



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kiprop & 2 others v Korir & 2 others (Environment and Land Appeal E018 of 2022) [2024] KEELC 260 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 260 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ITEN  
ENVIRONMENT AND LAND APPEAL E018 OF 2022**

**L WAITHAKA, J  
JANUARY 25, 2024**

**BETWEEN**

**MUSA KIPROP ..... 1<sup>ST</sup> APPELLANT  
SAMSON KA TIM ..... 2<sup>ND</sup> APPELLANT  
MICHAEL K KURGAT ..... 3<sup>RD</sup> APPELLANT**

**AND**

**JONAH KORIR ..... 1<sup>ST</sup> RESPONDENT  
AGNES JEPTEPKENY ..... 2<sup>ND</sup> RESPONDENT  
KIPROP CHANGWONY ..... 3<sup>RD</sup> RESPONDENT**

*(An Appeal from the Judgment of Hon. R. Koech SPM at Eldama Ravine delivered on 17th March 2022 in Eldama Ravine CMCC (ELC) No. 60 of 2015)*

**JUDGMENT**

**Background**

1. By a Plaint dated 21<sup>st</sup> October 2015 and amended on 26<sup>th</sup> April 2018, the plaintiffs (now appellants) instituted a suit in the lower court to wit Eldama Ravine SRMCC Case No. 60 of 2015 seeking judgment against the defendants (now respondents) for:-
  - a. An order of eviction directing the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants to vacate and remove all structures within the plaintiffs' parcels of land known as Mogotio L.R No. Block 1/48 and 51 each measuring 0.076 hectares or thereabout (the suit properties);
  - b. Mesne profits for illegal encroachment and interference with the suit properties;



- c. A permanent and mandatory injunction to restrain the defendants, their agents and/or servants from further interference with the plaintiffs' properties;
  - d. Costs of the suit;
  - e. Interest on (a) and (b) above;
  - f. Any other or further relief or order that the court may deem fit to grant.
2. The plaintiffs' suit was premised on the grounds that at all times material to the suit, the plaintiffs were the registered proprietors of the suit properties having been allocated the suit properties by the Commissioner of lands in 1988. The plaintiffs blamed the 2<sup>nd</sup> and the 3<sup>rd</sup> defendants of having unlawfully trespassed into the suit properties thereby depriving them of their use and enjoyment of the suit properties. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants were said to have been helped by the 1<sup>st</sup> defendant to do the acts complained of.
  3. The 1<sup>st</sup> defendant filed a statement of defence dated 19<sup>th</sup> April 2018, denying the allegations levelled against him and contending that the plaintiffs colluded and fraudulently had themselves registered as the owners of the suit properties without any legal documents and/or without following due process. Vide paragraph 6 of the statement of defence, the 1<sup>st</sup> defendant listed the particulars of fraud levelled against the plaintiffs as follows: -
    - i. Fraudulently had themselves registered without clearance from the Commissioner of lands;
    - ii. Procuring registration without lease documents;
    - iii. Falsing records at the District Lands Registry.
  4. The 1<sup>st</sup> defendant also contended that the plaintiffs got themselves registered as the proprietors of the suit properties despite the defunct Municipal Council of Baringo raising a red flag over the records at the District Lands office.
  5. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants also filed statements of defence denying the allegations levelled against them and contending that the plaintiffs procured registration of the suit properties fraudulently and without process.
  6. It is noteworthy that unlike the 1<sup>st</sup> defendant, the 2<sup>nd</sup> and the 3<sup>rd</sup> defendants did not provide the particulars of fraud urged against the plaintiffs or of the alleged none compliance with the law in procuring registration of the suit properties in their names.
  7. By way of counterclaim, the 2<sup>nd</sup> defendant prayed for judgment against the plaintiffs for: -
    - a. A declaration that he, the 2<sup>nd</sup> defendant, is the owner of the parcel of land known as Mogotio Township Block 1/48 also known as plot No. 946 at Mogotio Township and an order of cancellation of the certificate of lease issued to the 1<sup>st</sup> defendant for the said parcel of land;
    - b. An order of permanent injunction restraining the 1<sup>st</sup> and 3<sup>rd</sup> plaintiffs, their servants, agents and/or employees from evicting and/or interfering with his possession of the parcel of land known as Mogotio Township 1/48 (also known as plot No. 946 at Mogotio Township);
    - c. Costs of the suit and counter claim.
  8. Through his counterclaim, the 3<sup>rd</sup> defendant sought judgment against the plaintiffs for: -



