



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
IN THE ENVIRONMENT AND LAND COURT
ELC. NO. 1758 OF 1995

MAJOR HENRY MWITARI.....PLAINTIFF

VERSUS

COMMISSIONER FOR LANDS.....1ST DEFENDANT

ROSE MUTHONI MATHENGE.....2ND DEFENDANT

JUDGEMENT

The Plaintiff herein *Major H.K Mwitari* by an amended Plaint dated *5th September 1995*, against the Defendants herein *Commissioner of Lands* and *Rose Muthoni Mathenge*, sought for the following orders:-

- a. A declaration that the allotment of L.R. No. 20780 formerly 27/34 Ridgeways' Estate, Nairobi by the 1st Defendant to the 2nd Defendant is illegal, null and void.*
- b. An order directing the 1st Defendant to cancel the registration of L.R. 20780 (formerly 27/34, Nairobi in respect of 2nd Defendant and an order directing the 1st Defendant to register the plaintiff as the owner thereof.*
- c. An Injunction restraining the 2nd Defendant, whether by herself, her servants or agents from interfering with the Plaintiff's possession and use of the suit premises or in any other manner whatsoever dealing with the suit property.*
- d. Costs of the suit.*

In his Plaint, he alleged that at all material times, the Plaintiff who was an officer in the Kenya Army had been the occupant of *L.R No 20780*, formerly *27/34 Ridgeways Estate Nairobi*, comprising of *five (5) acres* or thereabout, which plot had all along been a Government property. He further alleged that on *12th March 1995*, he applied to the 1st Defendant for allotment of the said plot to him which application was considered and approval given on *30th April 1995*. It was his further allegation that upon obtaining the approval aforesaid, the Plaintiff submitted his approval to the 1st Defendant for the purposes of having his title/grant processed, but upon perusal of the land parcel file, the Plaintiff discovered that the said property was secretly allocated to the 2nd Defendant, who was not a Civil Servant.

The Plaintiff contended that the allocation of the property to the 2nd Defendant was done fraudulently and

secretly and was meant to deprive him of the property which he had occupied for many years. It was his contention that the 2nd Defendant was a front for other undisclosed people and the registration thereof should be cancelled in his favour. He was also apprehensive that the property may be sold or otherwise encumbered to his detriment and he stood to suffer loss and damages. Further that despite his protest, the 1st Defendant has refused to nullify the allocation to 2nd Defendant. He urged the court to allow his claim.

The Defendants filed their statement of Defence and denied the allegations. In its Defence, the 1st Defendant denied all the allegations made in the Plaint and did put the Plaintiff to strict proof. The 1st Defendant denied that on or about **12th March 1995**, the Plaintiff applied to the 1st Defendant for allotment to him **Plot No. L.R No. 20780**, formerly **27/34 Ridgeways Estate**, which application was considered and approval given or at all and did put the Plaintiff to strict proof.

The 1st Defendant also denied that the said property was secretly allocated to the 2nd Defendant and also did put the Plaintiff to strict proof. It was the 1st Defendants allegation that if at all the Plaintiff's application was approved, then the said approval was not a guarantee that he would be allocated the said piece of land for which he had requested. It was its further allegation that the Plaintiff was offered another piece of land which he rejected.

Further, it alleged that the said piece of land was initially allocated to **Department of Defence** for purposes of housing their staffs and specifically the Plaintiff who was in occupation of the house but subject to him remaining as a staff of **Department of Defence**. It was further alleged that the said property was later allocated to the 2nd Defendant which allocation preceded the Plaintiff's presentation of documents for allocation. It was the 1st Defendant's Defence that it was against the law to double allocate one piece of land to two individuals and in such cases, the 1st allottee has a right over the 2nd allottee. The 1st Defendant denied that the allocation to the 2nd Defendant was done fraudulently, and secretly in order to deprive the Plaintiff of the said property but averred that the allocation was done procedurally as provided by the law. Further, that the title certificate has already been issued to the 2nd Defendant and this parcel of land cannot be allocated to the Plaintiff herein. It was alleged that the Plaintiff suit is defective and should not be entertained by this court.

