



**Kiarie v Mwangi & another (Environment & Land Case 245 of 2017)
[2024] KEELC 1750 (KLR) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 1750 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 245 OF 2017**

**LA OMOLLO, J
APRIL 11, 2024**

BETWEEN

PATRICK NG'ANG'A KIARIE PLAINTIFF

AND

MICHAEL KAMAU MWANGI 1ST DEFENDANT

COUNTY GOVERNMENT OF NAKURU 2ND DEFENDANT

JUDGMENT

1. The Plaintiff commenced this suit vide a Complaint dated 12th June, 2017. Subsequently, the Complaint was amended on 9th February, 2022.
2. The Plaintiff avers that he is the legal owner of a plot known as Light Industry Plot No. 30 at Bahati Trading Center that was allotted to him by the 2nd Defendant.
3. The Plaintiff also avers that on or around 1st September, 2009 he came across a Notice of Repossession of Plots within the jurisdiction of the County Council of Nakuru which notice was issued by the 2nd Defendant.
4. The Plaintiff further avers that around 30th October, 2009 he applied for allocation of a plot from the 2nd Defendant.
5. It is the averment of the Plaintiff that his application was approved and he was asked to pay the ground rent arrears, application fee, land acquisition fee, survey fee, showing fee, administration fee, allotment fee and other charges which he paid.
6. It is also the averment of the Plaintiff that on 30th July, 2012 he was allotted Plot No. 30 and was issued with an allotment letter. He adds that the allotment letter was accompanied with minutes of a



- meeting held on 15th December, 2009 at the Chambers of the County Council of Nakuru regarding repossession of plots.
7. It is further the averment of the Plaintiff that the 2nd Respondent gave him the letter dated 7th May, 2010 and a list of plot owners names showing their outstanding arrears which was sent to all plot owners including the 1st Defendant's father Elijah Mwangi.
 8. The Plaintiff avers that he has been paying the ground rent since he was allocated the plot.
 9. The Plaintiff also avers that around the month of June 2017, the 1st Defendant entered the suit plot and started claiming that it belonged to his deceased father Elijah Mwangi.
 10. The Plaintiff further avers that the 1st Defendant's actions amount to trespass and they have occasioned him loss and damage.
 11. It is the Plaintiff's averment that unless the 1st Defendant is restrained by way of an injunction, he will stand to suffer irreparable damage.
 12. The Plaintiff prays for judgement against the Defendants for;
 - a. A declaration that the Plaintiff is the legal registered owner of the disputed parcel of land being parcel of land referred to as Light Industry Plot No. 30 at Bahati Trading Centre.
 - b. A declaration that the 1st Defendant, his agents' servants, relatives and any other person acting under the 1st Defendant's authority and permission is a trespasser on the disputed parcel being land referred to as Light Industry Plot No. 30 at Bahati Trading Center.
 - c. An order of eviction of the 1st Defendant, his agents' servants, relatives and any other person acting under the 1st Defendant's authority from the disputed parcel of land and the removal of both temporary and permanent structures erected thereon and the parcel of land registered as Industry Plot No. 30 at Bahati Trading Center.
 - d. An order of temporary/permanent injunction do issue against the 1st Defendant whether by himself, his servants and/or agents or otherwise whomsoever from selling, cultivating and/or interfering with the Plaintiff's quiet possession and enjoyment of Light Industry Plot No. 30 at Bahati Trading Center, a declaration that the Plaintiff is the legal owner of Light Industry Plot No. 30 at Bahati Trading Center.
 - e. Costs and interest of the suit.
 - f. Any other relief this honorable court deems fit to grant.
 13. The 1st Defendant filed his Statement of Defence on 12th February, 2021. The Statement of Defence was subsequently amended on 14th July, 2022 and a counterclaim filed.
 14. The 1st Defendant denies all the averments in the Plaint. In his counterclaim he states he is the co-administrator of the estate of Elijah Mwangi Mbiro (Deceased) who is the registered owner of Light Industry Plot No. 30 (Bahati).
 15. The 1st Defendant also states that Elijah Mwangi Mbiro (Deceased) was the original allottee of the suit property and that he was duly registered as the owner and adds that he had also taken possession, developed the plot and has been in occupation to date.
 16. The 1st Defendant further states that he has continuously paid all the land rates to the 2nd Defendant to date and has been in a quiet possession of the suit property until the suit was filed.