- a. A declaration that he, the 3<sup>rd</sup> defendant, is the lawful owner of the parcel of land known as Mogotio/Township Block 1/51 formerly known as plot number 1056; an order for cancellation and/or revocation of the certificate of lease issued in the name of Samson K.A. Tim and for a certificate of lease to be issued in his name;
  - b. An order of permanent injunction restraining the Defendants by themselves, their agents, servants and/or assigns or any person acting on their behalf from entering, transferring the parcel of land known as Mogotio Township block 1/51 formerly known as plot No. 1056;
  - c. Costs and Interest of the suit.
9. The parties led evidence in support of their pleaded cases.
10. Upon considering the cases urged before him, the learned trial magistrate (TM) entered judgment in favour of the defendants/respondents and against the plaintiffs/ appellants. In so doing, the learned TM inter alia observed/held: -

“What is appearing from the evidence presented is that the 2<sup>nd</sup> and the 3<sup>rd</sup> plaintiffs acquired letters of allotment without involving the defunct council of Koibatek which already had allocated plot No. 946 and 1056 to the 2<sup>nd</sup> defendant and one Evans Kipkurui respectively. I do find that the disputed properties fell within trust lands. The authority to allocate rested with the defunct county council of Baringo and later the defunct county council of Koibatek.

The commissioner of lands could only allocate leases with the consent and concurrence of the defunct county councils. Any allocation by the Commissioner of lands done without consent of the defunct councils amounts to a nullity....In the circumstances, I do dismiss the plaintiffs’ suit with costs to the Defendants and allow the counterclaim by the 2<sup>nd</sup> Defendant and DW3 who was sued as the 3<sup>rd</sup> Defendant.”

11. Aggrieved by the judgment/decision of the learned TM, the plaintiffs/appellants appealed to this court on the following grounds: -
- That Learned Trial Magistrate (TM) erred by: -
1. Finding against the appellants when there was overwhelming evidence in favour of them;
  2. Wrongly shifting the burden of proof to the appellants;
  3. Granting prayers that were not sought by the respondents in the counterclaim;
  4. Making a finding to cancel their title without a finding on fraud or evidence to support such cancellation.
12. Pursuant to directions given on 23<sup>rd</sup> March, 2023 the appeal was disposed by way of written submissions.

### **Appellant’s Submissions**

13. In their submissions filed on 18<sup>th</sup> April 2023, the appellants have reiterated their contention that the learned TM erred by entering judgment against them when there was overwhelming evidence in support of their case. In that regard, the appellants have submitted that they adduced evidence showing that they were the legal owners of the suit properties and that they were allocated the suit properties by



the Commissioner of lands way before the same was purportedly allocated to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants by the County Council of Koibatek.

14. Arguing that they followed due procedure in acquiring title to the suit properties, the appellants submit that being the first ones in time to be allocated the suit properties, their interest in the suit properties ranks higher than that of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. The appellants fault the learned trial magistrate for determining that the suit property was trust land when there was no evidence adduced by the parties to that effect.
15. Based on the certificates of lease issued to them showing that the lessor is the Government of Kenya, it is submitted that the learned trial magistrate erred by holding that the Commissioner of lands had no authority to allocate land vested in County Government without the consent and/or participation of the County Councils.
16. Arguing that the certificates of lease issued to them have not been impeached by any competent authority, the appellants submit that the learned trial magistrate erred by ordering cancellation of their certificates of lease. In that regard, reference is made to the decisions in the cases of Joseph N.K Arap Ng'ok v. Moiyo Ole Keiwua & 4 others (1997)e KLR; Elijah Makeri Nyangw'a vs. Stephen Mungai Njuguna & another (2013)e KLR and Republic v. City Council of Nairobi & 3 others (2014)e KLR.

