



**Musingi v Muthoni & another (Environment & Land Case  
136 of 2012) [2024] KEELC 356 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 356 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 136 OF 2012  
LN MBUGUA, J  
JANUARY 25, 2024**

**BETWEEN**

**ANASTACIA WANJIRU MUSINGI ..... PLAINTIFF**

**AND**

**ANTHONY MWANGI MUTHONI ..... 1<sup>ST</sup> DEFENDANT**

**NAIROBI COUNTY GOVERNMENT ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. By a plaint dated 16.3.2012 and amended on 10.6.2018, the plaintiff claims to be the owner of a parcel of land identified as Komarack Bridge Jua Kali Plot No.81, having purchased the same from one Paul Kabunga Karanja in year 2005. That the vendor was a beneficiary of the plot after being displaced from Muoroto. The plaintiff contends that the process of identification of the beneficiaries in the entity known as Komarock Bridge Jua Kali was undertaken by the Provincial Administration and the Housing Development Department (hereinafter H.D.D.) which is a unit of the 2<sup>nd</sup> defendant.
2. The plaintiff contends that the suit plot was trespassed upon by the 1<sup>st</sup> defendant on 29.2.2012, and she therefore seeks the following orders;
  - i. A permanent injunction restraining the defendants, its agents, servants, employees, officers and/or directors from trespassing and interfering with the suit premises in any manner whatsoever.
  - ii. A mandatory injunction compelling the Defendants to remove the building materials and the structure erected on the suit premise.
  - iii. A declaration and order that the Plaintiff is the owner of the suit premises.
  - iv. General damages.



- v. Cost of this suit.
- vi. Any other or further orders this Honourable Court may deem just and fit so grant.
3. The 1<sup>st</sup> defendant denied the claim of the plaintiff through his statement of defence dated 22.7.2014 and amended on 17.3.2017. He admits the contents of paragraph 6 of the plaint to the extent that the beneficiaries of the plot (s) were evictees from Muoroto, but denies that the plot in question belongs to the plaintiff. He claims to be the legal owner of the plot in question, thus he denies being a trespasser.
4. The 2<sup>nd</sup> defendant had filed a statement of defence on 23.8.2012. However, on 29.1.2015, counsel for the 2<sup>nd</sup> defendant applied to withdraw the aforementioned statement of defence ostensibly because they were conceding to the claim of the plaintiff. Subsequently, that pleading was expunged from the records.
5. I have stumbled upon another statement of defence of the 2<sup>nd</sup> defendant filed on 11.9.2018, but there is no evidence to indicate that leave was obtained to file the same out of time. Further, DW3, one Benson Ndegwa did not refer or seek to introduce this pleading when he took to the stand on 4.7.2023. It follows that the said statement of defence filed by the 2<sup>nd</sup> defendant on 11.9.2018 is irregular. The import thereof is that the evidence tendered by DW3 is anchored on nothing and the same is hereby disregarded. Consequently, the court will consider the submissions of the 2<sup>nd</sup> defendant only in relation to points of law.

### **The Evidence**

6. The case of the plaintiff was advanced by two witnesses, herself testifying as PW1 (Anastasia Wanjiru Musindi). She adopted her witness statement dated 6.6.2013 as her evidence, and she produced the 20 items in her list of documents of even date as Plaintiff Exhibits 1-20.
7. PW1's testimony is that she was introduced to the vendor (Paul Kabuga Karanja) of the suit plot by her father as the two men were friends. That on 21.6.2005, the plaintiff and the vendor entered into a sale agreement for the suit plot at a consideration of Ksh. 430 000. She paid the purchase price in instalments until year 2008. She had conducted due diligence and had confirmed with the 2<sup>nd</sup> defendant that Karanja was the owner of the suit plot.
8. That due to financial constraints, she did not develop the plot immediately, but was ready to do so in the year 2011. That is when she learnt that the Komorock bridge plots had issues, of which her plot no.81 had two names. The H.D.D department at Dandora however gave her a statement of accounts dated 20.4.2011, and she proceeded to make payments amounting to Ksh.27,200. That the H.D.D then gave her a plot formalization card No. 064 indicating that she was the owner of the suit plot. She then brought a care taker to the said plot.
9. In February 2012, she visited the suit plot and found that a construction at the foundation stage was under way. She reported the matter to the H.D.D who investigated the issue and summoned the 1<sup>st</sup> defendant to their office on 6.3.2012 in the presence of PW1. The 1<sup>st</sup> defendant was then issued with a notice to stop the construction as H.D.D undertook to establish who the true owner of the plot was. However, the 1<sup>st</sup> defendant did not stop the construction.
10. PW1 stated that she does not stay on the suit plot.
11. In cross examination, PW1 stated that in the sale agreement, the suit plot is described as Plot at Dandora Phase 1 No.81, and clarified that the said plot is located at Dandora phase 1. She however does not know the size of the plot.