On her part, the 2nd Defendant filed her Defence on **3rd February 2008**, and denied all the allegations made in the Plaint. She denied that on **12th March 1995**, the Plaintiff applied to the 1st Defendant for allocation of the suit property and that the said application was considered and approved on **30th April 1995**. It was her allegation that the Plaintiff's application was lodged after the land had been allocated to the 2nd Defendant and title deed had already been issued to her. She averred that the Plaintiff's approval was given on **30th April 1995**, long after the 2nd Defendant had been registered as the **absolute** and **indefeasible** owner of the said property. The 2nd Defendant further denied that the alleged allocation of the property was done fraudulently and secretly to deprive the Plaintiff of the property. She further denied that she is a front for other undisclosed people and she denied that she was in the verge of selling the property. It was her allegation that there is no reasonable cause of action against her and that it is indeed the Plaintiff who is illegally occupying the property, **L.R No. 20780**. Further that the 1st Defendant should not be directed to cancel the registration of **LR No 20780** in favour of 2nd defendant and that the same be registered in favour of the Plaintiff.

The hearing commenced on **20th May 2015**, when the Plaintiff herein, **Major Henry Mwitari**, gave evidence for himself and called no witness. He adopted his witness statement dated **2nd March 2015**, and produced the attached list of documents. It was his testimony that he owns the Plot in Ridgeways being **L.R No. 27/34** which later became **LR No 20780**. It was his evidence that he was shortchanged after he had fulfilled all the requirements. He also testified that all his documents and the file disappeared from the Lands office. He also testified that after he was allocated the land, he later discovered that the said land was secretly allocated to **Rose Muthoni Mathenge**. Then the Plaintiff moved to court and was granted an injunction but he was thrown out by the **Military** and later sacked from the Army. That after

he was thrown out of the plot, **Rose Muthoni Mathenge** 2nd Defendant took up the plot although he had lived in the house from the year **1993-1996**. That although he was sacked from the Army, he was not given the reasons for his sacking but he believed that his problems started from the allocation of the plot. It was his testimony that he was staying in the house and he decided to purchase the same as he was a serving Civil Servant, who had worked in the Government for **17 years** and **Rose Muthoni Mathenge** was a not a Civil Servant. Further that he had the first priority but he was later shortchanged and that the title deed was issued to Rose **Muthoni Mathenge** without the **Deed Plan**. He therefore sought for cancellation of her title deed and that the same be granted to him. It was his further testimony that he has suffered a lot in pursuant of Justice and that he should be awarded costs of the suit and interest thereon.

In cross-examination he stated that the house was not owned by the Military but **military officers** used to live there. Further that he wrote the letter dated **20th June 1995**, as he had been coerced to leave the house. He also confirmed that he had an order of injunction allowing him to remain in the house until the suit was heard and determined.

The 1st Defendant called one witness to support its case.

D.W.1 Silas K. Mburugu, told the court that he works with the National **Land Commission** and he adopted his witness statement dated **15th April 2015**. He testified that in the **year 1994**, the Government allocated the suit property to **Rose Muthoni Mathenge**, as evident from the allotment letter **D Exhibit 1**. Further that the allotment letter was issued pursuant to an application for allocation of the plot by **Rose Muthoni Mathenge** as is evident from **D Exhibit 2**. He also testified that the allottee accepted the offer and made payment as evident from the receipt dated **21st March 1995**. The acceptance letter was produced as

D. Exhibit No.3. It was his further testimony that after the acceptance, a letter was written to the Director of Survey, who was informed about the acceptance. Thereafter a survey as carried out and a **Deed Plan** was prepared. He also testified that by the time the Plaintiff applied for allocation of the plot, the same had already been allocated to somebody else.

In cross-examination, DW1 stated that the houses were being allocated to **Civil Servants** and he was not aware if **Rose Muthoni Mathenge** was in occupation of the house. He also confirmed that **Rose Muthoni Mathenge's** letters of application and acceptance have no dates. He was not sure when Rose applied for the house. The witness further confirmed that the Plaintiff's application was approved by the President. He also confirmed that in **Rose Muthoni Mathenge's** application, the President's approval was not seen.

The 2nd Defendant though filed her Defence did not appear in court to give evidence. Her advocates on record **Kilonzo & Company Advocates** applied for leave to cease acting for her. The said application was prosecuted on **25th February 2015** and allowed. Therefore the matter proceeded in the absence of the 2nd defendant.

