



Njue (Suing as the Administrator Ad litem of Pius Kamiti Ngure) v Macharia (Environment and Land Appeal 104 of 2022) [2024] KEELC 4923 (KLR) (20 June 2024) (Judgment)

Neutral citation: [2024] KEELC 4923 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL 104 OF 2022**

**JG KEMEI, J
JUNE 20, 2024**

BETWEEN

**JOHN NJIRU NJUE (SUING AS THE ADMINISTRATOR AD LITEM OF PIUS
KAMITI NGURE) APPELLANT**

AND

SAMUEL MWANGI MACHARIA RESPONDENT

JUDGMENT

Background

1. The appeal arises from the judgement of Hon. O. Wanyaga, SRM delivered on the 19/10/2021 in MCELC NO 163 of 2019-Thika. In the trial Court the Appellant and the Respondent were the Plaintiff and the Defendant respectively.
2. Vide a Complaint dated the 8/10/2019 the Appellant filed suit against the Respondent seeking the following orders;
 - a. That the registration and issuance of the lease and certificate of lease to the Defendant of plot number UNS. Residential Plot No. 6 – Thika Municipality, now Thika Municipality Block 14/60 be cancelled and the same be registered in the name of the Plaintiff as the Administrator of the estate of Pius Kamiti Ngure alias Kamiti Ngure – Deceased.
 - b. A permanent injunction be issued restraining the Defendant, his agents, servants and/or employees from entering, trespassing, undertaking acts of waste or in any other way interfering with the Plaintiff's possession and use of the ongoing UNS. Residential Plot No. 6 – Thika Municipality, now Thika Municipality Block 14/60.
 - c. Cost of the suit and interest thereon.



3. It was the case of the Appellant that the Respondent acquired the suit land fraudulently and particulars of fraud were pleaded under para 8 of the Plaintiff. The Appellant averred that the suit land belonged to his father the late Pius Kamiti Ngure alias Kamiti Ngure who was allocated the land vide a letter of allotment dated the 8/3/1994. That the deceased accepted the offer, caused the suit land to be registered at the Municipal Council of Thika, took possession and developed godowns. That following the death of his father, the Appellant, with intention to process the title of the land was met with a rude shock when he discovered that the title of the suit land had been issued in the name of the 1st Respondent in an irregular, fraudulent and illegal manner hence the suit.
4. The 1st Respondent denied the claim of the Appellant. By the statement of defense and counterclaim dated the 5/11/2019, the Respondent sought orders by way of counterclaim as follows;
 - a. A declaration that the Plaintiff is the lawful registered lessee of the suit property, Thika Municipality Block 14/60 Formerly Known As Unsurveyed Plot Number 6 – Thika Municipality.
 - b. A mandatory injunction do issue to the 1st Defendant and the 2nd Defendant directing him to demolish all the structures, buildings and fences put on the land Title Number Thika Municipality Block 14/60 formerly known as Unsurveyed Plot Number 6 – Thika Municipality at his cost.
 - c. A permanent injunction restraining the 1st Defendant and the 2nd Defendant either by themselves, agents, servants and/or tenants from trespassing, taking into all that is known as Thika Municipality Block 14/60 formerly known as Unsurveyed Plot No. 6 – Thika Municipality.
 - d. A permanent injunction restraining 1st Defendant and the 2nd Defendant their servants and/or agents from erecting any structures, constructing and if any other manner interfering with Thika Municipality Block 14/60 formerly known as Unsurveyed Plot Number 6 – Thika Municipality.
 - e. A declaration that the Sale Agreement dated 26th June 2015 entered into by the 1st Defendant and the 2nd Defendant is illegal, void and unenforceable.
 - f. An order of eviction do issue against the 1st Defendant and the 2nd Defendant on all that is known as Thika Municipality Block 14/60 formerly known as Unsurveyed Plot Number 6 – Thika Municipality.
 - g. General damages for trespass and mesne profits.
 - h. Costs of the suit and interest.
5. It was contended by the Respondent that he acquired the land lawfully by way of a letter of allotment in 1982, complied with the conditions of the said allotment which included acceptance of the offer, payment of the stand premiums and other charges, took possession in 1987 and constructed temporary structures and was issued with a title in 2019.
6. It was further contended by the Respondent that unknown to him, the Appellant fraudulently acquired the suit land and later sold it to 2nd Defendant, one Stephen Nderitu Kireri and particulars of fraud and illegality were pleaded under para 19 of the counterclaim.