17. The 1st Defendant states that the suit property was subject of Nakuru High Court Succession Cause No. 38 of 2016 which was concluded on 7th June, 2022. The Plaintiff did not raise any objection or claim the suit property in the succession proceedings.
18. The 1st Defendant alleges that that the purported reallocation of the same plot to the Plaintiff was fraudulent, irregular and the same should be declared a nullity and cancelled.
19. The 1st Defendant sets out particulars of fraud/illegality and prays for judgement against the Plaintiff for;
 - a. A declaration that the property known as Light Industry Plot No. 30 (Bahati) belongs to the estate of Elijah Mwangi Mbiro (Deceased).
 - b. A declaration that the estate of Elijah Mwangi Mbiro has acquired the property by way of adverse possession having occupied the same continuously for a period of more than 12 years.
 - c. A declaration that the purported reallocation of the plot to the Plaintiff now 1st Defendant by the 2nd Defendant was irregular and fraudulent and the same should be cancelled.
 - d. A declaration that any records reflecting otherwise than of Elijah Mwangi Mbiro are a nullity and should be rectified by the 2nd Defendant -County Government of Nakuru. (Sic)
 - e. The costs of this suit should be borne by the Plaintiff now Defendant.
20. Despite service, the 2nd Defendant did not enter appearance or file any Statement of Defence.

Plaintiff's Evidence

21. Patrick Nganga Kiarie testified asPW1.
22. It was his evidence that he filed this suit over the parcel of land known as Light Industry Plot No. 30 at Bahati Trading Center.
23. It was also his evidence that he had an allotment letter dated 30th July, 2012 that showed that the suit property belonged to him. He had the original with him in court and he produced it as Exhibit P1.
24. It was further his evidence that he acquired the said property after it was advertised by the 2nd Defendant adding that it formed part of the plots that were repossessed by the County Government of Nakuru.
25. He testified that the advertisement was dated 1st September, 2009 and added that he read it on a Notice Board and also in the Newspaper. He produced the advertisement as Exhibit P2.
26. He also testified that after he saw the advertisement, he made an application for allocation of a plot through the letter dated 30th October, 2009. He explained that he left the original with the 2nd Defendant and produced a copy as Exhibit P3.
27. He further testified that after he made the application, he was given an allotment letter which shows that he had made the necessary payments.
28. It was his evidence that he had a copy of the minutes of a meeting held on 15th December, 2009 by the County Council of Nakuru. He went on to state that Min No. 275/NCC/2009 was on repossession of plots. He narrated that Cllr. Mercy Muriu had explained that there were several plots that were undeveloped and that the allottees had not paid the council the rates for the said plots and she proposed that the plots be repossessed. The said minutes were produced as Exhibit P4.



29. It was further his evidence that he had another letter dated 7th May, 2010 which was issued to him by the 2nd Defendant and states that the suit parcel was in Elijah Mwangi's name. The letters were produced as Exhibits P5(a) and (b).
30. PW1 went on to testify that he had the following rate payment receipts:
 - a. Receipt dated 10th May, 2022 for kshs. 3000/=.
 - b. Receipt dated 3rd June, 2016 for Kshs. 1500/=.
 - c. Receipt dated 6th January, 2015 for kshs. 14,820/=.
 - d. Receipt dated 24th May, 2019 for Kshs. 2400/=.
 - e. Receipt dated 16th January, 2017 for kshs. 1500/=.
31. The receipts were produced as Exhibits P6(a), (b), (c), (d) and (e).
32. It was his evidence that the last time he paid rates was on 20th February, 2023 of Kshs. 1500/= which receipt he produced as Exhibit P6(f).
33. He also testified he had photographs that show there was a house on the suit property which belonged to the 1st Defendant. The photographs were produced as Exhibit P7(a) and (b).
34. He further testified that since allotment he had never taken possession of the suit property as the persons in occupation stated that they did not know anything about the repossession.
35. It was his evidence that he paid the sums on the allotment letter and was issued with a receipt for Kshs. 14, 820/= which he had produced as Exhibit P6(c).
36. It was also his evidence that the allotment letter stated that Kshs. 10,000/= shall be paid within thirty days but he paid on 6th January, 2015.
37. It was further his evidence that he paid the money late because he did not have enough money at the time he received the allotment letter and that the Kshs. 10,000/= was part of the payment of Kshs. 14, 820/=.
38. He testified that the 1st Defendant alleged that he was an administrator of the estate of Elijah Mwangi and that there is a confirmation of grant dated 7th June, 2022. He also testified that the 1st Defendant alleged that the suit property formed part of the estate of the deceased. He further testified that he was not aware of the said succession cause and that at the time of the confirmation of the grant, the present suit had already been filed.
39. He then sought that the prayers in his amended plaint be granted.
40. Upon cross-examination he confirmed that he had instituted the present suit against Michael Kamau Mwangi and the County Government of Nakuru.
41. He also confirmed that he only sought that the County Government of Nakuru confirms that he had been allocated the suit property and further confirmed that he had not sought that the money he had paid be returned.
42. He confirmed that he became aware of Elijah's demise after he had instituted the present suit and that he did not know him prior.