Parties thereafter filed their written submission. **S.N. Thuku & Associates, Advocates**, for the Plaintiff filed the written submission on **15th September 2015** and urged the court to allow the Plaintiff's case. Plaintiff submitted that the 1st Defendant acted **ultra-vires**, in purporting to allocate and register the land in the names of the 2nd defendant since he never had such powers under the **Old Constitution** over allocation of land. It was further submitted that the 1st Defendant's action was **illegal, null** and **void**. Plaintiff relied on **Section 3** of the **Government Lands Act, Cap 280 (repealed)** which provides that;

“The President in addition to but without limiting any other right, power or authority vested in him under this Act, may:-

(a) subject to any other written law makes grant or disposition of any estate, interest or right in or over unalienated Government Land”

It was further submitted that under Section 3 of the **Government Lands Act**, (repealed) only the President could alienate any unalienated Government Land having regard to the lawful mode of disposal set out in Sections 9 and 12 of the said Act. Further that the Commissioner of Lands, could not exercise powers reserved for the President on the alienation of unalienated Government land. It was also submitted that the Land in issue prior to the issuance of the allotment was unalienated land which was under the control of the President and not the 1st Defendant.

It was further submitted that **Section 23** of the **Registration of Titles Act, Cap 281 (repealed)**, is only applicable for transactions which are not first registrations. Therefore since the current dispute revolves upon a matter on first registration of land, then Section 23 of the **Registration of Titles Act** did not apply. Plaintiff relied on the case of **Mombasa, Civil Appeal No. 252 of 2005:- Funzi Development Ltd & others Vs County Council of Kwale,** where the court held that:

“As I have pointed out, the 3rd Respondent relying on Section 23(1) of the Registration of Titles Act, Cap 281 Laws of Kenya, contended that the Grant of the suit Land conferred on it an absolute and indefeasible Title I hasten to point out that section refers to Certificate of title issued to purchasers. In the case of allocated land, even if the section is applicable, a registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular. A court of law cannot on the basis of indefeasibility of title sanctions illegality or gives its seal of approval to an illegal or irregularly obtained title”

Further, Plaintiff relied on the case of **Kassim Ahmed Omar & Another Vs Anwar Ahmed Abed & Others, Malindi ELC No. 18 of 2015** where the court held that:

“A certificate of title is an end product of a process. If the process that was followed in issuing the title did not comply with the law, then such a title can be cancelled by the Court”.

On the part of the 1st Defendant, the office of the **Attorney General**, filed their written submissions on **16th November, 2015** and submitted that the 1st Defendant did not act **capriciously** and **ultra vires** as submitted by the Plaintiff. It was their submissions that the same approving authority had mistakenly allocated an already committed land to the Plaintiff and when the mistake was discovered, the same authority cancelled the allocation. 1st Defendant relied on the case of **Robert Mutiso Lelli Vs Betty Kahia & 5 others, Nairobi. HCCC No. 704 of 1996**, where it was held that since the subject matter was not unalienated Government Land, the President had no power to alienate it and that any purported grant by the President was therefore **null** and **void**.

It was also submitted that the allegation of fraud was not proved. They relied on the case of **Njuwangu Holdings Ltd Vs Langata KPA, Nairobi & 5 others (2014) eKLR** where, the Court held that:-

“the allegations of irregularity and/or fraud remain just that until established and/or proved. The standard of proving fraud in court cases is higher than on a balance of probability An allegation of fraud is a serious involvement against a party to whom it is made and though the standard of proof is not beyond a reasonable doubt as in criminal cases, it is no doubt near there but is certainly higher than on a balance of probability---

It was further submitted that if the Court was to find that the two parties have equal right to the land, then the Maxim of Equity of **“first in time should prevail”** should be adopted. They relied on the case of **Wreck Motors Enterprises Vs Commissioner of Lands, Court of Appeal, C.A No. 71 of 1997** where the Court held that:-

-----like Equity kept teaching us, the first in time prevails, so that in the event such as this one where mistake that is admitted, the Commissioner of Lands, issued two titles in respect of the same parcel of Land, then if both are apparently and on the face they were issued regularly and procedurally without fraud save for the mistake, then the first in time prevails”

The 1st Defendant urged the Court to dismiss the Plaintiff's suit and further submitted that the 2nd Defendant property is protected under **Article 40** of the **Constitution** as she is the registered proprietor of the suit property.