12. She further stated that she did not pay the purchase price at once due to financial constraints.
13. She also stated that in the year 2011, she desired to commence construction on the suit plot, that is why she visited H.D.D, and was told that the plot had issues relating to double allocation.
14. She confirmed that the card she had exhibited emanated from the office of H.D.D and it captures the plot as Komarock Bridge Jua Kali. That when she purchased the plot, the vendor had given her a card, but she surrendered the same to H.D.D. PW1 has no allotment letter from the 2<sup>nd</sup> defendant. She started paying land rates in the year 2011.
15. In re-examination, pw1 stated that the sale agreement did not make reference to the size of the plot. She added that the card she was given by H.D.D identifies the scheme, the plot no, identity of the allottee and bears a stamp and signature from H.D.D.
16. PW2 is one Paul Kabuga Karaja who adopted his witness statement dated 6.6.2013 as his evidence. He is the one who sold the suit plot to the plaintiff. He contends that he was a timber merchant at Gikomba, but in the year 1992, they were evicted by the 2<sup>nd</sup> defendant and their structures were demolished in what was known as Muoroto evictions. Him and other evictees were then taken to Dandora on a five acre piece of land which was in the hands of an entity known as Cotran Auctioneers via a temporary occupational license. They went to court but eventually, the said entity (Cotran) joined them and got 3 plots.
17. A register of the evictees was generated where the members were identified in the entity known as Komarock Bridge Jua Kali Association. They had a chairman and secretary. This is the register exhibited in plaintiff's bundle of documents as exhibit 3. That the officials of the entity worked tirelessly with H.D.D to ensure that the members of the association got plots. That is how Pw2 acquired plot no.81.
18. PW2 avers that he was a friend of plaintiff's father. The latter was aware that PW2 had problems, that is how pw1 was scouted to buy the suit plot from him at Ksh 430 000. It was PW2's evidence that he had the plot from year 1992 upto year 2005 without any interference and he had never heard of the 1<sup>st</sup> defendant.
19. In cross examination, PW2 stated that he left Gikomba in the year 1990-1992 or thereabout and they were moved to off Kangundo road.
20. PW2 did not follow up on whether the list of beneficiaries was actually forwarded to the Town clerk for approval. What he had as evidence of ownership was a card and there were no allotment letters. He did all the transaction of the sale with the father of the plaintiff, but he showed her the actual plot. He confirmed that their association was known as Komarock Bridge Jua Kali Association.
21. PW2 reiterated that they were about 150 evictees, they were taken to Dandora where they found that one Cotran Auctioneers had taken hold of 5 acres. They had to go to court suing Cotran to get the land, but Cotran was eventually given 3 plots. Thereafter, each of them got small portions of the land without any actual measurements before the actual allocation by H.D.D. His plot is however measuring 30 by 60 feet.
22. In re-examination, PW2 stated that he did not grab the suit land and that the 2<sup>nd</sup> defendant did not take him to court.
23. The case of the 1<sup>st</sup> defendant was advanced by two witnesses, himself testifying as DW1 (Anthony Mwangi Muthoni). He adopted his witness statement at page 50 of his trial bundle as his evidence.



