



**Mukiri (The personal representative of the Estate of Regina Mweru Njuku (Deceased) v Wandia & 2 others; County Government of Nairobi (Third party) (Environment & Land Case 1049 of 2014) [2023] KEELC 759 (KLR) (14 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 759 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
**ENVIRONMENT & LAND CASE 1049 OF 2014**  
**JA MOGENI, J**  
**FEBRUARY 14, 2023**

**BETWEEN**

**MARK ANTONY MUKIRI (THE PERSONAL REPRESENTATIVE OF THE ESTATE OF REGINA MWERU NJUKU (DECEASED) ..... PLAINTIFF**

**AND**

**JANE WANDIA ..... 1<sup>ST</sup> DEFENDANT**

**MICHAEL MWANGI KARANJA ..... 2<sup>ND</sup> DEFENDANT**

**ALEX NGOTHO ..... 3<sup>RD</sup> DEFENDANT**

**AND**

**COUNTY GOVERNMENT OF NAIROBI ..... THIRD PARTY**

**JUDGMENT**

1. Vide Plaintiff dated August 5, 2014 and an Amended Plaintiff dated April 4, 2022, the Plaintiff sued the Defendants seeking the following orders:
  - a. A permanent injunction restraining the Defendants by themselves, their servants, agents and or employees from entering, constructing, demolishing or otherwise dealing and or in any manner whatsoever interfering the developments on and or with the Plaintiff's quiet possession of Plot Number C 41 situated in Komarock Estate, Nairobi.
  - b. General damages.
  - c. A declaration that the Plaintiff is the rightful owner of Plot No C41 also known as Nairobi/Block 133/260.



- d. A declaration that the issuance of Lease and Certificate of Lease in respect of Nairobi/Block 133/260 to the 1<sup>st</sup> Defendant was unprocedural, illegal and consequently null and void.
- e. An order cancelling the Lease and Certificate of Lease issued to the 1<sup>st</sup> Defendant.
- f. Costs of this suit and interest.
- g. Any other relief this Honourable Court may deem fit to grant.

### **The Plaintiff's case**

2. It is the Plaintiff's case that by a letter of allotment dated October 4, 1995, the Nairobi City Commission, as it then was, allocated Plot No C 41 situated along Spine Road in Komarock, Nairobi to the deceased Plaintiff.
3. The Plaintiff's claim is that the deceased took possession of the property, submitted, and obtained approvals for the development plans from the City Council of Nairobi. The deceased commenced construction and she has been in possession of the property since 1995 and has been paying the ground rent and other attendant outgoings for the property.
4. That on or about August 3, 2014, the Defendants unlawfully and callously entered upon the deceased Plaintiff's property and started to demolish some of the buildings and fixtures erected on the property.
5. The plaintiff avers that the defendants joint and several unlawful acts stated above have interfered with her quiet possession of her property and she has suffered loss and damages.
6. That subsequent to the dispute herein arising, the Plaintiff learnt that:
  - i. The Defendants in an attempt to grab and/or deprive the Plaintiff of the property had a Certificate of Lease processed in the name of the 1<sup>st</sup> Defendant and the property Plot No C41 was referred to as Nairobi/Block/133/260.
  - ii. The Plaintiff avers that the said action by the Defendants is illegal, unprocedural and unlawful and any title obtained thereof should be cancelled.

### **The Defendants' Case**

7. The suit was contested, and the Defendant filed a statement of defence dated August 15, 2018 and an Amended Statement of Defence dated April 12, 2022 and denied all allegations by the plaintiff in the Amended Plaintiff.
8. The Defendants firmly state that the Plaintiff has never had any ownership rights over the suit property. That the same belongs, and legally so, to the 1<sup>st</sup> Defendant as the registered sole proprietor and shall so prove.
9. The Defendants particularly deny being complicit in the acts attributed in paragraph 6 and 7 of the plaintiff.
10. The Defendants further state that this suit is misplaced and an abuse of the court process as it is the 1<sup>st</sup> Defendant who has always been in possession of the property.
11. Lastly, the Defendants pray that the Plaintiff's suit against them be dismissed with costs.



12. A third-party notice dated October 3, 2014 was filed and served upon the Third-Party seeking indemnity and full compensation of the present market value of the suit property together with further orders. Through its defence dated December 9, 2019, the Third Party denied the allegation levelled against him by the 1<sup>st</sup> Defendant in the Third-Party Notice.
13. They aver that it has been wrongly sued and that it will raise an objection to the suit proceeding against it. Accordingly, they deny that the 1<sup>st</sup> Defendant is entitled to any of the reliefs sought in the Third Party or at all. They pray that the 1<sup>st</sup> Defendant's Third-Party Notice be dismissed with costs to the Third Party.
14. The matter proceeded by way of viva voce evidence wherein the Plaintiff called two witnesses and closed his case. The Defendants called one witness and closed their case. The Third party did not call any witness.

