



**Githinji v Mungai & another (Environment & Land Case 23 of 2018)  
[2024] KEELC 688 (KLR) (15 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 688 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 23 OF 2018  
A OMBWAYO, J  
FEBRUARY 15, 2024**

**BETWEEN**

**MOSES MBUTHIA GITHINJI ..... PLAINTIFF**

**AND**

**MUNGAI ..... 1<sup>ST</sup> DEFENDANT**

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

**JUDGMENT**

1. The Plaintiff commenced this suit vide an Amended Plaint dated 23<sup>rd</sup> May, 2018 against the Defendants seeking the following orders:
  - a. An eviction order to issue against 1st defendants, her servants and her agents from the plaintiffs' parcel of land known as unsurveyed residential plot no. 130 within Naivasha township.
  - b. A permanent injunction restraining the 1st defendants, her agents and servants from entering dealing with or in any manner howsoever from interfering with unsurveyed residential plot no. 130 within Naivasha township.
  - c. A declaration that the unsurveyed residential plot no. 130 within Naivasha township with the allotment letter by the commissioner for land issued on 1st May 1991 to one Gibson Wahome is valid hence the plaintiff is the bonafide owner of unsurveyed residential plot no. 130 within Naivasha township
  - d. An order against the 3rd defendant to issue directing it to rectify the anomaly on the ground for the double allocation if any and a declaration that it had no capacity to issue an allotment letter to one Enock Kungu Njoroge.
  - E. That the costs of this case be borne by the Defendant.



- f. Any other relief this honourable court may deem fit.
2. The 1<sup>st</sup> Defendant filed her Statement of Defence and Counter claim on 27<sup>th</sup> August, 2019. She sought for the following orders in her counter claim:
    - a. An eviction order be issued to a Court bailiff who with the provision of security and assistance from the O.C.P.D. and or O.C.S. Naivasha Police Division/Station, should evict and forcibly remove the Defendant (Moses Mbuthia Githinji) by himself, his agents, his servants, his workers and other persons acting under him together with all their structures, buildings and developments from all that plot of land known as Plot No. 130 Naivasha Township and to deliver vacant possession therefrom to the Plaintiff (Rosemary Wanjiku Mungai). Eviction costs to be borne by the Defendant (Moses Mbuthia Githinji).
    - b. A permanent order of injunction restraining the Defendant (Moses Mbuthia Githinji); by himself, his agents, his servants, his workers and or his employees and persons acting under or by his directions from entering, remaining into, trespassing, dealing with or in any way interfering with the Plaintiff's (Rosemary Wanjiku Mungai) quiet and peaceful use, possession, occupation and development of plot No. Uns. 130 Naivasha Township.
    - c. Costs of this counter-claim be borne by the Defendant (Moses Mbuthia Githinji).
  2. The 2<sup>nd</sup> Defendant filed its Statement of Defence on 17<sup>th</sup> July, 2018 where it averred that any dispute relating to the suit property can only be resolved by the Commissioner of Lands and/or the National Land Commission. It denied all the other allegations in the Amended Plaint.

### **Plaintiffs' Case**

3. Moses Mbuthia Githinji testified as PW1. He testified that he has sued the Defendants since they have unlawfully occupied his unsurveyed plot No. 130 Naivasha Township. He further testified that he bought the suit land on 9<sup>th</sup> October 2017, from Margaret Wanjiku Karanja as per the sale agreement. He testified that the price was Ksh 3 million which he paid in 2 tranches via Bank Transfer. The sale agreement was produced and marked as P. Exb 1(a) while the bank transfer form marked as P. Exb1 (b) and (c) as exhibited in the plaintiff's bundle of documents filed on 11/4/2019.
4. He further testified that the vendor gave him an affidavit, allotment letter and sale agreement from the original allottee to the subsequent buyers. He produced the original allotment letter 1/5/1991 as P. Exb 2, sale agreement dated 10/1/1999 between Gibson Wahome to John Mwangi Chege as P. Exb 3 (a). Transfer dated 18/4/2000 – P Exb 3 'b' Letter from Gibson Wahome to Commissioner of lands dated 26/9/2000 – P. Exb 3'c' A sketch map from Municipal Counsel Naivasha 'P. Exb 3 (d) Receipt dated 18/1/2000 No. 276973- P Exb 3'e' Sale Agreement dated 25/1/2010 between John Mwangi Chege and Margaret Wanjiru Karanja and 3 others P. Exb 4 'a'. Affidavit sworn on 13/10/2013 by John Mwangi Chege P. Exb 4 'b' Transfer dated 25/1/2010 from John Mwangi Chege to Margaret Wanjiku Karanja P. Exb 4 'c'. Application for development by John Mwangi Chege dated 19.6.2004 – P. Exh 4 'd' Application for development dated 19/7/2004 by John Mwangi Chege P. Exb 4 'e' Building inspection sheet for John Mwangi Chege P. Exb 4 'f' Letter dated 15/10/2013 for NLC to County Government of Naivasha – P. Exb 4 'g' Bundle of receipts from Municipal Council of Naivasha (7 receipts) from 2002 – 2017) produced as P. exb 5 Building Plan – produced as P. Exb 6
5. He testified that he bought the plot and was shown the plot by Margaret Karanja and later by the county surveyor who showed him the beacons. He produced the certificate of plot and beacon dated 9/10/2017 as P. Exb 7. He further testified that the plot was transferred to him and produced the