43. When referred to the allotment letter which had been produced as Exhibit P1, he confirmed that it is dated 30th July, 2022. He also confirmed that it was titled as “re-allocated” as the plot was being re-allocated to him.
44. He further confirmed that there were conditions attached to the allocation which were at paragraph 2. He also confirmed that one of the said conditions was that he was to pay within 30 days, failure to which the said offer would be revoked.
45. He admitted that he did not pay within thirty days and neither did he get a letter of extension. He also admitted that after making the necessary payments, he was supposed to be shown the plot by the surveyor.
46. He further admitted that he could not remember if he went with the surveyor to be shown the said plot and neither did he have a letter showing that they went.
47. He confirmed that he has never been in occupation of the suit property as there were people already living on the land. he further admitted that the house on the suit property had rooms occupied by tenants and confirmed that the tenants have never paid any rent to him. He also confirmed that he has never served them with an eviction notice.
48. When he was referred to Exhibit P4 which were the minutes of the council,PW1 admitted that the minutes did not discuss the particulars of the suit property.
49. When referred to Exhibit P2 which was the repossession notice,PW1 confirmed that the notice did not have particulars of the suit property and neither did it contain a description of proprietors.
50. He admitted that when he applied for allocation of a plot he did not specify which plot he wanted.
51. PW1 also confirmed that he did not attend the meeting of the council and apart from the minutes, he could not tell what else was deliberated.
52. He also confirmed that Min. No. 275/NCC/2009 did not mention specific plots and further confirmed that he did not receive any rates demand from the council.
53. He admitted that he did not know if Elijah’s family received rates demand and when he was referred to Exhibit P5 (a) & (b) he confirmed that the letter is dated 7th May, 2010 and that it was the first time that the list that was attached to it was made public.
54. He also admitted that the said list was not signed and neither did it have the Council’s letter head or stamp. He further admitted that he did not remember which officer had given him the list.
55. He confirmed that he was not aware of the succession proceedings that had been filed by Mwangi Elijah’s family and further confirmed that he never sued the council for specific performance.
56. PW1 also confirmed that he did not ask for an alternative plot or seek to have his money paid back. He admitted that he did not think the 2nd Defendant was ready to give him another plot.
57. He denied that the procedure he used to acquire the suit property was illegal and that the offer of the suit property lapsed when he did not pay within thirty days.
58. Upon re-examination he stated that his allotment letter was dated 30th July, 2012.
59. The Plaintiff’s case was then closed.



