



Gitata & 18 others v Nairobi County Government & 4 others (Environment & Land Case E311 of 2010) [2024] KEELC 1736 (KLR) (19 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1736 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E311 OF 2010**

**JO MBOYA, J
MARCH 19, 2024**

BETWEEN

SIMON MWANGI GITATA & 18 OTHERS PLAINTIFF

AND

NAIROBI COUNTY GOVERNMENT 1ST DEFENDANT

**BILACHA GALWE YAKARE BONAYA BAKATA ARGAMO HASSAN
LOLO LOCHE [BEING TRUSTEES OF HURUMA ISLAMIC
ASSOCIATION) 2ND DEFENDANT**

CABINET SECRETARY FOR LANDS 3RD DEFENDANT

NATIONAL LAND COMMISSION 4TH DEFENDANT

ATTORNEY GENERAL 5TH DEFENDANT

JUDGMENT

Introduction and Background

1. The Plaintiffs herein [who are 19 in number] approached the Honourable court vide Plaint dated the 28th June 2010, albeit filed in court on the 1st July 2010 and in respect of which same [Plaintiffs] sought to be declared as the lawful/bona fide allottees of plots situate within Huruma Estate Kia-maiko on L.R No. 209/7963/479 [I.R No. 30840].
2. Subsequently, the Plaintiffs herein sought and obtained leave to file and serve an amended Plaint. Consequently and in this regard, the Plaintiffs filed an amended Plaint dated the 23rd May 2019; and wherein the Plaintiffs sought for the following reliefs [verbatim];
 - a. A declaration that the Plaintiffs are the bona fide allottees of infill plots Huruma Estate (Kia-Maiko) situated on LR NO. 209/7963/479; [Title No. I.R. 30840].



- b. An order be issued for demolition of all structures erected on the suit premises by the 2nd Defendant, its agents and or people under their authority and vacant possession of the suit premises be restored to the Plaintiffs respectively.
 - c. A permanent injunction restraining the Defendants either by themselves itself, their its servants, agents and or otherwise in any means howsoever from evict the Plaintiffs and/or in any Way interfering with the Plaintiffs' quiet, possession and or right of occupation of the suit premises being LR.NO. 209/7963/479 Title no. IR 30840.
 - d. An order of cancellation of the lease title no. I.R. No. 30840 issued in the name of the 2nd Defendants as it was fraudulently acquired.
 - e. An order that survey be done and the suit premises be divided into plots and Lease[s]/ title[s] be issued in the name of each Plaintiff in accordance with the allotment letters issued to each of the Plaintiffs respectively.
 - f. An order for compensation of each Plaintiff for damages sustained during the eviction of the Plaintiffs from the suit premises.
 - g. General damages for psychological torture of the Plaintiffs and their families for illegal eviction from the suit premises.
 - h. Mesne profits.
 - i. Costs of this suit plus interest thereon at court rates.
 - j. Any other or further relief that this Honourable Court may deem fit and just to grant.
3. Upon being served with the original Plaint, the 1st Defendant duly entered appearance and thereafter filed a statement of defense in respect of which same [1st Defendant] denied and/or disputed the Plaintiff's claim to and in respect of the suit property.
 4. On the other hand, the 2nd Defendant duly entered appearance on the 16th November 2010 and thereafter filed a statement of defense dated the 5th August 2019. For good measure, the 2nd Defendant contended that same [2nd Defendant] is the lawful and bona fide proprietor of LR.NO. 209/7963/479 Title no. IR 30840.
 5. Other than the foregoing, the 3rd and 5th Defendants also entered appearance and filed a statement of defense through the office of the Honourable Attorney General and in respect of which same [3rd and 5th Defendants] disputed the claims by and on behalf of the Plaintiffs.
 6. Additionally, the 4th Defendant also entered appearance dated the 31st July 2019 and thereafter filed a statement of defense dated the 26th August 2019. For coherence, the 4th Defendant also disputed the claims by and on behalf of the Plaintiffs.
 7. First forward, the instant matter came up for pretrial directions on the 23rd February 2021 before Lady Justice K Bor [Judge] whereupon the advocates for the respective Parties confirmed that same had filed and exchanged all the requisite pleadings, list and bundle of documents and the witness statement[s]. Furthermore, the advocates also confirmed that the matter was therefore ready for hearing.
 8. Premised on the confirmation by and on behalf of the advocates for the respective Parties, the matter was fixed/set down for hearing.



Evidence by the Parties:

a. Plaintiffs' case:

9. The Plaintiffs' case is premised on the evidence of five [5] witnesses, namely, Simon Mwangi Gitata, John Koyier Barreh, Stanley Mwangi Kimani, Christopher Otieno Owuor and Antony Charles Muiruri, who testified as PW1, PW2, PW3, PW4 and PW5, respectively.
10. It was the testimony of PW1, that same is one of the Plaintiffs in respect of the instant matter and thus by virtue of being one of the Plaintiffs, same [witness] is knowledgeable of the facts pertaining to the subject dispute.
11. Furthermore, the witness also averred that same has since recorded a witness statement dated the 23rd May 2019, albeit filed in court on the 7th June 2019; and in respect of which same has provided an account of the facts pertaining to and concerning the subject property.
12. For coherence, the witness thereafter sought to adopt and rely on the witness statement under reference. Instructively, the witness statement dated the 23rd May 2019 was thereafter adopted and constituted as the evidence in chief of the witness.
13. On the other hand, the witness also adverted to a list and bundle of documents dated the 5th November 2021 and same sought to produce the various documents as exhibits on behalf of the Plaintiffs. However, an objection was taken to documents numbers 7, 10, 11, 15, 16, 17 and 24 respectively.
14. Upon hearing the objection concerning the admissibility of the various documents [details in terms of the preceding paragraph] the court found and held that the documents objected to were public documents, which were neither certified in the requisite manner or at all. Besides, the court also held that the impugned documents were photocopied and thus their authenticity was not verified.
15. Consequently and in view of the foregoing, the court proceeded to and upheld the objection. In this regard, the said documents were thereafter marked for identification as PMFI 19 to 25, respectively.
16. Other than the foregoing, the rest of the documents, which were not objected to were duly admitted and constituted as Exhibit[s] P1 to P18, respectively.
17. Additionally, the witness alluded to the further amended Plaint dated the 23rd May 2019; and thereafter implored the Honourable court to grant the reliefs sought thereunder.
18. On cross examination by learned counsel for the 2nd Defendant, the witness stated that same [witness] entered upon and started staying on what constitutes the suit property in the year 1983. Nevertheless, the witness added that when same entered onto what now comprises the suit property, same [witness] did not have any title documents thereto.
19. On further cross examination, the witness averred that what comprises the suit property was hitherto Government land belonging to the Government of the Republic of Kenya.
20. Furthermore, the witness averred that when same entered onto and commenced to stay on what now comprises the suit property, there were other 19 people who also entered thereon. In any event, the witness averred that subsequently some other people also came and entered onto the land.
21. Whilst under further cross examination, the witness averred that the total number of people who entered onto the land were 31 in number. However, the witness added that the instant suit has been filed by 19 Plaintiffs.



