



REPUBLIC OF KENYA



**Kagwanja v Town Clerk Town Council of Molo & 4 others (Environment & Land Case 85 of 2013) [2024] KEELC 722 (KLR) (15 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 722 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 85 OF 2013  
LA OMOLLO, J  
FEBRUARY 15, 2024  
(FORMERLY H.C.C.C NO 204 OF 2012)**

**BETWEEN**

**GEOFFREY KAGWANJA ..... PLAINTIFF**

**AND**

**TOWN CLERK TOWN COUNCIL OF MOLO ..... 1<sup>ST</sup> DEFENDANT**

**TOWN COUNCIL OF MOLO ..... 2<sup>ND</sup> DEFENDANT**

**JAMES MMWANGI ..... 3<sup>RD</sup> DEFENDANT**

**MARY WAMBU I NJENGA ..... 4<sup>TH</sup> DEFENDANT**

**MICHAEL KIMANI KARIUKI ..... 5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff commenced this suit vide a Complaint dated 4<sup>th</sup> June, 2012 which was further amended and filed on 1<sup>st</sup> November, 2016.
2. In the further amended complaint, the Plaintiff avers that at all material times, he was the licensee of all that piece of land at Molo Township now Molo Sub-County granted under T.O.L (Temporary Occupation License) which was duly executed by the Commissioner of Lands in 1976.
3. He further avers that he was allotted a plot measuring approximately 0.8418 Hectares Map Plan No 7218/V/216A by the Commissioner of Lands which is located at Molo near (K.C.C) opposite the Molo Railway Station in the year 1976.
4. It is his averment that he received a Notice from the Ministry of Lands Settlement asking for payment of land rent on 5<sup>th</sup> March, 2004. He also avers that he received a copy of a letter addressed to District



- Land Officer, District Surveyor, Director of Physical Planning and Town Clerk Molo confirming that he had made an application for conversion of his T.O.L Plot in Molo into 99 years.
5. He avers that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' wrote a letter to George Kori Njuguna claiming that he has illegally encroached on a land along Molo Kibunja Road on 27<sup>th</sup> January, 2000. He avers that the commissioner of lands was in the process of converting the same when for no apparent reason the Defendants unlawfully and without any colour of right proceeded to demolish the Plaintiff's fence and structure which was built on the said plot causing the Plaintiff losses amounting to Kshs. 400,000/=.
  6. He avers that he later reconstructed the fence and erected buildings on the said plot where currently it houses a nursery school by the name Numbers Junior School on the approval of the 1<sup>st</sup> and 2<sup>nd</sup> Defendant.
  7. It is his averment that he has been in occupation in that plot since 1976 up to-date and has put a lot of money into the property and that if the Defendants are not stopped, they are likely to cause him a lot of loss and damage.
  8. He avers that he has in the past applied to have the said license converted to a 99 years lease as per the allotment letter dated 23<sup>rd</sup> July, 1996. He prays that the Defendants be enjoined by this court to avoid a violation of his proprietary rights.
  9. The Plaintiff avers that the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> started laying claim on portions of his land on the strength of allotment letters issued by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
  10. He also avers that there was another case being Nakuru CMCC No 2048 of 2006 which was dismissed for want of prosecution since his Advocates on record M/s Munyua Kariuki & Co Advocates moved to Nairobi and never informed him.
  11. The Plaintiff prays for judgment and orders as follows:
    - a. An order of temporary/permanent injunction do issue against the Defendants whether by themselves, their servants and/or agents or otherwise whomsoever from interfering with the Plaintiff's quiet (sic) possession and enjoyment of piece of unsurveyed (sic) commercial plot measuring approximately 1 ha 0.8418 Hectares Map Plan No 7218/V/216A.
    - b. A declaration that the Plaintiff is the rightful and registered owner of piece unsurveyed (sic) commercial plot measuring approximately 1 ha 0.8418 Hectares Map Plan No 7218/V/216A. (sic)
    - c. Costs and interest of the suit
    - d. Any other this honourable court deems fit to grant.
  12. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed their amended statement of defence on 10<sup>th</sup> January, 2017.
  13. They deny the averments in the further amended plaint and state that all that land at Molo Township belongs the 2<sup>nd</sup> Defendant and has never licensed the Plaintiff to use any part of its land as alleged or at all.
  14. They state that if the Plaintiff had ever occupied any part of it, he occupied the same unlawfully and he was a trespasser therein.
  15. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants state that the Plaintiff is not the lawful owner of the suit property and also state that the Plaintiff's proprietary rights have not been violated as he is not the owner of the suit property.



16. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants also state that the approval to the Plaintiff was not granted by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. They pray that the Plaintiff be struck out and/or dismissed with costs.
17. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants filed their statement of defence on 8<sup>th</sup> November, 2016 and they deny the Plaintiff's averments in the Plaintiff. They state that on or about 28<sup>th</sup> August, 1996, they were allotted L.R NO. 533/104 and L.R NO 533/105 Molo Township Commercial Plots respectively by the Commissioner of Lands and they proceeded to meet the relevant conditions thereof.
18. They also deny demolishing any fence or structures owned by the Plaintiff and put the Plaintiff to strict proof of allegations thereof.
19. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants also state that the suit herein is res judicata as the Plaintiff filed NKU CMCC No 2048 of 2006 over the same cause of action and that the same was dismissed.
20. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants pray for the dismissal of the Plaintiff's case with costs.
21. The 5<sup>th</sup> Defendant filed an amended statement of defence and counterclaim on 16<sup>th</sup> January, 2017. In the amended statement of defence, he denies the Plaintiff's averments in the further amended plaintiff and he states that he is the lawful allottee of all that parcel of land known as L.R NO 533/101- Molo Township Commercial Plot measuring 0.1550 Ha.
22. He also denies causing and/or occasioning the Plaintiff the alleged loss of Kshs. 400,000. He also states that he has not in any way violated the proprietary rights of the Plaintiff since he has none.
23. The 5<sup>th</sup> Defendant states that on the contrary, it is the Plaintiff who has violated his proprietary rights. He prays that the Plaintiff's suit be dismissed.
24. In his counterclaim, the 5<sup>th</sup> Defendant avers that he is the lawful allottee of all that parcel of land known as L.R No 533/101 Molo Township Commercial Plot measuring 0.1550 Ha.
25. The 5<sup>th</sup> Defendant avers that sometimes in the year 2007, the Plaintiff encroached on his parcel of land and therein erected illegal structures.
26. He avers that as a result of the said encroachment, he has been denied access and use of his parcel of land to date.
27. The 5<sup>th</sup> Defendant prays for judgment against the Plaintiff for:
  - a. An order of eviction and demolition of all illegal structures thereon.
  - b. A permanent injunction restraining the Plaintiff now 5<sup>th</sup> Defendant (sic) from entering, remaining in trespassing, developing, cultivating and/or in any way dealing with parcel No. 533/101 Molo Township Commercial Plot.
  - c. An order of measne (sic) profit from 2007 to date.
  - d. Costs of the suit.
28. The Plaintiff filed a Defence to the counterclaim on 8<sup>th</sup> October, 2021. He denies the averments in the counterclaim.
29. He states that it is the 5<sup>th</sup> Defendant who trespassed on the Plaintiff's parcel of land known as Plot 7218/V/216 measuring approximately 1.0 Hectares REF NO. 16015/XIV/188B which was given to the Plaintiff by the Commissioner of Lands and which land is located at Molo near Kenya Co-operative Creameries Limited opposite the Molo Railway station.