The Grounds of Appeal

7. Upon hearing the parties the Learned trial Magistrate rendered the impugned judgment on the 19/10/2022 in favour of the Respondent thus triggering the subject appeal. The Learned trial Magistrate held that the Appellant failed to prove his case on a balance of probabilities and that from the evidence presented, it was manifestly clear that by the time the Appellant purported to have been purported to be allocated the land, the same was not available on account that it had been alienated to the Respondent much earlier. The Appellant has adverted the appeal on 8 grounds as follows;
 - a. The Learned Senior Resident Magistrate erred in law and in fact in failing to analyze the evidence given by the Plaintiff and therefore reached a wrong decision.
 - b. The Learned trial Magistrate erred in law and in facts in his analysis of evidence before him on facts manifesting bias against the Appellant's case from the onset of the Judgment to his conclusion thereby causing his Judgment to fall short of establishment principles of a legal Judgment.
 - c. The Learned trial Magistrate erred in law and in facts in his declaration that the Sale Agreement dated 26/5/2015 entered into by the Appellant and Stephen Nderitu Kireri is illegal, void and unenforceable.
 - d. The Learned Senior Resident Magistrate erred in law and in fact in giving adverse orders against a party that was not part of the proceedings, namely Stephen Nderitu Kireri who was a bonafide purchaser for valuable consideration without any notice of challenge to the property.
 - e. The Learned Senior Resident Magistrate erred in law and in fact in failing to find that Respondent processed the Certificate of Lease and lease documents without establishing the physical status of the property wherein a third party had already the possession and constructing Go downs therein.
 - f. The Learned Magistrate erred in law and fact in that he disregarded and failed to consider the weight of the evidence of the Appellant's submissions and the judicial authorities tendered before the Court.
 - g. The Learned Senior Resident Magistrate erred in law and in fact in failing to put into account all the evidence showing the veracity of the Appellant case and therefore made the wrong decision that occasioned a miscarriage of justice.
 - h. The Learned Senior Resident Magistrate erred in law and in fact in solely accepting the evidence of the Respondent and his witnesses and completely disregarding the evidence tendered by the Appellant and his witness therefore made the wrong decision.
8. The Appellant sought the following orders on appeal;
 - a. The Appellant prays that this appeal be allowed, the Judgment delivered on 9th October, 2022 and the subsequent Orders in the Lower Court be set aside and the same be substituted with an Order allowing the Appellant's suit and dismissing the Respondent's Counterclaim with costs.
9. Equally the Respondent has proffered a cross appeal dated the 25/11/2022 on the following grounds;
 - a. That the Learned Magistrate erred in law and fact by failing to award the Respondent with general damages and mesne profits as prayed for in the Respondent's Counterclaim yet he



appreciated that the Appellant was and continues to be a trespasser on the suit property and continues unlawfully enjoy propriety rights over the suit property.

- b. That the Learned Magistrate erred in law and fact in his omission to award the Respondent general damages and mesne profits failed to appreciate that the suit property is a commercial property wherein the Appellant continues to collect rental income without having proprietary rights to the detriment of the Respondent.
 - c. That the Learned Magistrate erred in law by failing to apply the principles of awarding general damages and mesne profits despite the Respondent proving that he has irreparable suffered financial loss.
 - d. That the Learned Magistrate erred in law as his Judgment fails to meet the legal threshold for essentials of a Judgment as he failed to analyse the issues and give ratio decidendi in his final Judgment.
10. In his cross appeal the Respondent sought the following orders;
- a. Do deem it fit to grant an award of general damages and mesne profits to the Respondent as prayed in the Respondent's amended Counterclaim dated 21st January, 2020.
 - b. That the cost of this Appeal be borne by the Appellant.