22. It was the further testimony of the witness that even though same entered onto the land in 1983, same [witness] started looking for title documents in the year 1999. Besides, it was the evidence of the witness that same commenced to look for title documents from the City council of Nairobi, now defunct, and from the Ministry of land.
23. Furthermore, it was the testimony of the witness that before going to the Ministry of land[s], the Plaintiffs herein visited the offices of the chief and the area district officer, who gave unto the Plaintiffs a letter to take to the minister for land and settlement.
24. On the other hand, it was the evidence of the witness that thereafter the Plaintiffs indeed proceeded to and met the minister for land who generated a letter addressed to the Town Clerk, city council of Nairobi, [now defunct], and in respect of which the minister for lands directed the Town clerk to issue the Plaintiffs with letters of allotments.
25. On further cross examination, the witness averred, that pursuant to the letter by the minister for lands, the Town clerk, city council of Nairobi, [now defunct] proceeded to and issued the Plaintiffs with a letter of allotment. For good measure, it was the testimony of the witness that the letters of allotment were issued in 1989.
26. Nevertheless, upon being referred to the various letters of allotments tendered and produced before the Honourable court, the witness averred that the date on the letters of allotment was 2nd November 2000 and not otherwise.
27. On the other hand, it was the testimony of the witness that the Plaintiffs made various payments towards and on account of the stand premium. However the witness admitted that the Plaintiffs' had not finished paying the stand premium up to and including the time when same [witness] tendered evidence.
28. Whilst under further cross examination, the witness averred that when same [Plaintiffs] finished paying the stand premium and incidental charges the surveyor would come onto the land and survey same [property].
29. It was the further testimony, that the land in question was surveyed. However, the witness stated that same was not knowledgeable of the date/time when the land was surveyed.
30. Other than the foregoing, it was also the testimony of the witness that the 2nd Defendant entered onto the land in the year 1988 and thereafter built a Madrasa on a portion of what now constitutes the suit property.
31. Additionally, the witness averred that subsequently, himself [witness] and the rest of the Plaintiffs were evicted from the suit property on the allegations that same [Plaintiffs] were squatters on the land.
32. Be that as it may, the witness averred that the Plaintiffs herein are keen and desirous to be returned onto the suit property.
33. On cross examination by learned counsel for the 3rd and 5th Defendants, the witness averred that the letters of allotment which same [witness] has tendered and produced before the court were brought to him [witness] by someone. However, the witness was not able to authenticate the details of the someone.
34. On the other hand, it was the testimony of the witness that prior to the issuance of the letters of allotment, same [witness] had requested for allotment of the land. In any event, the witness added that



- the letters of allotment which were issued to and in favor of the Plaintiffs had conditions which needed to be complied with.
35. Whilst under further cross examination, the witness averred that same was supposed to pay the stand premium and ground rent. However, the witness added that same has not tendered a copy of the receipt as pertains to the payments of the stand premium and ground rents.
 36. Besides, it was the testimony of the witness that the letters of allotment also require that the allottees [Plaintiffs] do accept the terms therein. However, the witness added that same has neither tendered nor produced any letter of acceptance.
 37. On further cross examination, the witness averred that the Plaintiffs herein have sued the minister for land because the minister has taken their [Plaintiffs] land and given it to the 2nd Defendant.
 38. On re-examination, the witness stated that same [Plaintiffs] have continued to pay various fees to the city county government. In any event, the witness averred that the fees are payable annually.
 39. Furthermore, the witness averred that though the plots which were allocated unto the Plaintiffs were subsequently surveyed and some Plaintiffs were issued with beacon certificate, same [witness] has not been issued with a beacon certificate. Nevertheless, the witness clarified that one of the documents which same tendered and produced before the court is a copy of the beacon certificate issued to Sarah Wairimu.
 40. Other than the foregoing, it was the testimony of the witness that the rest of the Plaintiffs have not been issued with the beacon certificate[s] because of the dispute pertaining to double allocation.
 41. Nevertheless, the witness avers that the land which is claimed by the Plaintiffs herein is the same land which is claimed by the 2nd Defendant.
 42. On further re-examination, the witness averred that same paid the stand premium and ground rents. However, the witness conceded that same has neither tendered nor produced before the court any evidence of such payments.
 43. Finally, it was the testimony of the witness that to date the Plaintiffs have neither been issued with nor availed any certificate of title.
 44. The 2nd witness who testified on behalf of the Plaintiffs was John Koyier Barreh. Same testified as PW2.
 45. It was the testimony of the witness that same is a town planner and a registered Environmental Impact Assessment Expert, duly registered as number PP0102 and 1108, respectively.
 46. On the other hand, the witness averred that same is privy to and knowledgeable of the facts pertaining to the instant matter. In any event, the witness added that same remembers having prepared an internal memo dated the 4th July 2014, during the time when same [witness] worked with the City County Government of Nairobi.
 47. Furthermore, it was the testimony of the witness that having prepared the internal memo dated the 4th July 2014, same [witness] was therefore competent to produce the internal memo as an exhibit before the court. For good measure, the witness therefore sought to tender and produce the internal memo as an exhibit before the court.
 48. There being no objection to the production of the internal memo dated the 4th July 2014 as an exhibit, same [internal memo] was thereafter tendered and produced before the court as exhibit P22.