The court has now carefully considered the above available evidence and the pleadings in general. The Court has also considered the exhibits produced in Court, the written submissions and the cited authorities. The Court has also considered the circumstance of this case and the Court renders itself as follows:.

There is no doubt that the Plaintiff herein **Major H.K Mwitari** was occupying the suit property herein **L.R No. 27/34**, which was later, changed to **LR No 20780** from the year 1993. The Plaintiff occupied the suit premises by virtue of being an employee of Department of Defence (DOD) and an Army Major. Plaintiff was commissioned by the President on **13th March 1979**. There is also no doubt that the Plaintiff did apply for allocation of the suit premises, **LR No 27/34**, Ridgeways on **12th March 1995** as evident from the document produced as exhibit **No. 6**. It is also not in doubt that the President approved the said allocation on **30th April 1995**. It is evident that on **31st May 1995**, Brigadier Commander **J.W Chemoss – Psirmoi** wrote a letter to the **Chief of logistics, Department of Defence**, informing him that **Major H.K Mwitari**, the Plaintiff herein had been allocated **LR No 27/34** and that the Plaintiff was in the process of finalizing allocation procedures. It is also evident that thereafter, the Plaintiff discovered that the suit property had been allocated to one **Rose Muthoni Mathenge**, 2nd Defendant who was not in occupation. There is also evidence that thereafter, the Plaintiff filed this suit at the High Court in Nairobi and an Injunction Order was issued restraining the 2nd Defendant from interfering with the Plaintiff's use and occupation of suit premises **LR No 27/34** Ridgeways otherwise also referred to as **LR No 20780**. The Court has also seen a further Court Order where it was agreed by consent that:

“That the present status quo, ie the Plaintiff do remain in the suit premises pending the hearing and determination of the application for Injunction:”

From the above two Orders, the Plaintiff was supposed to remain in occupation of the suit property until the application filed on **7th June 1995** was heard and determined.

Further, it is evident that the Plaintiff was terminated from service in the year 1995 having worked in the Kenya Army for **17 years and 6 months**. He testified that he was terminated due to this case and the fact that he refused to withdraw the same. It is evident that during the pendency of this case, the same **Brigadier J.W. Chemoss Psirmoi** wrote a notice letter dated **27th July 1995**, to the Plaintiff and communicated to him about the termination of his service and allocation of another **“married quarter”** House No **L.R No 209/8336/239** in Loresho. The Plaintiff was asked to move out of the suit premises despite the fact that at this time there was a Court Order on the **status quo** where the Plaintiff was to remain in the suit premise, until the hearing and determination of the application filed. It is also evident that Plaintiff's Commission in the Army was terminated during the pendency of this suit or immediately after he filed the suit. This suit was filed on **14th June, 1995** and Plaintiff's Commission was terminated on **27th July 1995** and he was directed to continue with his remaining **30 days leave** pending further instructions.

It is also evident that during the pendency of this suit, the Plaintiff was evicted from the house by the **Military**, although by then, the suit land was registered in the name of **Rose Muthoni Mathenge** and was therefore was not owned by the Military. The Grant over the suit land was allegedly issued to **Rose Muthoni Mathenge** on **1st February 1995**, though the Deed Plan is dated **21st March 1995**.

Further, it is not in doubt that the Plaintiff was evicted by the **Military** during the existence of an Injunction Order, restraining the 2nd defendant from interfering with the Plaintiff's possession of the suit property. Though the eviction of the Plaintiff was carried by Military, after the said eviction, the suit land was handed over to the 2nd Defendant in contravention of the existing Court Order on Injunction and **Status quo** where the Plaintiff was to remain in possession.

The Plaintiff has remained in Court since **14th June 1995** seeking for Justice for himself. From the available documents, the 2nd Defendant re-located to Britain and had been issuing instructions to her advocate who later ceased acting for her through **Davey Franklin Jones Solicitor** based in **United Kingdom** who had been handling matrimonial matters for the 2nd Defendant who was by then going by the name of **Mrs Rose Newman**. The court has noted from a statement dated 1st October 1996, that one **Mr. Newman** had stated that the suit property was allocated to his wife **Rose Muthoni Newman** by the President in year **1994**.