The written submissions

11. On the 17/4/2023 parties elected to canvass the appeal by way of written submissions. The firm of Fredrick Macharia filed written submissions on behalf of the Appellant while that of Kaloki Ilia & Associates filed on behalf of the Respondent.
12. The Appellant framed the following issues in the appeal;
 - a. Whether the Learned Magistrate erred in law and in fact in failing to analyze the evidence before him as tendered by the Plaintiff and manifesting bias against the Plaintiff from the onset of the Judgment to the conclusion? – being {Ground 1 & 2}.
 - b. Whether the trial Court erred in law and in facts in his declaration that the Sale Agreement dated 26/5/2015 entered into by the Appellant and Stephen Nderitu Kireri is illegal, void and unenforceable and in giving adverse orders against a party that was not part of the proceedings who was just a bonafide purchaser for valuable consideration without nay notice of challenge to the property? – being {Ground 3 & 4}
 - c. Whether the Learned Senior Resident Magistrate erred in law and in fact in failing to find that Respondent processed the Certificate of Lease and Lease documents without establishing the physical status of the property wherein a third party had already the possession and constructing Go downs therein? – being {Ground 5}
 - d. Whether the trial Magistrate erred failed and/or disregarded to consider the weight of the evidence of the Appellant's submissions and the judicial authorities proving the veracity of the appellant's case as tendered? – being {Ground 6 7 7}
 - e. Whether the trial Magistrate erred in law and in fact in solely accepting the evidence of the Respondent and his witnesses and completely disregarding the evidence tendered by the Appellant and his witness therefore made the wrong decision? – being {Ground 8}



13. The Court was faulted for not considering the evidence led by the Appellant in the trial and in particular that despite leading evidence on among others the allotment letter for UNS residential plot No 6 – Thika Municipality, payment of land rates and rents to the local authority, payment of construction plans and approvals were totally ignored exhibiting bias by the Court towards the Appellant. Relying on the case of Porter Vs Magill (2002) 1 ALL ER 465, the Appellant reiterated that the test in determining bias is whether a fair minded and informed observer having considered the facts would conclude that there was a real possibility that the tribunal was biased.
14. Counsel for the Appellant submitted that the sale agreement dated the 5/2/2015 entered into between himself and his father was valid and complied with the provisions of section 3(3) of the Law of Contract Act. That having acquired a valid interest from his father, he subsequently sold the suit land to Stephen Nderitu Kireri. The Court was faulted for making a finding that the said sale agreements were illegal, void and unenforceable, failing to appreciate the admissibility of the sale agreements and failing to give weight to the same in the judgement.
15. Further counsel for the Appellant emphasized that a man must not be condemned without being given an opportunity to be heard on his defence and any agreement or practice to the contrary would be invalid. In buttressing the point, reliance was placed in the case of Abbot Vs Sullivan (1952) 1 KB 189 as well as the case of James Kanyiita Nderitu & Anor Vs Marios Philotas Ghikas & Anor (2016) eKLR where the Court stated that where an adverse order is made against a party who is affected by it without notice to her or him, the order is liable to be set aside as a matter of cause. In line with the above proposition counsel for the Appellant submitted that the Court made adverse orders against one Stephen Nderitu Kireri who despite being a bonafide purchaser without notice was not a party to the suit.
16. Counsel for the Appellant submitted that the Respondent processed a new lease to the property with the full knowledge that it had been developed by the deceased with godowns and without obtaining clearance from the County Government of Kiambu wherein he could have discovered that the suit land had been alienated to the deceased Appellants father. It was contended further that the Respondent acquired the title through a tainted process in that the physical status of the land was not taken into consideration when the title was processed and issued to the Respondent. That the title having been processed despite the existence of a parallel claim on the land was a clear act to defeat the right of the Appellant
17. It was further submitted that the Respondent did not lead cogent evidence in support of when the land was surveyed and that the Court accepted the evidence without any support whatsoever.
18. In his supplementary submissions filed on the 29/6/2023 the Appellant framed the three issues as follows; whether the Learned Magistrate erred in law and in fact in failing to award general damages and mesne profits as prayed in the Respondent’s Counter Claim? – being {Ground 1, 2 & 3; whether the Learned Senior Resident Magistrate erred in law as his Judgment failed to meet the legal threshold for essentials of a Judgment? {Ground 4}; who should bear the costs of the Appeal?
19. Counsel for the Appellant submitted that the Respondent has not discharged the burden of proof as to the claim of mesne profits and urged the Court to disallow the claim.
20. As to whether the learned trial Magistrate erred in law in failing to meet the legal threshold essential of a judgment, counsel for the Appellant submitted that a close perusal of the judgement shows that the Magistrate met the threshold and in some cases fell short of the same.
21. Lastly the Court was urged to allow the appeal with costs.



22. Counsel for the Respondent framed the following issues on appeal; whether the Learned Magistrate erred in law and in fact by declaring that the Respondent is the bonafide owner of Thika Municipality Block 14/60 formerly known as unsurveyed Plot No. 6, Thika Municipality. (Ground 1, 2, 5, 6, 7 and 8 of the Memorandum of Appeal dated 15th November 2022); whether the Appellant was able to pass good title to Mr. Stephen Nderitu Kireri vide the sale agreement dated 26th June 2015. (Ground 3 & 4 of the Memorandum of Appeal dated 15th November 2022); whether the Learned Magistrate erred in law and in fact by failing to award the Respondent general and mesne profits as prayed in his amended counterclaim dated 21st January 2020. (Ground 1 – 4 of the Cross of Appeal dated 25th November 2022); which party should bear the cost of this Appeal?
23. It was submitted that the Respondent proved on a balance of probabilities that he is the registered owner of the suit land and that the allotment letter dated the 11/8/87 is genuine and that of the Appellants dated the 8/3/1994 is a forgery and the same did not confer any interest in land to the Appellant capable of defeating the title of the Respondent.
24. As to whether the Appellant conveyed a good title to Stephen Nderitu Kireri vide the agreement dated the 26/6/2015, counsel for the Respondent submitted that having established that the Appellant received no good title, he did not pass any title to the said Mr Kireri and therefore he cannot be afforded the defence of a bonafide purchaser for value.
25. On the question of general damages and mesne profits the Respondent submitted and faulted the Court for failing to give the award despite its finding that he was the proprietor of the land and that the Appellant was a trespasser on the suit land.
26. The Court was urged to grant the sum of Kshs 800,000/- being mesne profits as well as general and exemplary damages.
27. Finally, the Court was urged to disallow the appeal and allow the cross appeal.

Analysis and determination

28. Having considered the record of appeal, the grounds of appeal, the rival submissions of the parties and all the material placed before the Court, the following issues are for determination;
 - a. Who is the bonafide and lawful owner of the suit land?
 - b. Whether the Appellant and or Stephen Nderitu Kireri were bonafides purchasers of land.
 - c. Is the Respondent entitled to an award of mesne profits as well as general damages?
 - d. Who meets the costs?
29. This being a first appeal, it is the duty of the Court to review the evidence adduced before the lower Court and satisfy itself that the decision was well-founded. In *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated as thus:

“....this Court is not bound necessarily to accept the findings of fact by the Court below. An appeal to this Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect....”



30. The Court is also aware that it can interfere with the discretion of the Court where it is shown that the same was exercised contrary to the law or that the magistrate misapprehended the applicable law and failed to consider a relevant factor or took into account an irrelevant factor or that on the facts and law, the decision is plainly wrong. See *Mbogo Vs Shah EA* page 93.
31. In this case both parties are claiming title to the same parcel of land identified as UNS Plot No 6 now Thika Municipality Block 14/60.
32. It is not in dispute that the genesis or the root of title of the suit land is traced to allocation of land by the allotting authority which then was the Government of Kenya through the Commissioner of Lands.
33. It was the case of the Appellant that his father Pius Kamiti Ngure acquired the land through a Letter of Allotment dated the 8/3/1994. The suit land is described in the allotment letter as Unsurveyed residential plot No 6 – Thika Municipality, the area is 0.0946 ha for a term of 99 years from 1/3/1994. The stand premium stated therein was Kshs 20,134/-. The Appellant led evidence that his father took possession and developed the suit land with godowns before he met his death in 2015. That he also paid rates for the land as well as approved development plans for the construction of the godowns and obtained clearance certificate from the Municipal Council of Thika. That before his father died on the 19/3/2015 he sold the suit land, among other lands, to him vide the agreement of sale dated the 5/2/2015.
34. In cross examination, the Appellant informed the Court that he did not obtain any title in respect to the suit land except for the letter of allotment and the land rent and rates receipts. He also informed the Court that he did not have any evidence to support the payment of the stand premium on the allotment letter by himself or his late father. Inter alia, that he did not produce any evidence to support change of user from residential to commercial, approval building plans for the godowns or consent for the construction of the go downs. That he later sold the suit land to Stephen Kireri vide the agreement dated the 26/6/2015.
35. Stephen Nderitu Kireri testified and informed the Court that he purchased the land from the Appellant. That at the time of the purchase he relied on a letter of allotment in the custody of the Appellant and that he inquired at the County Offices at Thika whereupon he satisfied himself that the land belonged to the Appellant's father. With that confirmation, he proceeded to construct the godowns on the suit land using the approved building plans that had been obtained by the Appellant's father in 2013. That no claim was brought on the suit land from any quarters as he developed the land till completion in 2018
36. Samuel Mwangi Macharia (DW1) led evidence and relied on his witness statement dated the 5/11/2019 and produced documents in support of his defence and counterclaim. He led evidence that he was allocated the land in 1982, accepted the terms of the allotment letter, paid for the allotment, took possession under his nephew who was carrying out agricultural activities on the land, and finally obtained title in 2019. On visiting the suit land, he discovered that the Appellant had encroached on to the land and immediately reported the trespass to the police.
37. Charles Githae (DW2) reiterated the evidence of DW1 that he occupied the suit land from 2004 to 2015 under the permission of his uncle -DW1. That during the period he was in occupation he carried out subsistence farming and that there was no godown but only came to learn that godowns were constructed about the year 2020.
38. Next to take the stand was DW3- Robert Simiyu, the Assistant Director, Land administration in the Ministry of Lands who confirmed that the letter of allotment in the name of the Respondent was genuine and emanated from his office; the land was surveyed in 1988 which survey was amended in



2018; there is no double allocation of the allotment letters; the letter of allotment in the name of the Appellant's father did not emanate from his office; the land was not available for alienation in 1994 when the Appellant's father is purported to have been allotted the same; that land had been allotted to the Respondent in 1982; the land belongs to the Respondent.

39. DW4- Wangombe Kamuyu, the Land Registrar Thika testified and confirmed that according to the records at the Land registry the suit land belonged to the Respondent which title was issued on the 21/2/2019.
40. I shall now address the process of land allocation under the Government Lands Act (GLA) which was in force during the period the land in question was alienated.
41. Under Section 2 of the Government Lands Act (GLA), unalienated land was defined as Government land which is not for the time being leased or which the Commissioner of Lands has not issued any letter of allotment. Under Section 3 of the GLA, the President had power to, make grants or dispositions of any estates, interests or rights in or over unalienated government land, subject to any other written law.
42. Section 9 of the GLA, empowered the Commissioner of Lands "to cause any portion of a township which is not required for public purposes to be divided into plots suitable for the erection of buildings for business or residential purposes, and such plots may from time to time be disposed of in the prescribed manner."
43. Section 10 of the GLA, the Leases of town plots could only be granted for any term not exceeding one hundred years.
44. Further provisions in Section 11-13 of GLA provided as follow:-

" 11.

- (1) Before any town plot is disposed off under section 12, the Commissioner shall determine— (a) the upset price at which the lease of the plot will be sold; (b) the building conditions to be inserted in the lease of the plot; (c) the special covenants, if any, which shall be inserted in the lease; and (d) the periods into which the term is to be divided and the annual rent to be paid in respect of each period. (2) For the purposes of the rent payable under a lease under this Part granted before the 1st January, 1989—
 - (a) the term of the lease shall notwithstanding anything to the contrary contained in the lease, be divided into periods, the first of which shall expire on the 31st December, 1988 and each period thereafter shall expire on the 31st December of every tenth year until end of the term;
 - (b) the annual rent shall be payable in advance on the 1st January in each year of the term; (c) the annual rent payable for the period expiring on the 31st December, 1988 shall be that reserved in the lease; and



- (d) the annual rent payable on and after the 1st January, 1989 shall for each next ensuing period of ten years be at such percentage of the unimproved value of the land as at the 1st January of such ensuing periods as the President may by order in the Gazette determine.
- (3) For the purposes of the rent payable under a lease under this Part granted for a term commencing on or after the 1st January, 1989 —
- (a) the term of the lease shall be divided into ten periods, the first of which shall expire on the 31st December of every subsequent tenth year until the end of the term;
 - (b) the annual rent shall be payable in advance on the 1st January in each year of the term; (c) the annual rent payable for the first period of ten years of the term shall be that reserved in the lease; and
 - (d) the annual rent payable on and after the 1st January, 1999 shall for each next ensuing period of ten years be at such percentage of the unimproved value of the land as at the 1st January of such next ensuing period as the President may by order in the Gazette determine.
12. Leases of town plots shall, unless the President otherwise orders in any particular case or cases, be sold by auction.
13. The place and time of sale shall be notified in the Gazette not less than four weeks nor more than three months before the day of sale, and the notice shall state—
- (a) the number of plots and the situation and area of each plot;
 - (b) the upset price at which the lease of each plot will be sold;
 - (c) the amount of survey fees and the cost of the deeds for each plot;
 - (d) the term of the lease and the rent payable in respect of each plot; and
 - (e) the building conditions and the special covenants, if any, to be inserted in the lease to be granted in respect of any plot: Provided that the lease of any plot may be withdrawn from sale by the Commissioner at any time before it is offered for sale.”
45. The provisions of section 11- 13 applied to the instant case as can be seen in the content of the GN No 3893 of 18/12/1981 where the Commissioner of Lands called for applications for allocation of plots in Thika Municipality.



46. The procedure for allocation of land is contained in the provisions of GLA set out above. I shall now look at Court decisions on the subject of land allocation.

47. In the case of Nelson Kazungu Chai & 9 Others Vs. Pwani University [2014] eKLR the Court stated as follows:

“... It is trite law that under the repealed Government Lands Act, a Part Development Plan must be drawn and approved by the Commissioner of Lands or the Minister for lands before any un-alienated Government land could be allocated. After a Part Development Plan (PDP) has been drawn, a letter of allotment based on the approved PDP is then issued to the allottees.

131. It is only after the issuance of the letter of allotment, and the compliance of the terms therein, that a cadastral survey can be conducted for the purpose of issuance of a certificate of lease. This procedural requirement was confirmed by the surveyor, PW3. The process was also reinstated in the case of African Line Transport Co. Ltd vs. The Hon. Attorney General, Mombasa HCCC No. 276 of 2013 where Njagi J. held as follows: “Secondly, all the defence witnesses were unanimous that in the normal course of events, planning comes first, then surveying follows. A letter of allotment is invariably accompanied by a PDP with a definite number. These are then taken to the department of survey, who undertake the surveying. Once the surveying is complete, it is then referred to the Director of Surveys for authentication and approval. Thereafter, a land reference number is issued in respect of the plot.¹³² A part development plan (PDP) can only be prepared in respect to Government land that has not been alienated or surveyed...”

48. This process is restated in African Line Transport Co. Ltd v The Hon. Attorney General, Mombasa, HCCC No.276 of 2003 [2007] eKLR where it was held that planning comes first, then surveying. A letter of allotment is invariably accompanied by a PDP with a definite number, which would then be taken to the Department of Survey for surveying. Thereafter, it is then referred to the Director of Surveys for authentication and approval. It is after that process that a land reference number is issued in respect of the plot.

49. In the case of Funzi Development Ltd & Others Vs. County Council of Kwale, Mombasa Civil Appeal No.252 of 2005 [2014] eKLR the Court of Appeal, which decision this Court affirmed, stated that:

“... A registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular. A Court of law cannot on the basis of indefeasibility of title sanction an illegality or give its seal of approval to an illegal or irregularly obtained title.”

50. Section 107 of the *Evidence Act* states as follows;

“

“107. Burden of proof

(1)Whoever desires any court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.(2)When a person



is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

51. It therefore follows that when a Court is faced with competing claims over a parcel of land it is upon the parties to lead evidence which shows the root of their title. In this case both parties have accused each other of fraud and illegality in the manner in which they have acquired the suit land. It behoved them in equal measure to prove their claims by leading cogent evidence to support their cases.

52. First before I delve into the evidence of each party it is important to state the guiding principles when determining fraud. In the case of *Vijay Morjaria Vs. Nansingh, Madhusingh Darbar & Another* [2000]eKLR the Court stated as follows;

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

53. The Black’s Law Dictionary defines fraud thus: -

“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. Fraud, as applied to contracts, is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, In the sense of a Court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another.”

54. It is settled law that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. At page 427 in *Bullen & Leake & Jacobs, Precedent of pleadings 13th Edition* quoting with approval the cases of *Wallingford v Mutual Society* (1880) 5 App. Cas.685 at 697, 701, 709, *Garden Neptune V Occident* [1989] 1 Lloyd’s Rep. 305, 308, *Lawrence V Lord Norreys* (1880) 15 App. Cas. 210 at 221 and *Davy V Garrett* (1878) 7 ch.D. 473 at 489 it is stated that: -

“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged. The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (i). “General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice.”



55. Section 26 of the [Land Registration Act](#) provides as follows;

- “(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
- (2) A certified copy of registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”

56. I shall now examine the case of the Appellant to see if he discharged the burden of proof that he held a valid letter of allotment and subsequently a valid title to the land. Taking the evidence of the Appellant against the law and precedent set out in the preceding paras, the Court finds as follows; save for the letter of allotment dated the 8/3/1994 the Appellant failed to show that the said letter was accepted in writing, stand premium was paid and a receipt thereof exhibited and that a title was issued to the Appellants father. A letter of allotment being an offer, cannot on its own confer interest or a right in land. The offer must be accepted and the applicant must comply with the terms and conditions therein, there must be payment of the offer to be complete. The same being contractual in nature, it follows that in this case the offer was never accepted, no payment was made to the offeror, in this case the Commissioner of Lands, no title was processed in the name of the Appellants father or the Appellant for that matter.

57. The long and short of the Appellants case is that neither his father nor himself acquired any interest in the suit land capable of being conveyed from the Appellants father to the Appellant vide the agreement of sale dated the 5/2/2015. Similarly the Appellant acquired no interest capable of conveying to Stephen Nderitu Kireru vide the agreement of sale dated the 26/6/2015. I say so because the suit land was not available for alienation in 1994, the same having been allotted vide a Gazette Notice in 1982 to the Respondent and accepted and paid for in 1987.

58. The Appellants reliance on payment of rates and rent to the Thika Municipality is not one of the ways of acquisition of land provided under our laws. As long as the Appellants title is devoid of a root which is traceable to the allocating authority, he acquired nothing.

59. The Court finds that the Appellant did not discharge the burden of proof and for that matter the trial Court cannot be faulted for reaching the decision that it did.

60. The same cannot be said of the evidence of the Respondent. Evidence was led that vide the Gazette notice dated the 18/12/1981 the Commissioner of Lands called for applications for the allotment of 60 plots in Thika Municipality, one of which was Uns Plot 6 listed as No 6 in the Gazette Notice. Unchallenged evidence was led by the Respondent that he applied and paid an allocation fee of Kshs 1000/- where he was issued with an allotment letter dated the 11/8/1982. The allotment letter is for Uns. Plot No 6 – Thika Municipality advertised through Gazette Notice No 3893 of 31/12/1981.



The narration of the letter of allotment is in conformity with the Gazette Notice earlier alluded to. Similarly, the size of the land is 0.1056 ha for a period of 99 years from 1/7/1982

61. Upon allocation, he accepted the offer vide the letter dated the 28/8/1987 addressed to the Commissioner of Lands. He paid for the land vide receipt dated the 26/8/1987 in the sum of Kshs 40,512/- . The Respondent also led evidence that he has been paying land rates to the council as shown with the receipts thereof. That thereafter he took possession of the land and in 2004 - 2015 and allowed his nephew DW2 to occupy the land where he carried out subsistence farming. DW2 collaborated the evidence during the trial when he stated that his occupation was interfered with by Maasais on the adjacent plots, the reason why he vacated in 2015.
62. DW3, the Land administrator led evidence that the letter of allotment in the hands of the Respondent was genuine; neither the Appellant nor his father was issued with an allotment letter for the suit land by his office and that the allotment letter of the Appellant did not emanate from his office. Equally DW4 the Land Registrar, Thika confirmed that the suit land belonged to the Respondent.
63. In sum therefore the Court finds that the Respondent has proved the root of his title and the learned Trial Magistrate did not err in so holding.
64. Having held that the Appellant acquired no interest in the suit land and that at best his occupation and that of the said Kireru amounts to trespass, I shall now look at the second issue being the award of mesne profits and general damages.
65. The Court finds guidance in Section 2 of the Civil Procedure Act which defines mesne profits as follows:-

“mesne profits”, in relation to property, means those profits which the in wrongful possession.”

profits, but does not include profits due to improvements made by the person with ordinary diligence have received therefrom, together with interest on such person in wrongful possession of such property actually received or might

66. Order 21 Rule 13 of the Civil Procedure Rules provides as follows;

- (1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the court may pass a decree-
 - (a) for the possession of the property;
 - b. for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits;
 - c. directing an inquiry as to rent or mesne profits from the institution of such suit until—
 - i. the delivery of possession to the decree-holder;
 - ii. the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the court; or
 - iii. the expiration of three years from the date of the decree, whichever event first occurs.



Where an inquiry is directed under subrule (1)(b) or (1)(c), a final decree in respect of the rent and mesne profits shall be passed in accordance with the result of such inquiry.”

67. It is trite that mesne profits are a genre of special damages which must be pleaded and proved. The Respondent has sought a sum of Kshs 800,000/- under this heading in the written submissions. The Court did not receive evidence how this amount was arrived at. This could have been in form of rent valuation / assessment report by a registered valuer.
68. The Court finds that the trial Court did not err in not making any award.
69. On the question of general damages, it is trite that once trespass has been determined, then the same is actionable per se meaning that it matters not if the claimant suffered any actual or real damages for the Court to grant the same.
70. In this case, evidence has been led to show that the Appellant is occupying the suit land without any justifiable cause. The Appellant and the said Stephen Kireru are trespassers on the land from 2019 to date. I have considered the length of the trespass and the size of the land and the overall inconvenience that the Respondent has suffered and I order the sum of Kshs 1 (one) Million being general damages in favour of the Respondent
71. On the question of bias, the Court has carefully reviewed the evidence led by both parties and finds no evidence to support bias on the part of the trial Court.
72. The Appellant appears to argue an appeal on behalf of Stephen Kireru that he was not enjoined to the case and that adverse orders were issued against him. The said party was enjoined in the counterclaim of the Respondent. The record does show that he filed a defence to the same. The record further shows that he attended Court and testified. The Court finds that the said Kireru was notified of the case that faced him in Court and he was given the opportunity to state his side of the case. The ground that he was not party and therefore not accorded the opportunity to be heard at best is misleading and the same is disallowed.
73. In the end the appeal is unmerited. It is dismissed.
74. The cross appeal succeeds to the extent that the Respondent is awarded general damages for trespass in the sum of Kshs 1 Million.
75. The costs shall be in favour of the Respondent in the appeal and the cross appeal.
76. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 20TH DAY OF JUNE 2024
VIA MICROSOFT TEAMS.**

J G KEMEI

JUDGE

Delivered online in the presence of;

Macharia for Appellant

Bala HB Ms. Mbugua for Respondent

Court Assistants – Phyllis/Oliver