- transfer dated 11/10/2017 as P. Exb 8. He also produced photographs of the plot taken on 12/1/2018 (3 photos) as P. Exb 9.
6. He testified that he is currently not in occupation of the suit land due to the court order. He further testified that at the time he bought the plot, the council record showed that it belonged to Margaret Karanja. He testified that he confirmed from the Nairobi Lands Office that the plot was allocated to Gibson Wahome.
  7. He went on to testify that he is in court since the defendant took occupation of the plot and started building a perimeter wall. He added that the plot only had structures which he had purchased.
  8. It was his evidence that together with Margaret, they made a report to the police via OB 56/0/01/2018 and wrote statements. He testified that they also made a report to the county offices which gave them letters stopping any further developments until the matter was resolved. He produced a letter dated 12/1/2018 from the county government and a hand-written letter from the surveyor produced as P. Exb 10 'a' and 'b'. He also produced photographs (4) taken on 12/1/2018 as P. Exb 11.
  9. It was his testimony that the county office did not resolve the issue after which together with Rosemary, they took ownership. He further testified that he later saw the 2<sup>nd</sup> defendant continuing with construction and it was then that he decided to file this suit. He also testified that the county offices never wrote to him confirming that the 2<sup>nd</sup> defendant was the owner of the plot. He added that the 2<sup>nd</sup> defendant completed building the perimeter wall.
  10. He prays that the court orders the eviction of the 2<sup>nd</sup> defendant from his plot and be restrained from trespassing.
  11. Upon cross examination by Mr. Karanja for the 1<sup>st</sup> Defendant, PW1 confirmed that he owns the suit land having bought the same from Margaret Karanja and her sons. The witness was referred to P.Exb 2 where he admitted that the same did not state that he was given any documents. He was further referred to P.Exb 3 – Letter of allotment to Gibson Wahome where he confirmed that the same had been issued by Lands office in Nairobi. He also confirmed that the allocation letter was dated 1<sup>st</sup> May 1991 and admitted that the said date was Labour Day.
  12. PW1 was shown letter dated 15/10/2017 from National Land Commission. He confirmed that the letter was addressed to the county office and not copied to him. He was also referred to P. Exb 4 c and d – where he confirmed that both sought for development permission. He further confirmed that 4 'c' related to a TOL and did not show plot number 4 'c' is dated 19/7/2006
  13. He was referred to P. Exb 4D – dated 19/6/2004. He confirmed that it showed form No. 0241 without any plot number. He also confirmed that the two forms were not signed by any council officer. The witness was further referred to P. Exh 2 where he admitted that acceptance was to be within 30 days. He was also shown P. Exb 3 'e' where he confirmed that payment was made in 2000 as per the receipt. He was again referred to the Building Plans – P. Ex 6 and stated that the plan related to John Mwangi Chege. He added that the copy of the building plan filed with the plaint did not show the plot number. He however admitted that P. Ex 6 showed the plot number which was inserted by pen.
  14. PW1 admitted that Margaret was the one who was paying the rates. He stated that he was not aware that there was an extension of Naivasha Town called Kabati.
  15. Upon cross examination by Mr. Kinuthia for the 2<sup>nd</sup> Defendant, he confirmed that Margaret Karanja bought the plot from John Mwangi Chege who had previously bought it from Gibson Wahome. The witness was referred to P. Exb 2 where he admitted that he never paid any rates. He stated that the allotments were for uns plot No. 130 Naivasha issued by the Ministry of Lands. He further stated that



