the application inter parties on 3rd April 2017.
3. On the 3rd April 2017, when this matter came for inter parte hearings, the court was informed by the Plaintiff’s Counsel that upon service on the Defendant s with the Plaintiff’s pleading and in order to circumvent the orders of temporal injunction, the Defendant s herein, knowing that the court would not be sitting, filed another suit in Nakuru vide ELC No. 336 of 2017 wherein they had obtained interim orders. Counsel therefore sought that the Nakuru ELC No. 336 of 2017 be dismissed with costs to the Respondents for reasons that it was impotuous for the Applicant in Nakuru ELC No. 336/2017 to approach a court through deceit and seek to benefit from the reliefs of a court.
4. Counsel for the Defendant on the other hand submitted that by the time they were filing suit in the Nakuru Environment and Land Court, service had not been effected on them and therefore they were not aware of an existing suit and Court orders. That the Defendant only came to learn of the existence of this suit on 28th March 2017 when he had been served with an application dated 22nd March 2017. That the question of service of those pleadings was crucial wherein they would require the process server to testify on oath on when he had effected service of the same upon the Defendant herein.
5. That since there was property in dispute where two parties were claiming ownership and both parties had obtained orders of interim injunction, that pending the determination of the actual owner of that property, thereof none of the parties should develop the suit property.
6. The Court had reserved its ruling for the afternoon of the 6th April 2017. On the morning of the said date, parties recorded a consent to the effect that the Civil Cases No. 324 of 2017 and No. 336 of 2017 be consolidated with ELC No. 324 of 2017 being the lead file. The consent was adopted as the order of the court wherein parties had been ordered to maintain the status quo. The ruling was differed to the 19th April 2017.
7. On the 19th April 2017, the ruling was delivered wherein parties were temporary restrained from dealing and/or interfering with the suit property in any way, pending the hearing and determination of the suit. Further orders were that parties comply with the provisions of Order 11 of the Civil Procedure Rules so that the matter could be set down for hearing.

8. On the 25th April 2017 while awaiting the hearing of the main suit, the Defendants herein vide their application dated the 20th April 2017 under Certificate of Urgency, sought that the Plaintiff herein be cited for contempt of the court orders of 21st March 2017 in Nakuru ELC 336/2017. When the parties appeared for the hearing of the said application, they leveled all manner of allegations against each other to the effect that there had arisen a criminal case No. 1044 of 2017 fled in the lower Court where the 1st Defendant had been charged jointly with others with the offence of malicious damage to property. There were also proceedings filed before the Rent Tribunal Court. Parties had then sought leave to try to solve the issues amicably which prayer the court granted.

9. On the 3rd October 2017, when the parties came before court for mention to find out on the progress of the out of court settlement, the court had been informed that all efforts to solve the matter amicably had failed and therefore Counsel were of the view that a date be fixed for the hearing of the application for contempt. By consent, parties agreed to have the application dated the 20th April 2017 be disposed of by way of written submissions with the highlighting of the same on the 20th November 2017. A ruling was subsequently delivered on the 12th February 2018 wherein parties were ordered to refrain from dealing with the suit property and since parties had complied with the provisions of Order 11 of the Civil Procedure Rules, the matter was set down for hearing. The matters having been consolidated with Nyahururu ELC No. 324 of 2017 as the maintain suit, Nakuru ELC No. 336 of 2017 became the counterclaim. The Defendant/Plaintiff in the counter claim had sought for orders that:

- i. A declaration that the Plaintiff is the lawful owner and proprietor of plot No. K34 Ol Kalou Township.
- ii. An order of mandatory and permanent injunction to issue against the Defendant by herself, her agents, Servants, employees and/or anybody acting pursuant to her instructions from trespassing, entering, remaining, occupying, cultivating, constructing, possessing, utilizing and/or in any manner whatsoever interfering with the Plaintiff's peaceful and quiet possession of plot No. K24 Ol Kalou Township in perpetuity.
- iii. General damages for trespass and unlawful occupation against the Plaintiff's property aforesaid.
- iv. Costs of the suit and interest at court rates.

Plaintiff's case.

10. The Plaintiff testified that she was the bonafide owner of parcel of land plot No. K-34 opposite Hospital Juakali –Ol-Kalou. That she also belonged to a group called Gikombo Self Help water project. That as a group, they had decided to put up a water project so as to supply water to the villagers wherein they had embarked on looking for a parcel of land where they could erect a water tank.

11. That in the course of their search, they had decided that since her parcel of land was on a raised ground, the same was appropriate to build the water tank thereon so that after the pipes were fixed, the water would flow downwards to the village through gravity. That she had agreed to excise a piece of her land measuring 50 X100 on parcel No. LR Nyandarua/Olkalou Central/909 so that they could build the water tank thereon.

12. That the surveyor had gone on the ground wherein he had then drawn a sketch and also made a report on the proposed sub division which report she produced as Pf exh 1. The land had been excised wherein after the sub division was done, the group had procured a title to the land which was the registered in the name of 'Gikumbu group'. The members of the Gikombo water project group had then got together and in the presence of the chief, had decided to compensate her with another plot.

13. Thereafter they visited the Council and sought for a plot wherein there had been several meetings which meetings had deliberated on the proposed plot for compensation. The Plaintiff produced a copy of the minutes of one of the meetings held on 13th December 2006 at the Olkalou Town Council Chambers as Pf exh 2. That vide those minutes, it had been decided that she be given a plot as compensation. She also produced the extract of the full meeting of 13th December 2006 as Pf exh 3(a)

14. That after a resolution had been passed to compensate her for her land, the chairman of the Olkalou Council had directed a surveyor to go and show her the plot which had been given to her as compensation. That at the time, there had been many other people who were also compensated for relinquishing their parcels of lands for the public use as per the list herein produced as Pf Exh 3(b). Her name appeared as No 58 on the said list.