- He also produced the 6 documents in his list dated 29.7.2013 as Defence Exhibits 1-6, and the two documents in his list dated 23.6.2015 as his exhibits 7 and 8.
24. DW1 avers that he is the lawful owner of the suit plot, no. 81 Komarock Bridge Jua Kali, having benefited from the same after an eviction from Muoroto. He was then given a letter of allotment by the 2<sup>nd</sup> defendant dated 21.9.2001, of which he duly paid the stand premium and all outstanding dues. He then obtained the necessary clearance and approvals from the 2<sup>nd</sup> defendant to develop the suit plot, paving way for the commencement of his construction in February 2012.
  25. In cross examination, Dw1 stated that the Muoroto evictions took place in 1990. By then, he had a house where he was residing. He was however not a trader. At no point did he engage the H.D.D. He dealt with Nairobi city Council as they are the ones who enforced the evictions.
  26. Referred to the document at page 46 of his bundle, DW1 stated that H.D.D. is mentioned, of which the allotment letters and cards issued by the aforementioned entity were to be revoked, but a local councillor got an injunction from court stopping the exercise.
  27. DW1 further stated that his allotment letter is dated 21.9.2001, he was required to make payments within 30 days, but he made the payments in the year 2012.
  28. DW1 also stated that when the evictions occurred, the names of the evictees were compiled at Muoroto, and the list of beneficiaries was generated by the area councillor in year 1990 and was forwarded to the 2<sup>nd</sup> defendant. The list however doesn't have the identity card numbers of the beneficiaries.
  29. Referred to the document at page 36 of his bundle, DW1 confirmed that he sued the 2<sup>nd</sup> defendant in a case CMCC 1133 of 2012 where he obtained an injunction in his favour, as the 2<sup>nd</sup> defendant had wanted to demolish his developments.
  30. DW1 stated that H.D.D was not involved in the allocation of the plots, the allotment emanated from the 2<sup>nd</sup> defendant, however, the latter referred him to H.D.D to make payments for the developments. He has no card.
  31. DW1 finally stated that he was born in 1982 and was aged 19 years by the time he was allocated the suit plot in year 2001.
  32. In re examination, DW1 stated that PW2 had not produced any card or letter of allotment. He further stated that the document of ownership relied upon by the plaintiff was the sale agreement where the suit plot was identified as "plot at Dandora phase 1 no.81, while the description of his plot in the letter of allotment is "Komarock Bridge Jua Kali plot no.81." He added that the monies he paid in the year 2012 were accepted by the 2<sup>nd</sup> defendant, and that his allotment letter was not revoked.
  33. DW2 is one Joel Mwangi Thayu who adopted his witness statement dated 18.5.2015 as his evidence. He was a councillor of Dandora ward from 1997-2002, and in that capacity, he was involved in the allocation of squatters. He averred that when he was elected, he found many problems on the ground which hindered the formalization and allocation of the squatters where different groups were engaged in vicious fights over the land.
  34. That himself, representatives of the squatter groups, the District Officer, Chief of the area and officers from the 2<sup>nd</sup> defendant formed a committee which eventually generated the list of the genuine squatters which was then forwarded to the Town clerk who signed the same. The list was then forwarded to the Director of City Planning for the production of the allotment letters. The exercise was successful in year 2001. However, in year 2008, goons invaded the area and purported to allocate the land in cahoots with personnel from H.D.D. He personally filed a case 302 of 2010 prohibiting interference with the



allocations of year 2001. Thus as far as DW2 is concerned, the only genuine allocations are those of year 2001.

35. In cross examination, DW2 could not recall when Muoroto evictions occurred, but he was involved in the vetting of the genuine evictees who were registered under Komarock Bridge Jua Kali Association in Dandora phase 1. He however relied on the association to know the genuine owners as the outfit had its own leadership. His role was to facilitate as they had empty land.
36. DW2 averred that the list at page 17 of 1<sup>st</sup> defendant's documents is not the one they generated as the one at page 17 has no identity numbers, while theirs had such identities.
37. He further clarified that H.D.D was issuing cards for identification of the allottees of Gikomba evictees and this was done before he joined the council, but the said list was overruled.
38. DW2 is aware that the 1<sup>st</sup> defendant was a beneficiary of the suit plot.
39. In re-examination, DW2 stated that they did the vetting exercise with officers from the 2<sup>nd</sup> defendant and that by then, H.D.D did not exist.