- he bought the plot for Ksh 3,000,000/= which was identified by Mr. Atai, the surveyor on 11/10/2017 (P. Exb 7). He added that the council offices verified that Margaret Karanja was the owner while his verification at the Lands Office showed that Gibson Wahome was the allottee.
16. Upon reexamination, PW1 stated that the allotment letter had not been challenged by anybody and added that P. Exb 4 G – Letter from NLC confirmed that the plot belonged to Gibson Wahome. He stated that P. Exh 4 ‘Dc Clause 4(a) referred to LR/Parcel 130 (TOL Kabati) while P. Ex 4 ‘c’ did not refer to plot No. The witness referred to P. Ex 7 – Beacon certificate where he stated that the plot measured 50ft by 100ft. He stated that on 9/10/2017 they signed the sale agreement and they were shown the plot on 11/10/2017.
  17. Robert Simiyu the Assistant Director Land Administration at the Ministry of Lands testified as PW2. He testified that he had a correspondence file No.137189 in favour of Gibson Wahome relating to unsurveyed plot No.130 Naivasha. He further testified that there was an allotment letter Folio 1 dated 1/5/1991 issued to one Gibson Wahome by the Commissioner of Lands. He further testified that the allottee paid Kshs. 8,930/= and was issued a receipt on 18/1/2000 receipt No.276973. He added that the allotment letter had a (PDP) attached to it. He produced a certificate copy of correspondence file as a bundle.
  18. He went on to testify that the only transfer of the plot was from Gibson Wahome to John Mwangi Chege on 16/2/2001. He added that no lease for the property had been processed. He testified that under Cap 280 only the commissioner of Lands could issue an allotment as well as a temporary occupation license (TOL’s) and not the county councils. He testified that there was only one correspondence file for plot No.130 Naivasha.
  19. Upon cross examination by Mr. Karanja, PW2 admitted that two correspondence files could be opened in error and confirmed that once the mistake was discovered, the fake file is expunged. He further confirmed that copies of transfer were maintained on the correspondence file and added that the only transfer on record was the one from Wahome to John Mwangi. He stated that all the transfers had to be consented to by the Commissioner of Lands failure to which the same would be regarded as irregular.
  20. He confirmed that in the event the land was not developed, an informal transfer may be given whereby the government is made a party. He confirmed that the record showed that the approval for the transfer was in respect of undeveloped land. He further confirmed that the acceptance letter was written on 17/1/2000.
  21. He stated that they usually accept payment out of time (30 days), unless the allotment had been cancelled and/or revoked. PW2 was referred to letter of allotment where he affirmed that the letter was issued on 1/5/1991 which was a public holiday. He added that a PDP is specific to the plots it captures
  22. Upon cross examination by Mr. Kinuthia, the witness confirmed that the allotment letter was dated 1/5/1991 which he stated that it may have been an oversight. He stated that the government did not cancel the allocation nor issue a notice to the allottee. He also stated that the county Government allocation committee could make recommendation for allotment of plots. Upon reexamination, PW2 stated that the letter issued to Mr. Wahome on 1/5/1991 was never revoked for any reason and remained valid. This marked the close of the Plaintiff’s case.

### **1<sup>st</sup> Defendant’s Case**

23. Rosemary Wanjiku Mungai testified as DW1. She adopted her written statement witness statement dated 22/8/2018 and Replying affidavit filed on 27/8/2018 which was adopted as her evidence in chief. She also produced her bundle documents at page 40 which were marked as 1<sup>st</sup> DEX 1. to 1<sup>st</sup>