49. On the other hand, it was the testimony of the witness that same generated the internal memo Exhibit P22 in his capacity as the Director of Urban Planning and Housing.
50. Additionally, it was the testimony of the witness that there was an un-procedural survey which had been carried out on the suit property and which survey was inconsistent with the approved Part Development Plan [PDP].
51. On the other hand, it was the testimony of the witness that by the time, same [witness] wrote the internal memo there were complaints from various residents who had hitherto been allocated the plots on the same ground. Furthermore, the witness averred that the complaints were to the effect that the approved PDP had displaced the said residents.
52. Other than the foregoing, the witness averred that same proceeded to and visited the disputed ground with a view to validating the complaints. For good measure, the witness added that when same visited the disputed ground and upon looking at the approved PDP, same [witness] discerned and inconsistency between the survey and the approved PDP.
53. It was the further testimony of the witness that after visiting the disputed ground same proceeded to and generated the internal memo [exhibit P12] and whose purpose was to highlight the inconsistency between the survey and the approved PDP. In any event, the witness averred that the purpose of the internal memo was to facilitate reconciliation of the cadastral plan and the approved PDP, with a view to procuring an amendment of the PDP.
54. Additionally, the witness averred that though same escalated the internal memo to the relevant office, same was not privy to whether the contents/recommendations at the foot of the internal memo were acted upon or at all.
55. On cross examination by learned counsel for the 2nd Defendant, the witness testified that same prepared the internal memo with a view to providing a status report as pertains to the situation obtaining on the disputed land. Furthermore, the witness added that same attached a copy of the survey report to the internal memo.
56. Whilst under further cross examination, the witness stated that though same attached a copy of the survey report to the internal memo [exhibit P22], the said survey report is not part of the documents tendered before the court.
57. Other than the foregoing, the witness averred that same visited the ground in question in July 2024. Nevertheless, the witness conceded that by the time same visited the disputed ground there was already an approved PDP which had been prepared over and in respect of the suit plot. Furthermore, the witness added that the approved PDP was prepared on the 4th February 2005.
58. It was the further testimony of the witness that same visited the disputed grounds upon receipts of complaints from the Plaintiffs herein, who contended that same had been allocated the disputed ground.
59. Other than the foregoing, the witness averred that the nature of the complaint was to the effect that the plot which had been allocated to the 2nd Defendant had encompassed the plot[s] that had been allocated to and in favor of the Plaintiffs.
60. Whilst under further cross examination by learned counsel for the 2nd Defendant, the witness averred that same was not aware of a PDP which was gazetted in the year 2004. Nevertheless, the witness thereafter admitted that same has seen a PDP being alluded to vide a gazette notice.



61. It was the further testimony of the witness that the PDP being alluded to in the gazette notice related to an amended PDP for which invitations [objections] were being sought for prior to its approval.
62. Be that as it may, it was the further evidence of the witness that the advertisement of a Part Development Plan [PDP] is part of the process attendant to the approval of a PDP.
63. On further cross examination, the witness averred that by the time, same [witness] prepared the internal memo same was not aware of the approved Part Development Plan [PDP].
64. On cross examination by learned counsel for the 3rd and 5th Defendants, the witness averred that same prepared the internal memo [exhibit P22], in his capacity as the director of planning. Nevertheless, the witness stated that same has since retired.
65. On the other hand, it was the testimony of the witness that an approved Part Development Plan [PDP] would be assigned an approval number. However, the witness averred that in his report same has not alluded to an approved PDP.
66. Whilst under further cross examination, the witness averred that a PDP can be subjected to amendments. Nevertheless, it was the testimony of the witness that the amendments that were undertaken on the original PDP were un-procedural.
67. Be that as it may, the witness admitted that same has not produced any other PDP before the court. In any event, the witness acknowledged that the only approved PDP is the one tendered and produced before the court by the 2nd Defendant.
68. It was the further testimony of the witness that a PDP can be amended. However, the witness averred that there is a procedure to be followed prior to and before the amendment of a PDP.
69. On re-examination by learned counsel for the Plaintiff, the witness averred that the process pertaining to approval of a PDP includes, inter-alia, advertisement in a local daily newspapers, both in English and Kiswahili; gazettement in the official Kenya gazette as well as circulation through various designated departments.
70. It was the further testimony that whenever a PDP is prepared, same must be consistent with the Cadastral Plan [Survey Plan]; and in the event of the inconsistency, same ought to be addressed.
71. The third witness who testified on behalf of the Plaintiffs was one Stanly Mwangi Kimani. Same testified as PW3.
72. It was the testimony of the witness that same is also one of the Plaintiffs. Consequently, the witness averred that same is therefore conversant with the facts of the instant matter.
73. Furthermore, the witness averred that same has since recorded a witness statement dated the 23rd May 2019 and which witness statement same [witness] sought to adopt as his Evidence in chief.
74. Suffice it to point out that the witness statement dated the 23rd May 2019; was thereafter adopted and constituted as the Evidence in chief of the witness.
75. On cross examination by learned counsel or the 1st Defendant, the witness averred that same is one of the residents of the disputed property. In any event, the witness added that there are a total of 19 occupants of the suit property.
76. On further cross examination, the witness stated that though same is one of the residents/occupants of the disputed property, same was never issued with a letter of allotment. For good measure, the witness admitted that same has neither tendered nor produced any letter of allotment.