### **Submissions**

40. The plaintiff's submissions are dated 21.9.2023 where it was argued that the suit plot is unregistered, hence proof of ownership is pegged on documentary evidence. To this end, reference was made to the cases of Wangui and Others vs Wangui and Another (2022) KEELC3755 (KLR) and Caroline Awinja Ochieng & Another v. Jane Mbithe Gitau & Others 2015 ECLR.
41. It was further submitted that the allotment letter of the 1<sup>st</sup> defendant was not validly obtained as the steps set out in the Government Lands Act on such allocations were not followed. For instance, it had not been ascertained that the land in question was government land and no part development plans had been drawn. To this end, the cases of Mohamed Haji Dagane vs. Hakar Abshir & 3 Others (2021) eCLR, Mako Abdi Dolal vs. Ali Duane & 2 Others (2019) eCLR and Nelson Kazungu Chai & 9 Others vs. Pwani University College (2014) eCLR were proffered.
42. The submissions of the 1<sup>st</sup> defendant are dated 17.10.2023 where it is argued that the plaintiff had not discharged the burden of proof on her claim to the suit plot, in that; her agreement speaks of a different property, that the said agreement was disowned by the vendor, the plaintiff does not know the boundaries and measurements of the suit plot and that plaintiff admitted to having not conducted due diligence before the purchase.
43. He further argued that the H.D.D was not mandated to allocate the land in question and that the plaintiff had herself to blame for failing to conduct due diligence. To this end, the cases of Mechanised Clearing and Forwarding Co. Limited & 2 Others vs. Tulip Apartments LTD & Another (2000) and National Land Commission vs, Afrison Export Import Limited & 10 Others (2019) eCLR were proffered.
44. It was submitted that the plaintiff was bound by her sale agreement with all its ambiguity and cannot be amended aesthetically as she would want to do. To buttress this point, the cases of Speaker of Kisii County Assembly vs. James Omariba Nyaoga (2015) eCLR and Twiga Chemicals Industries LTD vs. Allan Stevens Reynolds (2015) eCLR were proffered.
45. The 1<sup>st</sup> defendant has also invoked the maxim of equity that where there are equal equities, the first in time prevails. To this end, the 1<sup>st</sup> defendant relied on the case of Gitwany Investments Limited vs. Tajmal Limited & 2 Others (2006) eCLR cited in Benja Properties Ltd vs. Syedna Mohammed



Burhannudin Sahed & 4 Others (2015) eKLR. He urges the court to find that he is the one favoured by the first in time doctrine.

46. The submissions of the 2<sup>nd</sup> defendant are dated 18.10.2023. As pronounced earlier on, only points of law would be considered in the aforementioned submissions. And the point of law raised by the 2<sup>nd</sup> defendant relates to the provisions of Section 107 of the *evidence Act* on the burden of proof which happens to be the correct position of the law.

### Determination

47. There is no controversy that the suit plot in question is unregistered. It is also common ground that the protagonists are tracing the root of their claims to the Muoroto evictions which occurred in the early 1990s. To this end, the 1<sup>st</sup> defendant has in his defence admitted the contents of paragraph 6 of the plaint, that the beneficiaries of what came to be known as “Komorock Bridge Jua Kali” were the people who had been displaced from Muoroto. It follows that any claim by the combatants must be traced to the aforementioned Muoroto displacements.

48. As rightly submitted by the 2<sup>nd</sup> defendant, he who alleges must prove his or her case in tandem with the provisions of Section 107 of the *Evidence Act*. See- Susan Kanini Mwangangi & another v Patrick Mbithi Kavita [2019] eKLR. The said provisions of law stipulate as follows:

“(1) (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”

49. The Court of Appeal in the case of Palace Investments Limited v Geoffrey Kariuki Mwenda & another [2015] eKLR had this to say on burden of proof;

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: ‘We think its more probable than not’, the burden is discharged....”

50. While in Samson S. Maitai & another V. African Safari Club Limited & Another [2010] eKLR, the court stated thus.

“Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute.”