The above are the undisputed facts. The Plaintiff has alleged that the suit property was allocated to him by the President but the 1st Defendant shortchanged him and allocated the property to 2nd Defendant who was only a front for other people. The 2nd Defendant has denied that allegation and stated that the suit property was properly allocated to her and mistakenly allocated to the Plaintiff herein and that is why they said allocation was cancelled.

The issues now for determination are

- i. **Was the 2nd Defendant regularly allocated the suit property.**
- ii. **Is the 2nd Defendants title absolute and indefeasible and protected by Article 40 of the Constitution**
- iii. **Is the Plaintiff entitled to the prayers sought**
- iv. **Who is entitled to bear costs of this suit?.**

There is no doubt that the suit property was initially Government Land where a Government House stood and the Plaintiff who was a Commissioned Army Officer was housed by virtue of being a Civil servant. There is no doubt that the suit property was an unalienated Government Land governed by the **Government Lands Act, Cap 280 (Repealed)**. Under section 3 of the said Act, which states that:-

“The President in addition to but without limiting any other right, power & or authority vested in him under this Act may-

(a) subject to any other written law makes grant or disposition of any estates, interests or rights on or over unalienated land”.

Therefore, the suit property being an unalienated Government land, only the President had powers to alienate the same. The suit land herein is in the name of 2nd Defendant and by virtue of section **26(1)** of the **Land Registration Act**, the registered proprietor is deemed to be the absolute and indefeasible proprietor of the said property. However the certificate of title of such property can be challenged as provided by section **26(1) (a) & (b)** of the **Land Registration Act**, which provides that:-

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

- a. **On the ground of fraud or misrepresentation to which the person is proved to be a party: or**
- b. **Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.**

Further, the suit property herein was allegedly registered in the name of the 2nd Defendant **on 1st**

February 1995, under the Registration of **Titles Act , Cap 281 (now Repealed)**. Section 23 of the said Registration of Titles Act provide that

“The certificate of Title issued by the Registrar to a purchaser of land---

Shall be taken by all court as conducive evidence and the person registered is taken to be the absolute and indefeasible owner”

However the above section only applies to purchasers and subsequent registrations, but not a first registration. This was findings in the case of ***Funzi Development Ltd & others Vs County Council of Kwale (Supra)*** where the Court held that:

“It is clear from the provisions of section 23(1) that the Act only protects a certificate of Title issued to a purchaser of land upon transfer and transmission which is not the case herein”.

From the above Provisions of law and the decided authorities, it is clear that a ***Certificate of title is absolute and indefeasible*** if it was acquired procedurally and regularly. The 2nd Defendant was allegedly registered as the owner of the suit property on ***1st February 1995***. The land having been an unalienated government land, the person with powers to alienate the same was the President. A person desirous of being allocated such land needed to apply to the President and then the President would approve the said allocation. The Plaintiff herein produced a letter of application for allocation of the suit property. He applied for such allocation on ***12th March 1995*** and the President approved the same on ***30th April 1995***. One ***Brigadier J.W Psirmoi*** even wrote to the ***Chief of Logistics*** confirming allocation of the said Plot to the Plaintiff. However on the letter of application by the 2nd Defendant, the same is not dated and it does not contain the approval of the President. The 2nd defendant alleged letter of acceptance of the allocation is also not dated. The letter of allocation is dated ***14th February 1995*** although the Grant was allegedly issued on ***1st February 1995***. It seems the Grant was issued before the ***Letter of Allotment*** was issued and accepted. The sequence of events therefore does not add up and it is suspect.