- DEX-22. She testified that her property is L.R No. Kabati 130 Kabatini extension Naivasha township. She testified that together with her husband Andrew Mungai Macharia they went to Naivasha town council where they met with Emos Njogu. She testified that they were introduced by John Macharia Njoroge. She further testified that they confirmed from the rates office that the plot was his. It was her testimony that they did their due diligence in confirming that the plot belonged to Emos Njogu.
24. DW1 testified that Francis Okwambo showed her the parcel of land which she purchased on 31/3/1987 and the transfer was effected in November 1988. She testified that they are yet to develop the land. She further testified that when she paid the rates in 2010, the plot was still vacant. She added that in December 2012 a neighbor one, Salome Wangari informed her that Chege had encroached the plot and constructed a structure.
  25. She testified that the county Engineer and Town clerk confirmed that her documents were in order and on the 6/8/2013 she was declared as the rightful owner of the property. She testified that Margaret Wanjiku Karanja came with a group of people who threatened her and told her that the land belonged to them. She further testified that she went back to the county offices where she was told that the County Surveyor, Engineer and Clerk had been transferred. She went on to testify that on December 2017, she was informed by the neighbor that someone had deposited materials on her land. She added that she went to the county offices where the county surveyor and engineer wrote a letter on 5/12/2017 confirming that she was the owner.
  26. She testified that she commenced construction in January 2018 and when she was about to finish, she was stopped by a group of people led by one Mathege who confirmed that he had been sent by Magaret Wanjiru Karanja and the Plaintiff. She further testified that she reported to the police who requested that they go to the suit land. It was her testimony that directions from the county offices through the planner directed that she should stop constructing to allow investigations. She testified that on 12/1/2018 the planner wrote a letter telling her to stop construction pending investigation but on 20/1/2018 she resumed the construction and finished the fence.
  27. She testified that on 30/1/2018 she was summoned to court and informed that the Plaintiff was the owner of the land and that she had trespassed. She urged the court to grant her prayers a and b and c of the counter claim and a permanent order of injunction against the Plaintiff.
  28. Upon cross examination by Gathecha, she confirmed that she is in possession of the land and added that she did not know how the management sold the land. She stated that the plot had been sold fraudulently. DW1 confirmed that Anderson Mugiri Macharia was her late husband and that they had bought the property from Enock and did the transfer. She admitted that she did not have a sale agreement and added that the Temporary occupation Licence (TOL) had been converted to an allotment letter. She also admitted that she did not have the current allotment letter and does not live on the land.
  29. DW1 stated that the plot is partially developed by the plaintiff and added that the perimeter wall had been constructed in 2018. She further stated that she has the transfer documents. She admitted that she did not have the acceptance letter by Enock. She confirmed that she was present when the plot was shown to my husband in 1987 and 1988 and admitted that she was not present when the beacon certificate was shown in 2003.
  30. Upon cross examination by Mr. Kinuthia, she confirmed that the suit property is 130 Kabati extension and not Naivasha township. She stated that she acquired the plot in 1987 and started having issues in 2012. She also confirmed that she built a perimeter wall and added that the plaintiff has since trespassed. She stated that the allocation was TOL which has never been removed.



31. Upon re-examination, DW1 stated that she paid Kshs 20,000 for the suit property. She confirmed that they had a verbal agreement and added that her husband was the one paying the rates. She stated that she constructed the wall. She also stated that construction was done by Chege Mwangi who then sold to the Margaret Karanja who later sold to the land to the Plaintiff. She further stated that there is nobody on the land aside from the materials and that the structures present belong either to Margaret or the Plaintiff. She stated that she has been paying rates to Naivasha County council and not the National government. She also stated that the County Government gave her the suit land and has never rescinded her ownership. She prays for eviction and removal of structures.
32. Alice Wangari Kamau testified as DW2 where her statement dated 9/8/2023 which was adopted as her evidence in chief. She testified that Roseline was her friend and that they used to go together to pay rates in respect of her Naivasha plot.
33. Upon cross examination by Mr. Gathecha, she stated that she lives in Nairobi but lived in Naivasha for some time. She further stated that she has owns two properties one at Kinamba and the other in Maraiguch which she has been paying rates. She confirmed that Rosemary Wanjiku's plot is located few kilometres away. She stated that they are in different parts of Naivasha. She confirmed that there was a house and added that she could not ascertain when the wall was constructed.
34. She also stated that she used to accompany Rosemary to pay rates but could not confirm when exactly.
35. Upon cross examination by Mr. Kinuthia, she stated that the plot is located at Naivasha township at Kabatini. She added that Kabatini and township are different since Kabatini is an extension and touches the highway.
36. Peter Karanja Warindi testified as DW3 where his witness statement dated 9<sup>th</sup> August, 2023 was adopted as his evidence in chief. He testified that Rosemary Wanjiku is his sister in law.
37. Upon cross examination by Mr. Gatheca, he stated that he visited the suit plot in the late 90's and confirmed that the land had not been developed. He stated that he later visited the suit plot in 2012 and found a small structure at the corner.

## **2<sup>nd</sup> Defendant's case**

38. Douglas Nyabayo Ongari a former physical planner produced his witness statement dated 17/7/2017 which was adopted as his evidence in chief.
39. Upon cross examination by Mr. Gathecha, he stated that he is a former physical planner. He confirmed that he did not have the PDP for the suit parcel and added that he went with a surveyor in 2018 where he confirmed that the plot existed. He further confirmed that there was no development and that the land was vacant. He also confirmed that he was present when the perimeter wall was done in 2018.
40. He stated that he did not have the minutes allocating the suit land to Enock. He further stated that the suit plot was Naivasha Township plot number 130 which belonged to the National Government. He added that he did not establish the situation of the plot. He also stated that paying rates does not make you an owner of the parcel. He confirmed that for one to obtain a title, one needs to have an allotment letter with a PDP.
41. He stated that the plots had to be advertised through balloting and that directions of physical planning was involved. He explained that the allotment letter was issued by the planning committee and was to be forwarded by National Government and Individuals would do a PDP. He further explained that the Director of Surveys would prepare a survey plan after which the Commission of lands would issue an allotment letter. He confirmed that the land was still unsurveyed.