The 1st Defendant's Case

60. Michael Kamau Mwangi testified as DW1. He adopted his witness statement dated 27th January, 2022 as part of his evidence.
61. It was his evidence that the suit property is Industry Plot No. 30 Bahati Trading Center and that he was the administrator of the estate of Elijah Mwangi his late father.
62. It was also his evidence that the suit property was subject of succession proceedings and that the Plaintiff did not raise any objections.
63. It was further his evidence that there is a house on the suit property which house is made of iron sheets and is occupied by tenants. He added that the suit property has been on lease since the 1990's.
64. He went on to testify that since the demise of his father, his estate has been collecting rent through Anne Njoroge Mbiro one of the beneficiaries of the said estate.
65. He also testified that there have been no attempts to dispossess them of the suit property and that there has been no disturbance.
66. It was DW1's evidence that he filed a list of documents dated 14th July, 2022. He explained that document No. 1 is a grant of Letters of Administration issued in Nakuru HCC No. 38 of 2016 which he produced and was marked as Exhibit D1.
67. He produced a copy of the official receipt for payment of land rent dated 3rd March, 2022 for Kshs. 2000/= and it was marked as Exhibit D2.
68. He testified that they have been paying rent every year under the name Elijah Mwangi Mbiro and have never received any documents from the County Government of Nakuru.
69. He produced a copy of the confirmation of grant where the suit property is listed and the confirmation of grant is. The same was marked as Exhibit D3.
70. He produced a copy of the letter dated 3rd October, 2014 that was written by the Office of the Governor Nakuru County. The same confirmed that the suit property belonged to the late Elijah Mwangi Mbiro. The letter is signed by J.K Kibe Administrator Bahati Sub County. It was marked as Exhibit D4.
71. He went on to explain that Exhibit D4 was attached to the petition for confirmation of grant because the suit property did not have a title deed. He explained that at the time of applying for grant, he was required to give evidence of ownership and this confirmation from the County Government was issued in respect of the suit property for succession purposes, to state that the property belonged to his father.
72. He went on to narrate that for the properties of the deceased that had title deeds they attached certificates of official search.
73. He further testified that it was not true that the suit property was repossessed for the reason that they had been in continuous occupation of the suit property and had been paying rates.
74. It was his evidence that they had not received any notice from County Government of Nakuru and neither has there been any disturbance to their occupation of the suit property.
75. It was also his evidence that he did know the Plaintiff and that it was his first time seeing him in court. He denied having any knowledge on the repossession and/or re-allocation of the suit property.



76. When he was referred to Exhibit P1, he testified that he was not aware of it. He also testified that the said document was issued in 2012 and made reference to the County Council of Nakuru and yet at that time the County Council of Nakuru was non-existent.
77. He further testified that the said letter should have referred to the County Government of Nakuru since it was issued after the Constitution of Kenya 2010 came into effect.
78. He compared Exhibit P1 and Exhibit D4 and gave evidence that if the property had changed in 2012 then the letter dated 3rd October, 2014 would not have been issued.
79. He testified that if at all there was a process of re-allocation or repossession of the suit property it was not proper. He then sought that the prayers in his counterclaim be granted.
80. He concluded his evidence by stating that as at the time of giving evidence, the suit property belonged to Anne Njoki Mbiro pursuant to the confirmation of grant dated 7th June, 2022.
81. In his witness statement he states that the particulars of the succession proceedings with regard to the estate of his deceased father are Nakuru Succession Causes No. 37 and 38 of 2016.
82. Upon cross-examination he confirmed that the property was allocated to his father in the mid 1990's and he had paying rates.
83. He also confirmed that he had produced one receipt for 2022 but he did not have any other receipts in court because they were in possession of Anne Njoki Mbiro.
84. He further confirmed that he could not demonstrate to the court that his father was not in default in payment of land rates.
85. When he was referred to Exhibit P5(a), he admitted that the subject of the said letter was rent arrears. The letter referred to a notice dated 1st September, 2009 which had a list of persons owing the council.
86. He admitted that the list attached to the letter dated 1st September, 2009 had his father's name next to Plot No. 30 and that the arrears are indicated as being Kshs. 32,930/=.
87. When he was referred to Exhibit P2, he confirmed that it was a notice dated 1st September, 2009 for repossession of plots. He admitted that he lived in Kilimani, Nairobi while his father lived in Bahati on a different property.
88. When he was referred to Exhibit D1, he admitted that it indicated that his father had died in Chania which was in Bahati.
89. When he was referred to Exhibit D3, he admitted that he did not know if the Plaintiff was aware of the Succession cause. He confirmed that the Plaintiff was not served because there was no complaint in respect of the suit property.
90. He also admitted that even though this suit was commenced in 2017 and the succession cause commenced in 2016, he did not inform the Succession court of the present proceedings. He confirmed that the succession cause was concluded on 7th June, 2022.
91. When he was referred to Exhibit P7 (a) and (b) which were photographs, he confirmed that the photographs were of the suit property and that Anne Njoki Mbiro was collecting rent from the premises on the suit property.
92. He also admitted that he did have the rate payment receipts from the years 2009 to 2012. He reiterated that Exhibit P1 should have been titled County Government of Nakuru instead of County Council



of Nakuru because of the establishment of county governments by the Constitution of Kenya which replaced county councils.