15. That she had then been issued with a temporary letter of allotment herein produced as Pf exh 4, on the 12th June 2007 by the Olkalou Town Council wherein she had been requested to pay Ksh. 6,000/=. She had made the payments and fenced the plot which was vacant at the time, as demanded by the terms of the allotment letter.

16. That after paying the initial sum of Ksh 6,000/= which was inclusive of the surveyor's fee, she had continued paying the land rates to the plot she had been allotted being No. K34 opposite the hospital. She produced the receipts she had been issued with upon the payments and opening of the file reference No. 408, as follows:

- i. Receipt ref No.143856 dated the 22nd November 2010 for Ksh 5,400/= produced as Pf exhibit 5(a)
- ii. Receipt dated 22nd November 2010 ref No. 30753 for ksh 1,240/= PF exhibit 5(b) for both land rates and surety fee.
- iii. She also paid the land rates every year as follows;

- a) Receipt dated 5/1/2012 for ksh 1,000/=Ref No. 37398 Pf exhibit 5©
- b) Receipt dated 6/1/2012 for ksh 1,240/= Ref No. 37525 Pf exhibit 5(d)
- c) Receipt dated 8/5/2014 for ksh 1,020 Ref No. LR 1405-00-135 a computer generated receipt as Pf exhibit 5(e)
- d) Receipt dated 3/3/2017 for ksh 1,000/= Ref No 24824 as PF exhibit 5(f)

17. The witness proceeded to testify that after she had been given the parcel of land, she had built six rooms/houses thereon wherein after she had been injuncted from developing the land further.

18. That apart from the temporary allotment letter, vide a letter dated the 26th May 2011 herein produced as Pf exh 6, the Town Council had sought for their allotment letters from Nairobi. That she had also gone to Nairobi but upon her return, she had found that somebody had removed her fence, folded it and had kept it aside thereby erecting his own fence on the suit plot.

19. That when she went to pay rates at the Town Council, her money had not been received wherein she had been informed that the plot had two owners. She retracted her evidence and stated that initially there was nobody on the plot and that was why she had then decided to remove the new fence, fold and place it aside thereby commencing construction thereon so that she could know who the second person was.

20. She testified that she had up structures in the year 2011 on the piece of land where the fence had been removed and another erected. That after she had removed the second fence, she had filed the present suit. That by the time the letter was being written to Nairobi, she had developed her plot. She confirmed that she did not buy the plot but that it had been given to her as compensation for relinquishing her land.

21. On Cross examination, she confirmed that she had been given the suit land as compensation for her plot. She also confirmed that she was still the registered proprietor of parcel No. Nyandarua/Olkalou Central/909 which measured 3 acres. That she had agreed to excise a portion of the said land for the self Help group because of the typographical position of her land and so that the water tank could be put thereon for easy flow of the water.

22. That although she had entered into a formal agreement with the self-help group and had signed the same, she did not have the agreement in court but could avail it if needed. She confirmed that Olkalou Council was not privy to the agreement with the self-help group and that the agreement had only been executed in the presence of the chief and sub chief. She confirmed having gone to the Land Control Board, but had been informed that she would be issued with a title deed after finalization of the present case. She however could not remember the year she had made the application before the Land Control Board although it had been later that the year 2005 – 2017.

23. She also confirmed that her land had already been sub divided but there was no new title. That the self-help group had no title to the piece of land excised from her land because she had to be compensated first. That they had contributed Ksh 35,000/=, money which was to be paid as the surveyor's fee and payment towards obtaining the title deed.

24. When referred to Pf exh 1, the Plaintiff testified that the surveyor who had sub divided the piece of land drew the sketch plan but that he had no consent from the board and that was the reason why they had gone to the Chief and District Officer who had told them to wait.

25. At this stage the Plaintiff complained that she was not feeling well wherein she sought for another date for further Plaintiff hearing where she was to call the chief as her witness. She was stood down.

26. The matter proceeded on cross examination of the Plaintiff on the 10th April 2019 where upon being reminded that she was a still on oath, the Plaintiff testified that she still had her title deed. That it had been the self-help group that had decided to go to the Council. That she did not apply to be compensated by the Town Council, but the self-help group.

27. When referred to Pf exh 2 and 3 (b), the Plaintiff confirmed that she was not in the meeting held on 13th December 2006, but members of the group were. She also confirmed that she had been given the exhibits by the Town Council. That although she did not know how to read, yet she knew Mr. Kabue as the chairman and that he had been the town clerk at the time.

28. She also confirmed to having signed the letter of allotment when it was issued to her at the Council offices and that she was to await for another letter from the Commissioner of Lands. That she had started constructions after 3 years whereas the terms to build had been stipulated on the Temporary letter of allotment as within 24 months. She gave the reason for her delay as having fallen ill and having been at the hospital. That upon her discharge, she had started building although she could not remember the exact year.

29. She also confirmed that she could not construct without the plans which she did not have. That further, she had been stopped from further construction by the Town Council because the plot had been allocated to other people. That she did not know that the Council had no right to allocate the land, and that it had been the Commissioner of Land who was to issue her the land.

30. She also confirmed that after she had been issued with the Temporary letter of allotment, the next day she had gone and fenced the plot. After some years when she went back to the plot, she found that it had been fenced a new. That she had never gone to the Council with the Defendants to sort out the issue on the double allocation but that she had not sold the plot. After re –examination where the Plaintiff reiterated her evidence in chief, the Plaintiff's case was closed.

Defendant s' case.