### **1<sup>st</sup> Respondent's Submissions**

17. In his submissions filed on 5<sup>th</sup> July 2023, the 1<sup>st</sup> respondent has framed the following issues for the court's determination: -
  - i. Whether 1<sup>st</sup> defendant/respondent was a necessary party?
  - ii. Whether the trial court erred by dismissing the appellant suit and allowing the 2<sup>nd</sup> and 3<sup>rd</sup> defendants counter claim?
  - iii. What is the order as to costs?
18. Concerning the first issue, reference is made to the court's proceedings and submitted that it is clear that the 1<sup>st</sup> defendant/respondent was sued in his capacity as a surveyor yet he had no interest whatsoever in the suit properties. The plaintiffs are said to have failed to disclose any cause of action against the 1<sup>st</sup> defendant/respondent. Explaining that his role was limited to ascertaining the boundaries of the suit properties and confirming whether there was any encroachment, the 1<sup>st</sup> defendant/respondent submits that the plaintiffs' claim that he allocated the suit properties is without basis as he had no power to allocate the suit property to the 2<sup>nd</sup> and the 3<sup>rd</sup> respondents.
19. According to the 1<sup>st</sup> defendant/respondent, only the Commissioner of lands and/or the defunct County Councils had power to allocate land.
20. Maintaining that he was wrongly joined in the suit, the 1<sup>st</sup> respondent submits that the plaintiffs' suit against him was incompetent and without basis. In that regard reliance is placed on the case of Solomon Kipchoge Kipsogei vs. Lake Victoria North Water Services Board & 3 others (2019)e KLR.
21. On whether the trial court erred by dismissing the appellants' suit and allowing the 2<sup>nd</sup> and the 3<sup>rd</sup> defendants'/respondents' counterclaim;- based on his evidence to the effect that plot No. D13, Plot No.946 and Plot No. Mogotio Township Block 1/51 refer to the same plot on the ground, being the plot claimed by the 2<sup>nd</sup> plaintiff/appellant and the 2<sup>nd</sup> defendant/respondent and that plot No D11, Plot No.1056 and Plot No. Mogotio Township Block 1/48 refer to the same plot on the ground being the plot claimed by the 3<sup>rd</sup> plaintiff/appellant and the 3<sup>rd</sup> defendant/respondent, the concession by



P.W.3 (1<sup>st</sup> appellant) that Mogotio Township belongs to the County Government of Baringo, formerly the defunct County Council of Koibatek, it is submitted that the suit properties were trust lands. Further reliance is placed on the decisions in the cases of Leah Magoma Ongai vs Attorney General (2015) e KLR; Daudi Kiptugen v. Commissioner of lands & 4 others (2015) e KLR; Re RE HEA (minor) (2011) eKLR; Macfoy v. United Africa Company Ltd (1961) 3 ALL ER 1169; Advisory Opinion Reference No.2 of 2014-in the matter of the National Land Commission 2015 e KLR; Simon Abuki Omboto v Kisii County Government & another (2015) e KLR.

22. It is submitted that the Commissioner of lands had no authority to alienate land to the appellants without the resolution of the defunct County Council of Koibatek and Baringo. In view of the foregoing, it is submitted that the learned trial magistrate was right in dismissing the appellants' suit and allowing the 2<sup>nd</sup> and the 3<sup>rd</sup> defendant/respondents' counterclaim.