42. He further confirmed that Plot No. 130 Naivasha Township does not exist. He however admitted to have a PDP of Kabati Extension. He also stated that the township was the old municipal boundary and added Kabati was within Naivasha Township. He confirmed that Plot No. 130 Kabati Naivasha Township and plot 130 Naivasha Township are not the same.
43. He stated that the owner of TOL 130 Naivasha was shown her parcel of land and John Mwangi Chege was also shown plot number TOL extension Kabati. He confirmed that parties were shown the same plot.
44. He confirmed that Mr Okobo was in order when he showed John Megi Chege the plot. He stated that the TOL had been done awaiting the final processes. He explained that when given a TOL one had the authority to develop to develop and even put up a permanent structure. He admitted that he did not have an authority and confirmed that there had to be acceptance by the allottees.
45. Upon cross examination by Mr. Maingi, he confirmed that the parcel of land had not been developed or surveyed. He further confirmed that he went to the suit land in 2018. He admitted that the land belonged to the national government. He further admitted that Plot number 130 Kabati external belonged to Naivasha sub county. He confirmed that they had a PDP but confirmed that he could not ascertain that payment for rates had been received. He explained that the TOL remained valid as long as it was not cancelled. He added that in 1987 and 1989 TOL could be transferred where the committee had to have a sitting.
46. Upon cross examination by Danston Omari, he admitted that he did not know who owned the land. He confirmed that he only saw the allotment letter dated 1/5/1991.
47. Upon reexamination, he stated that it was possible to pin point the location of plot no 130 Kabati extension. He added that it was not possible to identify plot No. 130 Naivasha Township Kabati. He stated that the parcel is on the right as you enter Naivasha town. He further stated that the plot allotted in 1987 fell under the municipal council of Naivasha while the one allotted in 1991 fell under the commission of lands. He confirmed that he had the PDP and added that TOL could be revoked. That marked the close of the 2<sup>nd</sup> Defendant's case.
48. Salome Gachie testified as DW4 where her statement dated 9/8/2023 which was adopted as her evidence in chief She testified that she knew Chege since he had constructed a house near her. She testified that he had not put up the structure. It was her testimony that Rosemary had put up fence on a date she could not recall. She further testified that Chege built the structure first. She also testified that the parcels had been issued by the county council and added that she had a title deed for 99 years.
49. It was her testimony that they had been given titles by the District Officer and that they were using the documents from the county council. She testified that her plot number was 134. She further testified that Margaret Wanjiku Karanja bought the plot from Chege. DW4 testified that Rosemary never lived on the plot. Upon re-examination, she stated that Rosemary came in the years 1980's and constructed the wall. That marked the close of 1<sup>st</sup> defendant case. The second defendant did not call any witness.

## **Submissions**

50. The Plaintiff filed his submissions dated 31<sup>st</sup> January, 2024 where he gave a brief background of the case and identified four issues for determination. First issue was whether unsurveyed plot no. 130 Naivasha Township (residential) and Kabati extension residential plot 130 is one and the same. He submitted that the PDP produced by both parties indicate that both parcels are in the same area. He further submitted that one indicates that the plot is at the edge while the other parcel is between plot 129



and 131. He submitted that parties confirmed that they referred to one plot as both had deposited construction materials and put up a fence.