In the allocation to 2nd defendant, there is no evidence that the President authorized such allocation. In the case of ***Henry Muthee Kathurima Vs Commissioner of Lands, and Another (2015) eKLR***, the Court of Appeal held that:-

“We have examined the evidence on record and there is nothing on record to show that the President had authorized the Commissioner of Lands to alienate the suit property. We have examined the Provisions of Sections 3, 7, 9 and 12 of the Government Lands Act and we are satisfied that the Commissioner of Lands, had no power and authority to alienate the suit property and issue certificate of lease”

Equally, in this matter, 1st Defendant through DW1 produced an application letter by 2nd Defendant but the same was not approved by the President and Court cannot find and hold that the President did authorize the allocation of the said property to 2nd Defendant as he had done to the Plaintiff through the approval dated ***30th April 1995***. As was held in the case of ***Kassim Ahmend Omar & Another Vs Ahwar Ahmed Abeid & others (Supra)***, ***“A certificate of Title is and an product of a process”***. If the process that followed the issuing the title did not comply with the law, then such title can be cancelled by the Court. Further in the ***Funzi Island Development Case***, quoted above, the Court of Appeal held that:-

“---in the case of allocated land, even if the section is applicable, a registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular. A Court of law cannot, on the basis of indefeasibility of title sanction on illegality or give seal of approval to an illegal a irregularly obtained title”.

In the instant suit, the court finds that though the 2nd Defendant has a certificate of title, the process of acquiring the same is questionable and the Court finds that the President did not authorize the allocation

of the same to the 2nd Defendant. It is therefore, not enough to dangle the said certificate of title as the process of acquisition and history of the root of the title is not proper. The Court will rely on the case of **Munyu Maina Vs Hiram Gathiho Maina, Civil Appeal No. 233 of 2009** where the court held that,

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the Instrument of Title as proof of ownership. It is this instrument of Title that is challenged and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title to 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”

The 2nd defendant herein had a duty to show how the certificate of title was acquired. The 2nd Defendant did not turn up in court to give evidence and it seems she lost interest in the matter and even relocated to **Britain** where she is known by the name of Mrs Rose **Newman**. Her loss of interest in the matter gives credence to the Plaintiff's evidence that 2nd Defendant was just a front for undisclosed people. The documents produced by DW1 did not prove with certainty that the President did authorize the allocation of this suit property to 2nd Defendant as provided by section 3 (a) of the Government Lands Act (now repealed). The Plaintiff had alleged that the allocation of the houses was supposed to be given to serving Civil Servants and 2nd Defendant was not a Civil servant and was not in occupation of the suit property. That evidence of allocation of Government houses to serving Civil Servants was confirmed by DW1. Since 2nd Defendant did not avail herself in court to support the process of allocation of the suit premises to herself, the court finds, that the allocation of the house to 2nd Defendant while the same was being occupied by Plaintiff who was a serving officer, was **irregularly and unprocedurally** done. Therefore, this Court cannot hold that the 2nd Defendant ownership of the property is protected by Article 40 of the Constitution. Further Article 40(6) of the Constitution does not offer protection to property acquired illegally. It provides as follows:-

“The right under this Article do not extend to any property that has been found to have been unlawfully acquired”

Having found that the 2nd Defendant did not acquire registration of the title to herself legally and procedurally, the Court finds that her certificate of title is not **absolute and indefeasible** and can therefore be impugned or challenged. The 2nd Defendant therefore cannot seek protection under **Section 26 of the Land Registration Act** and **Article 40** of the Constitution.

Having now found that the 2nd Defendant's title was irregularly and unprocedurally acquired and registered, and having found that her title is not **absolute and indefeasible**, the court has therefore answered issues No. I and II.

The 3rd issue is whether the Plaintiff herein is entitled to the prayers sought in his Plea. The prayers sought by the Plaintiff are three fold:- **A declaration that the allotment of L.R No 20780 formerly 27/34 Ridgeways Estate to the 2nd Defendant by the 1st Defendant was illegal, null and void. An order directing the 1st Defendant to cancel the registration of L.R No 20780 to 2nd Defendant and have it registered in the name of the Plaintiff and an order of injunction.**