### **3<sup>rd</sup> Respondent's Submissions**

23. In his submissions filed on 5<sup>th</sup> May 2023, the 3<sup>rd</sup> defendant/respondent submits that the plaintiffs had the primary burden of showing that the suit properties belong to them. It is acknowledged that the plaintiffs had certificates of lease but submitted that the fact that the plaintiff could not account for the procedure of acquisition of the suit properties was prima facie evidence of illegality in the acquisition. Reliance is placed on the decision in the case of Munyu Maina vs. Hiram Gathima Maina (2015) e KLR where the Court of Appeal held it is not sufficient to dangle the instrument of title as proof of ownership since it is that instrument of title that is under challenge.
24. It is submitted that the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.
25. The plaintiffs are said to have failed to prove that the 3<sup>rd</sup> defendant/respondent, in collusion with the 1<sup>st</sup> defendant /respondent arbitrarily, illegally and/or fraudulently and without any colour of right, deprived the 2<sup>nd</sup> defendant/respondent parcel number 1/51 (formerly known as 1056). The plaintiffs are also said to have failed to provide any concrete evidence challenging the 3<sup>rd</sup> defendant's /respondent's proprietorship of the suit property or affirming the 2<sup>nd</sup> plaintiff/appellant's proprietorship as alleged.
26. It is further submitted that the plaintiff's pleadings fell short of the standard of pleading fraud, under Order 2 Rule 10(1) of the Civil Procedure Rules. In that regard, reference is made to the case of Kuria Kiarie & 2 others v. Sammy Magera (2018)e KLR where the Court of Appeal stated:-
- “We need not belabor this issue as we are satisfied that it was neither properly pleaded nor strictly proved.”
27. On standard of proof of fraud, the 2<sup>nd</sup> appellant is said to have failed to prove to the required standard the alleged acts of fraud and/or illegality levelled against the defendants /respondents, particularly the 1<sup>st</sup> and the 3<sup>rd</sup> defendant /respondent. The 3<sup>rd</sup> defendant/respondent is said to have adduced evidence concerning how he acquired the suit property which evidence is said to have been uncontroverted.
28. It is reiterated that the 2<sup>nd</sup> appellant did not have probative proof of ownership of land.
29. The contention that the learned trial magistrate granted prayers that were not sought is said to be an effort in futility as the learned trial magistrate dismissed the plaintiffs' suit with costs to the defendants and allowed the counterclaim by the 2<sup>nd</sup> defendant and D.W.3 who was sued as the 3<sup>rd</sup> defendant.



30. It is reiterated that the plaintiffs/appellants are not entitled to the orders sought as they did not prove their case to warrant issuance of the orders sought against the defendants/respondents.
31. It is pointed out that the learned trial magistrate was concerned with the irregularities that occurred. For instance, acquisition of land by a minor and submitted that no explanation was offered on how that happened.
32. It is further submitted that allocation of land to the appellants by the Commissioner of lands was done irregularly in that the letters produced by the 1<sup>st</sup> Respondent in evidence are said to be public documents hence not mandatory that they be produced by the maker.
33. Maintaining that the plaintiffs /appellants failed to prove ownership of the suit properties, the 3<sup>rd</sup> respondent urges the court to dismiss the Appeal with costs to the respondents.
34. The 2<sup>nd</sup> defendant/respondent did not file submissions or otherwise put his submissions, if filed, were not in the court file at the time of writing this judgment.

### **Analysis and determination**

35. In exercise of the duty vested in this court as the first appellate court, I have re-evaluated the evidence adduced before the lower court with a view of reaching my own conclusion on it. I have reminded myself that a first appellate court will not ordinarily interfere with findings of fact by the trial court unless they were based on no evidence at all, or were based on misapprehension of the evidence or unless it is demonstrated that the trial court acted upon wrong principles in reaching the finding. In that regard, see *Selle & another vs. Associated Motor Boat Co. Ltd (1968)E.A 123* and *Mwanasokoni vs. Kenya Bus Service Ltd (1982-88)1 KAR* and *Kiruga vs. Kiruga & Another (1988)KLR 348*.
36. A review of the evidence adduced before the lower court shows that the plaintiffs have leases and certificates of lease issued to them by the Commissioner of Lands. Issuance of the leases and certificates of leases was preceded by offers granted to them by the Commissioner of lands (letters of allotment) which offers, the plaintiffs accepted and complied with the conditions set therein before they were issued with leases for their respective parcels of land and later certificates of lease.
37. By operation of law, and in particular, Sections, 27, 28 and 143 of the Registered *Land Act*, Cap 300 Laws of Kenya, (repealed) as read with Section 107 of the *Land Registration Act*, 2012, the certificates of lease held by the 1<sup>st</sup> and 2<sup>nd</sup> appellants enjoy legal protection and can only be challenged on the grounds/ circumstances contemplated under Sections 27, 28 and 143 of the Registered *Land Act*, (repealed) Cap 300 Laws of Kenya. In that regard see the said Section of the law which provide as follows:-
  - “27. Subject to this Act - (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.
  28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject -



(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and (b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register: Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.