51. The second issue is whether the Plaintiff is entitled to the reliefs sought. The Plaintiff relied on Section 2 and 40 of the *Land Act* and section 42 of the Government *Land Act*. He submitted that the government is required to give notice to the licensee to terminate the license. He further submitted that the said license may also be forfeited under section 42 for failure on the part of the licensee to meet the conditions stated in the license. The Plaintiff relied on the Court of Appeal case of Runda Coffee Estates Ltd V Ujagar Singh [1966] E.A 564 and submitted that any license over land is extinguished upon the death of the licensee and cannot be inherited or be the subject of succession. He further cited the Court of Appeal case of Faraj Maharus V J.B Martin Glass Industries & 3 Others [2005] eKLR. The Plaintiff relied on the case of Dr. Joseph N.K Arap Ng'ok V Justice Moijo Ole Keiyua & 4 Others CA 60/1997 and submitted that the original allottee complied with all the conditions set out even though not within the timelines given. He further submitted that the 1<sup>st</sup> Defendant failed to comply as she only had a temporary occupation license with no acceptance or minutes availed. The Plaintiff also relied on the case of John Kariuki Maina V Town Clerk of the Municipal Council of Thika [2015] eKLR. The Plaintiff submitted that he proved his case and prayed that the same be allowed with costs.
52. The 1<sup>st</sup> defendant on his part submitted that it is trite that he who alleges must prove. Under Sections 107 and 108 of the *Evidence Act*, the person who alleges is under a duty to prove all allegations as contained in his claim against the respondent on a balance of probabilities. He relies on the case of Kirugi & Another - Vs - Kabiya & 3 Others [1987] KLR 347, where the Court of Appeal held thus:
- “The burden was always on the plaintiff to prove his case on the balance of probabilities even if the case was heard on formal proof.”<sup>1</sup>
53. The defendants argue that it was incumbent on the Plaintiff to prove that the parcel of land known as UNS Plot no. 130 Naivasha Township is the same as the 1<sup>st</sup> Defendant's property being Plot no 130 Kabati extension. However, the Plaintiff did not present sufficient evidence before this court to aid it in finding that indeed the parcels of land in dispute are one and the same. That the 2<sup>nd</sup> Defendant's witness conceded that he was not in a position to ascertain where UNS Plot no. 130 Naivasha Township but he was well aware and could ascertain the land plot no 130 Kabati Extension.
54. Therefore, it is our submission that the Plaintiff's claim against the Defendant is misplaced as the parcels of land in question are different and the claim is a waste of the court's precious time. On Whether the land plot no 130 Kabati- Extension Naivasha belongs to the Defendant Rose Wanjiku,
55. The defendant argues that the land was acquired through a Temporary occupation license. A Temporary Occupation License (T.O.L) is defined under section 2 of the *Land Act* as follows:-
- “a permission by the Commissioner In respect of public land or a proprietor in respect of private or community land or a lease which allows the licensee to do some act in relation to the land comprised in the lease which would otherwise be a trespass, but does not include an easement or a profit”
56. As the custodian of unoccupied government land in Kenya, Commissioner of Lands was empowered by the Government Lands Act (Cap 280, Laws of Kenya, now repealed), to grant and revoke Temporary Occupation Licences. Section 40 of the Act provided —



- (1). Licences to occupy unalienated Government land for temporary purposes may be granted by the Commissioner;
2. Unless it is expressly provided under this section shall continue for one year and thenceforth until the expiration of any three months' notice to quit.  
Provided that the notice to quit may be served upon the licensees at any time after the expiration of nine months from the date of the licence."
3. The rent payable under a licence under this section, the period and the agreements and conditions of the licence shall be such as may be prescribed by rules under this Act or as may be determined by the Commissioner.
4. The benefit of a licence under this section may, with the consent of the Commissioner be transferred by the licensee, and the transfer and the consent thereto shall be endorsed on the license.

57. Under the mandatory provisions of section 40 the government is required to give notice to the licensee to terminate the license. From the 2<sup>nd</sup> Defendant's witness testified that temporary occupation license can remain in force indefinitely for so long as the party continues to pay rent when it falls due. The defendant relies on the case of Daudi Kiptugen v Commissioner Of Lands Nairobi Lands & 4 others [2015] eKLR, the court stated as follows:-

58. In order to determine the question whether the lease held by the plaintiff is valid it must be demonstrated that it was properly acquired. It is not enough that one waves a Lease or a Certificate of Lease and assert that he has good title by the mere possession of the Lease or Certificate of Lease. Where there is contention that a Lease or Certificate of Lease held by an individual was improperly acquired, then the holder thereof, must demonstrate, through evidence, that the Lease or Certificate of Lease that he holds, was properly acquired. The acquisition of title cannot be construed only in the end result, the process of acquisition is material. It follows that if a document of title was not acquired through the proper process. The title itself cannot be said to be a good title. If this were not the position, then all one would need to do is to manufacture a Lease or Certificate of Title, at a backyard or the corner Ota dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein. It is therefore necessary for this court to determine how the plaintiff ended up having a Lease and Certificate of Lease in his name and further determine if the Government did intend to issue the plaintiff with a Lease over the suit land. "

59. He submits that a party must prove that the same was lawfully acquired. The Plaintiff in this case has failed in discharge of their burden to show the legality of the process through which they acquired the title that they are holding.

60. Based on the foregoing, the 1<sup>st</sup> defendant submits that the 1<sup>st</sup> Defendant is a law-abiding citizen appearing before the court with clean hands, seeking protection by the law from third parties who have been interfering with her peaceful and quiet possession of land plot no 130 Kabati Extension Naivasha.