### **The Evidence**

15. The hearing of this suit proceeded on February 3, 2022 when the Plaintiff, called an expert witness, Emily Wawira Njeru, PW1, who presented her case before the court. She testified that she is a licensed land surveyor as per license no 226.
16. It was her evidence that she prepared a expert report dated June 11, 2021. On page 3 of the report, the property named as plot C41 is the same as LR Nairobi/Block/133/260. In her report, she testified that the area of the certificate of lease and the area of the plot are different, and the qualifications is that the difference is acceptable since it is an estimation at planning. As per the letter of allotment, the acreage was 0.08 hectare dated October 4, 1995. The certificate of lease however indicates the acreage as 0.572 hectares as see on defendant's documents at page 9. The difference in acreage is that usually a planner draws estimates on general layout, and they allocate numbers, so like in this case, she contended that it was allocated C41. So, the allocation authority uses the plan and letter of allotment which the surveyor uses. On the plan it is noted as allotment subject to surveyor, then the survey comes up with an actively measured plan and they draw and submit to the director of survey who authenticates the plan. Here, land was under RLA. The plan is used to amend the RIM. When application of lease is applied for, they submit RIM and areas as indicated on the survey plan. After lease is made, they apply for registration and so those are the details that are picked. Here, the number given is Nairobi/Block/133/260 and the area as registered was 0.0572 hectares. For the lease to issue from survey, what is required is RIM.
17. It was her evidence that when someone is given a letter of allotment, there are conditions to be met. She then produced the report as evidence.
18. In cross examination, she confirmed that she got the PDP from the counsel of the plaintiff and that she never visited the Nairobi City County to verify its authenticity. Paragraph 3.2 at page 5 indicates that the statement on page 5 is part of her instructions. It is her evidence that she never visited the land. She took the coordinates of the land. The folio reference 281/19 gave her the coordinates. The document on page 14 does not have C41. The plan obtained has LR No Nairobi/Block/133/260 and it shows the size of the parcel which is 0.0572 hectares. She was shown a copy of the title that the Defendant holds, and it aligns with the measurement on the title. The size is mentioned on paragraph 3 on page 6, and it is 0.0572 ha. She confirmed that that is the size shown on the title by the Defendant. She verified from documentation at the Director of Surveys that the area and the title are factual.
19. She confirmed that she did not go to any office to verify the allotment letter and PDP, but she went to the Director of Survey to verify the plan that supports the title by the Defendant.



20. In re-examination, she testified that the survey plan is used to issue title. It is the one in the custody of the director of surveys. PDP is prepared by a planner and here the planning authority is prepared by city council of Nairobi. The one on page 15. You can connect the FR and PDP. The PDP is the first document prepared for the public. A PDP was used to prepare the plan 281/19.
21. PW2 - Mark Anthony Mukiri Njogu. He testified that he is the administrator of the Estate of Regina. He adopted his statement dated May 11, 2021 as part of his evidence. He also referred to and adopted statement dated August 5, 2014 of the deceased Regina and he produced a bundle of documents dated July 23, 2021 which he asked the court to adopt and mark as Plaintiff docs no 1-11 (No 8 is the survey report). No 9 is a receipt dated August 24, 1982. These are his supplementary list of documents. He told the court that he came to know about the dispute when they came to demolish the house. The deceased is his mother and she passed on in 2016.
22. In cross examination, he testified that he was of age when the property was acquired but he was not present at the time of purchase. He added that the originals of documents 1,2 and 3 were not with him in court. Page 1 of the plaintiff's bundle has literature that ends abruptly. Page 2 and page 1 the font size is the same. Page 1 is itemized 1,2,3,4 but no continuation on the second page but page 2 is a conclusion of page 1 with the sentence 'amounts set below' and on page 2 there is no continuation. The allotment letter on page 6 has a different font from page 7, though to him it looks the same. He stated that he has seen other allotment letters other than this one before.
23. He testified that his mother acquired the plot from Naima Mohamed, who is a wife to his friend. The sale agreement was done in October 4, 1995 and the allotment letter is also dated October 4, 1995. On the allotment letter on page 6, there are writings at the top, but he could not explain how they got there. He has been on the ground before and when the construction was ongoing. He added that he has seen the beacon certificate for plot no C41. It is on page 22, and it is not dated. Before his mother acquired the land, Naima had taken possession of the land. The amount in the letter of allotment was paid. At page 17, the receipts show the names of Naima Nyakinyua who paid on October 17, 2005. The letter on page 17 on the Defendant's bundle. He confirmed that he is the administrator and was not part of the allocation process, but her mother consulted him when she purchased the property.
24. He wasn't aware that the documents he produced are not in custody of the city council. Also, he has not produced any title nor letter to show that he had tried to apply for allotment. He has produced two allotments, one to Naima Mohamed and one to Regina.
25. He knows Naima but he cannot confirm how she came to own the land. He testified that he could see on the allocation letter there are payments to be made and it also said that all conditions to be imposed on the main title shall extend to the plot. The letter says that if payments are not made then the offer shall lapse. Naima made payments on August 24, 1992. See page 18.
26. In re-examination, it was his testimony that he was conversant with this matter when his mother bought the property and took possession, until that day, they're still in occupation. She also applied for development, and she got approval for construction. See page 8. She made all payments as per evidence on page 17-21. The defendant did not raise a dispute; they came with bulldozers to demolish. By the time he got to the site, they had demolished a permanent building. This was on August 3, 2014. These were shops and houses as per the development plan on page 8. There are photographs on page 27 after demolition. Before this date, there had been no one claiming the land from 1995 to 2014. On page 3, there is a certificate of lease. There was no letter of allotment relating to the lease document. The Defendant paid for development on September 18, 2014 and this was after they had demolished the property. PW2 testified that he reported the demolition on the same day. The police insisted that he leaves his copies with them but there were no documents from the Defendants. He maintained that he