77. On the other hand, the witness averred that same is one of the people whose properties were demolished. In addition, the witness added that their properties were demolished by the city council of Nairobi and the 2nd Defendant herein.
78. On cross examination, by learned counsel for the 2nd Defendant, the witness stated that same is one of the people who has filed the instant suit. Nevertheless, the witness acknowledged that his [Witness] name is neither contained nor reflected on the face of the Plaint.
79. Whilst under further cross examination, the witness averred that his plot is known as L2. However, the witness added that the plot in question is registered in the name of Nancy Mwihaki.
80. Other than the foregoing, it was the testimony of the witness that Nancy Mwihaki is his [Witness] sister and the witness has attended court on behalf of the said Nancy Mwihaki.
81. Whilst under further cross examination, the witness has averred that even though Nancy Mwihaki was issued with a letter of allotment, same [Nancy Mwihaki] did not comply with the terms and conditions of the letter of allotment.
82. On cross examination by learned counsel for the 3rd and 5th Defendants, the witness stated that same does not have any letter of allotment bearing his name. Nevertheless, the witness admitted that the plot in question belongs to the Mosque [2nd Defendant].
83. Furthermore, it was the testimony of the witness that Nancy Mwihaki, on whose behalf same contends to have appeared before the court was not issued with any certificate of lease over and in respect of the suit property.
84. On re-examination, the witness averred that same knew that the demolition complained of was undertaken by the city council of Nairobi, [now defunct]. In any event, the witness conceded that prior to the demolitions, the occupant[s] were served with a document from the city council of Nairobi.
85. The fourth [4th] witness who testified on behalf of the Plaintiffs was one Christopher Otieno Owuor. Same testified as PW4.
86. It was the testimony of the said witness that same is a surveyor by profession. In any event, the witness added that same is conversant with the facts of the suit herein. On the other hand, it was the testimony of the witness that same had been tasked to undertake a survey over and in respect of the disputed property with a view to demonstrating the nature of the structures standing thereon.
87. In this regard, the witness averred that same proceeded to and undertook a survey over the disputed property culminating into the preparation of a survey report dated the 17th July 2013.
88. On the other hand, the witness also alluded to another report dated the 9th April 2014; as well as Google earth map, relative to the disputed ground and which documents the witness sought to produce before the Honourable court as exhibits.
89. Nevertheless, an objection was taken to the production of the various documents by PW4 culminating into a ruling being rendered by the court whereupon the impugned documents were found to be inadmissible. For good measure, the court ordered that the impugned documents were not capable of being produced before the court.
90. Arising from the ruling of the court, the witness herein [PW4] was therefore not cross examined by learned counsel for the Defendants.



91. The fifth [5th] witness who testified on behalf of the Plaintiffs was one Antony Charles Muiruri. Same testified as PW5.
92. It was the testimony of the witness [PW5] that same is an employee of the city county Government of Nairobi. For good measure, the witness added that same is a technical assistant in the office of chief officer, Urban Development and Planning.
93. Arising from his portfolio, the witness herein averred that same is privy to and conversant with the contents of an internal report which was prepared for the consumption of his [witness] superiors. Furthermore, the witness thereafter sought to tender and produce the internal report which had been marked as MFI P19.
94. Be that as it may, an objection was taken by learned counsel for the 2nd Defendant pertaining to the capacity of the witness to tender and/or produce before the court a document which had been illegally procured from the offices of the 1st Defendant. For good measure, the objection by and on behalf of learned counsel for the 2nd Defendant was upheld by the court on the basis of the decision of the Supreme Court of Kenya in the case of Njonjo Mue and Others vs IEBC & Others (2017)eKLR, where the court underscored that illegally obtained evidence is inadmissible.
95. Following the rendition of the ruling by the court, learned counsel for the Plaintiff sought for and obtained an adjournment with a view to reconsidering his [counsel's position]. Instructively, the adjournment was duly granted.
96. Nevertheless, despite subsequent adjournments being granted, learned counsel for the Plaintiffs was unable to progress the Plaintiffs' case culminating into an order being made on the 26th October 2023; whereupon the Plaintiffs' case was closed.

b. 1st Defendant' case:

97. Though the 1st Defendant entered appearance and filed a statement of defense, same however did not file any witness statement.
98. Furthermore, learned counsel for the 1st Defendant intimated to the court that the 1st Defendant would not be calling any witness. Consequently and in this regard, the 1st Defendant's case was duly closed without any evidence being tendered.

c. 2nd Defendant's case

99. The 2nd Defendant's case revolves around the evidence of one [1] Witness, namely, Abdi Bayani. Same testified as DW1.
100. It was the testimony of the witness that same is a member of the 2nd Defendant and thus same [witness] is conversant with the facts of the subject matter. Furthermore, the witness averred that same has been sent by the 2nd Defendant to represent her [2nd Defendant] in respect of the instant matter.
101. Additionally, the witness averred that same has since recorded a witness statement dated the 5th August 2019; and thereafter sought to adopt and rely on the witness statement as his evidence in chief.
102. Suffice it to point out that the witness statement dated the 5th August 2019; was thereafter adopted and constituted ad the evidence in chief of the witness.



103. On the other hand, the witness also alluded to the List and bundle of documents dated the 5th August 2019, containing a total of 13th documents. For coherence, the witness thereafter sought to tender and produce the documents as Exhibits on behalf of the 2nd Defendant.
104. There being no objection to the production of the various documents contained at the foot of the list dated 5th August 2019, the documents were admitted as exhibits D1 to D13, respectively, on behalf of the 2nd Defendant.
105. Other than the foregoing, the witness alluded to the statement of defense filed by and on behalf of the 2nd Defendant. Instructively, the witness implored the Honourable court to dismiss the Plaintiff's suit.
106. On cross examination by learned counsel for the 1st Defendant, the witness averred that the suit property was allocated to and in favor of the 2nd Defendant. Furthermore, the witness added that upon the allocation of the suit property to the 2nd Defendant, the 2nd Defendant duly complied with the terms of the letter of allotment culminating into same [2nd Defendant] being issued with a certificate of lease.
107. Whilst under further cross examination, the witness averred that the suit property, which is known as LR.NO. 209/7963/479 Title no. IR 30840 lawfully belongs to the 2nd Defendant. In any event, the witness testified that the 2nd Defendant has since developed the suit property and in particular, the 2nd Defendant has erected a Mosque thereof.
108. With the foregoing testimony, the 2nd Defendant's case was duly closed.

d. 3rd and 5th Defendants' Case

109. The 3rd and 5th Defendants neither called any witness nor tendered any evidence before the court.
110. For good measure, the 3rd and 5th Defendants' case was duly closed without any evidence or at all.

e. 4th Defendant's case

111. Though the 4th Defendant entered appearance and filed a statement of defense dated the 26th August 2019, same neither filed any witness statement nor bundle of documents.
112. Similarly, the 4th Defendant did not call any witness at all. Suffice to point out that the 4th Defendant's case was duly closed without any evidence being tendered before the court.