30. He states that he has been on the parcel of land peacefully since 1976 where he had been given a license to occupy and that in 1966 after applying for the same to be converted to a lease, he was given an allotment letter for the same.
31. He states that in 2015, the 5<sup>th</sup> Defendant started laying claim that they had allotment letters that were issued to them and when he visited the suit parcel, he found that they had been given a plot inside his parcel of land and states that this can only happen where such allotments have been issued fraudulently.
32. The Plaintiff states that the 5<sup>th</sup> Defendant's allotments have been issued fraudulently the same should be cancelled and denies the 5<sup>th</sup> Defendant's averment that his parcels exists on paper and not on the suit parcel.
33. The Plaintiff lists the particulars of fraud on the 5<sup>th</sup> Defendant as:
  - a. The 5<sup>th</sup> Defendant causing L.R No 533/101 Molo
  - b. Township Commercial Plot to be issued with the allotment letters without the Defendant's authority, consent, knowledge or approval.
  - c. The 5<sup>th</sup> Defendant surrendering a fake allotment letter at the chief land registrar's office in Nairobi without the consent, approval, prior knowledge and/or authority of the Plaintiff.
  - d. The 5<sup>th</sup> Defendant presenting himself as the legal owner of L.R No 533/101 MOLO Township Commercial Plot and coercing the council to register the same to his own name knowing very well that the said property belonged to the Plaintiff.
  - e. The 5<sup>th</sup> Defendant claiming L.R No 533/101 Molo Township Commercial Plot within Molo Township on the suit parcel while their allotment letter does not refer to the Plaintiff's parcel of land.
  - f. The 5<sup>th</sup> Defendant using their official means having worked at the Molo County Council to defraud the Plaintiff his land using allotment letters that are not authentic.
  - g. The 5<sup>th</sup> Defendant in collusion with the county council registry to issue the fake allotment letters.
34. The Plaintiff prays that the counterclaim be dismissed with costs.

### **Factual Background.**

35. The matter came up for hearing on 26<sup>th</sup> September, 2018 and counsel for the Plaintiff informed the court that he has instructions to withdraw the suit with no orders as to costs. Counsel for the 1<sup>st</sup> Defendant did not object to the withdrawal of the suit but sought costs. Counsel for the 5<sup>th</sup> Defendant also sought costs.
36. The suit was marked as withdrawn with costs to the Defendants.
37. Subsequently, the 5<sup>th</sup> Defendant filed an Application dated 10<sup>th</sup> March, 2021 which sought the following orders:
  - a. That this Honourable Court be pleased to substitute the Plaintiff in the Counterclaim herein Michael Kimani Kariuki with Jacinta Wairimu Kimani being the legal representative of the estate of the deceased.



b. That Costs for the application be in the cause.

38. The matter came before the court on 23<sup>rd</sup> March, 2021 and the counsel for the Plaintiff did not oppose the application. The court directed that:

“The application for substitution indicates that the party sought to be substituted died on 6<sup>th</sup> November, 2019. The suit by him abated on 5<sup>th</sup> November, 2020 and technically, there is no suit before the court, the same having abated. As the deceased was the Applicant in the counterclaim, there was need to seek extension under Order 24 (3) (2) as per the provision thereof and for revival and substitution of the deceased plaintiff. There is no suit on which the substitution can be made. The Applicant is granted liberty to make an appropriate application for extension, revival and substitution under provisions of order 24 of the C.P.R.

39. Subsequently, on 4<sup>th</sup> June, 2021, one Jacinta Wairimu Kimani filed an application dated 2<sup>nd</sup> June, 2021- as the as the legal representative of the t estate of the 5<sup>th</sup> Defendant.

40. She sought orders that the suit be reinstated and she be substituted in place of the 5<sup>th</sup> Defendant in the counterclaim. The application was not opposed and the prayers sought were granted.

41. The counterclaim proceeded to hearing on 2<sup>nd</sup> December, 2021.

#### **5th Defendant’s Evidence in Support of the Counterclaim.**

42. The first witness to testify in support of the 5<sup>th</sup> Defendant’s case is Jacinta Wairimu Kimani. She testified that she is the wife to the 5<sup>th</sup> Defendant in the main suit and that the main suit was withdrawn.

43. She testified that she lives in Lanet but she is formerly from Molo. She testified that she is a teacher by profession and she is in this court as the administrator of the estate of Michael Kimani and has grant of letters of administration ad litem which was marked and produced as Exhibit P1.

44. She testified that Michael Kimani recorded a statement dated 24<sup>th</sup> November, 2014 and prayed that the statement be adopted as evidence in this case which prayer was acceded to.

45. It was her testimony that that she filed a suit against Geoffrey Kagwanja and the dispute pertains to land LR 533/101 and added that it is a commercial plot in Molo township and he is the defendant in the counterclaim.

46. She testified that the land is allotted to the late Michael Kimani her deceased husband and it was allotted to him on 23<sup>rd</sup> August, 1996. She testified that she has a letter of allotment which was marked and produced as Exhibit P2.

47. She testified that the 5<sup>th</sup> Defendant accepted the offer by paying some money amounting to 41,287 Kenyan shillings. She went on to state that she a receipt and cheque number. She explained that the receipt is dated 31<sup>st</sup> August, 2000. It was marked and produced as Exhibit P3.

48. It was her testimony that the 5<sup>th</sup> Defendant was shown the location of the land and that she has the map. A copy of F.R No 56/90 for I.R No 533/102 Molo was marked and produced as Exhibit P4.

49. She testified that the 5<sup>th</sup> Defendant had been paying land rates for the suit parcel and that she had a receipt dated 14<sup>th</sup> November, 2012 for Kshs.11,500. The same was marked and produced as Exhibit P5.