31. The 2nd Defendant's evidence was that in the year 1992, he had applied to the Commissioner of Lands to be allocated a plot wherein he was given plot No. unsurveyed industrial plot K34 Olkalou measuring 0.06 hectares, vide a letter of allotment dated the 4th February 1992 for a lease of 99 years from the 1st January 1992. That the allotment letter had the plan to the plot attached. He produced the letter of allotment and plan as Df exh 1 and 2
32. He further testified that the allotment letter had stipulated that he pays certain monies wherein he had written to the commissioner of land accepting the plot. He then paid Ksh 6,690/= through a bankers cheque from Kenya Commercial Bank wherein he was shown the plot by a surveyor from the County Council of Nyandarua. At the time, there was nothing on the ground, wherein he had then fenced it using poles and barbed wires and also dug a pit latrine.
33. On the 2nd May 2003, he had sold the plot to the 1st Defendant who was his nephew vide a sale agreement dated 2nd May 2003 herein produces as Df exh 3. The 1st Defendant had paid him the whole sum of money where they had then gone to the Council on the 3rd July 2003 and had effected the transfer which was entered in the Council's record. That the witness to their agreement was one Kamau. He produced the transfer which had been signed by the Town clerk on behalf of the Council as Df exh 4.
34. He confirmed that the 1st sum of money was paid to the Commissioner of Lands using a cheque although he did not remember whether he had given the receipt to the 1st Defendant or not. That after the 1st payment, he had continued to pay rates up to the year 2003. He testified that he did not know the Plaintiff or why she had sued him.
35. On cross examination, he had testified that he had applied to be issued with a plot to the Commissioner of Lands in the year 1992, but that he had not carried the application letter to court. He confirmed that Df exh 1 was the allotment letter he had been given. He also testified that he had complied with the special conditions attached to the letter because he had paid. That at the time, many people had applied for allotments and that immediately he was given the plot, he had fenced it and dug a toilet. He also confirmed that he had not brought evidence to prove that he had paid for the plot. That he did not see any special conditions informing him not to sell the land without getting a consent from the Commissioner of Lands, but that he had transferred it at the County Council of Nyandarua offices who were the agents of Commissioner of Lands and who had allowed him to transfer the plot by filling a form and making payments for the transfer.
36. That upon the transfer, his name had been removed and that of the 1st Defendant registered in the register at the Council office. That as per Df exh 4, the same was clear that the transfer had been for reasons that the 'owner was unable to develop the plot'. That he had not been asked to carry the receipts he had been given after payments and that it was not true that he had paid up to the year 2003 only otherwise he would not have been allowed to do the transfer. He had no debt with the County Council.
37. In Re-examination, he confirmed that the letter of allotment by the Commissioner of Lands had not been revoked and neither had the Commissioner of Lands complained. That since he sold the land, he had not done any search and therefore did not know what the records at the Commissioner of Lands in Nairobi contained in regard to the proprietorship of the plot. That they had no debt with the National Land Commission and had not received any letters from the Commissioner of Lands.
38. The 1st Defendant testified as DW 2 to the effect that on the 2nd May 2003, the 2nd Defendant who was his father's brother-his uncle sold him a piece of land K34 in Olkalou wherein they had reduced their agreement in writing. Df exh 3, in the presence of a witness. That he had paid Ksh 100,000/= as full and final payment to DW1. He reiterated the evidence of DW 1 to the effect that there was a map attached to the document and that the full citation of the plot was un-surveyed industrial plot no K34- Olkalou town. That DW1 had been allotted the parcel of land by the Central Government the Commissioner of Lands and that the area of the property was 0.06 hectares. The lease for a term of 99 years from 1st January 1992.
39. That after the payment, they had visited the site in the company of DW1 wherein they had found that DW1 had fenced the plot with barbed wire and there was a pit latrine. That subsequently, they had visited the Town Council Olklaou office to verify the ownership of the plot and to know whether there were outstanding debts wherein they had verified that the owner was DW1. They were then issued with the outstanding charges and the invoice dated the 30th June 2003 wherein they were required to pay a total of ksh 6,800/= in respect of various subheads. The Notice was marked for Defence identification DMFI5.
40. That after he had received the demand notice, he had made the payments as follows;
- i. On the 30th June 2003, they paid Ksh. 1,200/= on accounts of rates for LR K34 wherein they had been issued with a receipt No. 5622.
 - ii. On the 3rd July 2003 they had made further payments to the Council for Ksh 400/= vide receipt No. was 62539 to file opening of plot No. K34 Olkalou.
 - iii. On the 3rd July 2003 they made payments of Ksh .2,700/= and a plot deposit of Ksh 210/= vide receipts No. 62538
 - iv. On the 12th January 2012 they had paid ksh 23,542/= in respect of account of rates of LR No K34 vide receipt No 37666. The receipts as Df exh (a –d)
41. When referred to the computer generated documents, he testified that he recognized the 3 documents of which the 1st one was for payments made on the 26th July 2016 for Ksh. 13,600/= in respect of Land rates of the current year for K34 Olklaou. That the 2nd receipt was dated 26th July 2016 for Ksh. 450/= in respect of registration fee land plot and Kiosk. That the 3rd receipt was dated 4th September 2017 for payment to the County Council for ksh 1,000/= for land rates in the current year. He produced the receipts as Df exh 7 (a –c)

42. That there were no further payments made in respect of that property. However on the 16th March 2017, he had been informed that some people had gone to the plot where they had removed the fence and had started depositing building materials thereon. That he had travelled from Gilgil to Olkalou where he had gone to the County Government Offices to inquire if there had been changes. He found that the plot was still registered in his name. That he had gone on the site where he had found that his fence had been removed and there were building materials including stones and sand.

43. That he had not allowed the people to interfere with his plot and that by the 16th March 2017, there had been no buildings apart from the fence and pit latrine. That when he went to the County government office, the Plaintiff had been summoned wherein they had been instructed not to interfere with the plot until the issue was sorted out. However the Plaintiff had continued with the development on the plot. When this suit was filed to stop her from developing the plot, they had got temporal orders.