Parties' Submissions:

113. At the close of the hearing, the advocates for the respective Parties covenanted to file and exchange written submissions. Consequently and in this regard, the court proceeded to and circumscribed the timelines for the filing and exchange of the written submissions.
114. Pursuant to and in compliance with the direction[s] of the court, the Plaintiffs filed an undated written submissions before the court and in respect of which same has highlighted three [3] salient and pertinent issues for consideration and determination by the court.
115. On the other hand, learned counsel for the 1st Defendant filed written submissions dated the 2nd February 2024; whereas Learned counsel for the 2nd Defendant filed written submissions dated the 31st January 2024.
116. Other than the foregoing, the 3rd and 5th Defendants, through the office of the Honourable Attorney General filed written submissions dated the 8th November 2023 and in respect of which same



- contended that the dispute beforehand touches on [sic] double allocation and hence the court should apply the doctrine of first in time and thereafter decree that the allocation of the 2nd Defendant prevails.
117. For coherence, all the written submissions [details in terms of the preceding paragraph] forms part of the record of the court and thus same shall be taken into account by the court whilst crafting the Judgment under reference.
118. Furthermore, it is instructive to observe that even though the court has not rehashed and reproduced the salient features of the written submissions, same have however been appreciated.
119. In any event, the submissions and the case[s] alluded to have highlighted the salient issues for determination and thus same are of great help to the court in determining the dispute pertaining to the ownership of the suit property.

Issues for Determination:

120. Having reviewed the pleadings filed by and on behalf of the Parties; the evidence tendered [oral and documentary] and the written submissions filed, the following issues do emerge [crystalize] and are thus worthy of determination;
- i. Whether the Plaintiffs herein have any lawful rights and/or claims to and in respect of the suit property, capable of being protected under the law.
 - ii. Whether the suit property was lawfully allocated to and in favor of the 2nd Defendant and if so, whether the 2nd Defendant complied with the requisite terms at the foot of the letter of allotment.
 - iii. What reliefs, if any; ought to be granted.

Analysis and Determination:

Issue number 1

Whether the Plaintiffs herein have any lawful rights and/or claims to and in respect of the suit property, capable of being protected under the law.

121. The Plaintiffs herein have filed the instant suit, claiming that same were lawfully allocated various portions of the suit property by the city council of Nairobi, now defunct vide letters of allotments variously issued on the 2nd November 2000.
122. It was the evidence on behalf of the Plaintiffs that prior to and or before being issued with the letters of allotment, the Plaintiffs had been in possession of what now constitutes the suit property from the year 1983.
123. For good measure, PW1 testified as hereunder;
- “I started staying on the land in 1983. During the early times of 1983 I did not have any title documents to allow me to enter thereon. The land was belonging to the government of the Republic of Kenya. When we entered we were 19 people? Latter, some more people and they were brought by the chief. We then became 31 in number”.



124. Furthermore, whilst under cross examination by learned counsel for the 2nd Defendant, the witness [PW1] testified as hereunder;

“I started looking for title documents in the year 1999. We looked for the title document from the city council of Nairobi. We looked for the title document from the ministry of land. The office of the minister was at Jogoo House. We went to the offices and we did not have any letter. We paid him/her a courtesy visit over the issue of the land. Upon meeting the minister, same [minister] sent a letter to the town clerk, city council of Nairobi. We were praying for allotments letters”.

125. Whilst still under cross examination by learned counsel for the 2nd Defendant, PW1 stated as hereunder;

“we were issued with a letter of allotment in the year 2000. The letter of allotment was issued on 2nd November 2000. I cannot remember the dates of payments”.

126. From the evidence tendered by and on behalf of PW1, it is evident and apparent that the Plaintiffs herein had not been issued with any letter of allotment over and in respect of what now comprises the suit property, up to and including the 2nd November 2000.

127. Other than the foregoing, it was the testimony of PW1 that the letters of allotment which were issued to and in favor of the Plaintiffs contained terms and conditions which required to be complied with. For good measure, the witness added that the terms and conditions were to be complied with within a set timeline.

128. To this end, PW1 stated as hereunder whilst under cross examination by learned counsel for the 3rd and 5th Defendants;

“Before the letter of allotment, I had requested for the land. There were conditional and I complied with the same. The letter of allotment is dated 2nd November 2000. I was supposed to pay the stand premium and ground rent. I paid the sum of Kes.8, 600/= on account of stand premium and ground rent. I cannot see the receipt that shows the payments. I have not produced a copy of the letter of acceptance”.

129. Moreover, during re-examination by learned counsel for the Plaintiffs, PW1 stated as hereunder;

“I paid the stand premium and ground rents. I don't have the receipt. We have not been issued with certificate of titles”.

130. From the totality of the evidence that was tendered by PW1, it is discernible that though the Plaintiffs were issued with letters of allotment over and in respect of various portions of what now comprises the suit property, same however, did not accept the terms of the letters of allotment, either within the prescribed timelines or at all.

131. Furthermore, it is also apparent that though PW1 contended that same [PW1] as well as the rest of the Plaintiffs paid the requisite stand premium, however no receipts were tendered and/or produced before the court.