50. It was PW1's testimony that She testified that around 2007, the Plaintiff encroached on their land 533/101 in Molo Township and started putting up wooden structures on the land and she produced the photographs as Exhibit P6.
51. She testified that before that, the Plaintiff had similar issues of encroaching on someone else land. She testified that the Plaintiff responded to the pleadings and he filed a statement of defence and a list of documents both dated 4<sup>th</sup> October, 2021.
52. She testified that in regard to paragraph 3 of the statement of defence, it is not true that they have encroached onto the plot. She testified that they are owners as indicated in the survey and Registry Index Map and added that she is not aware of the parcel of land 7218/V/216.
53. It was her testimony that her parcel is 0.01550 Ha and the Plaintiff ( in the main suit) alleges that his parcel is 1.0 Ha. She testified that there is no relationship between her plot and his. She also testified that in respect of the particulars of fraud, the commissioner of lands is the one who allocated land to her husband. She testified that it is the government that did and she is not the allotting authority.
54. On the issue of PW1 the alleged fake allotment letters, PW1 stated that her husband was never charged for an offence of forgery, no complaint against him and that he has not seen the occurrence book report.
55. In the respect of the allegation of the 5<sup>th</sup> Defendant coercing the council to register the plot in his name, PW1 stated that Molo council is not a party to this suit and the council has not made any complaint of coercion against the 5<sup>th</sup> Defendant.
56. PW1 referred to the list of documents dated 4<sup>th</sup> October, 2021 and stated that the allotment letter, she testified that the allotment letter was issued on 23<sup>rd</sup> July, 1996 and it is for No. 7218/V/216 Molo township and it is issued to the Plaintiff.
57. She testified that the allotment letter in the Plaintiff's list of documents does not show any relation or connection between it that and 533/101 Molo Township. It was also her testimony that in respect of the verification of allotment, plot No is 7218/V/216 and it is not the same as her plot adding that the Plaintiff's parcel was allotted to him on 23<sup>rd</sup> May, 2016 and while the one to the 5<sup>th</sup> Defendant was allotted land on 23<sup>rd</sup> August, 1996.
58. It was also her testimony that the verification on the Plaintiff's allotment letter shows that it is government land, that it is surveyed and she added that she has not seen the survey map. She testified that there is no file number and it is indicated as being in process. She also testified that she has not seen the approved Part Development Plan (herein after referred to as PDP).
59. On the Plaintiff's sale agreement dated 1<sup>st</sup> November, 1975, PW1 stated that she has not seen the document and it is not a sale agreement but a license. She testified that the area is indicated is 0.8418 Ha and the allotment letter indicated 1.00 Ha which according to her is a material contradiction.
60. On the license ,as seen on the Plaintiff's list of documents, PW1 testified that the rent per year is 840 Kenya shillings in respect of 7218/V/216 and the Plaintiff is a licensee and not an owner. PW1 prayed that he be evicted from the land and sought judgment as per the counterclaim.
61. In his witness statement dated 24<sup>th</sup> November, 2014, Michael Kimani Kariuki states that he is the 5<sup>th</sup> Defendant and he is the lawful allottee to all that parcel of land known as L.R No 533/101 Molo Township plot measuring 0.1550 HA. He states that he was allotted the said parcel of land vide an allotment letter of 23<sup>rd</sup> August, 1996.



62. The 5<sup>th</sup> Defendant also states that he was required to make some statutory payments of Kshs. 41,287, as had been itemized on his said allotment letter, which he duly paid on 31<sup>st</sup> August, 2000 vide Cheque No 000315. He states that he has been remitting the annual rates to the 2<sup>nd</sup> Defendant from then on.
63. He states that the Plaintiff herein had filed another suit being CMCC NO 2048/08 which was dismissed for want of prosecution. He states that the folio registry (FR) No 56/90 is the map of the disputed parcel which gave rise to the subdivisions L.R No 533/06 to LR No 533/01 and to the best of his knowledge, the Plaintiff herein is not a lawful allottee of any of the said subdivisions.
64. He states that the Plaintiff's claim is thus ill founded, has no merit and has been overtaken by time.
65. Upon cross-examination, PW1 confirmed that parcel 533/101 belonged to her husband and it was allotted to him on 23<sup>rd</sup> August, 1996.
66. She confirmed that she has not taken occupation since there were people on it and also that there are people who developed it in 2007.
67. She stated that they would visit the parcel many times and that the 5<sup>th</sup> Defendant visited in 2007. She testified that in 1996, he visited it and it was vacant adding that she has never been inside but she knows where it is.
68. She confirmed that she was not with him when it was shown to him but she knows its location because she used to live there. She stated that her husband was a principal of a school and a teacher and denied that ever worked with the council of Molo.
69. She stated that after the survey they were given another number and that the suit parcel arose from a subdivision. She confirmed that that she does not have a survey beckon certificate and since 2007, she has not filed any matter in court other than this counterclaim.
70. She stated that the land is in Molo near the Railway station and there is Molo KCC near it. She stated that the 5<sup>th</sup> Defendant is in occupation of 533/101 and that when she has visited the parcel, there is a structure. She stated that a house might have been put up in 2007. She also stated that there is a fence.
71. PW1 also confirmed that there is a timber yard on the parcel. She stated that the parcel 533/101 is not fenced and stands on its own and that there is a larger parcel fenced and added that 533/101 is in there. She confirmed that she knows James Mwangi and Mary Njenga and they are allottees in the same area and also stated that they are not in occupation.
72. She stated that her plot is bigger than 50 by 100 and the parcel fenced by the Plaintiff is larger than 50 by 100. PW1 was referred to Exhibit P2 and stated that if an acceptance is not received within 30 days, the offer will be deemed to have lapsed.
73. She stated that the payment was made in 2000 and she has not produced the acceptance letter in court. She confirmed that she had seen the allotment letter of 23<sup>rd</sup> July, 1996 issued to the Plaintiff and confirmed that hers was issued a month later on 23<sup>rd</sup> August, 1996.
74. She stated that it is possible to have the land reallocated if one does not pay within 30 days. She stated that she has also been shown a license. She stated that a license is temporary or permission to do something. She reiterated that a license is different from an allotment and it does not show ownership.
75. PW1 confirmed that she has asked for mesne profits in her counterclaim and it is a commercial plot and she would have put up a building and she has been paying land rates. She confirmed that she has seen land rates paid by the Plaintiff and confirmed that she has also been paying.



76. PW1 further confirmed that she did not make a complaint to the National Land Commission that someone was in occupation of her land. She stated that her allotment was 0.1550 Ha and added that the area claimed by the Plaintiff is 1.00 Ha and confirmed that 1.00 Ha is bigger.
77. She confirmed that a person cannot be enjoined from using his/her own land and confirmed that that a survey report is necessary to show where the suit land is.
78. Upon re-examination, PW1 reiterated that her husband was issued with an allotment letter on 23<sup>rd</sup> August, 1996. She stated that payment was made on 31<sup>st</sup> August, 2000 and the receipt was issued by the ministry of lands.
79. PW1 testified that if there was a revocation of the offer, the payment would not have been received/accepted. She testified that it was accepted and receipt issued.
80. She testified that the land was a sub-divided and there is a map F.R No 56/90 and also a Part Development Plan. She testified that it was earmarked for subdivision by the government for the purpose of allocation to people.
81. She testified that when the plaintiff (Defendant in the Counterclaim) took possession and started developing the suit parcel in the year 2007. She confirmed that her counterclaim is dated 16<sup>th</sup> December, 2016. She testified that he was there for roughly nine years.
82. PW1 stated that there is no timber yard on 533/101. She testified that the allotment letter would have communicated to her if the offer had lapsed or been withdrawn.
83. She testified that she does not work for the lands office and does not issue allotment letters.
84. On whether land that has been issued can be issued to someone else, PW1 testified that the commission of lands should answer the questions and they are not a party to this suit.
85. It was PW1's testimony that documents in the Plaintiff's list of documents, that have been shown to her, indicate that the Plaintiff has been paying land rates. She testified that a demand notice dated 11<sup>th</sup> July, 2016 is addressed to the Plaintiff in respect of plot 7218/V/216 and added that this plot is not the same as subject of her suit.
86. She testified that she is not concerned with it because hers is 533/101. She testified that by the time the demand notice was issued to the Plaintiff, her husband was already paying rates.

#### **Plaintiff's Evidence.**

87. The Plaintiff in the main suit is the Defendant in the counterclaim.
88. One Geoffrey Kagwanja (hereinafter referred to as DW1) testified for the Plaintiff. It is his evidence that he lives in Nakuru and is a business man. He confirmed that he has been sued by Jacinta Wairimu.
89. He testified that he knew her while they were in court and he did not know her prior to this case. He testified that he did not know her husband Michael Kimani Kariuki (deceased). He testified that he has his witness statement dated 4<sup>th</sup> October, 2021 and prayed that it be adopted it as part of his evidence, which prayer the court acceded to.
90. He testified that he knows Molo Town Commercial plot LR 533/101 and it is along the road to Molo. He testified that he is the one in occupation and he lives on it as the owner.
91. He testified that he has an allotment letter dated 23<sup>rd</sup> July, 1996 and produced it as Exhibit D1. He produced the agreement dated 1<sup>st</sup> November, 1975 as Exhibit D2.