143. Subject to subsection (2), the court may order  
(1) rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake. (2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.”

38. Also see Section 107 of the *Land Registration Act, 2012* which provides as follows:-

“ 107. Unless the contrary is specifically provided for in this Act, any right, interest,  
(1) title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.”

39. The defendants/respondents acknowledge that the plaintiffs have leases issued to them by the Commissioner of Lands but contend that the leases were issued illegally and/or unprocedurally.

40. As pointed out herein above, the 1<sup>st</sup> defendant/ respondent contended that the plaintiffs colluded and fraudulently had themselves registered as owners of the suit properties without any legal documents and/or without following due process. Under paragraph 6 of his statement of defence the 1<sup>st</sup> defendant particularized the fraud urged against the plaintiffs as follows:-

- i. Fraudulently had themselves registered without clearance from the Commissioner of lands;
- ii. Procuring registration without lease documents;
- iii. Falsing records at the District Lands Registry.

41. Having gone through the evidence adduced in this case, I did not find any evidence adduced by the 1<sup>st</sup> defendant /respondent capable of proving the pleaded fraud.

42. Contrary to his pleaded case, the 1<sup>st</sup> defendant/ respondent acknowledges that the plaintiffs had leases issued by the Commissioner of lands but contended that the Commissioner of lands had no power to issue land belonging to County Councils without the consent or concurrence of the County Council.

43. The 1<sup>st</sup> defendant/respondent had also pleaded that the plaintiffs/appellants had gotten themselves registered as proprietors of the suit property without following due process.



44. Although no particulars of the pleaded want of due process were provided as by law required, the 1<sup>st</sup> defendant/respondent, produced evidence showing that the County Council of Koibatek, through its clerk, protested to the Commissioner of lands about allocation of land by the Commissioner in Mogotio Township. In cross examination, he acknowledged that the protest letters did not specifically refer to the parcels of land allocated to the plaintiffs. He also testified that the plaintiffs did not apply to the County Council for allocation of the land but dealt directly with the Commissioner of Lands. He based his allegation on the protest letters written by the Clerk County Council of Koibatek. In cross examination, he inter alia acknowledged that some allotments were done by the County Council of Baringo before the County Council of Koibatek was formed.
45. Have carefully re-evaluated and analyzed the evidence adduced by the 1<sup>st</sup> defendant/respondent, whereas it shows that the County Council of Koibatek protested against issuance of letters of allotment by the Commissioners of land without involvement of the County Council of Koibatek, it does not show that the allotments issued to the plaintiffs were done without consent or concurrence of either the County Council of Koibatek or that of Baringo.
46. It is a cardinal principle of law that he who alleges must prove that which he asserts. In that regard see Section 107 of the [Evidence Act](#), which provides as follows:-
- “Whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove that those facts exist”.
47. In the circumstances of this case, the 1<sup>st</sup> defendant /respondent, claimed that the Commissioner of lands did not seek the consent of the County Council or its concurrence before issuance of the letters of allotment he issued to the plaintiffs/appellant but failed to specifically prove that fact particularly regarding the letters of allotment issued to the plaintiffs/appellants.
48. Under Order 2 Rule 4 of the Civil Procedure Rules, it was not enough for the defendants to merely allege that there was illegality in the acquisition of the suit property by the plaintiffs/appellants arising from failure to follow due process in acquisition of the suit properties. The defendants were under a legal obligation to give particulars of want of due process. In that regard, see the said section of law, which provides as follows:-
- “A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality-
- a. Which he alleges makes any claim or defence of the opposite part not maintainable;
  - b. Which, if not specifically pleaded, might take the opposite party by surprise; or
  - c. Which raises issues of fact not arising out of the preceding pleading”.
49. On their part, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants merely pleaded that the plaintiffs obtained title to the suit property unlawfully and without following due procedure. They did not provide any particulars of unlawfulness or want of due process as required of them under Order 2 Rule 4 of the Civil Procedure Rules. Their attempt to prove unlawfulness or want of procedure when they had not pleaded it as by law required, amounts to an attempt to prop up their pleaded case something the law does not allow. In any event, they failed to prove to the required standard of proof that there was indeed unlawfulness and want of procedure in the allocation and issuance of the suit properties to the plaintiffs.