51. In the case at hand, the 1<sup>st</sup> defendant has not lodged a counterclaim. Thus the issue for determination is whether the plaintiff has proved her entitlement to the suit plot and damages on a balance of probabilities and whether the 1<sup>st</sup> defendant has surmounted sufficient defence to dislodge the claim of the plaintiff.

52. At the outset, I must point out that the entity which could have assisted the court to resolve the dispute is the 2<sup>nd</sup> defendant, seeing that it appears to have owned the land and ought to be the custodian of the records relating to that land. However, the conduct of the said entity has been wanting and shifty from the word go. This was noted by the court at the infancy stage of this suit in the Ruling dated 23.11.2012 at paragraph 6 when the court was dealing with the application for injunction by the plaintiff. At that



point, the 2<sup>nd</sup> defendant was stating that they had allocated the land to the 1<sup>st</sup> defendant and at the same time, they had issued him with a notice to demolish the building he had started to construct.

53. The 2<sup>nd</sup> defendant was to file a defence stating that the plot belonged to the 1<sup>st</sup> defendant. Come the date of 29.1.2015 and the said defence was withdrawn and expunged from the records after counsel for the 2<sup>nd</sup> defendant indicated that they were conceding to the claim of the plaintiff. Years later, (2018) the 2<sup>nd</sup> defendant was to bang in a defence without leave of the court and then proceeded to adduce evidence without making any reference to any particular pleading. The court has pronounced itself on the said statement of defence and the evidence, to the effect that both have been disregarded. I must however point out that it is irresponsible and an abdication of its duty for the 2<sup>nd</sup> defendant to conduct serious land matters in such a pedestrian manner.
54. Back to the root of the claims. As already stated herein, the suit plot is untitled. In the case of *Danson Kimani Gacina & another v Embakasi Ranching Company LTD* [2014] eKLR, the court stated that;
- “The law on unregistered land, unlike on registered land, is slightly unclear. Proof of ownership in the case of the former is found in documentary evidence which lead to the root of title.”
55. Similarly in *Caroline Awinja Ochieng & another vs Jane Anne Mbithe Gitau & 2 others* [2015] eKLR, cited in *Beatrice Wambui Maina v Embakasi Ranching Company Ltd & another* [2022] eKLR, it was stated that;
- “In determining the above issue it would perhaps be appropriate to first state that tracing ownership of unregistered land is dependent on tracing the root of title. Unlike registered land where ownership is domiciled and founded in the register of titles, ownership of unregistered land and the ascertainment or confirmation thereof involves the intricate journey of wading through documentary history.....”.
56. In the case at hand, PW2, Paul Karanja has given an account of how traders at Gikomba were displaced in what was known as Muoroto evictions in the period 1990-1992. The evictees were taken to a place in Dandora forming an entity known as Komorock bridge Jua Kali Association, complete with a list of their members and officials. That register is the one which has been availed as plaintiff exhibit 3. The same contains the names of the beneficiaries, their respective plots and their identities.
57. Further, PW2 has explained that they had to fight it off with an entity known as Cotran Auctioneers who apparently had a temporary occupational license on 5 acres of land. The beneficiaries eventually got small portions of land, of which pw2's plot was identified as No.81. This is the plot he sold to the plaintiff.
58. What emerges from this evidence of pw2 is that the acquisition of rights and interests in the area claimed by the entity known as Komorock Bridge Jua Kali was not through the known conventional methods. There is no mention of the land having been planned, surveyed and allocated. Rather it was simply an occupation of the land by persons who had been displaced through Muoroto evictions. The said occupation was acquiesced by the 2<sup>nd</sup> defendant but was not formalized.
59. The list of the beneficiaries availed as Plaintiff exhibit 3 indicates that the same was to be forwarded to the Town Clerk for approval. Whether it was so forwarded or not is not clear. The logical conclusion to make is that the settlement by the Komarock Bridge Jua Kali entity was informal.
60. It follows that any ascertainment of rights and interests in that land have to be construed in the context of an informal settlement, by extension, informal transactions. That is why even the suit



plot measurements were not ascertained, while the description of the property was associated with the area. It is clear beyond peradventure that even in such circumstances, the land still remained a precious commodity capable of being alienated through all manner of transactions, including double recognition by the 2<sup>nd</sup> defendant!