132. Arising from the foregoing, it is therefore crystal clear that the Plaintiffs herein neither complied with nor adhered to the terms of the letters of allotment dated the 2nd November 2000 or at all. Consequently, the letters of allotment under reference lapsed and were thus rendered redundant [otiose], for all purposes and intent.



133. To this end, it suffices to cite and take cognizance of the holding in the case of Syedna Mohammed Burhannuddin Saheb & 2 others V Benja Properties LTD & 2 others [2007] eKLR, where the court held and observed as hereunder;

In any event, the letter of allotment relied upon by the Defendant had itself expired, and was therefore invalid. I do not accept Mr. Kirundi, Counsel for Defendant's argument, that the expired letter, when acted upon, had been "revived" through conduct. The letter had expired. It was dead. There was nothing to "revive". Finally, the letter of allotment had a disclaimer: the Government was not to be liable for any prior commitment.

134. The position, that a letter of allotment whose terms are neither complied with nor adhered to within the set timelines lapses and becomes extinct, was also highlighted in the case of Mbau Saw Mills Limited versus Attorney General & another [2014] eKLR, where the court held thus;

"I have considered the evidence on record and the submission of the parties and do find that a letter of allotment was issued to Mr. Joseph K. Mugambi on 21/10/1971 with a condition to accept the offer within 30 days. He did not do so and thereafter the offer lapsed 30 days after it was made in accordance with the allotment letter. Having failed to accept the offer as stipulated in the letter of allotment Mr. J.K. Mugambi did not acquire interest in the unsurveyed lorry depot and therefore had no interest to transfer to the plaintiff. This court holds that a letter of allotment does not confer any property rights to a person unless there is acceptance and payment of the stand premium and ground rent. In the letter dated 17/6/1988 which was written about 17 years after the allotment letter was issued, the Commissioner of Lands confirmed that the plot was allocated to Joseph M. Mugambi in 1971 for lorry depot.

However, the plot had neither been paid for nor an acceptance of the offer in the allotment letter made. The implication of this letter was that the allottee had not complied with the terms of the allotment letter and therefore the offer had lapsed. The offer having lapsed, the allottee Mr. Joseph M. Mugambi did not have any interest to transfer to the plaintiff and therefore all transactions between the allottee and the plaintiff were a nullity in law."

135. In the case of Waterfront Holdings Limited v Kandie & 2 others (Civil Appeal 88 of 2019) [2023] KECA 1223 (KLR) (6 October 2023) (Judgment), the Court of Appeal stated and held as hereunder:

52. Just as in the previous case, the issue as to whether the stand premium for the first allotment was paid or not was not an issue. However, this Court in Swaleh Mohamed Waziri & 3 Others v Houd Mohmoud Athman & Another [2020] eKLR held that:- "...an allottee having been allotted land by the Commissioner of Lands and duly paid all the stand premiums and other related charges, is considered to have acquired rights over such land, which thereafter rendered it unavailable for allocation to other persons or entities."

53. There is therefore no difficulty in situations where an allottee has duly paid the stand premiums and related charges and the title documents issued. In those circumstances, the allottee, now the registered proprietor, acquires all the rights to that land hence removing the land from the ambit of further allotment. That position is reflected in this Court's decision in Dr. Joseph N K Arap N'gok v Justice Moiyo Ole Keiwua & Others Civil Application No. Nai. 60 of 1997 where this Court held that title to landed property can only come into existence after the issuance of the letter of allotment meeting the conditions stated therein and actual issuance thereafter of title documents pursuant to the provisions under which the property is held.



54. From the foregoing, the legal position is not that once issued, the letter of allotment lasts indefinitely. There must be an acceptance of the offer to allot the land by the allottee fulfilling the conditions specified for the said allotment. To that extent, we associate ourselves with this Court's decision in *Fidelity Commercial Bank Limited v Kenya Grange Vehicle Industries Limited* [2017] eKLR which express the general law in contractual matters. "It is elementary learning that for there to be a contract, there has to be an acceptance of an offer on the same terms of the offer and such acceptance must be unconditional, unequivocal and absolute, accompanied by consideration."
136. Similarly, the Supreme Court of Kenya [The Apex Court] has also had an occasion to speak to the legal implication[s] of a letter of allotment whose terms were neither complied with nor adhered with. For coherence, the court expressed itself in the case of *Torino Enterprises Limited v Attorney General* (Petition 5 (E006) of 2022) [2023] KESC 79 (KLR) (22 September 2023) (Judgment), where the court stated and held thus;
62. Back to the facts of this case, the allotment letter issued to Renton Company limited was subject to payment of stand premium of Kshs 2,400,000.00, annual rent of Kshs 480,000.00 amongst others. Moreover, the letter was granted on condition that Renton Company Limited would accept it within thirty (30) days from the date of the offer, failure to which it would be considered to have lapsed.
63. While the allotment letter is dated December 19, 1999, Renton Company limited made the specified payments on April 24, 2001, one hundred and twenty-seven (127) days from the date of the offer. It is not in question that Renton had not complied with the terms and conditions of the allotment letter. Therefore, the letter ought to have been deemed as lapsed at the time it purported to transfer the same to the appellant. The respondent submitted that a letter of allotment does not confer any property rights unless it is perfected, failure to which it is rendered inoperative and of no legal import. We have already declared that an allotment letter, even if perfected, cannot by and in itself confer transferable title to the Allottee, unless the latter completes the process by registration. Therefore, the grim reality is that all transactions between Renton Company limited and the appellant were a nullity in law.
137. From the foregoing exposition of the law, there is no gainsaying that the letters of allotment, which underpin the Plaintiffs' claim to and in respect of the suit property, lapsed and were rendered extinct, for all intents and purposes.
138. Consequently and in view of the foregoing, the Plaintiffs herein cannot be heard to lay a claim to and in respect of the suit property [sic] on the basis of the letters of allotment which lapsed long before the conditions thereunder were complied with.
139. Other than the foregoing, there is yet another perspective that renders the Plaintiffs' claim to the suit property misconceived and legally untenable. For coherence, evidence was tendered by DW1 [Abdi Bayani] that what constitutes the suit property was duly allocated to and in favor of the 2nd Defendant vide a letter of allotment dated the 29th June 1999 and thereafter the 2nd Defendant complied with the terms and conditions of the letter of allotment culminating into an agreement being generated by and on behalf of City Council of Nairobi in favor of the 2nd Defendant as pertains to the suit property.
140. For good measure, the agreement between the city council of Nairobi, [now defunct] and the 2nd Defendant was dated the 25th January 2002 and same was thereafter presented and lodged for registration with the Registry of lands on the 29th January 2002.