### **Analysis and Determination**

61. I have considered the pleadings and the evidence on record and I am of the view that the following issues need to be determined:

- a. Who between the Plaintiff and the 1<sup>st</sup> Defendant is the lawful owner of the suit property.
- b. Whether the Plaintiff is entitled to the orders sought



- c. Whether the 1<sup>st</sup> Defendant is entitled to the orders sought in her Counterclaim.
62. Before delving into the first issue for determination, it is important for this court to establish whether the suit property unsurveyed plot No. 130 Naivasha Township and Plot No. 130 Kabati Naivasha Township are one and the same. It is not in dispute that the construction materials and the perimeter fence placed by both the Plaintiff and 1<sup>st</sup> Defendant refer to one and the same plot. It was also clear from the 2<sup>nd</sup> Defendant's case that the physical planner could not physically confirm whether the two plots are separate from each other. This court has considered the testimony by both the Plaintiff and Defendants and finds that it is clear that the dispute herein stems from the fact that both the Plaintiff and the 1<sup>st</sup> Defendant are claiming the same parcel of land albeit with different documents.
63. Both the Plaintiff and 1<sup>st</sup> Defendant went into great lengths to convince this court that they are the lawful owners of the suit property. On his part, the Plaintiff testified that he purchased the suit property from Margaret Wanjiku Karanja, Juvinalis Nyota Karanja, Ann Wairimu and Joram Kamau vide a sale agreement dated 9<sup>th</sup> October, 2017 for a consideration of Kshs. 3 million. He produced the sale agreement and receipt of payment. He also explained that vendor gave him an affidavit, allotment letter and sale agreement from the original allottee Gibson Wahome to the subsequent buyers as well as the original allotment letter dated 1/5/1991.
64. Both the 1<sup>st</sup> and 2<sup>nd</sup> Defendant's never challenged the validity of the allotment letter dated 1/05/1991. He produced the certificate of plot and beacon dated 9/10/2017 and confirmed that the plot had been transferred to him vide the transfer dated 11/10/2017 which he produced as evidence. The Plaintiff produced documents to show how he came to acquire the suit property which none of the Defendants challenged its validity. It was the Plaintiff's evidence that he then took possession and deposited construction materials until sometime in 2018 when the 1<sup>st</sup> Defendant entered the suit property and put up a fence. The Plaintiff through the Director Land Administration (PW2) confirmed that the allotment letter dated 1/5/1991 had been issued to one Gibson Wahome by the Commissioner of Lands where the allottee paid Kshs. 8,930/= and was issued a receipt on 18/1/2000 receipt No.276973. He also confirmed that the allotment letter had a (PDP) attached to it. PW2 confirmed that it was only the Commissioner of Lands who was authorized to issue an allotment and a Temporary Occupation License (TOL's) and not the county councils. He confirmed that there was only one correspondence file for plot No.130 Naivasha. He admitted that two correspondence files could be opened in error and confirmed that the only transfer that was on record was the one from Wahome to John Mwangi. He also confirmed that all the transfers had to be consented to by the Commissioner of Lands failure to which the same would be regarded as irregular.
65. The 1<sup>st</sup> Defendant on the other hand in laying claim to the ownership of the suit property testified that she acquired the suit property through her late husband Anderson Mugiri Macharia who had it from Enock Kungu Njogu vide a Temporary Occupation Licence (TOL) dated 11/3/1982 which allegedly had been later converted to an allotment letter. She admitted that she did not have a sale agreement or the current allotment letter and added that she was not in occupation of the suit land. It was her evidence that she had the transfer documents approved by the Naivasha Town Council. She admitted that she did not have the acceptance letter by Enock and that she was not present when the beacon certificate was shown in 2003. It was her evidence that she been paying rates to Naivasha County council and not the National government.
66. The 1<sup>st</sup> Defendant's root of claim to the suit property emanates from an alleged sale vide the TOL issued to Enock Kungu Njogu. She claimed that the TOL had been converted to an allotment letter which she admitted she didn't have.