61. Can the court ascertain any rights/interests of ownership in such a scenario?. The answer is certainly in the affirmative as the court cannot leave the parties to their own devices, since doing so would be a recipe for anarchy.
62. To this end, the agreement made by the plaintiff and PW2 has to be interpreted in the realm of an informal transaction. There are no rights of absolute ownership that can be said to have subsisted in such a set up, thus whatever was passed on to the plaintiff by PW2 was the latter's interests in the suit plot.
63. The fact that PW1 was issued with a card by the H.D.D is a pointer to the fact that the 2<sup>nd</sup> defendant had made attempts to identify the interests of the claimants in that area. To this end, the card contains the plot no. 081, the name of the claimant who is the plaintiff, her identity number as well as the reference number at H.D.D. It is pertinent to note that pursuant to the recognition of pw1's interests by the 2<sup>nd</sup> defendant, she was able to make various payments to the H.D.D after she was given a statement of account dated 20.4.2011.
64. For a claim in informal settlement, I would say that on a balance of probabilities, the plaintiff has discharged the burden of proof. I therefore pose the question; Has the 1<sup>st</sup> defendant advanced a defence capable of dislodging that claim of the plaintiff?.
65. The first line of defence advanced by the 1<sup>st</sup> defendant is anchored on his letter of allotment issued in year 2001, long before the plaintiff had purchased the land. I therefore pose the question; what is the bundle of rights and interests that the 1<sup>st</sup> defendant acquired through the said allotment letter?.
66. As rightly submitted by the plaintiff, there were several steps that had to be followed in allocation of Government land as was clearly elaborated in the case of Ali Mohamed Dagane (Granted Power of Attorney by Abdullahi Muhumed Dagane, suing on behalf of the Estate of Mohamed Haji Dagane) v Hakar Abshir & 3 Others (2021) eKLR where it was stated that;

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

67. There is nothing to indicate that the land in question had been identified and planned as envisaged under the then Government Lands Act before the letter of 21.9.2001 was issued. It was not open to any municipal council including the predecessor of the 2<sup>nd</sup> defendant to issue such letters of allotments at will. It follows that the 2<sup>nd</sup> defendant did not pass any rights and or interests in the suit plot to the 1<sup>st</sup> defendant, thus the latter cannot challenge the claim of the plaintiff on the basis of the said letter of allotment.



68. The other issue to consider relates to 1<sup>st</sup> defendant's roots to the Muoroto evictions. At the start of his cross examination, DW1 gave an account of his association with Muoroto of which it is necessary to recapture his words verbatim as follows;

“The eviction of Muoroto took place in year 1990. By then, I was not a trader. I was residing there. I had a house in Muoroto. I have nothing to show that I had a house there. There is someone who knew me as someone residing there. He is called James Mwangi Meru and he is my witness. He was my neighbour. As much as a good number of people were traders, others had homes. So I had a home. It was like a slum.”

69. Thus in his own words, Dw1 was a home dweller before 1990 at Muoroto.

70. At the end of his cross examination by plaintiff's counsel, DW1 had this to say;

“I was born in 1982. I was issued with allotment letter in 2001 and by then, I was 19 years. I had turned 19!”.

71. Going by his own evidence, DW1 was 8 years! by the time of his eviction in 1990. And he wants this court to believe that as a child, he was a home dweller, complete with neighbours. This is nothing but a fallacy!.

72. What more, DW1 told the court that the list of beneficiaries which he has availed at page 17 of his bundle was prepared at Muoroto in 1990. Does it mean that he was identified as a minor, and was even allocated plot No. 81 at that particular time?. It is not lost to this court that his list does not even contain particulars of identity of the beneficiaries as well as the purpose of the list. Further, his witness, DW2 disowned the said list, stating that their own list was prepared after 1997, that is after he became a councillor and the said list had identities of the beneficiaries.