93. When he was referred to Exhibit D4 he admitted that they obtained it through their advocates and the said letter was meant to ascertain the ownership of the suit property. He added that the letter head was that of the Office of the Governor and it was from the sub county administrator.
94. This marked the close of the 1st Defendant's case.
95. The 2nd Defendant's case was also closed since it failed to enter appearance despite service.

Issues for Determination.

96. The Plaintiff filed his submissions on October 6, 2023 while the 1st Defendant filed his submissions on November 2, 2023.
97. The Plaintiff in his submissions set out the summary of the both his case and the 1st Defendant's case and submits on whether he was rightfully and procedurally allocated the suit parcel of land.
98. The Plaintiff gives a summary of the evidence that he produced during the hearing together with the 1st Defendant's evidence and submits that it is not disputed that Elijah Mbiro (deceased) was allocated the suit property.
99. The Plaintiff also submits that even if it is not disputed that Elijah Mbiro (deceased) was the first allottee, no letter of allocation was produced and neither was there any rate payment receipt produced to show that he had been paying rates until 2010.
100. It is the Plaintiff's submissions that the suit property was listed for repossession for nonpayment of rates and even though the 1st Defendant produced the letter dated 3rd October, 2014, it was written by the Office of the Governor and was not issued by the County of Government which had issued the repossession letters.
101. It is also the Plaintiff's submissions that the 1st Defendant did not produce any evidence to show that the Plaintiff had acquired the letter of allotment irregularly.
102. It is further the Plaintiff's submissions that the succession cause was concluded during the pendency of this suit and it was the duty of the 1st Defendant to inform the court handling the Succession cause of the present matter but he chose not to and instead allocated the suit parcel of land to Ann Njoki Mbiro.
103. The Plaintiff relies on Section 24(a) of the Land Registration Act and seeks that the orders in the Plaintiff be granted as prayed.
104. The 1st Defendant submits that it is not disputed that the suit property was initially allocated to Elijah Mwangi Mbiro (Deceased) who put up rental houses on the property.
105. The 1st Defendant also submits that he is the administrator of the estate of Elijah Mwangi Mbiro which has always been in possession of the suit property and even though the Plaintiff claims that he was allocated the said plot vide the letter dated 6th June, 2015 he did not pay the monies required within thirty days.
106. The 1st Defendant then identifies the following issues for determination;
 - a. Whether the Plot was repossessed by the County Council of Nakuru.
 - b. Whether the Plot was re-allocated to the Plaintiff.



- c. Whether the Plaintiff has proved his case on a balance of probability.
 - d. Who should pay costs of the suit.
107. On the first and second issues the 1st Defendant submits that the suit property was not re-possessed procedurally as the original allottee was never given a notice and neither was he given a hearing as required.
108. The 1st Defendant reiterates that the Plaintiff was given a letter of offer dated 30th July, 2012 which required him to pay Kshs. 10,000/= within thirty days and that he admits that he made the necessary payments on 6th January, 2015 without seeking extension of time to pay.
109. The 1st Defendant relies on *Nairobi Permanent Society v Salim Enterprises & Others* (1995-1998) EA 232 and submits that the letter of offer lapsed after thirty days when the Plaintiff failed to pay the required sums within the required period.
110. On the third issue the 1st Defendant submits that the Plaintiff has not proved his case on a balance of probabilities and on the fourth issue, the 1st Defendant seeks that the Plaintiff's suit be dismissed with costs.

Analysis And Determination

111. After considering the pleadings, evidence and submissions, the following issues arise for determination;
- a. Who between the plaintiff and the 1st Defendant is the owner of Light Industry Plot No. 30 at Bahati Trading Center.
 - b. Whether the Plaintiff is entitled to the orders sought in the Plaintiff.
 - c. Whether the 1st Defendant is entitled to the orders sought in the counterclaim.
 - d. Who should bear costs of the suit.

A. Who between the Plaintiff and the 1st Defendant is the owner of Light Industry Plot No. 30 at Bahati Trading Center.

112. The Plaintiff's case is that the County Government of Nakuru re-possessed plots from owners who had failed to pay land rates in the year 2009.
113. It is also the Plaintiff's case that upon re-possession, the 2nd Defendant advertised re-allocation of the said plots and that pursuant to the said advertisement, he made an application on 30th October, 2009.
114. It is further the Plaintiff's case that after he made the application, a meeting was held by the County Council of Nakuru on 15th December, 2009 where the issue of re-allocation was deliberated upon and he was issued with a letter of allotment dated 30th July, 2012.
115. It is the Plaintiff's case that even though the letter of allotment required him to pay Kshs. 10,500 within thirty days, he paid the said sums on 6th January, 2015.
116. He admits that he has never been in possession of the suit property and seeks that the orders sought in the Plaintiff be granted as prayed.
117. In support of his case the Plaintiff produced a copy of a letter of allocation (Exhibit P1) that was addressed to him and was dated 30th July, 2012. The subject of the letter was allocation of a plot at Bahati Trading Center.