67. A Temporary Occupation License (T.O.L) is defined under section 2 of the [Land Act](#) as follows:
- a permission by the Commissioner in respect of public land or a proprietor in respect of private or community land or a lease which allows the licensee to do some act in relation to the land comprised in the lease which would otherwise be a trespass, but does not include an easement or a profit”
68. In the instant case, the Temporary Occupation License (TOL) was not issued by the Commissioner but the Municipal Council of Nakuru. The 1<sup>st</sup> Defendant did not produce any sale agreement to confirm that they purchased the suit land from the licensee Enock.
69. In line with Section 40 of the Government [Land Act](#), the Commissioner of Land as the custodian of unoccupied government land had the power to grant and revoke Temporary Occupation Licenses’. In the instant case, there was no evidence that the said TOL had been revoked, the 1<sup>st</sup> Defendant adduced evidence in form of receipts of payment for the suit property. The 1<sup>st</sup> Defendant also confirmed that her husband was the one who had been paying the rates. In view of the above and the evidence of the documents produced by the 1<sup>st</sup> Defendant including the alleged transfer documents, it is not in doubt that the 1<sup>st</sup> Defendant’s deceased’s husband was allegedly the one who purchased the suit land from the licensee.
70. In light of the same, this court ought to establish whether a TOL can be inherited or transferred. The Court of Appeal in the case of Runda Coffee Estates Ltd vs Ujagar Singh [1966] E.A 564 at p. 568 while referring to a TOL held as follows:
- It is the essence of a licence of this nature that it is personal to the licensee and creates no interest which can be disposed of by the licensee. As has been stated well over 100 years ago, it creates nothing which is assignable...”
71. Further, the Court of Appeal in the case of Faraj Maharus V J.B Martin Glass Industries & 3 others [2005] eKLR held that:
- the Temporary Occupation licence issued in 1926 could not oust the certificate of title granted under the Registration of Titles Act...The Appellant does not possess title under the Act.
72. We would agree therefore with the learned judge that the license to occupy the suit property came to an end upon the death of Efendi Maharus and his widow and as the appellant has nothing to show for the continued occupation of the suit land, his occupation amounted to trespass as against the registered proprietor”
73. In the case of Omar & 8 Others v Murania & Another [2006] 1 KLR (E&L) 206 Waki J (now retired JA) found as follows:
- The applicants do not deny that they are licensees of the Municipal Council on the plots they occupy and have constructed kiosks therein. The council has power under section 144(5) of the Local Government Act to grant something upon the immovable property of the grantor and does not amount to the creation of the interest in the property itself. It is permissive right and personal to the grantee and since the license has no interest or estate in the property such possession as he might have for enjoyment of the right is no judicial possession but only an occupation.”



74. From the above judicial authorities, it is trite law that license over land is extinguished upon the death of the licensee and cannot be inherited or be the subject of succession. In the instant case, the 1<sup>st</sup> Defendant has filed this suit in her capacity as the wife to her deceased husband who until his death was an alleged licensee of the suit by virtue of a Temporary Occupation License issued to him on 11/03/1982. This court finds that the 1<sup>st</sup> Defendant deceased husband could not assign to her the terms of the TOL. It therefore meant that the said rights of occupation of the suit property terminated upon his death and the 1<sup>st</sup> Defendant's occupation of the suit land amounted to trespass.
75. The Plaintiff on the other hand produced the allotment letter from the original allottee as well as the relevant documents sequentially showing how he came to be in occupation of the suit property. It was also clear from the evidence by the Director of Lands Administration (PW2) and the Physical Planner (2<sup>nd</sup> Defendant's witness) who both confirmed that the land records only showed the allotment letter dated 1/5/1991.
76. In view of the foregoing, this court finds that the Plaintiff has proved his case to the required standard as he successfully established the root of how he came to own the suit land. I therefore find that he is the lawful owner of the suit property thus entitled to the orders sought.
77. The 1<sup>st</sup> Defendant on the other hand failed to prove her case to the required standard therefore not entitled to the orders as sought in her Defence and Counter claim.
78. Consequently, this court grants judgment to the plaintiff in the following terms:
- a. A declaration that the Plaintiff is the lawful proprietor of unsurveyed residential plot no. 130 within Naivasha township.
  - b. An order of permanent injunction is issued restraining the 1<sup>st</sup> Defendant by herself, her servants or lawful agents from trespassing upon, entering, remaining, dealing in or otherwise in any other manner whatsoever from interfering with unsurveyed residential plot no. 130 within Naivasha township.
  - c. The 1<sup>st</sup> Defendant to vacate the said property within 90 days failure to which the Plaintiff is at liberty to engage a court bailiff or auctioneer and the OCS Naivasha Police Station to assist on the same with security.
  - d. An order is hereby issued directing the 2<sup>nd</sup> Defendant to rectify the anomaly on the ground for the double allocation and issuing a title to the suit property in the Plaintiff's name.
  - e. Each party shall bear its own costs as the wrong is attributable to the Nakuru County Council as it then was.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 15<sup>TH</sup> DAY OF FEBRUARY 2024.**

**A.O.OMBWAYO**

**JUDGE**