is in possession of the property. That the documents produced by the defence claiming ownership are not genuine. He isn't aware of any revocation of the allocation.

27. With that evidence, the Plaintiff closed his case.
28. DW1 – Jane Wandia. It was her testimony that she is a business lady as she runs a retail shop. She stays in Githurai. She is the 1<sup>st</sup> defendant. She adopted her witness statement as her evidence before this court and produced her list of documents dated August 15, 2018 as exhibit 1-7.
29. In cross examination, she testified that she had her ID with her. That she filed an affidavit dated August 21, 2014 which was filed in court on August 24, 2014. She added that she annexed a lease which was registered on May 25, 2002 and she got a certificate of lease, exhibit 1, dated February 24, 2002. From these documents, her interest on the property started on May 24, 2002. She had an interest in that property since before 2000. She was approached by a broker, and she told him that she was interested, and he started processing it for her. Except for the lease, he never gave her any other documents. She got the lease on June 5, 2001 and it was approved by the Chief Registrar. Then on May 24, 2002, she got the title. During this period, she made payments to the city council of Nairobi. The only documents produced to show any transactions on this property is the one dated October 7, 2003 - Doc no 3 (Exhibit 3). And this was after she was given the lease.
30. She reiterated that she was approached by a land broker, and she knew where the land was located before 2002. She was showed the land in 2000. Before she was shown, she did not express any interest in the property.
31. She confirmed that she didn't make any payments to the city council of Nairobi and has never made any inquiries to the city council because the broker was undertaking the process on her behalf. This was one Mr Peter Kamau.
32. She testified that she got the lease in 2002 and she didn't know that there were other people claiming the property. The dispute started on August 3, 2014. Before this date, she was not aware of any other claim to that property. She was not aware of any other people who were in occupation before August 2014. She had not visited the property before August 2014. In the affidavit dated August 23, 2014, she stated that she was not aware of any occupation of the suit property. From the letter, it shows that I was aware of the occupation in the suit property by other persons. See Exhibit 21. The handwritten memo states that notices should issue if there were occupants on the land. She was not aware that there was construction on the property. She is not aware that the dispute arose when the demolition was done. She was summoned to the police station subsequent to the demolition and complaint was malicious damage to property.
33. The Plaintiff's bundle of documents show payments made as early dated August 24, 1992. She confirmed that she has attached all documents relating to this property. In her statement she stated that she used to pay all rates relating to Nairobi city council to date, but she hasn't attached any receipts of payments before 2014. It is true that she had not made any payments before 2014. She testified that she entered the premises in August 2014. That when she saw this claim, she applied to join as a 3<sup>rd</sup> party the Nairobi City Council. She is not aware that Nairobi City council has denied her ownership. The payments made on July 30, 2014 was not to facilitate her to take possession on August 3, 2014. She never approached Nairobi city council. She never made payments to them, and she had no interaction with them. She testified that she never knew Regina Njeru before this claim. She never carried out a search or visited the property, but Peter Kamau did. She stated that she had the title which she produced to show ownership. She added that she has no outstanding rates respect to the suit property. She testified that no one was in occupation before she purchased.



34. In re-examination, it was her evidence that she has never been charged in a criminal case for malicious damage. She denied having demolished the suit property. Mr Peter Kamau was acting as her agent. The law allows it. She confirmed that she didn't sign any set of documents before she got her lease. That the county recognizes her as the owner as she has paid rates to date. That she is not on the ground due to a court order.
35. With that evidence, the Defendants closed their case.
36. The advocate for the 3<sup>rd</sup> party Ms Apolot who was in court waved their right to call a witness. This therefore marked the close of the plaintiff's case and the Defendants' case. The Counsel for the 3<sup>rd</sup> party also closed their case.

### **Submissions**

37. After hearing closed, all parties were given the opportunity to file their written submissions. The Plaintiff filed his submissions on September 20, 2022 while the Defendants filed their submissions on July 7, 2022 and the third party filed its submissions on June 16, 2022.

### **Issues for Determination**

38. I have perused the pleadings, the evidence adduced by each party and the submissions filed by the parties herein. The following are the issues that arise in this suit for determination:
  - a. Whether Plot No C41 and LR No Nairboi/Block 133/260 are different.
  - b. Who, as between the Plaintiff and the 1<sup>st</sup> Defendant, is the lawful owner of the suit property.
  - c. Whether to issue an order cancelling the Lease and Certificate of Lease issued to the 1<sup>st</sup> Defendant.
  - d. Whether the Plaintiff is entitled to the prayers sought in the amended Plaintiff.
  - e. Who shall bear the costs of the suit and interest.

### **Analysis and Determination**

#### **a. Whether Plot No C41 and LR No Nairboi/Block 133/260 are different**

39. To begin with, there has been claims that Plot No C41 and LR No Nairobi/Block 133/260 are not the same and that Plot No C41 does not exist. According to PW1, the evidence presented by the Plaintiff references a property on the approved PDP. The property existed with the reference portion no. C41 with an indicated approximate area of 0.08 Ha until a survey was done and registered and authenticated by Director of Survey.
40. As established from survey records, an authenticated and registered survey plan folio reference FR 281/19, the parcel was surveyed and submitted to Director of Survey on January 23, 1998 and authenticated on January 4, 2001 when the parcel of land became referenced as Nairobi/Block 133/260 from the forward.
41. Furthermore, according to the expert witness, conclusive determination can be drawn from information presented by exhibits submitted by both the plaintiff and the defendant together with the authenticated survey plan FR 281/19 that the two exhibits materially represent the same property- now referenced as Nairobi Block 133/260. The difference between the areas as indicated on the PDP



of 0.08 Ha and authenticated Survey Plan of 0.0572Ha is acceptable as the former is approximate at planning stage and confirmed accurately upon survey.

42. In summary, it was stated by PW1, that Plot No C41 was converted and registered as Nairobi/Block 133/260. Although the Defendants have tried to argue that Plot C41 and LR No Nairobi/Block 133/260 are different plots, I am not persuaded. The evidence before me is overwhelming that Plot No C41 is the same as LR No Nairobi/Block 133/260 and indeed I have no evidence before me that these are different plots. The defendant did not bring any witness nor give any evidence to state that these are different plots and do not refer to the same land.

**b. Who, as between the Plaintiff and the 1<sup>st</sup> Defendant, is the lawful owner of the suit property.**

43. The deceased Plaintiff went to great lengths to convince this court that she is the lawful owner of the suit property. The Plaintiff's deceased mother claims ownership by virtue of a letter of allotment dated August 24, 1992 issued to one Naima Nyakinyua Mohamed, who thereafter sold and transferred the Plot to the Plaintiff's deceased mother vide Sale Agreement dated October 4, 1995.
44. The transaction was allegedly approved by the Nairobi City Council and the Plaintiff's deceased mother was issued with an allotment letter dated October 4, 1995 by the Nairobi City Council. The Plaintiff told the Court that his deceased mother took possession thereafter in 1995, submitted and obtained approvals for development plans from the Council and subsequently started developing the property. The deceased plaintiff claimed that she had been paying rent as seen on page 17-26 and enjoyed quiet possession until August 3, 2014 when the defendants proceeded to demolish some of permanent buildings on the suit property as seen on page 27-30.
45. He produced to this court a copy of Naima's Letter of Allotment dated August 24, 1992, a Sale Agreement dated October 4, 1995 between his deceased mother and Naima and Regina's Letter of Allotment dated October 4, 1995, whose validity was challenged by the Defendants. The Plaintiff also demonstrated to the court that the stand premium and ground rent of Kshs 31,800.00 was paid by Naima Mohamed as per the receipt dated August 24, 1992 at page 18. That Naima paid survey fees for the suit property as per the receipt dated July 25, 1995 at page 19. Further, that ground payments and other attendant outgoings for the property had been paid by the deceased Plaintiff and he produced a copy of the receipts issued by the 3<sup>rd</sup> party which are contained in the bundle on pages 17-26.
46. To further support this claim, the Plaintiff also produced a copy of an undated Beacon Certificate issued to Naima Nyakinyua Mohamed in respect of the suit property by the 3<sup>rd</sup> Party and a letter dated October 29, 2014 from the Chief Officer Lands, Office of the Governor confirming that the deceased Regina Njuku is the owner of Plot No C41.
47. The Defendants and the third party particularly challenged the validity of the said Letters of Allotment. They submitted that the Plaintiff had not proved that they met the specific conditions in the letter of allotment which are to be met before the property actually passes or is allotted to the party who wishes to purchase the property.
48. It is true that the Plaintiff did not provide the Court with further evidence to confirm that Regina had met the specific conditions of the allotment, but the Plaintiff did provide evidence to demonstrate that Naima Nyakinyua Mohamed met the specific conditions. At page 18, it can be seen that Naima Mohamed paid stand premium and ground rent of Kshs 31,800.00 as per receipt dated August 24, 1992, at page 19, it can be seen that Naima paid survey fees for the suit property as per the receipt dated July 25, 1995 as well as the undated Beacon Certificate issued to Naima Nyakinyua Mohamed tabled before this Court. The Defendants and the third party also did not lead evidence to demonstrate that the allocation to Naima or Regina had been revoked.



49. The 1<sup>st</sup> Defendant claims ownership to the suit property vide certificate of lease for title no Nairobi/Block 133/260 issued on May 24, 2002. I note that no other documents have been tabled to support the 1<sup>st</sup> Defendant's claim on how she obtained the certificate of lease. She alleges that she has been paying rates to date and that the Nairobi City Council recognizes her as the owner of the suit property. However, during the hearing, she confirmed that she didn't make any payments to the city council of Nairobi and has never made any inquiries to the city council because the broker was undertaking the process on her behalf
50. The gist of the matter before me is that both the Plaintiff and the 1<sup>st</sup> Defendant claim title to the suit land. At the moment, it is the 1<sup>st</sup> Defendant who is registered as proprietor of the leasehold title. The Plaintiff claims that she is the owner of the suit property by virtue of sale agreement sated October 4, 1995 and subsequently, letter of allotment dated October 4, 1995. On the other hand, the 1<sup>st</sup> Defendant also claims ownership by virtue of Certificate of Lease issued in her name on May 24, 2002 but does not give specific details on how she obtained the lease.
51. From the records before this Court, the Plaintiff's claim emanates from one Naima Nyakinyua Mohamed who was issued with a letter of allotment dated August 24, 1992. I have seen the letter of allotment which was produced as an exhibit. I also have evidence that Naima has met the specific conditions of the said allotment letter. At page 18, it can be seen that Naima Mohamed paid a stand premium and ground rent of Kshs 31,800.00 as per receipt dated August 24, 1992, at page 19, it can be seen that Naima paid survey fees for the suit property as per the receipt dated July 25, 1995 as well as the undated Beacon Certificate issued to Naima Nyakinyua Mohamed by the Nairobi City Council.
52. None of the Defendants or the 3<sup>rd</sup> Party successfully challenged the validity of any of these documents. The specific condition was that the allottee pays Kshs 31,800.00 within 30 days. Naima paid the said amount on August 24, 1992, the same day as the date of the letter of allotment. I opine that this is sufficient evidence to demonstrate that indeed Naima met the specific conditions of the letter of allotment and that the letter of allotment conferred absolute right of ownership to Naima Nyakinyua Mohamed.
53. It follows that Naima Nyakinyua Mohamed subsequently sold and transferred the said property to the deceased Plaintiff. It is my view that no evidence has been tabled demonstrating that the deceased Plaintiff's allotment was revoked, and even if it was, it would have reverted back to the seller, Naima and not back to Nairobi City Council as they had already allotted the suit property to Naima Nyakinyua Mohamed in 1992.
54. The first document relied on by the Plaintiff is an allotment letter dated August 24, 1992 purporting to be from the Nairobi City Commission. It is in public knowledge (through legal notices relating to elections), and the court takes judicial notice of the fact, that the tenure of the defunct Nairobi City Commission ended upon conclusion of the first multiparty general elections in Kenya in December 1992. Effective from early 1993, the elected City Council of Nairobi was in charge of the City. The second document that the Plaintiff relied on is an allotment letter dated October 4, 1995 purporting to be from the Nairobi City Council. It is my view that the suit property was genuinely and procedurally allocated to Naima Nyakinyua Mohamed. The allotment letter and the proof of payment of Kshs 31,800.00 is testimony enough and the same is not challenged.
55. The Plaintiff claimed that she had a letter of allotment to the suit property and that the lease held by the 1<sup>st</sup> Defendant was obtained unprocedurally.



56. In the case of *Stephen Mburu & 4 Others vs Comat Merchants Ltd & Anor [2012] eKLR*, Kimondo J held that: 'from a legal standpoint, a letter of allotment is not a title to property. It is a transient and [is] often a right or offer to take property'.
57. The 1<sup>st</sup> Defendant produced the certificate of lease dated May 24, 2002 that indicated she was the registered owner of LR No Nairobi/Block 133/260. However, how the 1<sup>st</sup> Defendant ended up with a Certificate of Lease is not clear to me.
58. As things stand, the Plaintiff relies on the letters of allotment dated August 24, 1992 and October 4, 1995 in a bid to lay claim on the suit property whereas the 1<sup>st</sup> Defendant has a certificate of lease issued on May 24, 2002.
59. The 1<sup>st</sup> Defendant claimed that she used a land broker, one Peter Kamau, who processed the title on her behalf. She admitted that she never carried out a search or visit the suit property, but Peter Kamau did. I note that she has produced a certificate of search dated July 18, 2014 indicating that she is the owner of the suit property. The 1<sup>st</sup> Defendant further confirmed that she did not sign any set of documents before she got her lease. She claimed that she got her lease in 2002 and was not aware that there were other people claiming the suit property. She however tabled evidence in Court of a letter dated September 27, 2005 that somewhat alluded that she was aware that the suit property had occupants. She admitted that she did not adduce any receipts for payment of rates before 2014. That she entered the premises in August 2014.
60. The 1<sup>st</sup> Defendant tabled a copy of certificate of lease registered in her name issued on May 24, 2002. She did not produce any evidence to prove how she or the land broker obtained the certificate of lease. There is also no evidence that she took possession of the suit property. During the hearing, she did not explain to the Court how she obtained the certificate of lease. She further failed to convince the court that she carried out any search of the suit property to ascertain that it was available for purchase. She did not explain if she purchased the suit property or whether the land was allocated to her. It was her case that she only got a certificate of lease from the broker, Peter Kamau, and she did not sign any set of documents prior to obtaining the certificate of lease.
61. I have evidence of a certificate of search dated July 18, 2014 registered in favor of the 1<sup>st</sup> Defendant, a receipt dated September 8, 2003 for payment of rates issued by the Council of Nairobi, subsequent receipts dated July 28, 2014 for payment of sums due, issued by the Nairobi City County and a letter dated August 12, 2014 from the office of the governor stating that she is the owner of Nairobi/Block 133/260 and that there is no record of Plot No. C.41. She also adduced a construction permit dated September 18, 2014. There is a memo dated September 27, 2005 directing the Director City Inspectorate to vacate occupants of the suit property. However, there is no evidence that the said notice was served upon the occupants of the suit property.
62. There were many pointers to the fact that the transaction for the ownership of the suit property by the 1<sup>st</sup> Defendant was suspect. The documents produced in evidence by the 1<sup>st</sup> Defendant which I have mentioned above all point to an illegality. The 1<sup>st</sup> Defendant may be the holder of a Certificate of Lease in respect of the suit property but has failed to convince this court how she obtained the same. The position of the holder of a title deed over a parcel of land is well stated in Section 26(1) of the Land Registration Act which provides as follows:
- ' The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer shall be taken by all courts as prima facie evidence that the person named as



proprietor of the land is the absolute and indefeasible owner, and the title of that proprietor shall not be subject to challenge, except-

- 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.'
63. In this particular suit, it is alleged by the Plaintiff that the 1<sup>st</sup> Defendant's Certificate of Lease was acquired illegally and unprocedurally. I have raised several issues in the manner in which the 1<sup>st</sup> Defendant acquired the title which point to illegality. I seek to rely on the following observation of the court in the case of *Daudi Kiptugen versus Commissioner of Lands & 4 Others (2015) eKLR*:

' In order to determine the question whether the lease held by the plaintiff is valid, it must be demonstrated that it was properly acquired. It is not enough that one waves a Lease or a Certificate of Lease and assert that he has good title by the mere possession of the Lease or Certificate of Lease. Where there is contention that a Lease or Certificate of Lease held by an individual was improperly acquired, then the holder thereof must demonstrate through evidence that the Lease or Certificate of Lease that he holds was properly acquired. The acquisition of title cannot be construed only in the end result, the process of acquisition is material. It follows that if a document of title was not acquired through the proper process, the title itself cannot be said to be a good title. If this were not the position, then all one would need to do is to manufacture a Lease or Certificate of Title at a backyard or the corner of a dingy street and by virtue thereof claim to the rightful proprietor of the land indicated therein. It is therefore necessary for this court to determine how the plaintiff ended up having a Lease and Certificate of Lease in his name and further determine if the Government did intend to issue the plaintiff with a Lease over the suit land.'

64. The Defendants submitted that the Plaintiff did not produce any evidence that the ownership documents of the 1<sup>st</sup> Defendant were fraudulent. That it was established that there are no records at the Nairobi City Council regarding Plot No C41, and the Plaintiff's ownership documents. Further that the 1<sup>st</sup> defendant demonstrated that she is the lawful and equitable owner of the suit property, and she is registered as such and holds a certificate to that effect. That she adduced concrete proof before this Court showing that the title with her name is indeed valid. On the other hand, the Third party submitted that they are convinced that the 1<sup>st</sup> Defendant is the proprietor of the suit property having been registered as a proprietor and issued with a certificate of lease. They further submit that the third party only issued an allotment letter and expected that if the plaintiff complies to the conditions thereon, then the plaintiff would then proceed and process her title. That there is no evidence that the special conditions were complied with.

65. The 3<sup>rd</sup> Party is the one that has custody over the records for, among others, the suit property. It has been alleged that it was established during hearing that there are no records at the Nairobi City Council. But PW2 also tabled evidence in court indicating that Plot No C41 is also known as LR No Nairobi/Block 133/260. I am convinced that Naima Nyakinyua Mohamed was allotted the suit property as she met the specific conditions in the letter of allotment, and she could therefore transfer the suit property to the deceased Plaintiff. In the case of *Republic versus City Council of Nairobi & 3 Others (2014) eKLR*, Odunga, J had this to say about land that has already been allotted:

' Once allotment letter is issued and the allottee meets the conditions therein, the land in question is no longer available for allotment since a letter of allotment confers absolute right



of ownership unless it is challenged by the allotting authority or is acquired through fraud, mistake or misrepresentation or that the allotment was out rightly illegal, or it was against public interest. In other words, where land has been allocated, the same land cannot be reallocated unless the first allocation is validly and lawfully cancelled.'

66. No evidence was produced by the 1<sup>st</sup> Defendant and 3<sup>rd</sup> Party that the Letter of Allotment issued by the 3<sup>rd</sup> Party to Naima Nyakinyua Mohamed in respect of the suit property was ever cancelled or was invalid in any way. The failure of the 1<sup>st</sup> Defendant to ascertain the true owner of the suit property prior to obtaining a certificate of lease of the suit property is a failure in undertaking the due diligence required of her. The 1<sup>st</sup> Defendant's transaction with her land broker is riddled with inconsistencies. She admitted to having not signed any set of documents prior to obtaining the certificate of lease. This whole scenario paints a picture that the 1<sup>st</sup> Defendant was aware that the transaction was not above board. She was clearly not an innocent purchaser for value without notice. The 1<sup>st</sup> Defendant's counsel tried to shelter his client under provisions of Section 26 of the Land Registration Act, but I do not see how the said law can assist his client.
67. Section 26 does provide at Subsection (1) that the Certificate of title is to be taken as prima facie evidence of proprietorship, but it will be seen that such title, is subject to challenge if, the same was acquired through fraud or misrepresentation to which the party is proved to be a party, or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. In my view, when title is being attacked under Subsection (1) (b), it is not necessary for it to be proved that the title holder is a party to the vitiating factors mentioned therein. In the circumstances of this case, it is apparent to me, that the title herein was acquired unprocedurally and therefore it is not a legal title.
68. Overall, this court finds that the Plaintiff is the rightful owner of the suit property and the Certificate of Lease held by the 1<sup>st</sup> Defendant over the suit property is invalid and of no legal effect for the reason that it was obtained illegally and unprocedurally.

**c. Whether to issue an order cancelling the lease and certificate of lease issued to the 1<sup>st</sup> Defendant.**

69. The Court is empowered by the provision of Section 80 of the Land Registration Act to order for the rectification of the Land Register, if it is satisfied that any registration was made fraudulently. See Section 80 of the Land Registration Act, 2012. Which provides:

' 80 Subject to subsection (2), the Court may order the rectification of the register  
(1) 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.'

70. Having established that the suit property belongs to the Plaintiff and not the 1<sup>st</sup> Defendant, this Court hereby issues an order for cancellation of the Lease and Certificate of Lease issued to the 1<sup>st</sup> Defendant.

**d. Whether the Plaintiff is entitled to the prayers sought in the amended plaint.**

71. With the above finding that the Plaintiff is the rightful owner of the suit property, it follows that the Plaintiff has the rights over the suit property as set out in section 24(a) of the Land Registration Act which provides as follows:

' Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.'



72. I find that the Plaintiff is entitled to have exclusive use and possession of the suit property to the exclusion of the 1<sup>st</sup> Defendant. I therefore grant prayer (a) and issue an order of permanent injunction restraining the Defendants by themselves, their servants, agents and or employees from entering, constructing, demolishing or otherwise dealing and or in any manner whatsoever interfering the developments on and or with the Plaintiff's quiet possession of Plot Number C 41 situated in Komarock Estate, Nairobi.
73. With regard to Prayer (b), the Plaintiff has accused the Defendants of entering the suit land without their consent and demolished some of the buildings and fixtures erected thereon.
74. The Plaintiff has only provided this court photographic evidence showing the demolished buildings and fixtures. The Defendants did not adduce any evidence on this action and therefore the Plaintiff's evidence has not been controverted. The 1<sup>st</sup> Defendant also confirmed that she was summoned to the police station subsequent to the demolition and complaint was malicious damage to property. That no criminal charge has been preferred against the 1<sup>st</sup> Defendant for malicious damage to property. In the circumstances, I am satisfied that the Plaintiff has proved that the Defendants entered the suit property without the Plaintiff's consent and demolished some of the buildings and fixtures erected on the property without any justifiable cause. I therefore find on a balance of probabilities that the Defendants did enter into the Plaintiff's land without permission and their action of demolishing some of the buildings and fixtures thereon amounted to trespass.
75. Even though trespass is actionable per se, it is clear from the evidence adduced by the Plaintiff that they suffered loss and damage as a result of the Defendants' actions. The Plaintiff is therefore entitled to general damages for trespass.
76. The Plaintiff has not adduced any evidence as to the state or the value of the damage on the property after the demolition. This makes it difficult to assess the general damages. However, the Plaintiff suffered loss due to the demolition by the defendants. The loss was occasioned on August 3, 2014. This must have caused the plaintiff a lot of anguish and anxiety.
77. In the case of *Willesden Investments Limited vs. Kenya Hotel properties limited NBI HCC NO 367 of 2000*, the court stated that;
- ' There is no mathematical or scientific formula in these types of cases and that the guiding factors are the circumstances in each case. It is my considered view that Kshs 10 000 000 is a reasonable award for general damages'.
78. I have taken into account the fact that the damage occurred in a rather expansive chunk of land and the same is a commercial property as indicated in the letters of allotment. Additionally, I note that the defendants did not issue a notice before proceeding with demolition. I am of the view that an award of Kshs 10,000,000.00 as general damages is sufficient.
79. Prayer (c), (d) and (e) relate to a declaration that that the Plaintiff is the rightful owner of Plot No C41 also known as Nairobi/Block 133/260, a declaration that the issuance of Lease and Certificate of Lease in respect of Nairobi/Block 133/260 to the 1<sup>st</sup> Defendant was unprocedural, illegal and consequently null and void and an order cancelling the Lease and Certificate of Lease issued to the 1<sup>st</sup> Defendant. I have already effectively granted these prayers and I see no reason to return to them.
80. As to whether the Defendants have made up a case for being indemnified by the third party, based on my finding in this case, I find and hold that they have not made up a case for being indemnified by the



3<sup>rd</sup> party against whom in any event they failed to prove it was the one who unprocedurally issued the 1<sup>st</sup> Defendant with the certificate of lease to the suit property.

81. The upshot of the foregoing is that the plaintiff's suit has merit and is allowed in terms of prayers (a), to the extent that the plaintiff is awarded general damages of Kshs 10,000,000.00, (c), (d) and (e).

**e. Who shall bear the costs of the suit and interest.**

82. In light of the above, Judgment is entered in favour of the Plaintiff as set out herein with costs. The Plaintiff is entitled to impose interest at court rates on his costs of this suit, from the date of filing this suit until the same are paid in full.

**Disposal Orders**

83. I have dealt with all the issues herein and now I make the final orders:

- a. That an order of permanent injunction is hereby issued against the Defendants by themselves, their servants, agents and or employees from entering, constructing, demolishing, or otherwise dealing and or in any manner whatsoever interfering the developments on and or with the Plaintiff's quiet possession of Plot Number C 41 situated in Komarock Estate, Nairobi.
- b. That the Plaintiff is awarded Kshs 10,000,000.00 (Kenya Shillings Ten Million Only) as general damages.
- c. That a declaration is hereby issued that the Plaintiff is the rightful owner of Plot No C41 also known as Nairobi/Block 133/260.
- d. That a declaration is hereby issued that the issuance of Lease and Certificate of Lease in respect of Nairobi/Block 133/260 to the 1<sup>st</sup> Defendant was unprocedural, illegal and consequently null and void.
- e. That an order is hereby issued cancelling the Lease and Certificate of Lease issued to the 1<sup>st</sup> Defendant.
- f. The Plaintiff shall have the costs of this suit and interest at court rates from the date of filing this suit until payment in full.

It is so ordered.

**DATED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 14<sup>TH</sup> DAY OF FEBRUARY, 2023.**

**MOGENI J**

**JUDGE**

In the Virtual presence of :-

Mr. Githinji holding brief for Mr. Njuguna for Plaintiff

Mr Omondi holding brief for Mr Gachie for the Defendants

Ms. Naazi holding brief for Mr Githii for the 3<sup>rd</sup> Party

Ms. C. Sagina : Court Assistant