118. The letter informs the Plaintiff that following the repossession of plots by the council at Bahati Trading Center vide Minute No. NCC/275/2009 of 15th December, 2009 of Town Planning Markets and Housing Committee and pursuant to a council meeting that had been held on 22nd December, 2009 he had been allocated Light Industry Plot No. 30 at Bahati Trading Center.
119. The Plaintiff was required to pay within thirty days the sum of Kshs. 10,500/= to signify acceptance of the offer failure to which the said offer would be revoked. After payment, the Plaintiff was to be shown the physical site and extent of the plot by council.
120. A copy of a Notice of Repossession of Plots was also produced (Exhibit P2). It was issued by D. M Twala the clerk County Council of Nakuru. It informed the plot allottees within the jurisdiction of the County Council of Nakuru to clear their rate arrears within twenty-one days or forfeit their right of ownership and the parcels be re-allocated.
121. The said notice was placed in the Daily Nation newspaper of 1st September, 2009 at page 40.
122. A copy of the letter dated 30th October, 2009 was also produced. (Exhibit P3) It was written by the Plaintiff and addressed to the County Clerk through the Area Councilor Nakuru County Council.
123. The Subject of the letter was Allocation of a plot. The Plaintiff made reference to the notice dated 1st September, 2009 and applied for a plot at Bahati Trading Center.
124. A copy of minutes of a meeting of the Nakuru County Council was also produced (Exhibit P4). During the hearing the Plaintiff set out, in great detail, Min 275/NCC/2009 where the issue of re-allocation of plots was discussed.
125. A copy of the letter dated 7th May, 2010 was also produced (Exhibit P5(a). It was written by J.M Malinda clerk to council, County Council of Nakuru and addressed to all the plot owners of Bahati/Kabatini/Kabazi. The subject of the letter was plot rent arrears and repossession of plots.
126. The letter made reference to the Notice of Repossession dated 1st September, 2009, attached a list of plot owners who were in arrears and stated that the council had repossessed the plots in the said list and indicated that it will proceed to re-allocate the plots without any further reference to them.
127. Copies of rate payment receipts were produced (Exhibit P6(a), (b), (c), (d), (e) and (f). The receipts were for payment of ground rent for Plot No. 30 L/I Bahati by the Plaintiff Patrick Nganga Kiarie for various sums of money that he stated when he was giving evidence.
128. Photographs were also produced (Exhibit P7(a) and (b) that showed that there was a house on the suit property which DW1 confirmed were photographs of the suit property.
129. The 1st Defendant's case on the other hand is that his father Elijah Mwangi Mbiro was allocated the suit property. It is also his case that his father put up temporary rental houses which he rented out and has always been in occupation.
130. It is further the 1st Defendant's case that his father is deceased and the suit property was listed among his deceased's father's property in a succession cause.
131. The 1st Defendant argues that his late father never received any notice of repossession of plots and that he was not aware that the suit property was re-allocated to the Plaintiff since they have always been in possession.
132. In support of his case, the 1st Defendant produced a copy of the Grant of Letters of Administration issued in Nakuru HCC No. 38 of 2016(Exhibit D1) in the matter of the Estate of the late Elijah