92. He testified that he took occupation in 1975 adding that the plan for the suit parcel is No. 7218/V/216. He went on to state that the land was allotted to him by the Commissioner of Lands and that he uses the plot was for storage of building stones, fencing posts and timber. He testified that the land measured 0.8418 Ha and the agreement is a temporary occupation license (T.O.L).
93. DW1 testified that he was given an allotment letter on 23<sup>rd</sup> July, 1996 and it is for plot No 7218/V/216 Molo Township. He testified that before the allotment letter, he made an application on 5<sup>th</sup> April 1995. The application was marked and produced as Exhibit D3.
94. He testified that he has been in occupation of the suit land since 1975 and he has been paying land rates as evidence in the receipts dated 19<sup>th</sup> May, 2016, 23<sup>rd</sup> May, 2016 and the bank receipt is for 23<sup>rd</sup> May, 2016. They were marked and produced as Exhibit D4 (a), (b) and (c).
95. DW1 testified that he has a demand notice from the ministry of lands and settlement and it is dated 11<sup>th</sup> May, 2016. It was marked and produced it as Exhibit D5.
96. He testified that he also has a demand notice from the County government of Nakuru dated 11<sup>th</sup> July, 2016 and that it is for Plot No 7218/V/216 adding that he is the rate payer. It was marked and produced it as Exhibit D6.
97. DW1 testified that he also has a document titled verification of allotment letters. He testified that the verification happened at the Commissioner of Lands office in Nairobi. It was marked and produced as Exhibit D7.
98. He testified that the verification shows his land measures 1.00 Ha. He testified that the developments were done by him and the verification done by the Commissioner of Lands. He also stated the plot was allocated to him by the commissioner of lands Nairobi adding that nothing shows that the land had been sub-divided and given to third parties.
99. He testified that Jacinta Wairimu claims her plot is 50 by 100 and is inside his parcel. He testified that his allotment has never been revoked. He testified that they have never had the parcel re-surveyed and beckons put for the benefit of third parties.
100. DW1 was referred to Exhibit P2 which is an allotment letter and testified that it shows that the suit plot was allocated to the 5<sup>th</sup> Defendant in 1996 and the plot is LR No 533/101 Molo Township. He testified that his is 7218/V/216.
101. When referred to Exhibit P4 which is a survey plan for the subdivision, DW1 stated that his parcel of land is not sub-divided. He testified that this survey plan is not for his land because his has no subdivisions. He testified that his parcel and that belonging to the 5<sup>th</sup> Defendant are two separate plots.
102. In respect of Exhibit D2, DW1 stated that he was asked to pay Kshs. 96,250 and stated that he paid the said amount but did not have the receipt on that day.
103. In his witness statement dated 4<sup>th</sup> October, 2021, DW1 states that he was in the year 1976, allotted plot 7218/V/216 measuring approximately 1.0 Hectares REF NO 16015/XIV/188B by the Commissioner of Lands and that the plot is located at Molo near KCC opposite the Molo Railway Station.
104. He states that he even received a notice on 5<sup>th</sup> March, 2004 from the Ministry of Lands Settlement asking for payment of rent and that he also received a copy of a letter addressed to the District Land Officer, District Land Surveyor of Physical Planning and Town Clerk Molo confirming that he had made an application for conversion of his T.O.L plot in Molo into 99 years.



105. He states that he applied to have the said license converted to a 99 years lease as per the allotment letter dated 23<sup>rd</sup> July, 1996.
106. He states that he has been in occupation of that plot since 1976 up to date.
107. He states that the 5<sup>th</sup> Defendant started laying claim to his land on the strength of allotment letters issued by the County Council and adds that the same were obtained through fraud and without consent of the Commissioner of land.
108. Upon cross-examination, DW1 confirmed that he has another suit in Molo court and it involves LR No 533/105 Molo Township Commercial plot. He stated that the Plaintiff in that suit is one Mwangi. He stated that he does not know how far it is from his and he only knows about his.
109. He also stated that the temporary occupation license produced as Exhibit D2 is what enabled him to take occupation. He stated that it is true he got in as a licensee and not an allottee.
110. He further confirmed that according to Exhibit D2, he was to occupy the land shown edged red on the enclosed plan No 7218/V/216.
111. He confirmed that there was a plan and his parcel was marked red on the plan. He further confirmed that the court cannot know where the plot edged red is situated.
112. DW1 went on to confirmed that it is therefore true that his plot is not 7218/V/216 and it was marked red on the plan No 7218/V/216.
113. He stated that the term of the license produced as Exhibit D2 was for 9 months for a monthly rent of Kenya Shillings 840. He confirmed that the lease further says that in the event of failure to pay rent, the license would terminate and he was given the license in 1975 and he does not have evidence of payment of rent in 1976, 1977, 1978 and so on.
114. He stated that he was selling sand on the suit parcel but before that he was selling timber. He testified that he has no evidence of what he is doing on the parcel presently.
115. He denied that his license terminated on failure to pay rent and added that the county government sent him a demand note in 2016.
116. He confirmed that he filed this suit in 2013 and also confirmed that the first rent was paid in 2016. He referred to Exhibit D4(a) and stated that it shows that he paid Kshs. 80,170. He also referred to Exhibit D4 (b) and stated that it shows he paid Kshs. 281,610.
117. He stated that when he went to the commissioner of lands and was told that he was supposed to pay Kshs. 700,000 and he was given a waiver and paid Kshs. 281, 610. He confirmed that he was in arrears.
118. He also confirmed that he was not paying amounts as provided in the license agreement and further confirmed that the receipts show that he was paying for 7218/V/216 and that the verification is also for 7218/V/216.
119. DW1 further confirmed that 7218/V/216 is the same number appearing on the occupation letter. He confirmed that the license shows that 7218/V/216 is the plan number and not the plot number. He further confirmed that he cannot pay rent on a plan number.
120. DW1 further stated that the letter dated 5<sup>th</sup> April, 1995 was written by him but he is not the one who typed it. He stated that it was typed by a person whose business has computers and offers typing services. He confirmed that the date 5<sup>th</sup> April, 1995 is handwritten and not typed.