44. That even after the court had issued temporal orders the Plaintiff had continued with the construction wherein they had sited her for contempt. He testified that they had paid for the rates, and conducted the transfer at the Town Council of Olkalou wherein they had been issued with Df exh 4. That he was the owner of the plot as per the records at the Council register and that he had not transferred the plot.

45. He further testified that the Plaintiff was not the owner of the plot as he had occupied it since the year 2003 until she invaded it. That Pf exh 4 was dated 12th July 2007 from the Town Council of Olkalou issued to the Plaintiff. That the title of the document was ‘temporary letter of allotment’ That it was just for a short period ‘while she waited for another one from the Commissioner of Lands.

46. That the Plaintiff had not produced that other letter from Commissioner of Lands. That whereas the Plaintiff’s letter was dated 12th July 2007 yet DW1’s letter issued by the Commissioner of Lands was dated 4th February 1992 which meant that the Plaintiff was allotted the plot which had earlier been allotted to DW1.

47. That DW1’s letter had never been recalled or revoked by the Government. Further the Plaintiff had put up a residential house- stone building wherein the letter had clearly stated that “it was an industrial plot”. Her structure had therefore not been sanctioned by the County. The plan had not been approved and that even if the plot was declared his. He would have to demolish the structures because it is not approved, and was not the kind of structure he would have wanted to put up. He sought for the Plaintiff’s case to be dismissed and for damages for interference of his property as well as cost to demolish the structures build thereon.

48. On Cross examination, the witness confirmed that he had bought the suit plot from DW1 which was his 1st acquisition of land. That they gone to the ground in the year 2003 wherein there were no developments then. The place was vacant. That DW1 was not a surveyor. That their sale agreement was dated the 2nd May 2003. That the allotment letter DF exh 1 was dated the 4th February 1992 wherein the issuance of a title was to follow but that DW1 had not done much to get the title.

49. He also confirmed to not having received the special conditions attached to the allotment letter. That in regard to paragraph 2 of the letter, he confirmed to having seen it but did not go into details and had no reasons to ask DW1 whether he had accepted the allotment. That he had only asked whether the plot had been paid for.

50. He also confirmed that a map of the area around the District Hospital was attached to the letter of allotment, but that he could not see the plan number mentioned in the letter of allotment.

51. He also confirmed that he neither had plan No. 25465/x/1446 nor was the letter of allotment incomplete by virtue of the missing plan and special conditions which did not invalidate it. That the reasons for transfer was because the “Owner was unable to develop’ the plot. That DW1 was unable to develop the plot from the year 1992 – 2003 wherein he had sold it to him in the year 2003.

52. He confirmed that the result of the search at the Town Council of Olkalou was that the plot was still registered in his name as per the document demanding the rates .That DMFI 5 dated the 30th June 2003 also confirmed ownership where he had paid the various outstanding charges in the year 2003 and 2012 wherein in between those years he had been out of the country.

53. He also testified that it was not possible that his failure to pay rates could have resulted to the reallocation because there ought to have been a demand made that he pays the rates. Further there was no reasons for anyone to re-allocate the plot. That when they had met with the Plaintiff at the Nyandarua County office, they had been directed by the director of lands Mr. Kamau not to proceed with development of the land. That between the years 2003 and 2017 the development done on the plot had only been the fencing.

54. The plot allotted to him was plot No. K34 Olkalou town. That he knew the town very well. That there were various areas in Olkalou. That the plot was referred to as K34 Jua Kali Olkalou Township which area was towards the hospital. That the plan of his plot was attached to his letter of allotment. That the Plaintiff had hurriedly erected buildings on that area wherein she had started building on 17th March 2017 a period of 3 months. That although it was a shell of a building, the Plaintiff had complained that he had broken window panes which was not true and that was why the case on allegation of malicious damage to property had been dismissed.

55. When he was referred to Pf exhibit 6, he read the last sentence after numbering “the beneficiaries have already occupied.....” and stated that it was his 1st time to see the letter. That the plot allotted to DW1 was an un-surveyed industrial plot. That there were residential structures and in the neighborhood, including the Olkalou Dairy which was 50 meters away.

56. When re-examined, the witness testified that the Plaintiff had put up illegal structures on his plot and that was why she had received a letter dated the 23rd July 2017 from County Council reference, ‘illegal development on plot K34 Olkalou’, wherein she had been warned that she would be fined Ksh. 100,000/= if she continued with the development. That within the period he had bought the property to date, he had not received any demand notice by the County Council. That he did not have a time frame within which to pay and that it was not true that

because he had not paid the rates, the plot had been re-allocated. That the plot was not re-possessed and the letter of allotment had not been revoked.

57. That in reference to Pf exhibit 6, he had only seen it in court and that it did not form part of the Plaintiff's document and neither was it copied to him. That although the said document stated that the beneficiaries had occupied the plots and developed" he knew neither the beneficiaries nor the "plots in plural to which the letter was referring to. That the maker did not produce it, and therefore he did not know how the Plaintiff got it.

58. That as per the position obtaining to date, the Plaintiff had no letter of allotment. That there was no doubt that the plot in question, was K34 Olkalou which had a half built structure where there was nobody in occupation.

59. The Defence closed its case wherein parties filed their written submissions.

Plaintiff's written submissions.