141. Furthermore, it was the evidence of DW1, that subsequently what now comprises the suit property was formally transferred to and registered in the name of the 2nd Defendant on 7th May 2009. For good measure, the transfer instrument duly executed between the City Council of Nairobi and the Registered Trustees of the 2nd Defendant was presented and tendered before the court as exhibit D4.
142. Arising from the foregoing, it is imperative to state and observe that by the 2nd November 2002; when the Plaintiffs were allegedly being allocated various plots encompassed within the suit property, the suit property had long been allocated to and in favor of the 2nd Defendant.
143. To my mind, by the time the impugned letters of allotments were being issued to and in favor of the Plaintiffs, the suit property was already alienated and hence was incapable of being the basis/subject of allocation [alienation] to the Plaintiffs.
144. Put differently, the suit property was already private land duly allocated to and in favor of the 2nd Defendant and thus same ceased to be public land [Trust Land] capable of being alienated [re-alienated] by the City County Council of Nairobi, now defunct.
145. For good measure, it is instructive to note that allotment of land is an action in rem and must therefore attach to an existing land. Consequently, where an allotment is issued albeit as pertains to a non-existent land, then such an allotment is an exercise in futility and vanity.
146. To this end, it suffices to reiterate the holding of the Court of Appeal in the Benja Properties Limited versus Syedna Mohammed Burhannudin Sahed & 4 others [2015] eKLR, where the court stated and held as hereunder;
25. In arriving at our decision, we note that an interest in land cannot be allotted, alienated or transferred when the specific parcel of land allotted is not in existence. Allotment of an interest in land is a transaction in rem attaching to and running with a specific parcel of land. In the instant case, the allotment by the Commissioner of Land to the original allottees did not attach in rem to any land since there was no parcel upon which the allotment could attach. What the 5th respondent, the appellant and the original allottees did was to engage in paper transactions without a parcel of land upon which any interest in land would attach and vest – it was paper transactions without any parcel of land as its substratum.
147. Simply put, by the time the City Council of Nairobi [now defunct] was attempting to allocate various portions of the suit property to the Plaintiffs, there was no land capable of being allocated or at all. Instructively, the letters of allotment issued on the 2nd November 2002 constitute a mere paper transaction devoid of any legal foundation.
148. Lastly, it is also not lost on this court that mere letters of allotments [whose terms lapsed/expired] cannot be deployed to lay a claim of ownership to land or at all. For coherence, the right and/or interests to land only accrues upon the issuance of the certificate of title and not otherwise.
149. To this end, the holding [decision] of the Court of Appeal in the case of Joseph N.K. Arap Ng'ok v Moijo Ole Keiwua & 4 others [1997] eKLR is succinct and apt.
150. Instructively, the honorable court of appeal stated and observed as hereunder;
- “It is trite that such title to landed property can only come into existence after issuance of letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of title document pursuant to provisions in the Act under which the property is held”.



151. In a nutshell, my answer to issue number one [1] is threefold. Firstly, the letters of allotments dated the 2nd November 2000 and which have been deployed by the Plaintiffs to stake a claim to the suit property lapsed and were rendered extinct.
152. Secondly, there is no gainsaying that by the time the impugned letters of allotment were being issued to and in favor of the Plaintiffs, the suit property, had long been alienated and thus ceased to be available for further allotment or re-allotment or at all.
153. Thirdly, to the extent that the Plaintiffs did not progress their letters of allotments up to and including acquisition of certificate of title, same did not acquire any lawful rights and/or interests to the suit property, capable of being protected under the law.

Issue number 2

Whether the suit property was lawfully allocated to and in favor of the 2nd Defendant and if so, whether the 2nd Defendant complied with the requisite terms at the foot of the letter of allotment.

154. On her part, the 2nd Defendant also laid a claim to and in respect of the suit property. For clarity, it was the 2nd Defendant's case that same [2nd Defendant] was lawfully issued with a letter of allotment dated the 29th June 1999 pertaining to and concerning what now comprises of the suit property.
155. Additionally, DW1, who testified on behalf of the 2nd Defendant tendered and produced evidence before the court that upon being issued with the letter of allotment [details in terms of the preceding paragraph], the 2nd Defendant duly complied with the terms thereof, culminating into being issued with a certificate of title thereto.
156. Furthermore, it was also the evidence of DW1 that prior to and before the allotment of what now comprises the suit property, the Department of physical planning generated a PDP which was duly approved and thus evidencing the availability of the suit property for allotment.
157. For good measure, DW1 tendered before the court various documentation detailing the process that was undertaken by the City Council of Nairobi pertaining to and concerning the preparation of the Deed plan, the advertisement thereof in the local daily, the gazettelement of the PDP and ultimately the approval thereof.
158. At any rate, it is also worthy to recall that PW2, namely, John Koyier Barreh, testified and stated that there was indeed an approved PDP underpinning the allotment of the suit property to and in favor of the 2nd Defendant.
159. For good measure, PW2 whilst under cross examination by learned counsel for the 2nd Defendant stated as hereunder;

“I have not produced any other PDP save for the one shown to me by learned counsel for the 2nd Defendant. I only compared the PDP versus the survey plan. I did not have the file in respect of the approved amended PDP”.
160. From the evidence on record, there is no gainsaying that the allotment of what now constitutes the suit property to and in favor of the 2nd Defendant was anchored on a duly approved PDP.
161. At any rate, upon the issuance of the letter of allotment, the 2nd Defendant complied with all the requisite processes culminating into the issuance of the certificate of title.