121. He also confirmed that there is no evidence that the letter asking for allocation was received. He stated that he has no evidence that the commissioner of lands responded to his letter dated 5<sup>th</sup> April, 1995 but he has an allotment letter (Exhibit D1) for an unsurveyed commercial plot No 7218/V/216 Molo Township.
122. He confirmed that he was supposed to pay Kshs. 96,250 and the payment was to be paid within 30 days and if not paid, the offer would have lapsed.
123. He stated that he paid the amount of Kshs. 96, 250 and it is in the receipts produced. He confirmed that the receipts are for land rent and it does not say that it includes the amount on the allotment letter.
124. He further stated that he has no evidence of having paid the Kshs. 96,250 within 30 days and confirmed that the offer lapsed. He stated that the license agreement said that his parcel is 0.8418 Ha and his defence to the counterclaim at paragraph 3 says it is 1.0 HA and explained that this is according to verification of the allotment letter.
125. He confirmed that the application for allotment dated 5<sup>th</sup> April, 1995 did not ask that the acreage be increased and the letter was written on the basis of the license which is 0.8418 Ha. He explained that stated that the person verifying included the road and it was fenced too but is available for public use.
126. DW1 also confirmed that the last paragraph of his witness statement says that he has been in occupation since 1976 and that the allotment of the Plaintiff was obtained through fraud. He stated that he discovered this in 2013 but had not been to the police to report the fraud.
127. He stated that the fraud was committed by the 5<sup>th</sup> Defendant but he has not pleaded fraud in his documents or stated how the 5<sup>th</sup> Defendant participated in the fraud. He also confirmed that there is no report showing the documents are fraudulent.
128. DW1 was referred to the 5<sup>th</sup> Defendant's counterclaim dated 16<sup>th</sup> December, 2016 at paragraph 3 and stated that it is not true that he took occupation in the year 2007. He stated that he took occupation in 1975. He also denied that he used plan number to apply for the whole land. He further denied that the verification of allotment is also erroneous as it refers to plan number.
129. He stated that he has a problem with the 5<sup>th</sup> Defendant being given her portion because they have not agreed and she has not stated how she got the plot.
130. Upon re-examination. DW1 testified that the payment by him were after issuance of the allotment letter.
131. He testified that the license was set to expire after nine months and also stated that allotment letter is in respect of unsurveyed commercial plot No 7218/V/216 Molo Township.
132. DW1 testified that he has set out the particulars of fraud at paragraph 6 of his defence to the counterclaim and he took occupation of the suit parcel in 1975 and the license was the basis of his occupation.
133. He stated that the verification was done by the Commissioner of Lands Nairobi. He further testified that he has no interest in Plot 533/101 and that it is not part of his land.
134. He testified that the suit in Molo is in respect of 533/105 and the Plaintiffs are Defendants No 3 and 4 in the main suit adding that they have no counterclaim in this suit but chose to file a suit in Molo.
135. He clarified that he knew about the fraud in 2013 and that is when he filed this suit.



136. DW1 also stated that the amount in the allotment letter was to be paid within 30 days, he did not pay it within the stipulated time but he never got notice of revocation. He confirmed that the amount of Kshs. 96,250 was paid.

### **Issues for Determination.**

137. The 5<sup>th</sup> Defendant filed her submissions on 5<sup>th</sup> July, 2023. She identified the following issues for determination:
- a. Whether the 5<sup>th</sup> Defendant is entitled to the prayers sought in the counterclaim?
  - b. Who should bear the costs of this suit?
138. The 5<sup>th</sup> Defendant relies on Section 107 of the *Evidence Act* and the judicial decision of Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Another [2005] 1EA 334.
139. The 5<sup>th</sup> Defendant submits that she is entitled to an order of eviction and demolition of all illegal structures on the suit property. She relies on the judicial decision of Zakayo K. Bargoiyet vs Charity Gathoni & 2 others [2016] eKLR.
140. She submits that in the instant case, the 5<sup>th</sup> Defendant produced a copy of allotment letter dated 23<sup>rd</sup> August, 1996 and payment receipts dated 31<sup>st</sup> August, 2000 and F.R No. 56/90 for I.R NO. 533/101 Molo as Exhibit P2, P3 and P4 in support of her claim that her late husband, Michael Kariuki (Deceased), is the registered allottee of Parcel No 533/101 Molo Township Commercial Plot.
141. She also submits that in the instant case, the 5<sup>th</sup> Defendant, other than producing the documents in support of her ownership of the suit property, challenged the alleged allocation of the suit property to the Plaintiff and reiterated that the suit property was not available for allocation to him.
142. She relies on the judicial authority of Propwa Company Ltd vs Justus Nyamo Gatondo & Another [2020] eKLR. She submits that it behooves the Plaintiff to explain to this court the root of his allotment letter to the suit property to the required legal threshold.
143. She submits that it must not be lost on this court that the Plaintiff admitted in cross-examination and even re-examination that the 5<sup>th</sup> Defendant's suit property is within his property.
144. She submits that it was therefore incumbent upon him to prove to this court that he had a legitimate claim over the 5<sup>th</sup> Defendant's suit property.
145. She submits that in an attempt to discharge the evidential burden placed upon him, the Plaintiff produced a copy of allotment letter issued on the 23<sup>rd</sup> July, 1996 as Exhibit D1. She submits that he however did not have proof that he complied with the conditions set out in the alleged allotment letter within the prescribed time.
146. She relies on the judicial decision of Dina Management Limited vs County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) (Judgment).
147. She submits that this court is duty bound to go to the root of the Plaintiff's allotment letter and establish whether its acquisition was legal, formal, procedural and free from any encumbrance including the interest of the 5<sup>th</sup> Defendant.



148. She submits that in the instant case, the Plaintiff confirmed in cross-examination that he first entered the suit land vide Temporary Occupation License dated 1<sup>st</sup> November, 1975 as DEXB 2 and the said agreement reads in part thus:

“...whereby the Commissioner in pursuance of the powers conferred on him licenses and the licensee agrees to occupy all that piece of land \*shown edged red on the enclosed Plan No 7218/V/216 for the term of nine months from the date hereof....provided at the monthly/quarterly/yearly rent of Kshs. 840 payable in advance on the first day of every month/quarter/year. If the aforesaid rent or part thereof is unpaid for one calendar month after the same shall have become due or if the licensee shall commit any breach of or fail to perform any of the conditions set out hereunder this license shall thereupon cease and determine...”

149. It is her submission that the said agreement clearly described the Plaintiff’s portion as “that parcel of land shown edged red on the enclosed Plan No 7218/V/216”. She submits therefore, No. 7218/V/216 was the plan number and not plot number. She also submits that the Plaintiff failed to produce the said enclosed plan to enable this court to ascertain his portion therein.

150. She submits that the said agreement was for a period of “nine (9) months from the date of issue at a rent of Kshs. 840 payable in advance on the first day of every month/quarter/year.” She submits that the Plaintiff did not have proof of payment of the said rent for the period between the year 1975 when the license was issued and 2015.

151. She submits that it was an express term of the said license that, “if the aforesaid rent or part thereof is unpaid for one (1) calendar month after, the same shall have become due or if the licensee shall commit any breach of or fail to perform any of the conditions set out hereunder, this license shall thereupon cease and determine.”

152. It is her submission that the foregoing notwithstanding, the Plaintiff alleged that vide a letter dated 5<sup>th</sup> April, 1995 he made an application to the Commissioner of Lands requesting to be allocated land Molo Township Industrial Plot No 7218/V/216. She submits that the said letter read in part:

“Having rented the above mentioned plot for the last 40 (forty) years from you sir, (see enclosed lease/rent agreement), I now wish to apply to be allocated the same for timber industrial use.....Besides I am ready to abide by all the conditions are requirements (sic) set by the government including any payments on premiums and any other arrears thereof.”

153. She submits that the Plaintiff confirmed upon cross-examination that he did not have evidence that the said letter was duly served and received by the Commissioner of Lands and/ or responded to. She submits that however, he maintained that it was on account of his letter that the land was allocated to him and an allotment letter issued.