60. After giving the history of the matter as herein above stated, the Plaintiff framed issues for determination as follows;

- i. Whether the Plaintiff was validly allotted the suit property.
- ii. Whether the Plaintiff accepted the temporary letters of allotment.
- iii. Whether the Plaintiff complied with all the conditions for grant of temporary allotment
- iv. Whether the 2nd Defendant was validly allotted the suit property
- v. Whether the 2nd Defendant met all the requisite conditions for acceptance of the offer.
- vi. Whether the enactment of the 2nd Defendant was subsequently revoked by effluxion of time.
- vii. Whether the 2nd Defendant violated the terms of the allotment letter
- viii. Whether the Plaintiff discharged its burden of proof
- ix. Whether the 2nd Defendant discharged its burden of proof
- x. Whether the subsequent sale to the 1st Defendant was valid.
- xi. Whether the 2nd Defendant had discharged its burden of proof to the reasonable standard
- xii. Whether the Plaintiff is entitled to the orders sought

61. On the first issue for determination, it was the Plaintiff's submission that after she had voluntarily entered into an agreement with the Gikombo Self-help group, to transfer 0.047ha of her land known as LR. No. Nyandarua/Olkalou Central/909 to the said self-help group, the OlKalou Town Council had made a decision through a properly constituted a Council meeting on 13th December 2006 to have all persons who had voluntarily given their parcels of land for public use and/or utility to be rewarded or compensated through being given plots within and under the care and control of the Olkalou Town Council. The Plaintiff herein was then allotted parcel of land known as Plot No. K34 Jua Kali within the Olkalou Town Council wherein she had been issued with a temporary letter of allotment on the 12th July 2007. She paid her rates.

62. That there is a substantial difference in the allocations of properties to the Plaintiff and the 2nd Defendant. That whereas the Plaintiff was allocated plots No. 34 Jua Kali, the 2nd Defendant was allocated Industrial plot No. 34 Olkalou. That further the 2nd Defendant's letter of allotment was incomplete and lacked the special conditions thereto. That the Defendants had also neglected and/or refused to produce their plan which raises the question as to what they were trying to hide. The Defendants failed to establish any fraud on the part of the Plaintiff in acquiring the suit property.

63. On the second issue for determination, the Plaintiff submitted that all that was required of her was to accept the conditions of the temporary allotment by the signing on the copy thereof which she did.

64. The Plaintiff's further submission on the third issue for determination as to whether she had complied with all the conditions for grant of temporary allotment was in affirmative. Their assertion was further emphasized by the fact that the Town Council had indeed acknowledged the fact that the Plaintiff had developed the said plot in its letter to the National Land Commission herein produced as Pf exh 6. That the Plaintiff had paid the survey fee and other ground rent as evidenced in the Pf exh 5 wherein after she had set up her fence and proceeded to develop the dwelling houses.

65. On the issue as to whether the 2nd Defendant was validly allotted the suit property, it was the Plaintiff's submission that from the letters

of allotment for the second Defendant, which letter was without any attachments the same raises numerous issues including whether the letter presented was genuine or obtained by means of fraud The Plaintiff relied on the decided case of **Lazarus Estate Ltd vs Beasley [1956] 1 ALL ER 341 AT 193** where the court held that;

‘No court in this land will allow a person to keep an advantage which he has obtained by fraud.’

66. It was the Plaintiff’s submission on their 5th ground on matters of determination that indeed there was no evidence adduced by the 2nd Defendant that he had accepted the terms stipulated on the letter of allotment herein produced as Df exh 1. No letter of acceptance was adduced, and further no evidence was adduced showing that the payments indicated on the grant of allotment letter were ever done. The mere payments of the charge was not sufficient proof of acceptance as a written acceptance was required as was held in the case of **Bubaki Investment Company Ltd vs National Commission & 2 Others [2015] eKLR**. Further the 2nd Defendant did not adduce any evidence that he had paid all the fees as was required in the allotment letter. It was therefore the Plaintiff’s submission that the 2nd Defendant did not meet all the conditions for grant of letters of allotment and therefore did not acquire interest in the property therein.

67. That as it had held in the case of **Bubaki Investment (supra)**, the 2nd Defendant’s letter of allotment was deemed to be effluxed by the lapse of time because there had been no acceptance. That where the offer had specified time within which it had to be accepted, no communication for the revocation would be necessary as it would simply stand revoked at the expiry of the specified time.

68. That the 2nd Defendant herein violated the specific terms of the allotment by neglecting to pay the rent of Ksh 600/= annually as provided which would have resulted in cancellation of the allotment. That the receipts the 2nd Defendant relied upon as their exhibits were irregular. The period in default being four years between the years 2012 and 2016. The Plaintiff also submitted that the 2nd Defendant had failed to develop the property within the stipulated time in breach of the contractual terms of the allotment and therefore his allotment was liable for cancellation. Reliance was placed on the decided cases of **Philma Farm Produce & Supplies & 4 Others vs Attorney General & 6 others [2012] eKLR**. and **Gabriel S Chepkwony vs Gideon Nzioki Mbili & Another [2018] eKLR**

69. On the eighth issue for determination, the Plaintiff submitted that indeed she had discharged her burden to the satisfaction of the court as is provided for under Section 107 of the Evidence Act in that after she had been validly allotted the suit property, she had fulfilled all the conditions for grant of letter of allotment. The Defendants on the other hand had failed to discharge their burden of proof on the validity of the letter of allotment they held. That further the subsequent sale to the 1st Defendant was a nullity there having been lack of the requisite consent to transfer from the Commissioner of Lands. That despite the said sale to the 1st Defendant having been undertaken in the year 2003, the rates were paid in lump sum in the year 2012 many years after the alleged sale had been completed thus vitiating the said sale agreement.

70. That the Plaintiff had established her ownership over the suit property and as a result it was their prayer that the court grants her a permanent injunction against the Defendants from interfering with the use of the suit. Further that the court makes orders that the Plaintiff be registered as the beneficial owner of the suit plot as sought in her reliefs.

Defendant s’ submissions

71. The Defendants’ submissions on their counter claim was based on their statement of issues filed in court on the 10th July 2017 to which there was no response from the Plaintiff in the main plaint.