On the first prayer, it is evident that the suit land is registered in the name of the 2nd Defendant but the court has found that the said process of registration was irregular and unprocedural and therefore, the said Certificate of title is challengeable. The suit land being a Government land which was unalienated, the proper procedure for such alienation needed to be followed. In the instant suit, the Court finds that **Section 3(a)** of the Government Lands Act was flouted as the President did not approve the allocation to the 2nd Defendant. The Grant was issued before the Letter of Allotment was issued to the 2nd defendant, accepted and due process followed. The Deed Plan was drawn after the Grant was issued. Though the suit land was allocated to 2nd defendant, it was the **Military** which was used to evict the Plaintiff after the Plaintiff's Commission in the Army was terminated after filing of this suit. The eviction was carried out even after the Plaintiff had obtained an injunction order. The manner on which the Plaintiff was evicted

and terminated from employment due to this case smacks of ill motive and impunity on the parts of the Defendants. If the registration of the suit property to the 2nd defendant had been acquired procedurally and regularly, the Court believe that the Defendants would not have acted with the impunity that they portrayed during the eviction of the Plaintiff herein from the suit process.

The Court further finds that the suit land was allocated to the 2nd Defendant while the Plaintiff was in possession. In the alleged letter of allocation, 2nd Defendant had identified the suit property as **L.R 27/34 Ridgeways** and at that time the Plaintiff was a tenant therein. Therefore the 2nd Defendant applied for the suit property with intention of displacing the Plaintiff herein. That allotment was therefore **illegal, null and void**. The Court therefore proceeds to declare that the allotment of **L.R No 20780** (formerly **27/34 Ridgeways Estate**) by the 1st Defendant to the 2nd Defendant, was **illegal, null and void**.

On an Order directing the 1st Defendant to cancel the registration of **L.R No 20780**, formerly **27/34 Ridgeways Estate**, in respect of the 2nd Defendant and directing the 1st Defendant to register it in respect of the Plaintiff, the Court finds that the Plaintiff was in occupation of the suit property. He was a **Civil Servant**, who had worked for the Government for 17 years in the year 1995. He had applied for allotment of the suit property to himself vide a letter dated **12th March 1995** and the President had approved the same as provided by the law. The Plaintiff had a legitimate expectation that he would be registered as the owner of the suit property. To his utter shock, and dismay, he discovered that the same was registered in the name of the 2nd Defendant who was not a Civil Servant and who had allegedly applied for this specific suit land while knowing that the Plaintiff was in occupation of the same. The 2nd defendant therefore, had intention of dislodging the Plaintiff from the suit property. If the suit property was available for allocation, then the first priority should have been given to the Plaintiff who was in occupation. In the case of **Henry Muthee Kathurima Vs Commissioner of Lands (Supra)** the Court of Appeal held that:-

“We note that it is not in dispute that the 2nd Respondent has always been in actual and physical occupation of the suit property----. The appellant must have known of this fact when he applied for the suit property to be allocated to him. In his application for allotment of a Commercial Plot, made by a letter dated 21st March 1997, the appellant identified the suit property. ---- The inference to be drawn to that is that the appellant identified and knew the specific plot he desired and knew the 2nd respondent was in physical possession. It was the appellant’s clear. The intention not only to dispose the 2nd appellant of the property but to acquire the public utility land that was in possession of the public entity”

The same scenario appears in this case. The 2nd Defendant identified the suit property in the alleged letter of application for allocation of the suit property to herself while she knew that the Plaintiff was in actual possession of the same and he was a Civil servant. The 2nd Defendant therefore, had intention of disposing the Plaintiff herein who was a Civil Servant and in occupation of the property. The 2nd Defendants action of applying for the suit property was not in good faith but had intention of dislodging the Plaintiff from the suit property. The Court of Appeal in the case of **Mwangi & Another Vs Mwangi (1986) KLR 328** held that:-

“The right of a person in possession or occupation of Land has an equitable right which are binding on the land”

Equally in this suit, the Plaintiff who was in possession and occupation of the suit property since 1993 had an equitable right which was binding on the suit property and could not be dislodged in the manner applied herein by the Defendants.

Further, the ill motive of the defendants herein was exhibited by the matter in which the Plaintiff was evicted from the suit property even while in possession of a Court Order of **Injunction and status quo**. It is also baffling how the battle between the Plaintiff and 2nd defendant over possession of the suit

property embroiled the Military who facilitated the eviction of the Plaintiff herein. The 2nd Defendant is the one who had a certificate of title in the year 1995 and not the Department of Defence. Why did the Department of Defence evict the Plaintiff from the suit land which was not registered in their names? That would only give credence to the allegation by the Plaintiff that the 2nd Defendant was only a front for other undisclosed persons. Even after the Plaintiff was evicted, the Military did not take the possession of the suit property, but the same was taken over by 2nd Defendant. That was impunity and disregard of the court order exhibited by the 2nd Defendant herein. Since the filing of this matter, the 2nd Defendant has relocated to Britain and thus seem to have lost interest in the suit property. However, the Plaintiff has been craving for justice from 1995 as exhibited from the numerous letters that he has variously written to several Heads of Department in various Government Institutions/Departments.