154. She relies on the judicial decision of Nelson Kazungu Chai & 9 others vs Pwani University [2014] eKLR. She submits that it is no doubt that the process of allocation of land is clear and certain as explained therein. It is also her submission that in the instant case, the Plaintiff, other than failing to prove that his request for allocation was received and/or acted upon, failed to produce Part Development Plan (PDP), if any, to show that the suit

property was indeed earmarked for allocation to him. She submits that instead, he availed copies of allotment letter, verification of allotment and receipts describing his plot as Plot No 7218/V/216.



155. She relies on the judicial decision of African Line Transport Co Ltd vs Attorney General [2007] eKLR and submits that it is crystal clear that a legitimate letter of allotment as a matter of cause ought to be accompanied by a PDP with a definite number. She submits that it cannot therefore have such as the one contained in the Plaintiff's alleged plot number 7218/V/216 which Exhibit D2 clearly shows as the plan number and not plot number.
156. She submits that whereas she has demonstrated to the required legal threshold that her late husband was and is still the lawful allottee of the suit property, the Plaintiff has failed to explain the root of his allotment letter to satisfaction of this court.
157. She submits that it is not possible that the Plaintiff was issued with a definite plot number as 7218/V/216 which was the plan number showing the location of his portion.
158. She relies on the judicial decision of Samuel Kamere vs Land Registrar Kajado [2015] eKLR. She submits that the Plaintiff failed to prove that he paid rent between 1975 and 2015 in compliance with the terms of the license dated 1<sup>st</sup> July, 1975. She submits that the said license therefore terminated and was thus incapable of providing a basis for allocation of the suit property to the Plaintiff. She submits that there was no evidence tendered by the Plaintiff to show that the said license was reinstated upon termination.
159. The 5<sup>th</sup> Defendant submits that it is evident from her documents and evidence produced before this court that her late husband is the lawful allottee of the suit property.
160. She submits having demonstrated that her late husband is the lawful allottee of the suit property, she is thus entitled to orders of eviction against the Plaintiff.
161. She relies on the judicial decision of Alberta Mae Gacci vs Attorney General and 4 others [2006] eKLR and submits that this court must decline any invitation by the Plaintiff to give its seal of approval to an illegally and/or irregularly obtained allotment letter.
162. It is her submission that she is entitled to an order of permanent injunction restraining the Plaintiff from entering, remaining in, trespassing, developing, cultivating and/or in any way dealing with parcel No 533/101 Molo Township Commercial plot.
163. She relies on the judicial decision of Nguruman Limited vs Jan Bonde Nielsen & 2 others [2014] eKLR and submits that it is settled that for orders of permanent injunction to issue in favour of the 5<sup>th</sup> Defendant, she is required to establish a prima facie case, demonstrate irreparable injury if the orders of permanent injunction is not granted and in case of doubt, that the balance of convenience tilts in her favour.
164. She also submits that she has established a prima facie case. She relies on the judicial authority of Mrao Ltd vs First American Bank of Kenya Ltd [2003] eKLR and submits that in the instant case, she produced a copy of allotment letter and the receipt thereof in support of her evidence that her late husband is the lawful allottee of the suit property. She submits that the Plaintiff did not adduce evidence to controvert the 5<sup>th</sup> Defendant.
165. She relies on the judicial authorities of Nderitu vs Gatiro and 3 others (Environment & Land Case 823 of 2013) [2022] KEELC 2436 (KLR), Kitamaiyu Limited vs County Government Kiambu & Another [2018] eKLR and Naftali Ruthi Kinyua vs Patrick Thuita Gachure & Another [2015] eKLR. She submits that it is evident that the Plaintiff, did not adduce any evidence that would successfully impeach the evidence adduced by the 5<sup>th</sup> Defendant and the 5<sup>th</sup> Defendant's evidence thus remained unchallenged.



166. She submits that the 5<sup>th</sup> Defendant confirmed on cross examination that the Plaintiff trespassed onto the suit property in the year 2007 and constructed illegal structures thereon. She submits that the Plaintiff's claim over the suit property is predicated on a non-existent license dated 1<sup>st</sup> July, 1975.
167. She further submits that in her view therefore, the Plaintiff's occupation of the 5<sup>th</sup> Defendant's suit property is illegal and grossly violates the 5<sup>th</sup> Defendant's rights under Article 40 of *the Constitution* of Kenya, 2010. She submits that the 5<sup>th</sup> Defendant thus stands to suffer irreparable loss and/or injury which cannot be adequately compensated by an award of damages.
168. She also submits that the 5<sup>th</sup> Defendant is entitled to an order for Mesne Profit from the year 2007 to date. She relies on Section 2 of the *Civil Procedure Act*, Cap 21 of the Laws of Kenya and Order 21 Rule 13 (1) and (2) of the Civil Procedure Rules 2010. She also relies on the judicial authority of Attorney General vs Halal Meat Products Limited [2016] eKLR. She submits that the 5<sup>th</sup> Defendant averred at paragraph 3 of the counterclaim that the Plaintiff encroached onto the suit land sometimes in the year 2007 and erected illegal structures thereon thus denying the 5<sup>th</sup> Defendant quiet and peaceful occupation and use of her suit property. She submits that this evidence was not controverted by the Plaintiff.
169. She relies on the judicial authority of Mistry Valji vs Janendra Raichand & 2 others [2016] eKLR and Rajan Shah T/A Rajan S Shah & Partners vs Bipin P Shah [2016] eKLR. She submits that the Plaintiff herein having remained in wrongful occupation and use of the 5<sup>th</sup> Defendant's suit property since the year 2007 is liable to pay mesne profit to the 5<sup>th</sup> Defendant.
170. She submits that it is trite law that award of cost is discretionary and follow event (sic) pursuant to the provisions of Section 27 of the *Civil Procedure Act* and she prays that the cost of this suit be awarded to the 5<sup>th</sup> Defendant.
171. The Plaintiff filed his submissions on 2<sup>nd</sup> September, 2023 and he identified the following issues for determination:
- a. Do (sic) the allotment letter issued on 23<sup>rd</sup> August, 1996 for the parcel of land known as LR NO 533/101 MOLO TOWNSHIP and allotment letter dated 23<sup>rd</sup> July 1996 for the parcel of land known as UNSURVEYED SURVEY PLAN NO 7218/V/216A refer to the same parcel?
  - b. Whose allotment prevails as between the Plaintiff and the Defendant?
  - c. Does the Plaintiff succeed in the orders sought?
  - d. Who bears the cost of this suit?
172. He submits that the 5<sup>th</sup> Defendant did not have a title deed or a certificate of lease to the land but allotment letters. He submits that on his part, he laid a basis on how he entered the land as a licensee and was given a temporary occupation license. He submits that he later applied for the same and was issued with an allotment letter and later paid the same.
173. He submits that the 5<sup>th</sup> Defendant confirmed that the Plaintiff was in occupation and if at all her allotment letter was genuine, she should have sued the allocating authority or even call a representative of the commissioner of lands to inform the court which of the two allotments should be upheld.
174. It is his submission that the Plaintiff's parcel was bigger than that of the 5<sup>th</sup> Defendant and in essence, the 5<sup>th</sup> Defendant's parcel is inside the Plaintiff's parcel and if that was the case, the commissioner superimposed the 5<sup>th</sup> Defendant's land on his parcel.