73. One wonders whether DW2 gave a thought to the fact that DW1 was in his teens when he (DW2) became a councillor in 1997 and they allegedly embarked on identifying members of Komarock Bridge Jua Kali. It is also not lost to this court that DW2 has stated that he doesn't know when the Muoroto evictions occurred.

74. What resonates from the evidence of DW1 and 2 is that they were unable to establish or trace the roots of 1<sup>st</sup> defendant's claims to the Muoroto evictions. They have not the slightest history connecting 1<sup>st</sup> defendant to the 1990 Muoroto displacements. The logical conclusion to make is that their version of events is nothing but concocted stories.

75. That being the case, then the doctrine of the 'first in time' cannot apply as 1<sup>st</sup> defendant's interests in the suit plot have not been established. I therefore find that the 1<sup>st</sup> defendant has not in any way challenged the claim of the plaintiff's interests in the suit plot.

76. Is the plaintiff entitled to damages? As already pronounced herein, the land in question was a precious commodity, of which the 1<sup>st</sup> defendant had even embarked on putting up a building. This is a situation whereby the plaintiff was unable to utilize the suit property from year 2011 when she desired to put up a development.



77. In the case of *Dodd Properties (Kent) Limited and Another v Canterbury City Council and others* [1980] 1 All ER 928 cited in *Miaraho Limited v Synohydro Corporation Limited* [2019] eKLR the court stated that:
- “The general object underlying the rules for the assessment of damages is, so far as possible by means of monetary award, to place the plaintiff in the position which he would have occupied if he had not suffered the wrong complained of, be that wrong a tort or a breach of contract....”.
78. In *Kenya Power & Lighting Company Limited vs. Fleetwood Enterprises Limited* [2017] eKLR, the Court of Appeal while upholding the decision of Judge Angote in *Fleetwood Enterprises Ltd vs. Kenya Power & Lighting Co. Ltd* [2015] eKLR stated that where trespass is proven, the affected party need not prove that it suffered damages or loss as a result of the trespass so as to be awarded damages because once the trespass is proved, the court is bound to assess and award damages on a case to case basis.
79. For the case at hand, the plaintiff has proved that she has suffered damages since she was denied use of the land as from year 2012.
80. It is noted that the 1<sup>st</sup> defendant had commenced construction on the suit land. However, it has also emerged that the 1<sup>st</sup> defendant was well aware of the dispute at the infancy stage of the construction. In his own evidence, he commenced construction in February 2012. This suit was filed on 20.3.2012. This gives credence to plaintiff's claim that 1<sup>st</sup> defendant was at the foundation stage when the dispute thrived. He was even issued with a notice to halt the construction, but in his own words, he sued the 2<sup>nd</sup> defendant on the issue.
81. Further, in a ruling for injunctive orders sought by the plaintiff on 23.11.2012, the court issued an order of status quo to the effect that “no construction shall proceed”. Apparently, the 1<sup>st</sup> defendant continued with the said construction. In the circumstances plaintiff is awarded general damages against the 1<sup>st</sup> defendant to the tune of Ksh.1,100,000.

### **Final Orders**

82. Having proved her case, judgment is hereby entered for the plaintiff in the following terms;
1. It is hereby declared that the interests in the suit plot No. 81 Komarock Bridge Jua Kali in Dandora phase1 shall vest in the plaintiff.
  2. An order of permanent injunction is hereby issued against the defendants and their agents from whatsoever interfering with the suit plot to the detriment of the plaintiff.
  3. An order is hereby issued for the 1<sup>st</sup> defendant to vacate the suit plot within 30 days from the date of delivery of this ruling.
  4. The plaintiff is hereby awarded general damages for trespass to the tune of Ksh. 1,100,000 as against the 1<sup>st</sup> defendant.
  5. The defendants are jointly and severally condemned to pay the costs of the suit with interests to the plaintiff. The same to be calculated from the time of filing the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup> DAY OF JANUARY, 2024 THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**



**JUDGE**

**In the presence of:-**

**Olewe for Plaintiff**

**Njugi for 1<sup>st</sup> Defendant**

**Ms Were holding brief for Owade for 2<sup>nd</sup> Defendant**

**Court Assistant: Eddel**