162. Consequently, it is common ground that as between the 2nd Defendant and the Plaintiffs, the 2nd Defendant has the requisite legal documents [Certificate of Title] to underpin her claim to the suit property.
163. Simply put, the 2nd Defendant has been able to establish and demonstrate their ownership to the suit property and hence same [2nd Defendant] is entitled to the requisite protection in terms of the provisions of Section 24 and 25 of the Land Registration Act, 2012 [which replaced Section 23(1) of the Registration of Titles Act, now repealed].
164. Nevertheless, it is also appropriate to state that by virtue of being the lawful and legitimate proprietors of the suit property, the 2nd Defendant is therefore entitled to exclusive possession, occupation and use of the same [suit property].
165. To underscore the extent and scope of the 2nd Defendant’s rights to and in respect of the suit property, it suffices to take cognizance of the holding [decision] of the court in the case of Mohansons (Kenya) Limited versus Registrar of Titles & 2 others [2017] eKLR.

166. For coherence, the court stated and held as hereunder:

- (18) As held by the Court of Appeal for East Africa held in *Moya Drift Farm Ltd. v. Theuri* (1973) EA 114 a registered proprietor of land is the absolute and indefeasible owner of land and is entitled to take proceedings for trespass and eviction of a trespasser even if he did not have possession of the property. Spry, V-P at 116, considered the effect of section 23 of the Registration of Titles Act and held –

“I cannot see how a person could possibly be described as “the absolute and indefeasible owner” of land if he could not cause a trespasser to be evicted. The Act gives a registered proprietor his title on registration and, unless there is any other person lawfully in possession, such as a tenant, I think that title carries with it legal possession: there is nothing in the Act to say or even suggest that his title is imperfect until he has physical possession.”

Sir William Duffus, P. *ibid* at p.117 agreed with Spry, JA as follows:

“In any even I agree with the Vice-President that the fact that the appellant was the registered proprietor as owner in fee simple under the Registration of Titles Act, and as such vested with the absolute and indefeasible ownership of the land, was sufficient to vest legal possession of the land in the appellant and that this possession would be sufficient to support the action of trespass against a trespasser wrongly on the land.”

167. Arising from the foregoing, my answer to issue number two [2] is twofold. Firstly, what constitutes the suit property was duly and lawfully allocated to and in favor of the 2nd Defendant prior to and or before the Plaintiffs could lay a claim thereto. In this respect, the 2nd Defendant’s rights to and in respect of the suit property take precedence [priority].
168. Secondly, the 2nd Defendant complied with the terms of the letter of allotment and was thereafter issued with the certificate of title, which denotes the 2nd Defendant’s ownership to and in respect of the suit property. [See the dictum in *Joseph N.K. Arap Ng’ok v Moijo Ole Keiwua & 4 others* [1997] eKLR].



Issue number 3

What reliefs if any, ought to be granted.

169. The Plaintiffs herein had sought for a plethora of reliefs at the foot of the amended Plaint dated the 23rd May 2019, inter-alia declaration that same [Plaintiffs] are lawfully entitled to the suit property.
170. Nevertheless, whilst discussing issue number one [1] herein before, the court has reviewed the foundation [fulcrum] of the Plaintiffs' claim to the suit property and established that the Plaintiff's claim to the suit property was/is legally untenable.
171. Consequently and in the premises, there is no gainsaying that the declaration alluded to by and on behalf of the Plaintiff cannot be issued and/or be granted.
172. On the other hand, the Plaintiffs also sought for an order to cancel the certificate of title in the name of the 2nd Defendant. However, having found and held that the suit property lawfully belongs to the 2nd Defendant, there is certainly no basis upon which the cancelation can issue or at all.
173. Furthermore, the Plaintiffs herein also sought for an order of permanent injunction to issue as against the 2nd Defendant. Nevertheless, there is no gainsaying that a permanent injunction cannot issue and/or be granted against a lawful owner of a designated property.
174. For brevity, it suffices to adopt and reiterate the holding in the Court of Appeal in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR, where the court held as hereunder;
- “It must also be remembered that it is a serious thing to restrain a registered proprietor of a property over what is undeniably his unless there are justifiable grounds to do so”.
175. Lastly, the Plaintiffs sought for an award of mesne profits. However, there is no gainsaying that mesne profits can only issue and/or be granted in favor of the registered proprietor of the designated property and not any other stranger. Simply put, the Plaintiffs' herein are not the registered proprietors of the suit property and thus same cannot partake of and benefit from an award of mesne profits.
176. At any rate, it is not lost on the court that a claim for mesne profits, which is akin to a claim for special damages must not only be particularly pleaded but must also be specifically proved. [See the court of appeal decision in *Christine Nyanchama Oanda v Catholic Diocese of Homa Bay Registered Trustees* [2020] eKLR].
177. In a nutshell, it is apparent that the Plaintiffs herein have neither proved their claim to the suit property or at all. Consequently, the Plaintiffs' are not entitled to the reliefs enumerated at the foot of the amended Plaint or at all.

Final Disposition:

178. Having considered, evaluated and analyzed the thematic issues [details enumerated in the body of the Judgment], it must have become crystal clear that the Plaintiffs' suit is devoid and bereft of merits.
179. Consequently and in the premises, the Plaintiffs' suit vide Amended Plaint dated the 23rd May 2019; be and is hereby Dismissed with costs to the Defendants.
180. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH 2024.



OGUTTU MBOYA,

JUDGE.

In the Presence of:

Benson - Court Assistant

Ms. Ng'ang'a for the Plaintiffs

Mr. Nyakoe for the 1st Defendant

Mr. Osodo h/b for Mr. Owino for the 2nd Defendant

N/A for the 3rd and 5th Defendants

N/A for the 4th Defendant