175. He submits that the he was also paying rent and the 5<sup>th</sup> Defendant did not give a beacon certificate which shows that she was ever shown the land. He submits that once the land has been allocated to a party then the allocating authority can only allocate the land to another party after revoking the first allotment and once an allotment has been issued, it becomes private property and the government through the commissioner cannot interfere with it unless with the authority of the allottee.
176. He relies on the judicial authority of Hubert L. Martin & 2 others vs Margaret J Kamar & 5 others [2016] eKLR. He submits that the 5<sup>th</sup> Defendant has urged that this court to evict him yet he has an allotment letter to the land that was issued before the 5<sup>th</sup> Defendant's land.
177. He submits that the root of the 5<sup>th</sup> Defendant's is unknown and cannot be termed as a valid. He submits that the Plaintiff was in occupation of the parcel and the 5<sup>th</sup> Defendant had no proof of occupation.
178. He submits that the Plaintiff was still in occupation and was selling sand on the plot. He submits that it is trite that a registered proprietor enjoys the statutory protection of title as long as he/she can show that the title was acquired procedurally.
179. He submits that the *Land Registration Act* is very clear on issues of ownership of land and he relies on Section 24 (a) and Section 26 (1) of the *Land Registration Act*. He submits that the Plaintiff and the 5<sup>th</sup> Defendant have allotments one for the bigger portion before subdivision and the other a subdivision.
180. He prays that the Plaintiff's allotment be upheld as it was issued earlier and the law is clear that the Certificate of Title issued by the Registrar upon registration 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 and the title of that proprietor shall not be subject to challenge except on the ground of fraud or misrepresentation to which the person is proved to be a party; or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
181. He submits that the Plaintiff showed the court that his allotment was genuine and he followed the procedures and the 5<sup>th</sup> Defendant's allotment was acquired illegally, unprocedurally or through a corrupt scheme and the Plaintiff did not prove this.
182. The Plaintiff submits that fraud is knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment. He submits that in contract law, fraud has been defined as unconscionable dealing, the unfair use of the power arising out of the parties' relative positions and resulting in an unconscionable bargain.
183. He relies on the judicial decisions of Arthi Highway Developers Limited vs West End Butchery Limited & 6 others [2015] eKLR, Chemey Investment Limited v Attorney General & 2 others [2018] eKLR, RG Patel vs Lalji Makanji [1957] EA 314 and Peter Njoroge Ng'ang'a vs Statutory Manager for United Assurance Company Limited & Another [2020] eKLR.
184. He submits that among the rights to be enjoyed by a registered owner of any land is the right for peaceful and quiet enjoyment of the land he owns.
185. He submits that he took occupation and has been staying on the land. He submits that the 5<sup>th</sup> Defendant confirms she has never taken occupation of the subject land and the only reason why the Plaintiff is pursuing her counterclaim is because she was brought to court by the Plaintiff whose case was withdrawn due to the fault of her other advocates who failed to pursue his case and was dismissed for want of prosecution.



186. He urges the court to be guided by the maxims of equity that when two equities are equal, the first in time prevails and he relies on the judicial decision of Presbyterian Foundation v Kibera Siranga Self Help Group Nursery School (Civil Appeal 64 of 2014) [2023] KECA 371 (KLR) (31<sup>st</sup> March 2023) (Judgment).
187. He also relies on the judicial decision of Shah & another vs Kenya National Highways Authority (Civil Appeal 20 of 2018) [2023] KECA 404 (KLR) and submits that the Plaintiff entered on the parcel of land in 1972 and questions how he became a trespasser. He submits that he was allocated land before the 5<sup>th</sup> Defendant and further questions if the court can now sanctify an allotment letter issued after the Plaintiff?
188. He prays that the court finds that the 5<sup>th</sup> Defendant has failed to prove his case on a balance of probability, that his allotment letter be upheld and the 5<sup>th</sup> Defendant's suit be dismissed with costs.

### **Analysis and Determination.**

189. After considering the pleadings, submissions and the testimony of the Plaintiff and the 5<sup>th</sup> Defendant the following issues arise for determination:
  - a. Whether the 5<sup>th</sup> Defendant is entitled to the prayers sought in the counterclaim?
  - b. Who should bear the costs of this suit?

### **A. Whether the 5<sup>th</sup> Defendant is entitled to the prayers sought in the counterclaim.**

190. The 5<sup>th</sup> Defendant's case is that he is the lawful allottee of all that parcel of land known as L.R No 533/101 MOLO TOWNSHIP COMMERCIAL PLOT measuring 0.1550 Ha. It is also his case that the Plaintiff encroached on his parcel of land and erected illegal structures.
191. The 5<sup>th</sup> Defendant has produced an allotment letter dated 23<sup>rd</sup> August, 1996 as Exhibit P2. The allotment letter is in respect of L.R No 533/101- Molo Township Commercial Plot measuring approximately 0.1550 hectares.
192. The conditions attached to the allotment letter was payment of an amount of Kshs. 41,287. The 5<sup>th</sup> Defendant has produced a payment receipt dated 31<sup>st</sup> August, 2000 as Exhibit P3 showing that condition as to payment of Kshs. 41,287 was fulfilled.
193. The 5<sup>th</sup> Defendant has also produced a survey map (Exhibit P4) for the suit parcel ( LR No. 533/102). The same is FR No. 56/90. His evidence is that he was shown the location and has been paying land rates (Receipt dated 14<sup>th</sup> November, 2012).
194. The 5<sup>th</sup> Defendant also produced photographs of wooden structures on the suit parcel to show the plaintiff's encroachment on his parcel of land (Exhibit P6). The fact of encroachment by the Plaintiff has not been disputed. In his defence he says that the suit property was allocated to him.
195. The 5<sup>th</sup> defendant was categorical that his parcel is 0.01550 Ha while that claimed by the Plaintiff is 1.0 Ha and further stated that there is no relationship between his plot and that claimed by the Plaintiff.
196. The 5<sup>th</sup> Defendant seeks orders of eviction, permanent injunction and an order for mesne profits against the Plaintiff.