The court finds that the Plaintiff having been in possession of the suit property and also having legitimate expectation that the suit property would have been registered in his name after the approval of his application by the President, and having been in actual possession and occupation, then the allocation of the said suit land to 2nd Defendant by 1st Defendant was an affront to his legitimate expectation. Though 1st Defendant submitted that the approval of the allocation to the Plaintiff was a mistake and after the mistake was noted, the approval was cancelled, there was no evidence of such cancellation. The Plaintiff alleged that records of his application disappeared from the Lands office and that is why DW 1 could not avail any records to show that Plaintiff was actually allocated the suit property. Given the history of this matter, the court would not hesitate to believe that bit of the Plaintiff's evidence, Indeed the filing of this suit led to termination of the Plaintiff's Commission with the Army.

Having found that the registration of the suit land in respect of 2nd Defendant was tainted with **irregularity** and was **null and void**, the Court finds that it has no option but to revoke the 2nd Defendant's title.

Consequently as provided by Section 80 (1) of the Land Registration Act, wherein the Court has discretion to direct that the register be rectified by cancellation of any certificate of lease. The said section 80(1) of the Land Registration Act provides that:-

“Subject to sub-section (2) the Court may order the rectification of the Register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made is omitted by fraud or mistake.

The Court finds that the 2nd Defendant's registration was obtained irregularly and for that reason, this court directs that the Register herein be rectified by cancellation of the **Certificate of Lease** issued to the 2nd defendant. It is also evident that the Plaintiff allocation of the suit property had been approved by the President as per the law. The Court believe the Plaintiff's evidence that he was shortchanged in favour of the 2nd Defendant who was fronting undisclosed persons. The Court further, finds that after the cancellation of the Certificate of title held by the 2nd Defendant, the same should forthwith be registered in favour of the Plaintiff after payment of the requisite charges.

For the above reasons, the Court therefore, finds that the Plaintiff is entitled to his prayers as prayed in the Plaint. Further, by dint of Sections 1A, 1B and 3A of the Court Procedure Act, the Court is empowered to make such orders that would facilitate furtherance of the overriding objective of the Act and also ensure that Justice is met and done and also prevents abuse of the court process. It is evident that the Plaintiff herein was evicted while he was in possession of a valid Court Order. He incurred loss and damages due to the said illegal eviction. Even after realizing that the eviction was illegal, the Defendants never put the Plaintiff back into possession of the suit property or compensate him for the loss incurred. In his statement, the Plaintiff has quantified his loss and damages to the tune of

Kshs.3, 168,760/=. This court will invoke the provisions of Section 3A of the Civil Procedure Act and directs that the Defendants do compensate the Plaintiff for loss and damages that he suffered due to the illegal eviction. The Court will take a round figure of **Kshs. 4,000,000/=.**

Consequently, after careful analysis of the available evidence, the Court finds that the Plaintiff herein is entitled to the prayers sought in his Plaint. The Court therefore, finds that the Plaintiff has proved his case on a balance of probabilities and the court allows:-

- i. The Plaintiff's claim in terms of Amended Plaint dated **5th September 1995** in terms of prayers No.(a) (b) and (c).
- ii. The Plaintiff is also entitled to compensation of **Kshs, 4,000,000/=** to be paid by the Defendants herein jointly and severally for loss and damages that he suffered due to the illegal eviction.
- iii. Further the Plaintiff is entitled to Costs and interest to be paid at Court's rate from the date of filing of the suit to the date of this Judgment.

It is so Ordered.

Dated, signed and delivered this 10th March 2017.

L. GACHERU

JUDGE

In the Present of

.....Plaintiff

.....1st Defendant

.....2nd Defendant

.....Court Clerk

L. GACHERU

JUDGE