- Mwangi Mbiro. The grant had been issued to Michael Kamau Mwangi and Loise Wangari Njoroge on 29th April, 2016.
133. A copy of receipt for payment of land rent dated 3rd March, 2022(Exhibit D2) was also produced. It is issued by the County Government of Nakuru to Elijah Mwangi Mbiro for Plot No. 30 Light Industry for Kshs. 1500/=.
 134. This is the only receipt that the 1st Defendant produced that showed that they had been paying ground rent for the suit property.
 135. A copy of Confirmation of Grant (Exhibit D3) was also produced. It was issued in Nakuru HCC Succession Cause No. 38 of 2016 with respect to the estate of the late Elijah Mwangi Mbiro to Michael Kamau Mwangi and Loise Wangari Njoroge on 7th June, 2022. The suit property is stated to have been issued to Ann Njoki Mbiro.
 136. A copy of a letter dated 3rd October,2014 (Exhibit D4) was also produced. The letter head is that of the office of the Governor Nakuru County and it written by J.K Kibet Administrator, Bahati Sub-County. The subject of the letter is plots at Bahati trading center and states among other things that Elijah Mwangi Mbiro was the owner of Light Industry Plot No. 30 Bahati Trading Center.
 137. It is not disputed that Light Industry Plot No. 30 at Bahati Trading Center was initially allotted to Elijah Mwangi Mbiro the father to Michael Kamau Mwangi the 1st Defendant.
 138. It is also not disputed that the Plaintiff has never been in possession of the suit property as the property is occupied by tenants of the estate of the late Elijah Mwangi Mbiro.
 139. What is disputed is whether the suit property was re-posessed by the County Government of Nakuru and re-allocated to the Plaintiff.
 140. The Plaintiff has produced various documents that include a Notice of Repossession of Plots that was placed in the Daily Nation Newspaper on 1st September, 2009 that showed that the County Council of Nakuru had the intention of re-possessing plots whose owners were in rent arrears.
 141. The Plaintiff has also produced minutes that show that the County Council of Nakuru considered the issue of repossession of plots from owners who were in arrears before deciding to re-allocate them.
 142. The 1st Defendant is challenging the process of re-possession of the suit property and argues that his late father's estate was not issued with any notice of repossession and that they had been faithfully paying land rates.
 143. Even though the 1st Defendant alleges that his deceased father's estate has been consistently paying rates for the suit property, no evidence in support of the said allegation was produced as only one receipt issued in 2022 was produced.
 144. In the judicial decision of *Peter Oloishorua Nkuraiyia & 3 others v Peter Kamau Ng'ang'a & 2 others* [2019] eKLR the court held as follows;

“ 22. The next question is whether the suit property was repossessed. Ng'ang'a and the plaintiffs in Case No. 382 of 2017 insist that it was, while Nkuraiyia's stand is that there was no repossession. It is important to note that the allocation to Nkuraiyia was done by the Commissioner of Lands. According to Ng'ang'a and the plaintiffs in Case No. 382 of 2017, repossession was done by the County Council of Nakuru owing to non-payment of rent and following notices issued by the council. They produced copies of some of those notices



which appear to have been issued between the years 2009 and 2010. None of those notices was addressed to Nkuraiya whose address was readily available in the letter of allotment. Further, there is no allegation in any of those notices that there were arrears or rent in respect of the suit property. Equally, there is no letter or notice specifically addressed to Nkuraiya informing him that the suit property was repossessed.”

145. Similarly, in the present case the Plaintiff produced a Notice of Repossession of Plots issued by the County Council of Nakuru in the Daily Nation Newspaper of 1st September, 2009.
146. As admitted by the Plaintiff, the said notice did not have the particulars of the suit property. The Plaintiff also produced a copy of a letter dated 7th May, 2016 that was addressed to all plot owners Bahati/Kabatini/Kabazi. It made reference to a list that was annexed to the said letter of plot owners who were alleged to have been in arrears.
147. None of the notices was addressed to Elijah Mwangi and no evidence was adduced to show that the estate of Elijah Mwangi had been informed of repossession of the suit property.
148. I find that there is no evidence of notice of repossession of the suit property from the late Elijah Mwangi and or his estate. Nonetheless I will proceed and address the issue of the allotment letter that was issued to the Plaintiff.
149. As aforementioned, the Plaintiff produced a letter of application for a plot and an allotment letter that shows that he was allocated the suit property.
150. The terms of the letter of allotment have been set out in great detail in the preceding paragraphs and they included a requirement that the Plaintiff pays kshs. 10,500/= within thirty days from 30th July, 2012 to signify acceptance of the said offer failure to which it would be revoked.
151. The Plaintiff while giving his evidence admits that he paid the requisite fees on 6th January, 2015 which was two years four months after he was required to make the necessary payments.
152. In the judicial decision of *Ali Mohamed Dagane (Granted Power of Attorney by Abdullabi Mubumed Dagane, suing on behalf of the Estate of Mohamed Haji Dagane) v Hakar Absbir & 3 others* [2021] eKLR the court held as follows;

“In order for an allotment letter to become operative, the allottee was required to comply with the conditions set out therein including the payment of stand premium and ground rent within the prescribed period. (Emphasis mine)

See the decision in: *Mbau Saw Mills Ltd v Attorney General for and on behalf of the Commissioner of Lands & 2 others* [2014] eKLR

“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.”