72. That on the issues as to who was the legitimate allottee and the owner of plot No. K34 Olkalou Township (or k34 Jua Kali Olkalou) between the Plaintiff and the Defendant s, the Defendants submitted that from the evidence adduced before the court, it was beyond dispute that the 2nd Defendant was on the 4th February 1992 allotted by the Government of Kenya Parcel of land known as No. K34 Olkalou Township, wherein he had paid the sums required although he could not trace the receipts. That the allocation was for a portion of 0.06 hectares for a term of 99 years effective from 1st January 1992. The 2nd Defendant then sold his interest to the 1st Defendant and the change of interest was registered at the County offices wherein the 1st Defendant became the equitable owner of the plot aforesaid and he continued to pay the rates to the Nyandarua County Council as evidenced by the various receipts produced in court.

73. That when the Plaintiff had been issued with a temporary letter of allotment, the land in issue had already been alienated and was not available for re-alienation or re-allocation. The Defendant relied on the following cases in support of their submissions.

- i. **Thika ELC No. 282 of 2017 Wanjiku Njuguna & Others vs Frank Logistics & Others**
- ii. **Kericho ELC No. 30 of 2018 Geofry Kiprotich Koros vs Stanely Chirchir & Another**
- iii. **Kisumu ELC No. 4 of 2017 Ali Gadafi & Another vs Francis Muhia Mitungu & 2 Others [2017]eKLR**

74. The Defendants’ submission was that there was no evidence whatsoever of re-allocation or cancellation of the allocation to the 2nd Defendant by the Commissioner of Lands nor was there any demand for any monies whatsoever. That the Town Council of Ol Kalou had no authority to allot plot No. K34 Ol Kalou Township on a temporary basis because the said property was private property having been unlimited vide Df exh 1. Secondly the land in question belonged to the Government of Kenya and the Town Council of Ol Kalou simply had no interest thereon. Third, the Ol Kalou Town Council had no business issuing a temporary letter of allotment to the Plaintiff when the Plaintiff had not even applied for such a plot and had not in fact surrendered any piece of her land for public use as alleged.

75. That the evidence on record was that the Plaintiff’s title in respect of her land was still intact, she had never applied for or had never been granted any consent to either subdivide or transfer a portion of her land to the Ol Kalou Council, County of Nyandarua or the Gikombe Self-

Help Group. The basis therefore which the Plaintiff was allegedly compensated with the suit land had no foundation in fact or in law

76. That the letter of allotment issued to the Plaintiff was for a temporary period of time where the Ol Kalou Council intended to prevail upon the Commissioner of Lands to issue a permanent letter of allotment. To date no such letter had been issued to the Plaintiff.

77. That the temporary letter of allotment to the Plaintiff had no property worth because;

i. It did not proclaim how temporary it was

ii. It did not express the acreage that was offered on temporary basis

iii. It was not accompanied by a plan, PDP survey scheme identifiable on the ground

iv. It was not accepted by the Plaintiff by appending her signature at the bottom, she only signed the original letter when the case was ongoing.

v. The Plaintiff only paid acceptance charges to the County Council after five years in the year 2012.

78. That the temporary allotment letter did not vest any proprietary rights over the plot as of today and the Plaintiff therefore has no right on the plot capable of protection by a court of law.

79. On the issue for determination as to who between the Plaintiff and the Defendants had interfered with the subject plot in question, it was the Defendants' submission that from the evidence adduced in court the Defendants had been allotted the subject suit plot in the year 1992 where they paid the standard premium and had taken possession thereof erecting a perimeter fence and even dug a pit latrine. That thereafter in March 2017, the Plaintiff had encroached on the said suit land where she had deposited building materials and had excavated trenches. The Plaintiff had confirmed that indeed she had entered onto the suit property, removed the Defendants' fence and had actually commenced developing the property despite there having been no building approvals from the County Government of Nyandarua, the National Environment Management Authority, Kenya Construction Authority or the Public Health Authority. That her action had proved that she was desperately rushing to develop the plot without any approvals and contrary to the orders of the court. On the other hand, there was no interference by the Defendants.

80. On the third issue for determination as to whether the Plaintiff was entitled to any of the reliefs sought in her plaint, the Defendant submitted that they had demonstrated that the Plaintiff had been temporarily allocated a plot which already had been and alienated and which plot was not allotted by the Commissioner of Lands who was the residual (or reversionary) owner of the land and who had the authority to allocate the same. Further, the allotment was temporal waiting for future developments.

81. The Plaintiff did not surrender her parcel of land for use of public and utility upon which she was to be compensated with the suit plot. Despite there having been orders injuncting her from developing the suit land, the Plaintiff had without any approvals required in law, and in complete disregard of the court orders proceeded to develop the suit plot knowing very well that she had a temporary letter of allotment which had no efficacy or consequence in law. She therefore was not entitled to the prayers so sought in her plaint.

82. On the other hand as to whether the 1st Defendant was entitled to any relief sought in his plaint dated the 28th March 2017 in Nakuru ELC No. 336 of 2017, it was the Defendants' submission that based on the four prayers sought in their plaint, that their suit was never contested or defended by the Plaintiff who opted not to file any pleadings to challenge the averments in their plaint.

83. That in their uncontested evidence, they had proved that the Commissioner of Lands had allocated to the 2nd Defendant the piece of land known as Uns. Industrial plot No.34 Ol Kalou Township wherein the 1st Defendant had bought said interest from the 2nd Defendant for a valuable consideration as per their sale agreement. The transfer dated 3rd July 2003 was duly produced in court and the 1st Defendant has thereafter been paying the County rates as per the receipts produced in court. The Government of Kenya through the Commissioner of Lands has not revoked, recalled or cancelled the said letter of allotment dated 4th February 1992 to date. The 1st Defendant had therefore proved that he was the bona fide owner of the suit land herein being plot No. uns. Industrial plot No.34 Ol Kalou Township.