197. The Plaintiff's case that it is the 5<sup>th</sup> Defendant trespassed on the Plaintiff's parcel of land known as Plot 7218/V/216 measuring approximately 1.0 Hectares REF NO. 16015/XIV/188B which was allocated to him Plaintiff by the Commissioner of Lands. He states that the said parcel is located at Molo near K.C.C opposite the Molo Railway station.
198. It is also the Plaintiff's case that he has peacefully been on the parcel of land since 1976 when he was given a license to occupy and that in 1996 after applying for the same to be converted to a lease, he was given an allotment letter.
199. This Court notes that the Plaintiff has produced an agreement dated 1<sup>st</sup> November, 1975 as Exhibit D2. The agreement is between the Plaintiff as the Licensee and the Commissioner of lands. According to the agreement, the terms were that the parcel was to be used for storage of building sand store, fencing posts and timber for the term of nine months at an annual rent of Kshs. 840.
200. This Court has also interrogated other documents produced by the Plaintiff. Among them, is a verification of allotment letter dated 23<sup>rd</sup> May, 2016 (Exhibit D7). The said document shows the Plot number as 7218/V/216 and comment as to whether it is surveyed or not are that it is surveyed. The comment on the file number are that it is in process. The comment on the PDP is that it is approved while the area is 1.00 HA. It is obvious that the agreement and the verification of allotment are at variance as to description of the suit parcel and the measurement of it.
201. The Plaintiff has also produced an allotment letter dated 23<sup>rd</sup> July, 1996 as Exhibit D1. It is issued in respect of an unsurveyed commercial plot No. 7218/V/216- Molo Township. The parcel has an area of 1.000 Hectare.
202. In my view, the plaintiff (Defendant in the counterclaim) ought to have called evidence to shed light on the process that gave rise to his allocation of the suit parcel. It is not clear what the nexus between the plot that he was licensed to use in 1975 and Plot LR. 533/101 Molo Town ( Being claimed by the 5<sup>th</sup> Defendant ( Plaintiff in the counterclaim) is.
203. The Plaintiff (Defendant in the counterclaim) has also not provided any evidence to support his contention that after temporary occupation license/agreement which allowed him to take occupation of the unsurveyed plot shown edged red on the Plan No. 7218/V/216 came to an end, he applied an was allocated suit parcel.
204. I note that this license was for one year. I have seen a letter dated 5<sup>th</sup> April, 1995 which he describes as an application for allotment (Exhibit D3). There is no evidence that this application for allotment letter was received and/or acted upon by the Commissioner of Lands.
205. The demand notice from the country Government of Molo, land rent payment receipts, National Bank of Kenya customer transaction receipt all make reference to a plot number/LR. No. No. 7218/V/216. Again, the parcel claimed by the 5<sup>th</sup> Defendant is Parcel No. 533/101 Molo Township Commercial Plot. No evidence has been led to explain the nexus between the two.
206. The basis for the Plaintiff's occupation (Defendant in the counterclaim) is the agreement/temporary occupation license. No evidence has been led on the status of his license after its expiry. The agreement states that it was for one year.
207. During cross- examination, the Plaintiff informed the Court, that he was supposed to pay Kshs. 96,250 as a condition attached to the allotment letter and further that the payment was to be made within 30 days. The Plaintiff confirmed that he has no evidence of having paid the Kshs. 96,250 and admitted



- that the offer lapsed. This piece of evidence is crucial to the extent that this court has no confirmation that the conditions attached to the letter of allotment were met so as to make a finding in favour of the Plaintiff.
208. In the judicial decision of *Republic Vs City Council of Nairobi & 3 Others* (2014) eKLR, the court when confronted with the legal effect of issuance of letters of allotment had this to say;
- “Once allotment letter is issued and the allottee meets the conditions therein, the land in question is no longer available for allotment since a letter of allotment confers absolute right of ownership unless it is challenged by the allotting authority or is acquired through fraud, mistake or misrepresentation or that the allotment was out rightly illegal or it was against public interest. In other words, where land has been allocated, the same land cannot be reallocated unless the first allocation is validly and lawfully cancelled.”
209. During the hearing, evidence was led, which evidence distinguished between a plan number and a plot number. On one hand the agreement produced by the Plaintiff refers to Plan Number 7218/V/216 (unsurveyed) whereas the letter of allotment dated 23/8/1996 produced by the 5<sup>th</sup> Defendant (Exhibit P2) refers to L.R No 533/105. Further the allotment letter produced by the Plaintiff also makes reference to unsurveyed commercial plot No. 7218/V/216 Molo Township. I do not see any relationship between these two parcels of land.
210. A license is defined under section 2 of the *Land Act* as follows:
- “a permission given by the Commission in respect of public land or proprietor in respect of private or community land or a lease which allows the licensee to do some act in relation to the land or the land comprised in the lease which would otherwise be a trespass, but does not include an easement or a profit”
211. During cross-examination, the Plaintiff confirmed that the license shows that 7218/V/216 is the plan number and not the plot number. The Plaintiff also confirmed that it is not possible to pay rent on a plan number.
212. The wording of the temporary occupation license/ agreement (Exhibit D2) describes the parcel of land subject of the license as follows;
- “piece of land shown edged red on the enclosed Plan No. 7218/V/216 where unsurveyed being plot no\_\_\_ section\_\_\_ situated in Molo Township by measurement Area 0/8418 Hectares for the purpose of storage of building sand store fencing posts and timber for the term of nine months from the date hereof and thereafter until determined as hereinafter provided at the yearly rental of Sh. 840 payable in advance of the first day of every year.”
213. The Plaintiff did not produce a copy of the plan. As things remain, this court has no evidence of the ground position of the parcel of land claimed by the Plaintiff (Defendant in the counterclaim) and its relation to the suit property as claimed by the 5<sup>th</sup> Defendant.
214. The Plaintiff in his witness statement states that the allotment to the 5<sup>th</sup> defendant was fraudulent. He has however failed to prove the fact of fraud as alleged by him.
215. The 5<sup>th</sup> Defendant seeks orders of eviction and permanent injunction against the 5<sup>th</sup> Defendant. He has proved on a balance of probability that the suit parcel was allocated to him and that the Plaintiff has encroached on it by building wooden structures.



216. The 5<sup>th</sup> Defendant also seeks orders for mesne profits against the Plaintiff. In *Rajan Shah T/A Rajan S. Shah & Partners Vs Bipin P. Shah* (2016) eKLR the term mesne profits was defined thus;

“The term ‘mesne profits’ relates to damages or compensation from a person who has been in wrongful possession of immovable property...they are the rents and profits which a trespasser has or might have received or made during his occupation of the premises and which therefore he must pay over to the true owner as compensation for tort which he has committed.”

217. In the case *Peter Mwangi Msuitia & Another Vs Samow Edin Osman* (2014) eKLR, the Court of Appeal held as follows:

“As regards the payment of mesne profit, we think the Applicant has an arguable Appeal. No specific sum was claimed in the Plaint as mesne profit and it appears to us prima facie, that there was no evidence to support the actual figure awarded...”

218. In *Nakuru Industries Ltd Vs S.S. Mehta and Sons* (2016) eKLR it was held that mesne profits are a form of special damages which must be specifically pleaded and strictly proved.

219. No evidence was led by the 5<sup>th</sup> Defendant as to the specific amounts received or made by Plaintiff for use of the suit parcel during the period of his encroachment. It follows, therefore, that the Plaintiff has failed to meet the criteria for an award of mesne profits. Consequently, the prayer for mesne profits is declined.

#### **B. Who should bear the cost of the counterclaim?**

220. The general rule is that costs shall follow the event in accordance with the provisions of Section 27 of the *Civil Procedure Act* (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise.

#### **Disposition.**

221. In the result, the 5<sup>th</sup> Defendant’s counterclaim succeeds. Consequently, I enter judgment in the following terms:

- a. An order of eviction and demolition of all the illegal structures on the suit parcel i.e Parcel No. 533/101 Molo Township Commercial Plot is hereby issued against the Plaintiff.
- b. The order in (a) above shall take effect after 90 days from the date of this judgment.
- c. An order of permanent injunction restraining the Plaintiff from entering, remaining in trespassing, developing, cultivating and/or in any way dealing with Parcel No. 533/101 Molo Township Commercial Plot is hereby issued.
- d. The 5<sup>th</sup> Defendant shall have costs of the suit and of the counterclaim.

222. It is so ordered.

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

**L. A. OMOLLO**

**JUDGE**



**In the presence of: -**

Miss Gatheca for the Plaintiff.

Mr. Ouma for the 5<sup>th</sup> Defendant.

No appearance for the 1<sup>st</sup> and 2<sup>nd</sup> Defendant

No appearance for the 3<sup>rd</sup> and 4<sup>th</sup> Defendant.

Court Assistant; Ms. Monica Wanjohi.