50. As pointed out herein above, the mere fact that the County Council of Koibatek protested about allocation of land by the Commissioner of lands without its concurrence or approval, is not proof that the leases held by the plaintiffs /appellants were issued without the concurrence of the County Council.
51. It is the view of this court, that even if the certificates of lease issued to the plaintiffs were issued without the approval of the County Council, the right thing for the County Council to do was to challenge issuance of those certificates of lease in a court of law and not to purport to re-issue the suit properties as it did.
52. Although the 1<sup>st</sup> defendant claimed that she was allocated her parcel of land in 1979, prior to allocation of the same to the 1<sup>st</sup> plaintiff/appellant, the evidence adduced before court shows that the defendants were issued with letters of allotment in 2008 long after the suit properties were allocated to the plaintiffs and certificates of lease issued to them. The conclusion by the trial magistrate that the 2<sup>nd</sup> and the 3<sup>rd</sup> defendants obtained their letters of allotment before the plaintiffs/appellants is not backed by the totality of the evidence adduced before him.
53. Being the first ones to have been allocated the suit properties and having acquired certificates of lease in respect of the suit properties, the plaintiffs' interest in the suit properties ranks higher in priority compared to that of the defendants. In that regard, see the case of Rukaya Ali Mohamed vs. David Gikonyo Nambacha & Another Kisumu HCCA No. 9 of 2004 where it was held/stated;

“Once allotment letter is issued and the allottee meets the conditions therein, the land in question is no longer available for allotment since a letter of allotment confers absolute right of ownership or proprietorship unless it is challenged by the allotting authority or is acquired through fraud mistake or misrepresentation or that the allotment was out rightly illegal or it was against public interest. In other words, where land has been allocated, the same land cannot be reallocated unless the first allocation is validly and lawfully cancelled.”

54. Also see the case of Muthithi Investments Limited v. Andrew S. Kyendo & 22 others (2014)eKLR where it was stated/held:-

“...I have already held that the plaintiff is validly registered as proprietor of L.R. NO. 23917 and as such is entitled to enjoy the rights of proprietorship as conferred under section 25(1) of the [Land Registration Act](#) NO.3 of 2012.... The Defendants admit in their evidence that they entered into possession of the suit land and caused the same to be subdivided whereupon they allocated their members sub plots on which they started to effect developments. The Defendants place reliance on the alleged letter of allotment as giving them authority to enter and occupy the suit land. As I have stated above the letter of allotment purported to allot plot L.R.NO. 11344/R whose location on the ground was not shown. The land on which the defendants entered and commenced to put up developments was the land that was leased out to the plaintiff pursuant to the court order being L.R. NO. 23917 Nairobi. To the extent that the plaintiff is the registered owner of this land the entry possession and occupation of the same by the Defendants was unlawful. In my view even if the defendants had a letter of allotment of the same property the letter of allotment until there was acceptance and compliance with the terms of the allotment remained just an intention on the part of the City Council which the council could rescind. Further on the basis of competing interests the interest of the holder of a validly registered title would be superior to that of the holder of a letter of allotment over the same property even if the letter of allotment may have been issued earlier than the title.



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

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

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

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

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

55. The upshot of the foregoing is that the Appeal has merit and is allowed as prayed.

**JUDGMENT DATED, SIGNED AND DELIVERED AT ITEN THIS 25<sup>TH</sup> DAY OF JANUARY, 2024.**

**L. N. WAITHAKA**

.....

**JUDGE**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

**Judgment delivered virtually in the presence of:-**

Mr. Maritim for the appellants

N/A for the 1<sup>st</sup> & 2<sup>nd</sup> Respondents



Mr. Kibet for the 3<sup>rd</sup> Respondent  
Christine Towett – Court Assistant