84. That the Plaintiff had trespassed on the said plot herein where she had erecting an unlawful building to which the 1st Defendant would have to use resources to pull it down. This thus entitled the 1st Defendant to orders of permanent injunction restraining the Plaintiff from interfering with the said plot as well as damages for trespass, unauthorized and/or unlawful occupation of his plot.

85. The Defendant also submitted that the Plaintiff's suit was incurably defective in law for the plaint filed on the 8th March 2017 was not dated or signed by either the Plaintiff or her Advocate, further her verifying affidavit was not executed by the deponent and was not dated. Secondly the Plaintiff's list of documents, witness statements and list of witnesses were neither dated nor executed by either the Plaintiff or her Advocate in contravention of Order 2 Rule 16 of the Civil Procedure Rules which make it mandatory for all the pleadings to be signed and dated. That the Plaintiff's case was fundamentally defective and incapable of salvation even by the provisions of Article 159(2) (d) of the Constitution.

86. That the Plaintiff's case was an abuse of the court process, scandalous, frivolous, and vexatious and meant to embarrass or delay a fair trial wherein Defendants sought that the Plaintiff's suit be dismissed with costs for lack of merit.

Analyses and Determination.

87. I have carefully considered the Plaintiff's claim against Defendants as well as the Defendants' counterclaim against the Plaintiff herein, the evidence, the submission as well as the applicable law thereto.

88. What comes out clearly in this case is that while the Plaintiff's case on one hand is that she was issued with a temporary letter of allotment to Plot No. K34 Jua Kali Olkalou by the Town Council of Olkalou on the 12th July 2007 as compensation for having surrendered her land for public use, when she went to fence the said plot, she had found that someone had illegally put a fence around it wherein she pulled it down and erected her own. That the Defendant herein then lay claim to it.

89. The Defendants' case on the other hand is that on the 4th February 1992, the 2nd Defendant had been allotted parcel of land plot No. K34 Olkalou Township measuring 0.06 hectares for a term of 99 years effective from 1st January 1992, by the Commissioner of Lands. That upon having been lawfully allotted his parcel of the suit land, he had erected a fence around it and had also dug a pit latrine thereon. Later in the year 2003, he had sold the same to the 1st Defendant at a consideration only to discover later that the Plaintiff lay claim to it.

90. The matters for determination herein are;

- i. Whether the suit land herein was Government or Trust land.
- ii. Whether the Town Council of Olkalou had authority to allocate it to the Plaintiff herein.
- iii. Whether the Plaintiff herein was entitled to the orders sought.
- iv. Whether the Defendant is entitled to the prayers sought in their Counterclaim.

91. In the case of **Leah Magoma Ongai v Attorney General[2015] eKLR**, the honorable judge gave a clear distinction of the powers granted by the statute to the commissioner of land vis-a-vis and the powers of the County Councils in as far as allocating land was concerned. The court held as follows:

Before the enactment of the Constitution of Kenya 2010, the Kenyan legal regime classified land as, Government land, Trust land and Private land. Government land was regulated by the Government Lands Act, Cap. 280 Laws of Kenya (now repealed) while Trust Land was regulated under the Trust Land Act Cap. 288, Laws of Kenya. Under the Government Lands Act aforesaid, the President had power or authority to make grants or dispositions of any interests or estates in un-alienated Government land. See, section 3 (a) of the Government Lands Act, Cap. 280 Laws of Kenya (now repealed). The power of the President to alienate Government land as aforesaid was delegated to the Commissioner of Lands in certain specific cases. The alienation of Government land by the President or the Commissioner of Lands was subject to the provisions of the Government Lands Act aforesaid. With regard to Trust land, Section 115 (1) of the repealed Constitution of Kenya vested all Trust land in County Councils in whose jurisdiction such land was situated.

Section 117 of the repealed Constitution of Kenya empowered the County Councils to set apart an area of Trust land within their jurisdiction for use and occupation by any person for a purpose which in the opinion of the County Council is likely to benefit the residents of the area. Section 13 of the Trust Land Act Cap. 288 Laws of Kenya provides for the setting apart of Trust land by County Councils for private use pursuant to the provisions of section 117 of the repealed Constitution of Kenya aforesaid. Section 53 of the Trust Land Act gave the Commissioner of Lands power to administer Trust land as an agent of the County Councils and in that regard, the Commissioner of Lands had power among others to execute on behalf of the County Councils, grants, leases, licences and other documents relating to Trust land. Section 13 (2) of the Trust Land Act provides that the setting apart of land by a County Council must be approved by a resolution passed by a majority of the members of the Council. Although the Commissioner of Lands had power to administer Trust land on behalf of the County Councils, section 53 (a) of the Trust Land Act denied it power to approve the setting apart of Trust land on behalf of the County Councils. In discharge of its duties under the Trust Land Act, the Commissioner of Lands was enjoined to act in accordance with the directions of the County Councils.

92. What clearly comes out from the above is that, Government land was vested in the Government, wherein only the President and the Commissioner of Lands had power to alienate the same. Trust land on the other hand was vested in County Councils and the Commissioner of Lands had no power to alienate the same save as directed by the County Councils through a resolution. Whereas the Plaintiff claimed that the suit property herein had been allocated to her by the Town Council of Olkalou, from the Temporary allotment letter dated 12th July 2007 herein produced as Pf exh 4, the same was to the effect that :

The Council through Min W.T.P.M /20/2006 dated 13th December 2006 hereby offers you this allotment letter for plot No.K34 at Olkalou as a compensation for having surrendered your land for public use while you wait for another one from the commissioner of lands...'

93. From the above captioned legal provisions and the sentiments of the Town Council of Olkalou in Pf exh 4 herein, it is clear that the Town Council had allotted to the Plaintiff Government land temporary while awaiting the final allotment letter from the body which was empowered to allocate the said land, the Commissioner of Land herein. There was no evidence adduced at the trial that the suit land was trust land which then would have been the preserve of the County Council of Olkalou to allocate.