153. As was held in *Ali Mohamed Dagane (Granted Power of Attorney by Abdullabi Mubumed Dagane, suing on behalf of the Estate of Mohamed Haji Dagane) v Hakar Absbir & 3 others* (*Supra*) cited above,



an allottee fails to acquire interest in property when he does not comply with the conditions of a letter of allotment within the stipulated period.

154. In the present matter, the finding that the process of re-possession of the suit property was improper is sufficient to dispose this suit. However, I also find that the Plaintiff failed to make the necessary payments within thirty days and did not therefore acquire interest in the suit property. The fact of making rate payments is therefore immaterial.

B. Whether the Plaintiff is entitled to the orders sought in the Plaintiff.

155. Given my finding on issue (a) above, the Plaintiff is not entitled to the orders sought in the Plaintiff.

C. Whether the 1st Defendant is entitled to the orders sought in the counterclaim.

156. Bearing in mind my finding on issue (a) above, the 1st Defendant is deserving of the orders of declaration that the suit property belongs to the estate of Elijah Mwangi Mbiro (deceased).

157. The 1st Defendant is also seeking a declaration that the estate of Elijah Mwangi Mbiro has acquired the suit property by way of adverse possession as against the Plaintiff.

158. In *Bedan Maina Njoroge v Patrick Ngaruiya & another* [2021] eKLR the court held as follows;

“ 33. The *Limitation of Actions Act* does not expressly define adverse possession. Nevertheless, case law is awash with what adverse possession entails and generally it is essentially a situation where a person takes possession of land, asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya 12 years. See Court of Appeal decision in *Mtana Lewa –v Kabindi Ngala Mwangandi*(2005) eKLR. It is also a well settled principle that a party claiming Adverse Possession ought to prove that this Possession was “nec vi, nec clam, nec precario,” that is, peaceful, open and continuous. The Possession should not have been through force, no in secrecy and without the authority or permission of the owner. These doctrines are internationally accepted and were specifically reiterated by the South Africa Supreme Court in the case of *Z F Stoffberg NO & others v City of Cape Town* (1325/2017) [2019] ZASCA 70.”

159. As was held in the judicial decision cited above, for a party to succeed in a claim of adverse possession, he has to demonstrate that he took possession of the land and the person having title to it has neglected to take action against him/her for a period of twelve years.

160. In the instant case, the late Elijah Mwangi Mbiro was the original allottee of the suit property and even though this is not disputed, no evidence was adduced as to when he took possession of the suit property.

161. In a claim for adverse possession, a party has to prove among others, that he/she has been in possession for a period of over twelve years. No evidence has been led as to when the 1st Defendant took possession or whether a period of 12 years has lapsed as against the Plaintiff from the date the Plaintiff's claim to be owner of the suit parcel. The claim for adverse possession fails.

162. The 1st Defendant also seeks a declaration that the purported reallocation of the plot to the Plaintiff by the 2nd Defendant was irregular and fraudulent and the same should be cancelled. Fraud must be specifically pleaded and proved. The 1st Defendant has not led any evidence of fraud. This claim also fails.



D. Who should bear costs of the suit.

163. It is now settled that costs shall follow the event. This is 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.

164. In the result, the Plaintiff's suit fails and is hereby dismissed. Judgement is entered in favour of the 1st Defendant in the following terms:

- a. A declaration is hereby made that the property known as Light Industry Plot No. 30 (Bahati) belongs to the estate of Elijah Mwangi Mbiro (Deceased).
- b. An order is hereby issued that the 2nd Defendant- County Government of Nakuru shall rectify its records to reflect Elijah Mwangi Mbiro (deceased) as the owner of the property known as Light Industry Plot No. 30 (Bahati).
- c. The 1st Defendant shall have costs of the suit and of the counterclaim.

165. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 11TH DAY OF APRIL 2024.

L. A. OMOLLO

JUDGE

In the presence of: -

No appearance for the Plaintiff.

No appearance for the 1st Defendant.

No appearance for the nd Defendant

Court Assistant; Mr. Joseph Makori.

