



Chemai v Kanamoi (Sued as Legal Representative of the Estate of the Late Kanamoi Cheptoo Kimoituk) & another (Environment & Land Case 47A of 2012) [2024] KEELC 6233 (KLR) (30 September 2024) (Judgment)

Neutral citation: [2024] KEELC 6233 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 47A OF 2012
EO OBAGA, J
SEPTEMBER 30, 2024**

BETWEEN

DAVID KIPLETING CHEMEI PLAINTIFF

AND

**ABRAHAM KIPRONO KANAMOI (SUED AS LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE KANAMOI CHEPTOO KIMOITUK) 1ST DEFENDANT
THE ATTORNEY GENERAL (ON BEHALF OF THE UASIN GISHU DISTRICT, LAND DISPUTES TRIBUNAL) 2ND DEFENDANT**

JUDGMENT

1. This suit was commenced in the High Court on 26th October, 2007 by way of Plaint dated 25th October, 2007 which was amended on 29th September, 2010 and later transferred to this court. The Plaintiff sought the following prayers:-
 - a. A declaration that the proceedings and the award made by the 2nd Defendant Tribunal on 25th October, 2006 and the subsequent judgement and decree given pursuant to the said award in ELD CMCC Award No. 37 of 2006 between the Plaintiff and the 1st Defendant are illegal, null and void and without jurisdiction.
 - b. A declaration that the invasion and demolition of the Plaintiffs premises on is illegal, null and void and amounts to trespass.
 - c. An injunction permanently restraining the 1st Defendant, his servants and or agents from entering, trespassing into, constructing upon, occupying, transferring, encumbering and or otherwise interfering with land parcel number Uasin Gishu/Illula/288.



- d. General damages for trespass.
 - e. Special damages in respect of the said demolition expenses and losses as in paragraph 21(A) of the amended Plaint
 - f. Interest on (d) and (e) above.
 - g. Costs of this suit.
 - h. Any other or further relief as the court may be pleased to grant.
2. The Plaintiff's case is that he is the first registered owner of Uasin Gishu/Illula/288 measuring 6.0 Hectares (the suit property herein), his name was entered in the parcel's register on 9th October, 1992 and he was issued with a title deed on the same day. That in the same month, he took possession thereof and constructed a permanent dwelling house, a wooden store, a stone built store, 2 roomed chicken pen, a toilet, sunk two boreholes planted trees and established a brick making business thereon. He averred that he had peaceful possession for 15 years before the 1st Defendant lodged a complaint over the land with the 2nd Defendant claiming ownership thereto alleging it had been allocated to him by the Government on 12th September, 1981. The 2nd Defendant heard the dispute despite lack of a formal claim or Defence and declared the 1st Defendant the owner of the land. The 1st Defendant personally lodged the award dated 25th October, 2006 in court on 20th November, 2006 and judgment was entered on its strength. The Plaintiff alleged that the said award was never read/delivered to the parties and he had no notice thereof.
 3. The Plaintiff averred that the proceedings before the 2nd Defendant and the judgment entered were illegal, null and void and set out particulars thereto. He claims to have learned of the existence of the proceedings in ELD CMCC Award No. 37 of 2006 when he served with a notice and decree by the 1st Defendant's Advocate therein. That at the time, the 6 months statutory period for him to challenge the award had lapsed. He averred that the decree was at variance with the judgement of the tribunal as an eviction order was added to decree. He alleged that the 1st Defendant obtained the eviction order ex parte and without notice to him from the CM's court on 12th and 13th September, 2007 despite the fact that he was by this point represented by Counsel.
 4. The Plaintiff averred that pursuant to the fresh decree, the 1st Defendant, accompanied by the Police, went to the suit property and demolished his house and the other structures forcing him and his family to flee, leaving his employees and livestock behind. The Plaintiff alleged that he had suffered special damage and inconvenience particulars of which he pleaded therein separately, and claimed prayed for judgment on the same. The Plaintiff's case is that the 1st Defendant has not taken possession or effected registration of the land in his name. The Plaintiff acknowledged that aside from ELD CMCC Award No. 37 of 2007, there was ELD HCA 126 of 2007, challenging the lower court's refusal to set aside the ex parte entry of judgement.
 5. On the part of the 1st Defendant, there is filed a Further Amended 1st Defendant's Statement of Defence and Counterclaim amended on 15th February, 2022. In the said Defence, the 1st Defendant denied all the averments in the Plaint and averred that he is the original owner of the suit property having been issued with a letter of allotment on 12th September, 1981. He averred that upon allotment, he paid Kshs. 1,813/- itemised in the allotment letter as land deposit on 5th May, 1983. The 1st Defendant averred that he then built a house for his son, one William Kanamoi, who has been in occupation of and farming on the suit property. The 1st Defendant alleged that he filed a formal claim against the Plaintiff before the 2nd Defendant and the Plaintiff was himself present through to the close of pleadings. He added that the Plaintiff fraudulently caused the suit property herein to be registered in his name and he



listed the particulars of fraud. The 1st Defendant contended that as per provisions of the Registration of Lands Act, this suit could not be maintained. Further, that the suit against the 1st Defendant discloses no reasonable cause of action, and is among other things an abuse of court process and prayed that it be dismissed with costs.

6. In the Counterclaim, the 1st Defendant claimed that the Plaintiff had fraudulently caused the 1st Defendant's land to be registered in the Plaintiff's name denying him his proprietary rights. He asked for the title deed in respect of the suit property be recalled/cancelled and be issued to the 1st Defendant. His prayers were for orders that:-
 - i. A declaration that the 1st Defendant is the legal owner Uasin Gishu/Illula/288 in accordance with ELD CMCC Award no. 37 of 2006
 - ii. The title deed in respect of Uasin Gishu/Illula/288 registered in the name of the Plaintiff be recalled and issued to the 1st Defendant.
 - iii. An injunction permanent restraining the Plaintiff, his servants and or agents from entering, trespassing into, constructing upon, occupying, transferring, encumbering and or otherwise interfering with land Number Uasin Gishu/Illula/288.
 - iv. Costs of the counterclaim.
7. In response, the Plaintiff filed a Reply to the 1st Defendant's Statement of Defence. The Plaintiff denied all the contents of the 1st Defendant's Defence and reiterated the contents of the Plaintiff. The Plaintiff then added that a letter of allotment cannot confer title. The Plaintiff further averred that the 1st Defendant is barred by the Limitations of Actions Act. The Plaintiff specifically reiterated that no formal claim was lodged with the 2nd Defendant. The Plaintiff further denied all the allegations of fraud set out in the Defence. The Plaintiff opined that the 2nd Defendant had no jurisdiction to deal with the matter.
8. In his Defence to the Counterclaim, the Plaintiff denied all the averments in the Counterclaim and contended that he is the first registered owner of the suit property having acquired it for valuable consideration. That the 1st Defendant's claim is time barred, bad for non-joinder of parties and that there is no privity of contract between the Plaintiff and 1st Defendant to warrant grant of the reliefs sought. He further averred that the 2nd Defendant cannot found a case on ELD CMCC Award no. 37 of 2006 since the 2nd Defendant that made it had no jurisdiction.
9. In a Reply to the Defence to Counterclaim filed on 2nd November, 2010 the 1st Defendant denied the contents of the counterclaim and reiterated the contents of the Statement of Defence and Counterclaim. He prayed for judgment against the Plaintiff as prayed in the counterclaim.

2nd Defendant's Case;

10. The 2nd Defendant filed its defence on 6th March, 2008 also denying the averments in the Plaintiff. The 2nd Defendant alleged that the first registered owner of the suit property was the Settlement Fund Trustee. That the 1st Defendant properly lodged a complaint claiming ownership of the suit property, which dispute was heard to completion with the participation of both parties and a decision made by the 2nd Defendant. That the Plaintiff was at liberty to file a Defence if he wished to do so. The 2nd Defendant averred that the Decision was lodged in the magistrate's court for adoption per the Land Dispute Tribunals Act. It was averred that the 2nd Defendant thereafter became functus officio with no control over its adoption and implementation. The 2nd Defendant denied that the proceedings before it



were illegal and denied the particulars of illegality pleaded. The 2nd Defendant claimed that the prayers set out in the Plaintiff were not tenable and asked that the suit be dismissed with costs.

Hearing and Evidence:

11. Hearing of the suit commenced on 23rd January, 2023 with the Plaintiff testifying under oath as PW1 and adopted his witness statement dated 18th February, 2013 as his evidence-in-chief. He also produced the documents in his list of the same date as PEX1-18 and 19 respectively. PW1 testified that the suit property was allotted to him by the Settlement Fund Trust (SFT) in 1992 upon application. That it was one of the parcels where the original allottees did not take possession for a long time, thus the SFT and Commissioner decided to give them to new owners. PW1 testified that he was shown the site and beacons of the property by an SFT officer called Kamau. That he paid for the land, and although he couldn't recall the exact amount he paid, he recalled paying KShs. 179,741/-. He told this court that he did not know the previous allottee of the suit property.
12. PW1 testified that he thereafter processed the title deed (PEX1) and was registered as owner on 9th October, 1992 whereupon he took possession immediately. That he fenced it, built a temporary and later permanent home where he lives with his children and developed the property as shown in the valuation report. He stated that on 17th September, 2007 the 1st Defendant, who he came to learn was the original allottee but did not occupy the land for 15 years, came accompanied by the police and destroyed his property. PW1 testified that he was asked to attend the tribunal hearing and he did, but midway he was instructed to make photocopies and when he came back, the hearing had been concluded and the land given to the 1st Defendant. He insisted that there was nobody when he went to occupy the land and prayed that the court grant him the prayers in the amended plaint.
13. PW1 was cross-examined by Mr. Kigen for the 1st Defendant and testified that he did not have the letter of application to SFT in court. PW1 clarified that it is the SFT and District Commissioner, one Mr. Langat, who made the decision to re-allocate the suit property to him. He testified that he did not have a letter of allotment as the same was given to the original allottee, and that he processed his title from Nairobi. He testified that the letter of offer dated 23rd June, 1992 was given to him by the SFT at Eldoret and confirmed that he knew someone at the District Commissioner's Office. PW1 admitted that he was summoned to the DC's Office at Iten, and also admitted that he was informed that the land belonged to the school. PW1 told this court that he was evicted from the land and did not know who was in occupation. PW1 further admitted that he took part in the tribunal hearing. PW1 testified that he was told the land belonged to the 1st Defendant, who he now admitted was present the first time he was shown the land even though he had had no house thereon.
14. PW1 was also cross-examined by Mr. Gitahi for the 2nd Defendant, and testified that he had not produced any minutes to show that the DC and the SFT passed a resolution to re-allocate unoccupied parcels. He testified that he was aware there was a school claiming the suit property. PW1 testified that he had no document to show that the 1st Defendant was served with notice before the re-possession. On re-examination, PW1 testified that PEX7 was a letter of offer issued by the Director, Land Adjudication & Settlement allocating him the suit property. PW1 testified that per PEX16, the 1st Defendant only paid 10% for the plot later it was re-possessed and re-allocated to him.
15. PW2 was one Joseph Kipyego, a farmer who has lived in Illula for over 20 years. He testified under oath and adopted his witness statement dated 8th February, 2013 as his evidence-in-chief. PW2 testified that when the Plaintiff went to the land, he told them that he had been given the land and they should stop grazing their cows on the suit property, and he later came and farmed the land. PW2 recalled that people came with the police and demolished the Plaintiff's home.



16. On cross-examination by Mr. Kigen, PW2 testified that he comes from a kilometre away from the suit property. He testified that he went to the area in 1992 and there was no house before the Plaintiff came into the suit property. Mr. Gitahi for the 2nd Defendant did not cross-examine the witness and this marked the close of the Plaintiff's case.
17. On the part of the Defence, Abraham Kiprono Kanamoi, the legal representative of the estate of the 1st Defendant, testified on oath as DW1 and adopted his witness statement as part of his evidence. DW1 then testified that the original Plaintiff was his father. He produced an Official Search as DEX1. He testified that his father gave land on which a school was built in exchange for the Illula land, and he produced an exchange agreement as DEX2. DW1 testified that his father was given an allotment letter, which he produced as DEX3, and two receipts as proof of payment made thereon which he produced as DEX 4(a) and (b). He also produced a Charge document as DEX5. DW1 testified that his father and brother, William Kanamoi, took possession of the land. He testified that the Plaintiff came to the land with police and chased his brother away. That, they then filed a case at the Tribunal who ruled in favour of his father. DW1 pointed out that there was a letter dated 27th October, 2003 written to the SFT indicating that his father had died, yet his father died on 6th September, 2021 as per the death certificate produced as DEX6. DW1 testified that they could not go back to the land they gave out in Elgeyo Marakwet as there is a school on it.
18. On cross-examination by Mr. Mathai, DW1 testified that the Plaintiff is the registered owner of the suit property. He testified that the allocation of the land was done on 12th September, 1981. DW1 was shown the letter dated 20th February, 2004 and testified that it stated that his father failed to make payments. He testified that his father did not get title. DW1 was then cross-examined by Mr. Odongo and he testified that his father gave plot No. 216 to the school and in exchange, he was given the land at Illula. When referred to DEX4(a) and (b), DW1 testified that there was a payment of KShs. 1,813/- twice on the same day and added that his father cleared the balance. DW1 testified that he was not aware if his father transferred the land to the school. He testified that his father filed a case at the Tribunal, whose decision was not appealed. DW1 testified that it is his family that is occupying the Illula land. On re-examination, DW1 testified that the letter dated 11th October 1991 was addressed to Post Office Box No. 4035, which is not their postal address, they used Box No. 902.
19. The Defence called William Kanamoi as DW2, he also testified under oath and adopted his witness statement dated 2nd December, 2011 as his evidence-in-chief. He testified that he gave Chororget Primary School in Elgeyo Marakwet his land and was in turn given land at Illula in 1981. That he stayed on the land until 1992 when the Plaintiff chased him away from it and demolished the house that the school put up on his behalf. DW2 testified that the land was registered in the name of his father, Kanamoi Cheptoo.
20. DW2 was cross-examined by Mr. Odongo, whereby he testified that the land in Elgeyo Marakwet belonged to his father, who gave it to the school. He testified that the school did not give his father the Illula land. He reiterated that the Plaintiff is the one who chased him from the Illula land. DW2 testified that it is the School which built him a house and he was ready to give the title to the Elgeyo Marakwet land to the school.
21. DW2 was further cross-examined by Mr. Mathai and he testified that the Illula land was given by the school. He testified that his father owned the land in Elgeyo Marakwet that he exchanged with the school. He conceded that he had no evidence to show he had constructed on the suit property. DW2 testified that he was 22 years old in 1981 and was privy to the exchange agreement. He added that his father did not pay any money for the Illula land, save for KShs. 40,000/- that he paid as rent for the Illula land. He clarified that his father was staying at the Chororget land and the Illula land had no



- owner. DW2 was re-examined, and he testified that the school was on separate land before it took the Chororget land from his father.
22. DW3 was one Edwin Kiprop, a parent at Chororget Primary School, who then became its chairman in 2008. He testified under oath and adopted his statement dated 2nd December, 2011. DW3 testified that in 1979, the school agreed to exchange Plot No. 288 at Illula Settlement Scheme with Plot 216 belonging to Kanamoi Cheptoo. DW3 testified that the school put up permanent buildings for Kanamoi Cheptoo and his son William to go stay in Illula, but Kanamoi only sent his son William to Illula. DW3 testified that William came back in 1991 claiming to have been chased away from the Illula land and the family started grazing their cows on the school land. That they reported to the DC, Keiyo who sent them to the DC of Uasin Gishu District. He added that the DC Uasin Gishu then appointed a Tribunal who ruled that David Kipleting was to move out of the land. DW3 testified that David appealed and the High Court quashed the Tribunal Verdict. He testified that the school still sits on Plot 216 and Kanamoi moved to a small plot near the school.
 23. DW3 was cross-examined by Mr. Odongo and he testified that the Illula land had been set aside for a school. DW3 testified that Kanamoi Cheptoo was given Plot 288 Illula under a duly witnessed exchange agreement, which the school has never renounced. DW3 confirmed that although the letter of registration shows the school is on Plot 288 Illula, it is actually on Plot 216, even though it has no title thereto. He testified that the Letter of Allotment dated 12th September, 1981 to Kanamoi Cheptoo is the correct position. DW3 testified that he had never seen any letter that Kanamoi Cheptoo was not the owner of Plot 288, neither had seen any allotment letter in favour of the Plaintiff other than the title deed. That the title held by David Kipleting has no root.
 24. DW3 was then cross-examined by Mr. Mathai, upon which he conceded that he had not supplied minutes showing his appointment as the chairman. He testified that there was no allotment letter in favour of the school in respect of the Illula land. DW3 was shown DMFI7 and he testified that the school was registered in 2006 under Ref. G/BE/163/2006. DW3 testified that as 1979, neither Kanamoi nor the school had a letter of allotment. He testified that as of 26th October, 1992 there was no allotment to Kanamoi Cheptoo. DW3 was also shown DMFI9 which was a letter dated 27th October, 2005 addressed to the Tribunal informing it of the re-allocation of the Illula land to David Kipleting. DW3 confirmed that they had never filed any suit against the occupant of the Illula land. That he was aware the verdict was set aside.
 25. On re-examination, DW3 testified that DEX2 was signed by the Chairman of the Board and the Treasurer. He was shown the letter dated 27th October, 2005 which, he testified, indicated that Kanamoi Cheptoo had died whereas he was alive as of that date. He was also shown the letter dated 11th October, 1991 sent to P.O. Box 4035 and testified that it was not correct as Kanamoi's address was 902.
 26. The Defence next called Musa Kipkoech, a head teacher of Chororget Primary School between the years 2010 and 2015, as DW4. He also testified under oath and adopted his witness statement dated 2nd December, 2011 as his evidence-in-chief. DW4 testified that the school was registered in 2006 under Plot No. 288 Illula, which had been set aside for public utilities, and he produced the Registration Certificate as DEX7. He confirmed however that the school is actually built on Plot 216 that belonged to Kanamoi Cheptoo. He reiterated that there was an exchange agreement with respect to the two plots.
 27. Under cross-examination by Mr. Odongo, DW4 testified that the school was established in 1980 as a public school, before that it was an ECDE Centre in 1970. DW4 testified that the Certificate for registration was being renewed after every 3 years on temporary basis until it was permanently registered in 2008. He reiterated that Kanamoi Cheptoo exchanged his plot 216 with Illula Plot



- No. 288 hence the exchange agreement of 13th November, 1971 between the School and Kanamoi Cheptoo. DW4 testified that before the *Basic Education Act*, Schools operated under the Education Act, which allowed the School and other individuals to sign agreements.
28. DW4 was also cross-examined by Mr. Mathai, where he testified that he did not have the temporary certificates of registration for the school in court. DW4 acknowledged that a school had to be registered in the first place. DW4 testified that the school was never issued with any allotment letter. He added that the registration of the School under Plot No. 288 was meant to show that the plot was public land as a sign of ownership. He also testified that he did not have any documents to show transfer of ownership from Kanamoi Cheptoo to the school. DW4 testified that the first allotment was in 1981 to Kanamoi Cheptoo. He further testified that as per his statement, Plot 216 was being shared by 3 sons of Kanamoi Cheptoo who agreed to transfer the land in exchange for several parcels in Uasin Gishu. He was not re-examined.
29. Lastly, Moses Kipyego Yator, a retired Senior Chief, testified under oath as DW5. He testified that he was a senior chief of Mosop Location in Elgeyo Marakwet, where the school is situated. He testified that the school is situated on Plot No. 216, which was donated by Kanamoi Cheptoo who was as a result given Plot No. 288 at Illula Settlement Scheme. DW5 testified that he wrote a letter dated 26th October, 1992 to the Settlement Officer that Kanamoi Cheptoo had given land for building a school, and he produced it as DEX8.
30. DW5 was cross-examined by Mr. Mathai and he stated that Kanamoi Cheptoo gave his land before the plot at Illula was given. DW5 testified that the records at Illula show that the owner of Plot no. 288 is Kanamoi Cheptoo. He also testified that he did not know how the Plaintiff went to occupy Plot No. 288 at Illula. On further cross-examination by Mr. Odongo, DW5 testified that the suit property was given to Kanamoi Cheptoo, who was required to pay KShs. 1,813/- to the SFT, which amount he paid on 5th May, 1983. He testified that he had not seen any letter cancelling the allocation to Kanamoi Cheptoo. He added that the land at Illula belongs to Kanamoi Cheptoo. DW5 was not re-examined and the 1st Defendant's case was closed.

Submissions:

Plaintiff's Submissions;

31. The Parties complied with the court's directions and filed written submissions, with the Plaintiff's Submissions dated 20th May, 2024. Counsel for the Plaintiff submitted that the Plaintiff was issued with a title deed on 9th October, 1992 under the Section 32(2) of the repealed Registered *Land Act*, which provides that the title was prima facie evidence of the matters showed therein. He submitted that the said provision is synonymous with Section 26(1) of the *Land Registration Act* No. 3 of 2012. That the Section 26(1) read with Section 25(1) thereof is clear that, a title deed is prima facie evidence of ownership and is indefeasible except for the vitiating factors provided by the Act, and that it entitles the owner to the privileges appertaining thereto. Counsel listed the vitiating factors as fraud or misrepresentation to which a one is proved to be a party, or where the title is acquired illegally, un-procedurally or through a corrupt scheme. In support of his arguments, Counsel relied on Elisha Makeri Nyangwra v Stephen Mungai Njuguna & Another [2013] eKLR.
32. Counsel submitted that the repealed Land Disputes Tribunals Act at Section 3(1) did not empower the 2nd Defendant to hear disputes relating to ownership of land, hence its decision was null and void. He pegged his argument on Mbogo Mwathi vs John Chege Mbogo [2002] eKLR, James Amukoye Were v Lurambi Divisional Land Disputes Tribunal & Another [2006] eKLR and Senele Mato v Eastern Province Land Dispute Committee & Another, Nairobi Misc. - CA 331 of 2002. Counsel submitted



that Jurisdiction flows from either *the Constitution*, legislation or both, and since the 2nd Defendant lacked jurisdiction to entertain the dispute, the award given thereunder was null and void, without legal effect even after being adopted, and the Decree was unenforceable. He submitted that consequently, the eviction of the Plaintiff was illegal and unlawful. For this, Counsel cited Samuel Kamau Macharia v Kenya Commercial Bank Limited & 2 Others [2012] eKLR and Macfoy v United Africa Co. Ltd [1961] All ER, 1169.

33. Flowing from the above, Counsel also submitted that since the eviction was commenced through a defective decree which was not served on the Plaintiff, the invasion into the Plaintiff's land and destruction of his property was illegal and unlawful. He cited the case of Atik Mohamed Omar Atik & 3 Others vs Joseph Katana & Another [2019] eKLR. Counsel further submitted that the 1st Defendant's actions amount to trespass and the Plaintiff is thus entitled to general damages for trespass (Phillip Ayaya Aluchio v Crispinus Ngayo [2014] eKLR). Counsel was of the opinion that the Plaintiff should be awarded KShs. 10,000,000/- in general damages. Counsel submitted that the Plaintiff had also proved his claim on special damages by producing a valuation report confirming the amount of KShs. 3,155,027.50 pleaded at paragraph 21A of his Amended Plaint. That the Plaintiff by, he relied on Joseph Kipkorir Rono v Kenya Breweries Limited & Another, Kericho HCCA No. 45 of 2015.
34. On impeachment of the Plaintiff's title, Counsel asserted that the Plaintiff had acquired the suit land procedurally. Counsel submitted that fraud must be specifically pleaded and proved, and that the standard of proof is higher than that required in ordinary civil cases. Counsel argued that the 1st Defendant had neither proved the fraud pleaded in his Defence against the Plaintiff, nor proved that the Plaintiff obtained the land through fraud, un-procedural means, corrupt ways or misrepresentation. Counsel referred the court to the cases of Alice Chemutai Too v Nickson Kipkurui Korir & Others [2015] eKLR, Vijay Morjaria v Mansingh Madhusingh & Another [2000] eKLR and Kinyanjui Kamau v George Kamau [2015] eKLR. With regards to the 2nd Defendant, counsel submitted that the failure to call witnesses means that the case against the 2nd Defendant remains unchallenged (Linus Nganga Kionge & 3 Others v Town Council of Kikuyu [2012] eKLR). Relying on Jamili Kiombe Lidodo v Emily Jerono Kiombe & Another [2013] eKLR, Counsel further submitted that the suit is properly before this court and that the Plaintiff had successfully discharged his burden of proof on a balance of probability. He thus urged this court to grant the orders sought in favour of the Plaintiff, and prayed that the 1st Defendant's Defence and Counterclaim be dismissed with costs.

1st Defendant's Submissions;

35. The 1st Defendant also complied by filing his submissions dated 14th May, 2024. Counsel reiterated the averments in the Defence and counterclaim as well as the testimonies of the Defence witnesses. Counsel then pointed out that the unexecuted legal documents were sent from the Land and Settlement office in Nairobi on 1st October, 1991 while the letter sent to the 1st Defendant dated 11th October, 1991 confirming that the letter for executed documents was sent even before sending the documents to the 1st Defendant. Counsel submitted that it is a legal requirement that for a plot to be re-possessed by the settlement office, a notice to remedy breach of conditions must be served on the allottee, but this procedure was not followed, and further, that the Plaintiff has not produced any notice to remedy breach.
36. Counsel further submitted that having been reserved for Chororget Primary School, the suit property was designated for public use, rendering it a public utility. The same could not be described as un-alienated public land and was not available for alienation to the Plaintiff. Counsel argued that the Commissioner of Lands as a Trustee was entrusted to keep the land for use by the public and he could not breach his trust by allotting the land to the Plaintiff. Counsel based his arguments



on Nakuru ELC No. 228 of 2018, John Edward Njeru & Another v Commissioner of Lands & Others. He further urged the court to consider that public interest must outweigh private interest. For this argument, Counsel cited James Joram Nyaga v AG & Another [2007] eKLR and Kenya Anti-Corruption Commission v Liona Limited & 2 Others [2019] eKLR. Counsel asserted that the purported transfer of the land to the Plaintiff amounted to a second allocation, which was illegal and fraudulent (Kenya Anti-Corruption Commission v Fawn Investment Limited & 6 Others [2020] eKLR). Counsel submitted that the suit be dismissed and the counterclaim be allowed.

Analysis and Determination;

37. This Court has considered the pleadings filed by the parties, the testimonies and evidence tendered by the various witnesses, the submissions filed as well as the authorities cited therein, and the relevant provisions of the Law. The court has set apart the following issues for consideration:-
- a. Whether the Uasin Gishu District Land Disputes Tribunal had the requisite jurisdiction to hear and determine the dispute and the effect of the decision emanating therefrom
 - b. Whether the Plaintiff obtained the suit property fraudulently
 - c. Whether the title deed issued over the suit property in the name of the Plaintiff should be cancelled
 - d. Whether the Plaintiff is entitled to general and special damages arising from his eviction from the suit property
 - e. Whether the 1st Defendant's Counterclaim has merit
 - f. Who should bear the costs of this suit?

a. Whether the Uasin Gishu District Land Disputes Tribunal had the requisite jurisdiction to hear and determine the dispute and the effect of the decision emanating therefrom

38. From the testimonies given and evidence adduced, my construction of the events in this case is that the 1st Defendant gave his plot of land known as Plot. No. 216 to Chororget Primary School to build classes and in return, he was given Uasin Gishu/Illula/288. Consequently, the 1st Defendant was issued with a letter of allotment dated 12th September, 1981. The letter did not come with any pre-conditions other than informing the 1st Defendant to not visit the settlement scheme to allow the surveyors carry out the demarcation of the plots without any hindrance or pressure. The letter did not indicate anything about payment of any money save for a handwritten endorsement at the top thereof that reads "To pay 1813/-" with no indication that there was a further amount to be paid thereafter, or that the said amount it was a percentage of any whole. The 1st Defendant complied and paid KShs. 1,813/= as evidenced by the receipt dated 5th May, 1983.
39. It is purported that the documents for processing the title in his favour, including a Charge were sent to the District Settlement Office in Eldoret for execution by the 1st Defendant, but it is alleged in the letter dated 16th October, 2006 that he did not appear. However, the 1st Defendant testified that the letter from the Settlement Office, Uasin Gishu District, used the wrong postal address and the letter never got to him. The land was then allegedly repossessed and re-allocated to the Plaintiff, who was subsequently registered as proprietor thereof. Pursuant to his registration, he went to the land and evicted the 1st Defendant's son, William Kanamoi, resulting in the dispute at the 2nd Defendant Tribunal that was decided in favour of the 1st Defendant.



40. The Plaintiff contended that the Tribunal had no jurisdiction given to determine the dispute the way it did because it dealt with an ownership dispute, which was a matter that was outside of its mandate. The jurisdiction of the Land Dispute Tribunals was given as Section 3(1) of the Land Disputes Tribunal Act CAP 303 A(repealed) which provided that:

“Subject to this Act, all cases of a civil nature involving a dispute as to:-

- (a) the division of, or the determination of boundaries to land, including land held in common;
- (b) a claim to occupy or work land; or
- (c) trespass to land shall be heard and determined by a Tribunal established under section 4.”

41. This court was not fortunate enough to see the complaint or claim presented before the 2nd Defendant. The proceedings have however been availed and the court has had a chance to peruse the same and notes that the decision was that:-

“(a) Having heard and considered the representation of all the parties and witnesses, and having considered all the documents submitted to us, we hereby decide jointly and accept the fact that there was clear collusion in part of those Land Settlement Officers who were at the District Level, Head Office in Nairobi and the objector in relation to the plot no. UG/Illula/288 which brought about this very dispute to the surface.

(b) It is our humble submission and decision that the title deed in the name of David Kiplating Chemei who is the objector and which is his custody was acquired in an unusual way and should be recalled back to be issued to the right owner. In an event he refuses to part with it, be cancelled (sic). The Claimant Kanamoi Cheptoo Kimoituk be restored in his land which was duly allocated to him. It is also our decision that all structures in plot No. 288 Illula Settlement Scheme in Uasin Gishu District be removed by the objector.”

42. From the above extract, it is apparent that the 2nd Defendant was clearly was making a determination on the ownership of and title to the land. However, the jurisdiction flowing from Section 3(1) above does not include disputes on ownership and title to land. In Joseph Malakwen Lelei & another v Rift Valley Land Disputes Appeals Committee & 2 others [2014] eKLR, the Court of Appeal restated the law relating to jurisdiction of Land Disputes Tribunal and states as follows:

“On the issue of jurisdiction, we note that the law on this issue is settled and we do not need to belabour it. Section 3 of the Land Disputes Tribunal Act (repealed) gives jurisdiction to the Land Disputes Tribunal to handle claims in the following matters only:

“3(1) subject to this Act, all cases of a civil nature involving a dispute as to:-

- (a) The division of, or the determination of boundaries to land, including land held on in common,
- (b) A claim to occupy, or work land or
- (c) Trespass to land.”



Evidently, the above provision does not include jurisdiction to deal with issues of determination of title to or ownership of registered land... Having found that the Tribunal and the Appeals Committee lacked jurisdiction to arbitrate on the matter before them, then all other grounds become moot. We say so because it is trite that where a court or tribunal takes upon itself to exercise a jurisdiction which it does not possess, its proceedings and decisions are null and void. It then follows that every other proceeding, decision, or award that results from such a process must be construed as a nullity...”

43. There is no doubt that the dispute between the Plaintiff herein and the 1st Defendant was primarily a dispute pertaining to ownership of the suit property. This court is satisfied that the 2nd Defendant went beyond its jurisdiction when it purported to hear and determine the dispute relating to ownership of land and purported to award it to the 1st Defendant. The 2nd Defendant acted in excess of the jurisdiction donated under Section 3(1) of the Land Disputes Act (now repealed). This position was reiterated by the Court of Appeal in Hezekiah Kungu Kinuthia v Ernest Kamau Kinuthia [2002] eKLR, where it held that:-

“Arbitration by elders constituting a land disputes tribunal is not intended to deal with matters connected with title to land so as to reverse the provisions of statute and redistribute land and reallocate titles to land; nor can such arbitration get into trust law. Legal issues of adverse possession, the trust concept, and the land laws of this country, are simply beyond even the slightest comprehension of lay tribunals however much the pretensions of grasp may be. This reality aside, the statute creating these tribunals and defining their jurisdiction loudly excluded these complicated concepts and fundamental rights from the jurisdiction of the tribunals.”

44. The Court of Appeal in the above case went further to prescribe the effect of a decision made by a Land Dispute Tribunal acting outside of its jurisdiction in the following words:-

“Any decision of a land disputes tribunal which impinges upon the title of a proprietor of land, or which is based on the trust concept must be struck down as a nullity, and it will be set aside... I hold that the tribunal adjudicated over matters and questions beyond its jurisdiction, namely, title to land and trust issues, and by reason thereof its decision was a nullity. And, as a nullity there was nothing which the magistrate’s court could record as a judgment of the court. Accordingly, this court orders the setting aside of the proceedings before the relevant tribunals and the judgment entered on the basis of the tribunals’ awards, and I further order that any order made after the nullified judgment is also a nullity and of no effect.”

45. This court agrees with the Plaintiff that since the 2nd Defendant lacked jurisdiction to entertain the dispute, any decision arising from its deliberations is null and void, as has been shown from the above decisions of the superior court. Consequently, even the subsequent adoption by the Magistrate’s Court did not sanitise the decision of the 2nd Defendant, and the eviction order arising therefrom is equally null and void.
46. This finding does away with the allegation that the Plaintiff was not served with notice, was not aware of and did not participate in the proceedings at the Tribunal. I have to point out however, that those allegations on the part of the Plaintiff were not truthful, the proceedings indicate that he attended the Tribunal. There is a letter from his Advocates asking that the matter be moved to another date to



accommodate counsel handling the matter because he was engaged in another matter before court on the date fixed for hearing before the Tribunal.

b. Whether the Plaintiff obtained the suit property fraudulently

47. This issue arises out of the fact that the Plaintiff holds title to the suit property herein. The Plaintiff claimed that by virtue of Section 32(2) of the repealed Registered Land Act, the statute under which the title was issued, the title is indefeasible. He Submitted that this provision is synonymous with Section 26(1) of the Land Registration Act, which is to the effect that the title can only be challenged on grounds of fraud or misrepresentation to which the person is proved to be a party, or where it was acquired illegally, un-procedurally or through a corrupt scheme.
48. As it is, the 1st Defendant did in fact challenge the Plaintiff's title on account that it was acquired through fraud, thereby challenging the very root of the Plaintiff's title. The 1st Defendant even submitted that since the land was initially reserved for the school, it is public utility land and was not available for re-allocation to the Plaintiff. It befalls this court therefore to investigate the manner in which the Plaintiff acquired the suit property to determine if the process was fully above-board. Courts have held that where the registered proprietor's root title is under challenge, he is obliged to prove the legality of the title and show that the acquisition was legal, formal and free from any encumbrance. See the Supreme Court decision of Dina Management Limited v County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR), where the apex court held that:-
- “ 93. As held by the Court of Appeal in Munyu Maina vs Hiram Gathiha Maina Civil Appeal No 239 of 2009 [2013] eKLR, where the registered proprietor's root title is under challenge, it is not enough to dangle the instrument of title as proof of ownership. It is the instrument that is in challenge and therefore the registered proprietor must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal and free from any encumbrance including interests which would not be noted in the register.
94. To establish whether the appellant is a bona fide purchaser for value therefore, we must first go to the root of the title, right from the first allotment, as this is the bone of contention in this matter.”
49. The Plaintiff's case is that he got information that there were parcels available and applied to be allocated one. There was no letter of application produced in court to prove this allegation. Despite this, the Plaintiff was issued with a Letter of Offer dated 23rd June, 1992 under which he was to pay a 10% deposit within 90 days. The Plaintiff testified that the letter of offer dated 23rd June, 1992 was given to him by the SFT at Eldoret, although it is clear that it emanated from the Land Adjudication & Settlement Office in Nairobi and was only copied to the Eldoret Office. Notably, the 1st Defendant's letter of allotment also was sent from the Department of Settlement in Nairobi, it was addressed directly to him. Nevertheless, the Plaintiff was issued with a Title Deed dated 9th October, 1992 showing he was now the owner, which information is repeated in the Official Search dated 2nd October, 2007. I note however, that the Plaintiff in his testimony admitted that from the said Search, his name appeared as entry number 2. I have looked at the said document and have confirmed it does, I have also noted there is no information on what the first entry was.
50. As for the 1st Defendant, he never got title to the suit property. According to the evidence, he never got the Charge or the other accompanying documents he was to sign to enable the title to be processed in his name. PEX9 is a letter dated 11th October 1991 addressed to the 1st Defendant herein asking him to



- appear before the District Land Adjudication Office and sign documents for the plot. DW1 testified that the postal address used on the said letter is 4305, Eldoret but that it was not their postal address. It appears that this is the reason the letter never got to the 1st Defendant. This solves the mystery as to why the 1st Defendant never appeared to execute the documents to enable him get the transfer. Why this is suspicious is because there is no explanation where the new address came from. Not even the Letter of Allotment to the 1st Defendant was sent through the said address, and it is rather suspicious that this is the only correspondence that was sent using that particular postal address.
51. Indeed, in the 1st Defendant's letter dated 14th September, 2005 he indicated his postal address as 902 Eldoret. This letter was written 2 years before filing of this suit in the High Court, so this is not just a fabrication to lure the court into believing that the documents were never sent to him. One wonders, how the same office could on other occasions get corresponded to the 1st Defendant without a hitch, but for this very important information regarding his land, the office somehow wrongly addressed his letter. One must bear in mind that the Plaintiff himself testified on cross-examination that he knew someone at the District Commissioner's Office, it is not far-fetched to presume that this made-up address was only used to divert the letter and pave way for allocation of the land to the Plaintiff.
52. It was also alleged that the suit property was re-possessed from the 1st Defendant and re-allocated to the Plaintiff. Three letters speak to this alleged re-possession of the suit property from the 1st Defendant due to failure to pay the requisite fees on time. PEX16 is a letter dated 22nd July, 2003 from the Uasin Gishu District Land Adjudicator, a Mrs. Y. M. Ogega, to the Director of Land Adjudication and Settlement. The letter states that records in their office indicate that the land was repossessed vide Notice Ref. No. DS/EST/Illua/VOL.II/65 dated 6th February, 1992. This information is reiterated in the letter dated 20th February, 2004 by the same Mrs. Y.M. Ogega to the District Land Registrar produced as PEX17. The said Mrs. Y.M. Ogega again wrote to the DC, Uasin Gishu District vide letter dated 10th February, 2006 produced as PEX 15, reiterating this information. In PEX 15 and PEX17, Mrs. Ogega also included the information that the 1st Defendant was issued with a Notice to Remedy Breach of Conditions but he did not respond.
53. It is not clear exactly whether a Notice to remedy breach was actually sent. In PEX16 Mrs. Ogega indicates that the Notice to Remedy Breach sent to the 1st Defendant was Ref. No. DS/EST/Illula/VOL.II/65 and dated 6th February, 1992. On the other hand, in PEX17, the same Mrs. Ogega stated that this letter dated 6th February, 1992 was the Notice Ref. No. DS/EST/Illua/VOL.II/65 through which the suit property was repossessed. It is not possible that the Notice to Remedy Breach of Conditions and the notice for repossession of the land were one and the same letter, being Ref. No. DS/EST/Illula/VOL.II/65 and dated 6th February, 1992. Logically, one must come before the other and it is quite clear even to a lay mind which of the two documents should precede the other. Notably also, neither the Notice to Remedy Breach of Conditions nor the Notice to repossess were produced in this court.
54. There is also the allegation that the 1st Defendant did not complete his payment for the land. As discussed earlier on in this decision, the 1st Defendant's Letter of Allotment did not come with any pre-condition on the amounts to be paid for the land aside for the hand-written endorsement that the 1st Defendant paid KShs. 1,813/-. There is no evidence that this was not the full amount and that there was any pending balance. In any event, I find it difficult to believe that the SFT would have prepared the charge for execution by the 1st Defendant if he had not cleared the amount indicated in the letter of allotment. Any further conditions for payment of money by the 1st Defendant is contained in the un-executed Charge, which it now appears the 1st Defendant never set his eyes on, thus he cannot be said to have defaulted on the loan to warrant a notice to remedy breach thereof.



55. The Plaintiff spoke of a decision by the DC and the SFT to re-allocate the parcels whose owners had not taken occupation of for a long time. A decision of such importance could not have been undertaken without official deliberation and a resolution being made, however, there seems to have been no official communication for taking such a decision, and indeed there were no minutes indicating that indeed such a resolution was made.

56. All these events put together cast a shadow over the process by which the Plaintiff obtained the suit property. Courts have held time and time again, that the title deed is the end result of a process. Therefore, where the root of a title is challenged, it is up to the registered owner to prove that the process through which he acquired title was clean. In *Munyu Maina v Hiram Gathiha Maina* [2013] eKLR, the Court of Appeal held that:-

“It is our considered view that the respondent did not discharge the evidential burden to rebut the testimony of the appellant that it was their deceased father who put both of them into possession of the suit property and to occupy the same in equal share. We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant’s testimony. We find that a trust exists in relation to the suit property.”

57. It is also the law that he who alleges must prove as is provided under Sections 107, 108 and 109 of the *Evidence Act*, CAP 80 Laws of Kenya which provide that:-

“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.

108. Incidence of burden.

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact.

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

58. If the Plaintiff desired this court to believe that the land was lawfully re-possessed due to default on the part of the 1st Defendant, he should have provided the evidence in support of these allegations. The Plaintiff did not do this, resorting instead to the proverbial dangling of his title deed and claiming indefeasibility. By failing to prove that the process used in acquiring title to the suit property was clean and above board, the Plaintiff failed to discharge his evidentiary burden. And in failing to do so, he



also failed to defend the root of his title. The result is that this court finds that the Plaintiff's title was acquired fraudulently and/or un-procedurally.

c. Whether the title deed issued over the suit property in the name of the Plaintiff should be cancelled

59. The Plaintiff was issued with a title deed dated 9th October, 1992. The 1st Defendant has sought for the cancellation of the title deed issued to the Plaintiff. It is trite law that the registration of a person as proprietor and the Certificate of title issued upon such registration is conclusive proof that such person is the owner of the property. However, the holding of such title is not absolute as the same may be impeached on the grounds set out at Section 26 (1)(a) and (b) of the *Land Registration Act*, which are;

- “(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, un-procedurally or through a corrupt scheme.”

60. Aside from the fact that the law does not protect a title that is not properly acquired, it grants the court power to cancel such a title under Section 80(1) of the *Land Registration Act*, which provides that:-

“Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”

61. In the case of *Alice Chemutai Too v Nickson Kipkurui Korir & 2 Others* [2015] eKLR, the Court held that:-

“It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, un-procedurally, or through a corrupt scheme. I do not see how a person with a perfectly good title should be deprived of his title by activities of fraudsters. It is in fact time to put down our feet and affirm that no fraudster, nor any beneficiary of fraudulent activities, stands to gain for his fraud, and no title holder will ever be deprived of his good title by the tricks of con artists.”

62. This Court has found that the 1st Defendant has established on a balance of probability that the Plaintiff's title was fraudulently and/or un-procedurally. There is no cogent reason then, why the Court should not exercise its power donated under Section 80 above and cancel it.

d. Whether the Plaintiff is entitled to general and special damages arising from his eviction from the suit property

63. The Plaintiff claimed that since the decree that led to his eviction emanated from defective proceedings, the 1st Defendant's actions of evicting him and destroying his property was null and void. The Plaintiff asserted that the 1st Defendant's entry into the land by virtue of the said decree amounted to trespass. The Plaintiff therefore sought compensation by way of general and special damages as pleaded in the Plaint. Section 3(1) of the *Trespass Act* provides that:

“Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”



64. The definition of trespass arising therefrom is that it is an intrusion by a person into the land of another who is legally in possession and/or ownership. It follows therefore, that a claim for trespass must be brought by a person with a legal interest in the land, such as the registered owner thereto or by a third party claiming a beneficial interest such as a tenant. Once a party proves trespass, they are entitled to damages without requiring further proof thereof. See the case of Duncan Nderitu Ndegwa v KP& LC Limited & Another [2013] eKLR where it was held that: -

“...once a trespass to land is established it is actionable per se, and indeed no proof of damage is necessary for the court to award general damages.”

65. I note that indeed, the decree used to evict the Plaintiff from his property arose from proceedings that this court has nullified, and is itself null and void. In any other circumstances, the Plaintiff's claim on trespass would at this point have been valid. If for instance, the Plaintiff had been held to be the rightful owner of the suit property herein and his title upheld, then this court would have no reservations about awarding him the damages that would have been his as of right. However, from the testimonies of the Defence witnesses, the 1st Defendant first lived on the suit property. The previous administration of Choroget Primary School testified that the school put up a house on the suit property for the 1st Defendant where his son William lived. Using his defective title, the Plaintiff went to the land and evicted William, in the process demolishing the house that had been built for him. It could be argued that the Plaintiff knowingly went into land that belonged to someone else, and he should have expected that the said action would have consequences, which include eviction as was done, albeit through a defective decree.

66. In addition, this court has made a finding that the Plaintiff is not the proper owner of the suit property, and he therefore has no legal interest in the suit property. There cannot be trespass where the claimant has no interest, or where the title relied on by the claimant was irregularly obtained. It will be inequitable that the wrongdoer be allowed to profit from his wrongs. Similarly, compensating the Plaintiff for losses incurred during his eviction from land that was not regularly acquired is akin to allowing him benefit from his wrongdoing. The Court of Appeal case of Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri [2014] eKLR held as follows:-

“This court is a court of equity; equity shall suffer no wrong without remedy. No man shall benefit from his own wrong doing, and equity detests unjust enrichments. This court is bound to deliver substantive rather than technical and procedural justice.”

67. Consequently, this court finds that the Plaintiff is not entitled to either general or special damages arising out of eviction from the suit property, registration of which he obtained fraudulently.

e. Whether the Defendant's counterclaim has merit

68. The 1st Defendant brought a counterclaim against the Plaintiff, seeking among other prayers cancellation of the Plaintiff's title and registration as the proprietor of the suit property. The 1st Defendant produced before this court an Exchange Agreement dated 13th November, 1979. Under the said Agreement, the school which had been allocated the suit property exchanged it with the 1st Defendant's land which was referred to throughout this hearing as Plot No. 216, but is actually known as Mosop/Choroget/216. All the Defence witnesses testified to the fact that the school still sits on the said land to date.

69. The Plaintiff challenged the 1st Defendant's counterclaim, alleging that the land was repossessed and re-allocated to him by the SFT and DC who made a decision to re-allocate un-occupied parcels. This



allegation was never proved because as already pointed out earlier, there was no official communication tabled showing how and when this decision was reached, or if at all it was made. That aside, from the testimonies of the Defence witnesses and the evidence adduced, it is very apparent that the suit property was set aside to be used to put up for a public school. And while there is a trail showing how the land that was public property, came to be in the 1st Defendant's hands despite the fact that it was public utility land, there is no explanation as to how the Plaintiff, somehow, managed to obtain a letter of offer and later registration as proprietor thereof.

70. I am alive to the prevailing jurisprudence emanating from superior courts that a letter of allotment cannot confer transferable interest in land as submitted by the Plaintiff. However, the 1st Defendant herein was not transferring his interest in any way or claiming to be the registered owner thereto. Having paid the KShs. 1,813/-, he had complied with the conditions on the said allotment. He then complied with directions on the Letter of Allotment and the instructions that he should await further communication from the Land Settlement and adjudication Office. This communication never came, and the reason has been unveiled above in the mystery of the wrongly addressed letter.
71. Once allotment letter was issued and the 1st Defendant met the conditions thereto by paying the required amount of KShs. 1,813/- as indicated in the letter of allotment, the suit property was no longer available for allotment. The allegations of non-loan repayment brought up in the letter dated 16th October, 2006 (PEX14) is illogical. The simple reason for this is that, without signing the charge, the 1st Defendant could not be expected to repay the SFT loan as he was not even aware what amounts he ought to have been paying. There was no reason therefore for the Notice to Remedy Breach to be issued, if at all that was done, because no breach had occurred. Secondly, as already indicated, this court has not seen any document claiming to the purported Notice to Remedy Breach of Conditions allegedly issued to the 1st Defendant. As matters stand, the allocation of the suit property to the 1st Defendant was never cancelled, and if there was such an intention, then the proper procedure was not followed. In the case of Ali Gadaffi & another vs Francis Muhia Mutungu & 2 others [2017] eKLR my brother Justice Olola held as follows:

“Where land has been allocated, the same land cannot be reallocated unless the first allocation is validly and lawfully cancelled. There can never be any allocation unless the land is an unalienated land. Consequently, when the Appellant was allocated the land on 27th April 1998, he acquired a legal interest, which could not and was not defeated by the purported subsequent allocation to the 2nd Respondent, on 6th May 1998. As at 27th April 1998, there was a commitment made on Plot 96 Kaloneni and it was therefore not available to the 2nd respondent for allotment.”

72. The Plaintiff never challenged the allotment letter on grounds that it was acquired through fraud, mistake or misrepresentation or that the allotment was out rightly illegal or it was against public interest. The fact that the land was originally reserved for putting up a school is not denied. A former head teacher of the School, a former chairman of the board and a retired Chief have attested to the fact that the 1st Defendant indeed gave out his land to the school in exchange for the suit property. Thereafter, he was allocated the suit property herein and after complying with the condition of payment of KShs. 1,813/-, the land could no longer be allocated to a third party without first legally cancelling his allocation. This was not done, and he thus remains the only allottee to the said land.
73. It would be remiss of me not to mention the letter dated 27th October, 2005 indicating that the 1st Defendant was dead at a time that he was actually alive bearing in mind the number of times the issue was raised in this suit. The letter is signed by one Ochillo Oyugi on behalf of the DC of Uasin Gishu District, and it is addressed to the District Settlement Officer, Uasin Gishu. At paragraph 2 thereof,



it states that the DC of Keiyo had written to his counterpart in Uasin Gishu District indicating that the plot No. 288 had been allocated to the deceased, who in the subject of the letter is Mr. Kanamoi Cheptoo Komoituk, after donating his land to Choroget Primary School. I will not cast aspersions as to why Mr. Kanamoi was supposed to be dead at a time when he decidedly was not. However, I note that the letter was only making an inquiry as the double allocation of the land to the Plaintiff and the 1st Defendant herein.

74. Consequently, I find that the 1st Defendant has proved his case against the Plaintiff to the effect that the alienation of the suit property was illegal, fraudulent, null and void. The said alienation could not therefore confer any interest or estate in the Plaintiff over the suit property. for this reason, this court finds that the 1st Defendant's Counterclaim succeeds in part.

f. Who should bear the costs of this suit?

75. Section 27 of the *Civil Procedure Act* provides that costs follow the event. Costs are however awarded at the discretion of the court. The Court in Machakos ELC Pet No. 6 of 2013 Party of Independent Candidate of Kenya & another v Mutula Kilonzo & 2 others [2013] eKLR quoted the case of Levben Products v Alexander Films (SA) (PTY)Ltd 1957 (4) SA 225 (SR) at 227 held:

“It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion (Fripp v Gibbon & Co., 1913 AD D 354). But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at....In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.”

76. I note that the Plaintiff was partially successful in convincing the court to nullify the proceedings before the 2nd Defendant Tribunal, and by virtue of that, the Defendant lost on that prayer. However, this whole case arose out of the actions of the Plaintiff when he first went to the land and removed the 1st Defendant's son. The chain reaction from there is well known, starting from the proceedings at the tribunal, the eviction of the Plaintiff from the suit property, which then had the Plaintiff move to this court to have them nullified, to the 1st Defendant's Counterclaim. All in all, although the Plaintiff succeeded on that one prayer, the 1st Defendant did prove his claim over the suit property and is thus not the successful party. The 1st Defendant is therefore entitled to costs and the court hereby awards him the said costs.

Orders:

77. For the above reasons, this court makes the following orders:-

- i. A declaration be and is hereby issued that the proceedings and the award made by the 2nd Defendant Tribunal on 25th October, 2006 and the subsequent judgement and decree given pursuant to the said award in ELD CMCC Award No. 37 of 2006 between the Plaintiff and the 1st Defendant are illegal, null and void and without jurisdiction but the rest of the Plaintiff's claim is dismissed.
- ii. A declaration be and is hereby issued that the 1st Defendant is the legal owner Uasin Gishu/Illula/288.
- iii. The title deed in respect of Uasin Gishu/Illula/288 registered in the name of the Plaintiff be recalled and cancelled.



- iv. The Land Registrar is hereby directed to issue a new title to the 1st Defendant over the said Uasin Gishu/Illula/288.
- v. A permanent injunction is hereby issued restraining the Plaintiff, his servants and or agents from entering, trespassing into, constructing upon, occupying, transferring, encumbering and or otherwise interfering with land Number Uasin Gishu/Illula/288.
- vi. Costs of the counterclaim and the main suit.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 30TH DAY OF SEPTEMBER, 2024.

E. O. OBAGA

JUDGE

In the virtual presence of;

Mr. Mathai for the Plaintiff.

Court Assistant –Laban

E. O. OBAGA

JUDGE

30th SEPTEMBER, 2024