94. Indeed the 1st Defendant's letter of allotment dated 4th February 1992 that was produced in evidence as Df.exh.1 was signed by the Commissioner of Lands. The letter leaves no doubt that the *un-surveyed Industrial Plot No. K34 Ol kalou Town* that was allotted to the 1st Defendant was Government land. The opening paragraph of the letter states as follows:-

“I have the honour to inform you that the Government (emphasis mine) hereby offers you a grant of the above plot shown edged in red on the attached plan”

The said letter of allotment continued as follows:-

“This letter of allotment is subject to and the grant will be made under the provisions of the Government Lands Act (Cap 280 of the revised edition of the laws of Kenya) and title will be issued under the Registration of Titles Act, (Cap 281).”

95. The Defendant was therein after to be issued with a title in the form of a grant under the Registration of Titles Act, Cap 281 of Laws of Kenya the land having been Government land. It therefore comes out clearly that the suit land herein was Government land and therefore the Town Council of Olkalou had no authority to allocate it to the Plaintiff herein.

96. Let us for once imagine that indeed the Town Council of Olkalou had the authority to allocate the suit land herein to the Plaintiff. Again we shall be drawn back to the temporary letter of allotment the Plaintiff held. The reason stipulated therein as to why she was being allotted the parcel of land was;

‘as a compensation for having surrendered your land for public use’

97. From the evidence adduced in court, although the Plaintiff had agreed to excise part of her land in Parcel No. LR Nyandarua/Olkalou Central/909 for the self-help group to erect a water tank to be used by the public, yet the evidence adduced in court and on record was that the Plaintiff’s title in respect of her land is still intact, she had never applied for or had never been granted any consent to either subdivide or transfer a portion of her land to the Ol Kalou Council, County of Nyandarua or the Gikombe Self-Help Group. Further her land had never been sub divided, or transferred and neither was any title conferred to the self-help group. The basis upon which the Plaintiff was allegedly compensated with the suit land had therefore no foundation in fact or in law.

98. Having found as above, I am obliged to consider a circumstance like this one where there was double allotment of the same parcel of land. As I understand, the requirements of allocation on land is that once a plot has been allocated there has to be followed a procedure for either cancellation or forfeiture of the allocation before the same is allocated to a second person. This is usually premised upon either breach of the conditions of the allocation such as development or outright rejection of allotment and that for the allocation to be forfeited there must be notification to the allottee of the cancellation or forfeiture. The 1st Defendant herein was the first to be allocated the plot on the 4th February 1992 and still retains the documents of allocation.

99. Upon receiving the said letter of allocation, he had gone and fenced the suit land and had dug a pit latrine thereon. In the year 2007 almost 15 years later in the year 2007, the Plaintiff, upon receiving a Temporary letter of allotment, went on the suit land and had removed the Defendant’s fence thereby erecting her own. In as far as this point is concerned, I find that as at the time the Plaintiff was pulling down the fence, the Defendant had been in possession of the suit premises and therefore was first on the said suit land. The Plaintiff’s actions therefore consisted of acts of trespass.

100. In the case of **Park Tower Vs Moses Chege & others HC Civil suit No. 1825 of 1999 (2014) eKLR** Justice Mutungi held as follows:-

“I agree with the learned judges that where trespass is proved a party needs not prove that he has suffered any specific damage or loss to be awarded damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case. As observed on the cases referred to there is no mathematical or scientific formula in such cases for assessment of general damages.and any unlawful act of aggression and/or intrusion that prevents the rightful owner of the property from enjoyment of his ownership rights of possession and use is to be frowned at and is punishable by way of an award of damages”.

101. Both the Temporary letter of allotment issued to the Plaintiff and the letter of Allotment issued to the 1st Defendant over the suit property contained special conditions attached thereto that had to be fulfilled by the allottees as a sign of acceptance. However going by the evidence adduced in court as well as the Documentary evidence adduced by both parties, the court finds that neither of the parties fully complied with the conditions therein. Further there was no acceptance letters, but both the Plaintiff and the Defendant have relied on the copies of the receipt whereby they had made various payments to the Town Council of OlKalou and the Commissioner of Land respectively as evidence of the acceptance of the offer of allotment of the suit plot.

102. This notwithstanding, once the 2nd Defendant had been allotted the suit land and had paid the requisite fees thereby taking possession, the plot was not available for allocation to the Plaintiff in 2007. See the case of **Benja Properties Limited v Syedna Mohammed Burhannudin Sahed & 4 Others [2015] eKLR**.

103. It is trite law that when there are two competing titles, the first in time will prevail. This position was emphasized in the case of **Wreck Motors Enterprises vs. The Commissioner of Lands and Others Civil Appeal Civil Appeal No. 71 of 1997**, where the court held that:

‘Where there are two competing titles the one registered earlier is the one that takes priority ‘

104. The same position was held in the case of **Gitwany Investment ltd vs. Tajmal Ltd & 3 Others (2006) eKLR** where the Court held that:-

‘...the first in time prevails, so that in the event such as this one whereby a mistake that is admitted, the Commissioner of Lands issues two title in respect of the same parcel of land, then if both are apparently and on the face of them issued regularly and procedurally, without fraud save for the mistake then the first in time must prevail’

105. I find that the Defendant’s title was the first in time and as equity dictates that **“when two equities are equal, the first in time prevails”**, then the Defendant’s allotment letter which was the first in time should prevail. Having found as above, the Plaintiff’s suit is herein dismissed with costs.

106. The court allows the Defendant’s counterclaim and grants prayers (a), (b) of the same. In regard to prayer (c) the court awards the Defendant Ksh 100,000/= as damages for trespass

107. It is so ordered.

Dated and delivered at Nyahururu this 12th day of November 2019.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE