



Kihu v Muchiri (Sued as the Legal Representative of Stanley Charles Muchiri - Deceased) & another (Environment & Land Case 357 of 2011) [2023] KEELC 15831 (KLR) (1 March 2023) (Judgment)

Neutral citation: [2023] KEELC 15831 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 357 OF 2011
SO OKONG'O, J
MARCH 1, 2023**

BETWEEN

ALFRED KARIUKI KIHU PLAINTIFF

AND

CHARLES NDONGA MUCHIRI (SUED AS THE LEGAL REPRESENTATIVE OF STANLEY CHARLES MUCHIRI - DECEASED) 1ST DEFENDANT

EMBAKASI RANCHING COMPANY LIMITED 2ND DEFENDANT

JUDGMENT

The Pleadings

1. The Plaintiff brought this suit against Stanley Charles Muchiri, deceased (hereinafter referred to only as “the 1st Defendant”) and Embakasi Ranching Company Limited on July 19, 2011 seeking the following reliefs;
 - a. A declaration that the Plaintiff is the rightful proprietor of two parcels of land known as Plot No L 75(886) and Plot No L 76(891) (hereinafter referred to as “the suit properties” where the context so permits).
 - b. An injunction restraining the 1st and 2nd Defendants from dealing with or in any way interfering with the suit properties.
 - c. Cost of the suit together with interest thereon.
 - d. Such other or further relief as this court may deem just and fit so to grant.
2. The Plaintiff averred that at all material times, he was the beneficial owner and proprietor of the suit properties. The Plaintiff averred that he purchased the suit properties from one, Alice Wanjiku



- Ndirangu (hereinafter referred to only as “Ms. Ndirangu”). The Plaintiff averred that Ms. Ndirangu was a shareholder of the 2nd Defendant and held two shares in the 2nd Defendant which she transferred to the Plaintiff. The Plaintiff averred that the two shares that Ms. Ndirangu held in the 2nd Defendant entitled her to the suit properties. The Plaintiff averred that the 2nd Defendant which was a land-buying company issued share certificates to its members as they waited to be issued with titles for the parcels of land allocated them. The Plaintiff averred that before the issuance of titles for the allocated parcels of land, evidence of ownership of the said parcels of land that the 2nd Defendant’s members held were the share certificates.
3. The Plaintiff averred that Ms. Ndirangu executed a share transfer form in his favour and the same was stamped on September 30, 1991. The Plaintiff averred that on or about July 11, 2011, the 1st Defendant trespassed on the suit properties and started erecting poles around the same with the aim of fencing the properties and commencing construction thereon. The Plaintiff averred that the 1st Defendant claimed that the suit properties were allocated to him by the 2nd Defendant. The Plaintiff averred that the purported allocation of the suit properties by the 2nd Defendant to the 1st Defendant was irregular and illegal and that the 1st Defendant’s activities on the properties demonstrated an intention of dispossessing the Plaintiff of the suit properties.
 4. The 1st Defendant entered appearance and filed a defence on May 13, 2013 and a cross-claim against the Plaintiff and 2nd Defendant on May 29, 2014. In his defence, the 1st Defendant averred that he was allocated parcels of land known as Plot No. V.227 and Plot No. V. 228(hereinafter together referred to only as “the 1st Defendant’s plots”) by the 2nd Defendant on August 26, 1999 and was issued with a Share Certificate No. 003418 for Plot No. V.227 and a Share Certificate No. 003419 for Plot No. V.228. The 1st Defendant averred that he paid to the 2nd Defendant a sum of Kshs. 17,000/= for each plot to cover registration fees, survey fees and engineering works. The 1st Defendant averred that he paid a further sum of Kshs. 2,000/= on October 17, 2002 for each plot for Beacon Certificates. The 1st Defendant averred on October 17, 2002, J.K. Mwangi who was the 2nd Defendant’s Vice Chairman, and the 2nd Defendant’s surveyor accompanied the 1st Defendant to the 1st Defendant’s plots for the purpose of showing him the location of the beacons for the said plots. The 1st Defendant averred that the 2nd Defendant’s said surveyor placed the beacons on the boundaries of the 1st Defendant’s plots in the presence of the 1st Defendant. The 1st Defendant averred that when they visited the 1st Defendant’s plots on October 17, 2002 for the said exercise, the plots were vacant and no one raised an objection to their entry into the properties.
 5. The 1st Defendant averred that he had not received a complaint from any person despite the beacons having been placed on the said plots by the surveyor. The 1st Defendant averred that he was allocated Plot No. V.227 and Plot No. V. 228(the 1st Defendant’s plots) and not Plot No. L 75(886) and Plot No. L 76(891) (the suit properties). The 1st Defendant averred that he was entitled to quiet possession of the 1st Defendant’s plots.
 6. In his cross-claim against the Plaintiff and the 2nd Defendant, the 1st Defendant reiterated the contents of his defence and averred that in August 2010, the Plaintiff’s agents trespassed on the 1st Defendant’s plots and fenced the same claiming to be acting on behalf of the owners of the said properties. The 1st Defendant averred that he reported the invasion to the 2nd Defendant and after investigations, the 2nd Defendant confirmed that he was the owner of the 1st Defendant’s plots. The 1st Defendant averred that his claim against the Plaintiff and the 2nd Defendant was for a declaration that he was the lawful proprietor of the 1st Defendant’s plots and an injunction restraining the Plaintiff and the 2nd Defendant from dealing in any way or interfering with the 1st Defendant’s plots. The 2nd Defendant entered



an appearance and filed its statement of defence on October 10, 2013 in which it admitted all the allegations made by the Plaintiff in the Plaint. The 2nd Defendant urged the court to enter judgment for the Plaintiff against the 1st Defendant as prayed in the plaint.

The evidence tendered by the parties:

6. At the trial, the Plaintiff narrated to the court how he acquired the suit properties from Ms. Ndirangu who was a shareholder of the 2nd Defendant. He stated that he paid Ms. Ndirangu Kshs.30,000/- for the two shares that she held in the 2nd Defendant. The Plaintiff told the court that the two shares that Ms. Ndirangu held in the 2nd Defendant entitled her to the suit properties. He stated that Ms. Ndirangu transferred the said shares to him after he purchased the same from her. The Plaintiff stated that after acquiring Ms. Ndirangu's two shares, he became entitled to the suit properties. The Plaintiff produced the share purchase agreement between him and Ms. Ndirangu and the share transfer form signed by Ms. Ndirangu in his favour as exhibits. The Plaintiff stated that after purchasing the said shares, the 2nd Defendant issued him with a share certificate on 18th October 1991 which he also produced in evidence as an exhibit. The Plaintiff stated that he made various payments to the 2nd Defendant and was issued with receipts which he similarly produced as exhibits. The Plaintiff stated that for every share, a shareholder was entitled to a parcel of land measuring one-quarter of an acre and for his two shares, he was allocated the suit properties in 1992. The Plaintiff stated that he was taken to the suit properties and shown the same. He stated that he went to the suit properties again in the company of the 2nd Defendant's surveyor and an official of the 2nd Defendant on 17th September 2009 when the beacons for the suit properties were fixed and confirmed an exercise for which he paid Kshs. 5,000/-. The Plaintiff stated that after being shown the suit properties in 1992, he took possession thereof, dug a pit latrine and put up a fence around the same.
7. The Plaintiff stated that the 1st Defendant trespassed on the suit properties around April 2011 and brought down his fence. He stated that upon receiving information regarding the trespass, he went to the site and found the 1st Defendant's manager one, Wahome who was very hostile. He stated that he reported the matter to Ruai Police Station which summoned the said Wahome to the Police Station. He stated that the Criminal Investigations Department(CID) at Ruai Police Station wrote to the 2nd Defendant to confirm the owner of the suit properties. He stated that in response to the inquiry, the 2nd Defendant confirmed that the suit properties belonged to him. He produced the letters exchanged between the CID at Ruai Police Station and the 2nd Defendant as exhibits.
8. In his evidence, the 1st Defendant, Stanley Charles Muchiri, deceased who died in 2018 after giving evidence in the matter told the court that on 26th August 1999, he paid the 2nd Defendant a total of Kshs. 34,000/= for two plots (Kshs. 17,000/= for each plot). He stated that the 2nd Defendant allocated to him Plot No. V.227 and Plot No. V. 228 (the 1st Defendant's plots). He stated that the said purchase price was inclusive of engineering and survey fees. He stated that the two receipts that were issued to him indicated that he was a non-member of the 2nd Defendant.
9. The 1st Defendant stated that he made the final payments of Kshs. 2,000/ for each of the 1st Defendant's plots on 17th October 2000 for the beacon certificates. He stated that the 2nd Defendant issued him with a receipt of the same date. He stated that after making the payment for the beacon certificates, he was accompanied to the site by the 2nd Defendant's surveyor, one Nyika and the 2nd Defendant's vice chairman, J.K. Mwangi who showed him the plots. He stated that the beacons were placed on the two plots and he was later issued with beacon certificates. He produced the beacon certificates and the receipts for the payments he made for the same in evidence as exhibits.



10. The 1st Defendant stated that after he was shown the beacons for the 1st Defendant's plots, he fenced the plots and installed a steel gate. He stated that he thereafter constructed a pit latrine, a bathroom and a house on the plots. He stated that the said house was occupied by a pastor. He stated that nobody came forward to claim the plots when he was carrying out these activities thereon. He stated that he was aware of the Plaintiff's claim. He stated that the Plaintiff came to the 1st Defendant's plots, damaged the fence surrounding the same together with the beacons and replaced the fence with his own fence. He stated that the matter was reported to the 2nd Defendant and the 2nd Defendant's chairman a Mr. Thumbi directed that the Plaintiff's fence be demolished as he had encroached on his (1st Defendant) Plots. He stated that he restored the fence that was brought down by the Plaintiff and that he had remained in possession of the 1st Defendant's plots as the bona fide owner of thereof.
11. On cross-examination, the 1st Defendant stated that he was not a shareholder of the 2nd Defendant but a purchaser of the 1st Defendant's plots from the 2nd Defendant. He stated that he was not aware that the Plaintiff had acquired the same properties earlier from the 2nd Defendant and had also been issued with share certificates. He stated that the disputed properties were sold to him lawfully by the 2nd Defendant. He stated further that he knew the chairman of the 2nd Defendant who was also his friend and a member of his bank. He stated that he came to know of the availability of the 1st Defendant's plots through the said chairman. He stated further that he did not enter into a written sale agreement with the 2nd Defendant in respect of the 1st Defendant's plots.
12. The 1st Defendant's first witness was Joseph Gitonga Wahome (DW2). DW2 stated that he was the 1st Defendant's property manager. He stated that the 1st Defendant purchased the 1st Defendant's plots in 1999 at Kshs. 17,000/- each. He stated that he was involved in the transaction and that the 1st Defendant was issued with documents that he had produced in evidence as exhibits. DW2 stated that he fenced the 1st Defendant's plots after the 1st Defendant purchased the same. He stated that he did not know the Plaintiff. He stated that while he was fencing the 1st Defendant's plots, policemen came from Ruai Police Station and told him that the plots belonged to someone else. He stated that he reported the incident to the 2nd Defendant but he did not follow up on the matter with the 2nd Defendant. On cross-examination, DW2 stated that when they went to the site of the 1st Defendant's plots in 2002, Mr. Thumbi and Mr. Mwangi who were the 2nd Defendant's directors, Mr. Nyika who was the 2nd Defendant's surveyor, the 1st Defendant and he were present. He stated that he put up the said fence in 2010.
13. The 1st Defendant's second witness was Raphael Kirumwa(DW3). DW3 stated that he was a businessman and a director of the 2nd Defendant. He stated that he had been a director of the 2nd Defendant since 1983. He stated that he knew the 1st Defendant. He stated that the 1st Defendant came to the 2nd Defendant's office and asked them if the 2nd Defendant could sell land to him. He stated that the 2nd Defendant sold to the 1st Defendant the 1st Defendant's plots at Kshs. 17,000/= each. He stated that he accompanied the 1st Defendant and the surveyor to the site of the 1st Defendant's plots to show him the plots that he had purchased.
14. DW3 stated that the 1st Defendant's plots were different from the suit properties. He stated that Plot No. L 75 and Plot No. L 76 were not the same as Plot No. V.227 and Plot No. V.228. He stated that Plot No. V. 227 was the same as Plot No. C 891 and Plot No. V.228 was the same as Plot No. C 886. He stated that letter "V" referred to plot reference in the register while letter "C" referred to the allocation map. DW3 stated that he could not confirm if the 1st Defendant's plots and the suit properties were in different maps. He stated that he was still a director of the 2nd Defendant and that he knew Samuel Mwangi Thuita who was the then chairman of the 2nd Defendant.



15. On cross examination, DW3 stated that the Plaintiff held two shares in the 2nd Defendant. He stated that the Plaintiff was issued with a share certificate No. 13043 and was allocated Plot No. L75 and L 76 (the suit properties) in 1992. He stated that he could not remember the surveyor who did the allocation but he was one of their surveyors. He stated that “C” meant “Chege” area. He stated further that the note at the back of the share certificate that Plot No. L 75 was the same as Plot No. C 886 while Plot No. L 76 was the same as Plot No. C 891 was correct. He stated that Plot No. V. 227 and Plot No. V. 228 were allocated to the 1st Defendant on 17th October 2002 and that Plot No. V.227 and Plot No. V.228 were equivalent to Plot No. C 891 and Plot No. C886 respectively. DW3 stated that he was present when the 1st Defendant was being shown the said plots.
16. DW3 stated further in cross-examination that the dispute between the Plaintiff and the 1st Defendant arose out of a double allocation. He stated that the 2nd Defendant allocated the same parcels of land twice. DW3 stated that the bonus plots were allocated to the Plaintiff on 24th January 2002. He stated that the Plaintiff was allocated the bonus plots because he owned Plot No. C 886 and Plot No. C 891(the suit properties). He stated that cases of double allocation were common with regard to the 2nd Defendant’s plots and that he was the chairman of the sub-committee dealing with double allocation.
17. On further cross-examination, DW3 stated that he was not giving evidence as a director of the 2nd Defendant but in his personal capacity as he was summoned by the court as a witness for the 1st Defendant. He denied that he was a relative of the 1st Defendant. DW3 stated that the Plaintiff was a shareholder of the 2nd Defendant while the 1st Defendant was a non-member. He confirmed that he had been a director of the 2nd Defendant since 1983 and that to be shown a plot, one had to go to the office with a share certificate and he would be shown the plot by their surveyor. He stated that the Plaintiff was a shareholder of the 2nd Defendant and that the ownership of the plots was tied to shareholding.
18. DW3 stated further that he was conversant with the signature of the then vice-chairman of the 2nd Defendant, J.K.Mwangi, deceased. He confirmed that the letter dated 12th July 2011 addressed to CID Ruai (P.EXH.8) was signed by J.K.Mwangi. He reiterated that “C” referred to the allocation map while “V” referred to the register. He reiterated that Plot No. V. 227 is the same as Plot No. C 891 and Plot No. V. 228 is the same as Plot No. 886. He stated that it was the 2nd Defendant’s surveyor who was involved in the double allocated of the disputed plots. He denied personal involvement.
19. The 2nd Defendant called one witness, Jack Kamau Wachira (DW4). DW4 told the court that he was a land surveyor and that he had worked for the 2nd Defendant in that capacity since 2003. He adopted his witness statement dated 23rd September 2021 as part of his evidence in chief with some corrections. He stated that the Plaintiff was allocated the suit properties in 1990 and not 1992 and that the 1st Defendant was allocated Plot No. V. 227 and Plot No. V. 228 in 2002 and not on August 26, 1991.
20. He stated that his statement was based on the office records held by the 2nd Defendant. He stated that according to the said records, the Plaintiff was allocated Plot No. C 886 and Plot No. C 891(the suit properties). He stated that he was not able to trace the allocation records for the 1st Defendant’s plots. He stated that according to their records, the suit properties were owned by the Plaintiff. He stated that he looked at the allocation map C which showed where the suit properties were located. He stated that the suit properties were different from Plot No. V.227 and Plot No. V. 228 claimed by the 1st Defendant. He stated that if the 1st Defendant was shown Plot No. C 886 and Plot No. C 891(the suit properties) on the ground then, that means that he was shown the Plaintiff’s plots. He stated that it was not legal for the 2nd Defendant to allocate to the 1st Defendant land that belonged to the Plaintiff since the plots were not available for allocation. He stated further that the 1st Defendant should go to the 2nd Defendant to be shown his plots.



21. On cross-examination by the advocate for the Plaintiff, he stated that he had perused the ownership documents held by the parties. He stated that the same were issued by the 2nd Defendant. He stated that the Plaintiff had taken possession of the suit properties in dispute and that the 1st Defendant's plots were available but he could not tell where they were. He contended that the parcels of land owned by the 1st Defendant were not near the suit properties and that the Plaintiff was the first person to acquire the suit properties in 1990 while the 1st Defendant acquired his properties in 2002.
22. On cross-examination by the advocate for the 1st Defendant, he stated that the suit properties and the 1st Defendant's plots were far from each other. He stated that he was not the one who pointed out the beacons to the parties. He stated that the person who pointed out the beacons was deceased. He stated that he was not able to locate the 1st Defendant's plots on the ground because he could not trace his allocation records.
23. He stated that he could point out the suit properties on the ground. He stated that the 1st Defendant was allocated land that had already been allocated to the Plaintiff. He stated that he got the information on the 1st Defendant's land allocation from the back of his share certificates. He stated that this was a case of double allocation. He stated that the 1st Defendant should go to the 2nd Defendant so that he could be allocated land lawfully and that they had a duty to correct the anomalies such as the one before the court.

The submissions:

23. The parties were directed to make closing submissions in writing.

The Plaintiff's Submissions:

24. The Plaintiff filed submissions dated April 26, 2022. The Plaintiff framed two issues for determination namely; whether the Plaintiff is the rightful proprietor of the suit properties and whether the Plaintiff is entitled to the costs of the suit. The Plaintiff submitted that there was no contention that the Plaintiff and the 1st Defendant were allocated plots by the 2nd Defendant. The Plaintiff submitted that the only contention was whether Plots L75 (C886) and L76 (C 891) were the plots that were allocated to both parties and if so, who between the two parties owned them.
25. The Plaintiff submitted that the 2nd Defendant was a land-buying company whose objective was to bring together prospective buyers of land, acquire land and allocate it to its shareholders. The Plaintiff submitted that for an individual to acquire an interest in the land owned by the 2nd Defendant, one had to purchase a share in the 2nd Defendant and be allocated land. The Plaintiff submitted that the allocation was done by the surveyors and officials of the 2nd Defendant who would allocate indexed plots to identified shareholders. The Plaintiff submitted that the process was evidenced by entries made on the share certificates by hand and the payment of the fees set by the 2nd Defendant.
26. The Plaintiff submitted that he acquired the suit properties 11 years before the 1st Defendant. The Plaintiff submitted that by 1991, the subject properties had been identified and had been allocated to the Plaintiff as evidenced by the entry by the 2nd Defendant on the back of the Plaintiff's share certificate. The Plaintiff submitted that he took actual possession of the suit properties 11 years before the 1st Defendant laid any claim to the same. The Plaintiff submitted that DW3 was biased against him. The Plaintiff submitted that DW3 could not explain why in a claim against the company involving two shareholders, he opted to testify against one shareholder instead of testifying for the company. The Plaintiff submitted the 2nd Defendant's surveyor confirmed that from the records held by the 2nd



Defendant, the suit properties were allocated to the Plaintiff and that the plots allegedly allocated to the 1st Defendant were not in the same block as the suit properties.

The 1st Defendant's submissions:

27. The 1st Defendant filed submissions dated June 2, 2022. The 1st Defendant framed five issues for determination. The first issue was whether the contested location belonged to Plot No. C 886 (L75) and Plot No. C 891 (L76) (the suit properties) or Plot No. V. 227 and Plot No. V. 228 (the 1st Defendant's Plots). The 1st Defendant submitted that the 2nd Defendant's witness alleged that Plot No. C 886 and Plot No. C 891 (the suit properties) were at a different site from the location of Plot No. V. 227 and Plot No. V. 228 (the 1st Defendant's Plots) but did not tender evidence to that effect. The 1st Defendant submitted that since the substratum of the Plaintiff's case was that the 1st Defendant's plots had encroached on the suit properties; the burden was upon the Plaintiff to tender evidence in the form of survey plans or maps in support of the allegation. The 1st Defendant submitted further that the 2nd Defendant failed to tender evidence showing the actual location of the suit properties and the 1st Defendant's plots.
28. The 1st Defendant submitted that from the evidence tendered by the witnesses, there was no prima facie evidence to support the Plaintiff's allegation that the 1st Defendant had encroached or trespassed on the suit properties. The 1st Defendant submitted that from the evidence before the court, the dispute between the parties revolved around the actual location of the suit properties and the 1st Defendant's plots.
29. The second issue framed by the 1st Defendant was whether the 1st Defendant's plots were in a different location from the contested site. The 1st Defendant submitted that no evidence was tendered pointing out the site of the suit properties and the site of the 1st Defendant's plots and that the court should make orders directing the 2nd Defendant to point out the sites of the respective plots. The third issue was whether the Plaintiff was entitled to the orders sought. The 1st Defendant submitted that he had demonstrated that the Plaintiff had failed to establish that the 1st Defendant trespassed on the suit properties and therefore the Plaintiff's suit should be dismissed.
30. The fourth issue was whether the 1st Defendant was entitled to the orders sought in the cross-claim. The 1st Defendant submitted that the Plaintiff had failed to demonstrate that the 1st Defendant trespassed on the suit properties. The 1st Defendant submitted that he was entitled to an order of injunction to subsist until such time that the 2nd Defendant will have regularized the position regarding the actual location of each plot. The fifth issue was whether the 2nd Defendant was entitled to any order. The 1st Defendant submitted that the 2nd Defendant did not file a counter-claim or a cross-claim against the 1st Defendant and as such it was not entitled to any relief.

The 2nd Defendant's submissions:

31. The 2nd Defendant filed submissions dated June 21, 2022. The 2nd Defendant framed the following issues for determination;
 - i. What is the true identity of the contested properties? Are they plot numbers L 75 (C 886) and L 76 (C 891) or V.227 and V. 228 respectively?
 - ii. Were the Plaintiff and the 1st Defendant allocated the same properties by the 2nd Defendant and therefore a case of double allocation?
 - iii. Which of the two allocations if so, was first in time, was it to the Plaintiff or the 1st Defendant?



- iv. If there was a double allocation with regard to the suit properties, was the 2nd Defendant's second allocation bona fide, lawful and capable of affecting and/or invalidating the first allocation?
 - v. Is the party who got the second allocation entitled to another proper allocation consistent with the actual location of his properties on the ground according to the allocation map?
32. The 2nd Defendant submitted that from the evidence tendered by all the parties, it was clear that the true identities of the disputed parcels of land were Plot No. L 75 (C 886) and Plot No. L76 (C 891) and that the bona fide owner of these properties was the Plaintiff. The 2nd Defendant submitted that the 1st Defendant was the owner of Plot No. V.227 and Plot No. V. 228 (the 1st Defendant's plots) which in the evidence of the 2nd Defendant were to be found elsewhere. The 2nd Defendant submitted that the 2nd Defendant had offered to assist the 1st Defendant to be properly allocated the 1st Defendant's plots.
33. The 2nd Defendant submitted that the title to the suit properties had already passed to the Plaintiff in June 1992 when they were allocated to him and that the suit properties were not available for allocation to the 1st Defendant. The 2nd Defendant submitted further that the 1st Defendant was entitled to be allocated the 1st Defendant's plots in a manner consistent with their actual location on the ground and in the allocation map and that it had offered to do so. The 2nd Defendant submitted that it would be fair and in the interest of justice to all the parties that a proper allocation was done in favour of the 1st Defendant. The 2nd Defendant submitted that the suit properties were owned by the Plaintiff. The 2nd Defendant submitted that the 1st Defendant was illegally and wrongfully allocated the suit properties by the 2nd Defendant.

Analysis and Determination:

34. From the pleadings, the evidence tendered by the parties and the submissions, I am of the view that the issues rising for determination in this suit are the following;
- a. Whether the parcels of land referred to by the Plaintiff as Plot No. L 75 (C886) and Plot No. L 76 (C891) (the suit properties) and by the 1st Defendant as Plot No. V.227 and Plot No. V. 228 (the 1st Defendant's plots) are the same on the ground and who is the lawful owner thereof.
 - b. Whether the Plaintiff is entitled to the reliefs sought in the plaint.
 - c. Whether the 1st Defendant is entitled to the reliefs sought in his cross-claim.
 - d. Whether the 2nd Defendant is entitled to any relief.
 - e. Who is liable for the costs of the suit?
35. I am satisfied from the evidence on record that the suit properties and the 1st Defendant's plots refer to the same properties on the ground and that the same were merely given different reference numbers at different times when the same were allocated to the parties. The Plaintiff traces the root of his titles to Alice Wanjiku Ndirangu (Ms. Ndirangu) who was a shareholder of the 2nd Defendant. Ms. Ndirangu had two shares in the 2nd Defendant company that entitled her to two main plots and two bonus plots. Ms. Ndirangu acquired shares in the 2nd Defendant in 1980s. One of the receipts produced in evidence showed that she paid a sum of Kshs. 1000/- to the 2nd Defendant on October 13, 1982 for survey fees. Through an agreement for sale dated December 19, 1990, Ms. Ndirangu sold her two (2) shares in the 2nd Defendant to the Plaintiff at a consideration of Kshs. 30,000/=. On October 18, 1991, the Plaintiff was issued with a share certificate No. 13643 in respect of the said two shares. In June 1992, the Plaintiff was allocated the suit properties and on January 24, 2002, the Plaintiff was allocated two (2) bonus



plots. The bonus plots were allocated to the Plaintiff on account of having been allocated two main plots (the suit properties).

36. It is common ground that the 1st Defendant was not a shareholder of the 2nd Defendant. The 1st Defendant is said to have purchased the 1st Defendant's plots from the 2nd Defendant on August 26, 1999 or thereabouts and was issued with Non-Member Certificate of Plot Ownership dated 6th April 2000. The 1st Defendant was shown the 1st Defendant's plots on 17th October 2002 on which date he was also shown the beacons for the plots. The endorsements at the back of the 1st Defendant's Plot Ownership Certificates show that the 1st Defendant's plots were the same as the suit properties. This means that the 2nd Defendant purported to sell to the 1st Defendant parcels of land that had already been allocated by the 2nd Defendant to the Plaintiff who was its shareholder. I am in agreement with DW3 and DW4 that this was a case of double allocation by the 2nd Defendant. I am satisfied from the evidence on record that the 1st Defendant purported to purchase the suit properties several years after the same were allocated to the Plaintiff and the Plaintiff had taken possession. When the 1st Defendant tried to dispossess the Plaintiff of the suit properties in 2011, the Plaintiff resisted the takeover of the properties. The dispute between the Plaintiff and the 1st Defendant over the ownership of the suit properties was reported to the police and the 2nd Defendant confirmed to the police that the Plaintiff was the bona fide owner of the suit properties. In these proceedings, the 2nd Defendant admitted in its defence and evidence that the Plaintiff is the lawful owner of the suit properties.

37. This is not the first time a court is being confronted with a case of double land allocation. In [*Hubert L. Martin & 2 Others v. Margaret J. Kamar & 5 others*](#) [2016] eKLR, the court stated as follows:

“A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.”

38. In [*Kamau James Njendu v. Serah Wanjiru & another*](#) [2018] eKLR the court stated as follows:

“In essence therefore I find that there could have been double allotment of the suit land and the blame would therefore lay squarely on the Settlement Fund Trustee. In the case of *M'Ikiara M'Rinkanya & Another -v- Gilbert Kabeere M'Mbijiwe, (1982-1988)* 1KAR 196, the court held that where there was a double allocation of land, the first allotment would prevail. That therefore there was no power to allot the same property again.”

39. In [*Republic v. City Council of Nairobi & 3 others*](#) [2014] eKLR, the court stated as follows:

“From the case as presented by the Applicant they no doubt had beneficial interest in the suit plot. As was held by Warsame, J (as he then was) in *Rukaya Ali Mohamed vs. David Gikonyo Nambacha & Another Kisumu HCCA No. 9 of 2004* once an 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 or proprietorship 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.”

40. It is a maxim of equity that where there are equal equities, the first in time prevails. In *Benja Properties Limited v. Syedna Mohammed Burbannudin Sabed & 4 others* [2015] eKLR, the Court of Appeal cited with approval the High Court case, *Gitwany Investment Limited v. Tajmal Limited & 2 others* [2006] eKLR where the court stated that:

“My understanding is therefore that the title given to Gitwany in the first instance and which I have held to be absolute and indefeasible as regards the suit land is the earlier grant and in the words of the Court of Appeal in *Wreck Motors Enterprises vs. commissioner of Lands*, C.A. No. 71/1997 (unreported) “– is the “grant [that] takes priority. The land is alienated already.” This decision was again upheld in *Faraj Maharus vs. J.B. Martin glass Industries and 3 others* C.A 130/2003 (unreported). Like equity keeps teaching us, the first in time prevails so that in the event such as this one where, by a mistake that is admitted, the Commissioner of Lands issues two titles in respect of the same parcel of land, then if both are apparently and in the fact to them, issued regularly and procedurally without fraud save for the mistake, then the first in time must prevail. It must prevail because without cancellation of the original title, it retains its sanctity....”

41. In this case, the parties had not been issued with title documents for their respective plots. It is however clear from the evidence on record that the Plaintiff acquired the suit properties earlier than the 1st Defendant. Guided by the above case law, it is the finding of the court that the Plaintiff's beneficial interests in the suit properties must prevail against that of the 1st Defendant. The Plaintiff is therefore the lawful owner of the suit properties also referred to as Plot No. V.227 and Plot No. V.228 by the 1st Defendant. The Plaintiff has therefore proved its case against the Defendants and is entitled to the reliefs sought in the plaint.
42. With regard to the 1st Defendant's cross-claim against the Plaintiff and the 2nd Defendant, I find no basis for the claim against the Plaintiff. I have found that the suit properties and the 1st Defendant's plots are the same parcels of land. I am not persuaded that the 1st Defendant's parcels of land exist somewhere as distinct and separate plots from the suit properties. Assigning two reference numbers to one parcel of land does not make that one parcel become two parcels. I have held that the suit properties which are referred to by the 1st Defendant as Plot No. V. 227 and Plot No. V.228 are owned by the Plaintiff. The 1st Defendant is therefore not entitled to a declaration that he is the owner of the same. The 1st Defendant is also not entitled to an injunction to restrain the Plaintiff and the 2nd Defendant from dealing with the same.
43. I am in agreement with the 1st defendant that the 2nd Defendant neither filed a counter-claim nor a cross-claim. The 2nd Defendant is therefore not entitled to any relief. The 2nd Defendant merely admitted the Plaintiff's claim and urged the court to enter judgment in favour of the Plaintiff against the 1st Defendant. That does not entitle the 2nd Defendant to a judgment in its favour.
44. On the issue of costs, as a general rule, costs follow the event unless for good reason the court holds otherwise. In this case, the Plaintiff has succeeded in his claim against the defendants. The court has found that the purported sale of the suit properties by the 2nd Defendant to the 1st Defendant as Plot No. V.227 and Plot No. V. 228 amounted to double allocation of land as such as unlawful. The



defendants have not put forward any good reason why the Plaintiff should be denied his costs of the suit. The costs of the suit shall be awarded to the Plaintiff.

Conclusion:

45. In conclusion, I hereby make the following orders:

1. I enter judgment for the Plaintiff against the 1st and 2nd defendants for;
 - a. A declaration that the Plaintiff is the lawful proprietor of Plot No L 75 (886) and Plot No L 76 (891) referred to as Plot No V.227 and V.228 by the 1st Defendant.
 - b. A permanent injunction restraining the 1st and 2nd Defendants from dealing with or in any way interfering with Plot No L 75 (886) and Plot No L 76 (891) referred to as Plot No V.227 and V.228 by the 1st Defendant.
 - c. Cost of the suit.
2. The 1st Defendant's cross-claim is dismissed with costs to the Plaintiff.

DELIVERED AND DATED AT KISUMU ON THIS 1ST DAY OF MARCH 2023

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Njoroge for the Plaintiff

Mr. Bundotich for the 1st Defendant

Mr. Bundotich h/b for Mr. Ngata for the 2nd Defendant

Ms. J. Omondi-Court Assistant

