



REPUBLIC OF KENYA



**Muya v Njuguna (Environment & Land Case 114 of 2019)
[2022] KEELC 150 (KLR) (21 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 150 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 114 OF 2019
FM NJOROGE, J
JUNE 21, 2022**

BETWEEN

AGNES NYOKABI MUYA PLAINTIFF

AND

ELIZABETH WAMBUI NJUGUNA DEFENDANT

JUDGMENT

1. By a Plaint dated 26/09/2019 and filed in court on 26/09/2019 the Plaintiff sought the following orders against the Defendant:
 - a. A permanent injunction restraining the Defendant, her agents, servants or any person from interfering with the Plaintiff's possession of Subukia/Subukia Block 13/889 (KIANWE)
 - b. An order that of Subukia/Subukia Block 13/889 (KIANWE) belongs to the Plaintiff exclusively.
 - c. Costs of the suit and interests.

The Plaintiff's Case

2. The Plaintiff averred that she is the registered owner of land parcel No. Subukia/Subukia Block 13/889 (Kianwe) measuring approximately 0.0326 Ha; that she was allocated the suit property by Kwale Self Help Group as one of their members in the year 2000; that around the year 2018, the defendant through her agents went to the suit property and threatened to evict the plaintiff; that they also fenced off the parcel of land; that the defendant's actions have violated her proprietary rights and that she will continue to suffer irreparable damage unless the court stops the defendant.



The Defendant's Defence and Counter Claim

3. The defendant filed her Statement of Defence and Counter Claim on 11/10/2019. She denied that the plaintiff is the registered owner of the suit property and stated that the land was allocated to her as residential plot 65 Subukia Trading Center by the County Council of Nakuru. She averred that the plaintiff fraudulently acquired the title to the suit property now known as Subukia/Subukia Block 13/1889 (Kianwe).
4. She averred further that she has been in uninterrupted possession of the suit property since the year 1994 and denies that the Plaintiff has been in possession since the year 2000. She also averred that in 2012 she wanted to develop the property and inquired from the Regional Survey office in Nakuru together with the Lands Registry with a view of processing her title for the plot known as No. 65 Subukia trading center only to discover that the plaintiff had acquired the title to the suit land.
5. She averred that she reported the matter to the CID offices at Subukia, Nakuru County CID and the National Land Commission which institutions determined that she was the legal owner of the plot. She denied all the other allegations in the Plaintiff.
6. In her counterclaim, she averred that the plaintiff in this matter obtained the registration of land parcel No. Subukia/Subukia Block 13/881 (Kianwe) previously known as Plot No. 65 Subukia Trading center Quarry by forging the allotment letter for plot No. 50 Subukia Trading Center and using it to process the title for the suit land.
7. That the matter was reported to the CID at Subukia and the Nakuru County CID who conducted investigations and established that the Plaintiff had committed multiple criminal offences jointly with her husband and they were subsequently charged in Nakuru Criminal Case No. 2834 of 2019. She reiterated that she has been in possession of the property since the year 1994 to date sought the following orders against the Plaintiff:
 - a. A declaration that she is the rightful legal owner of the suit land parcel Subukia/Subukia Block 13/889 (Kianwe) originally known as residential plot No. 65 Subukia trading center.
 - b. An order for cancellation of the title Subukia/Subukia Block 13/889 (Kianwe) in the name of Agnes Nyokabi Muya and order directed to the Land Registrar Nakuru to register and issue a title deed for Subukia/Subukia Block 13/889 (Kianwe) in the name of the Defendant Elizabeth Wambui Njuguna.
 - c. Costs of the suit.

The Plaintiff's Evidence

8. The Plaintiff gave her evidence on 5/11/2020 as PW1. She adopted her witness statement dated 26/09/2019 as her evidence-in-chief. It was her evidence that she acquired the title deed for Subukia/Subukia Block 13/889 (Kianwe) on 07/06/2000 and was the first registered owner. She produced a copy of the title deed as P.Exh 1. She testified that on 6/09/2019, she wrote a letter to the Land Registrar through her advocates Maragia Ogaro & Co. requesting for the green card which was issued to her after payment of Kshs. 500. She produced the letter as P.Exh 2, the green card as P.Exh 3 and the receipt as P.Exh 4.
9. It was her evidence that there was a company known as Put Sarajevo that was constructing the Nakuru – Nyahururu highway in the 1980's; that the company used to extract road construction material from plot No. 265 and she used to sell porridge and githeri amongst other things on the said plot. She testified



that the District Officer visited her together with the people who were trading on the said plot and advised them to form a group. The group, comprised of 108 persons, was formed with the help of the District Officer and christened Kwale Self Help Group and PW1 was registered as Member No. 50. That the group acquired the plot and subdivide it through a Surveyor, and she was allocated plot No. 889. She also testified that in the year 1994 the plot belonged to Put Sarajevo and that it did not belong to the Municipal Council of Nakuru and neither was it previously known as plot No. 65 as claimed by the Defendant. It was her evidence that upon allocation of the plot to her in the year 2000, she began to cultivate it and she did so up to the year 2018 when the defendant, claiming that it belonged to her, started fencing it. The defendant reported her to the Criminal Investigations Department office at Subukia who, after she had shown them her documents, had her arraigned in court in Nakuru CM Criminal Case No. 2834/2019. She produced the charge sheet as P. Exh 5 and stated that the case is still ongoing. It was the plaintiff's further evidence that she conducted a search on 24/07/2012 and paid Kshs. 500 and another search on 8/11/2018, both which showed that the suit property belonged to her. She produced a copy of the certificate of search as P. Exh 6A, the receipt of Kshs. 500 as P. Exh 6B and the subsequent certificate of search as P. Exh 7. She also produced photographs which, according to her, showed the fence the defendant had put up on the plot in the year 2018 as P. Exh 8. She testified that she saw the allotment letter belonging to the defendant for the first time in court and reiterated that she owned the plot from the year 2000 to 2019 when she filed the instant suit. She referred to her further list of documents filed on 27/02/2020 and testified that as at 8/12/1999 the suit property was referred to by No. 265. She produced a copy of the RIM dated 8/12/1999 as P. Exh 9. She further testified that according to the copy of the RIM issued by the Provincial Survey Records office on 15/10/2019 which she produced as P. Exh 10, plot No. 265 had been subdivided into several plots including plot 889; that at page 17 of the defendant's documents, there is a sketch that shows the subdivision of Subukia (Quarry) plot No. 34. She went on to testify that her plot came from plot no. 265 and not plot no. 34. That according to P.Exh 9, plot No. 265 and 43 are not adjacent to each other and that she did not collude with her husband as he did not work for Kwale Self Help Group as a surveyor.

10. On cross-examination she confirmed that her husband is a surveyor and that they have both been charged in a criminal case. She also confirmed that Plot No. 889 is registered in her name and not the name of her husband. She admitted that the hearing of the criminal case has commenced and as per the charge sheet the first count she is charged with is forgery. She also admitted that the size of the plot is a quarter an acre but according to the title it measures 0.0326 Hectares. She stated that she did not know whether 0.0326 Hectares is less than 50 feet by 100 feet.
11. She confirmed that where the date of the opening of the green card should be, it is indicated that it was opened on "17.19" with the approximate area being 0.0426 Ha and that she got the plot in the year 2000 as plot 889. She stated that on the membership register of the self-help group, she was No. 50. She admitted that she did not get an allotment to the property as it belonged to Put Sarajevo and she was given a title deed when she gave out her group number. She admitted that she did not present any transfer form at the Land Registry to get the title deed and neither did she have a receipt to show payment for the title or any evidence that showed that she signed for receipt of the title.
12. She pointed out that there is no toilet on the plot. When she was shown the allotment letter at page 25 of the defendant's bundle of documents, she stated that it referred to plot No. 50 and had her name on it which she was not aware of.
13. On re-examination she stated that the allotment letter at page 25 of the defendant's documents was not issued to her as the County Council did not allocate any land to her. She also stated that each member of the Self Help Group followed up on their own title individually.



14. Eliud Muya Kariuki testified as PW2. He adopted his witness statement dated 26/09/2019 as his evidence. He testified that the plaintiff is his wife and the registered owner of Land parcel No. Subukia/ Subukia Block 13/889 (Kianwe) pursuant to the Certificate of Title issued on 7/06/2000. He further testified that he was employed as a Chief Surveyor by a company known as Put Saragevo. He stated that there were sites set aside for collection of raw materials and one of them was the suit property that was bought from Kianwe Farmers Co. Limited. It was his evidence that there were people selling food to the workers who came together and formed Subukia Kwale Self Help Group with the plaintiff as one of the members. At that time the plot was number Subukia/Subukia Block 13/265 (Kianwe) and it was registered in the name of the self-help group; that the self-help group had 108 members with the plaintiff being given balloting number 50 and each member was given a 50 feet by 100 feet plot; that the first registered owner of the suit property was Kwale Self Help Group before it transferred the land to the Plaintiff.
15. It was his evidence that he does not know the defendant and that the plot was not initially plot No. 65. He was referred to the Mutation Form at page 31 of the defendant's list of documents and stated that plot No. 50 and 65 are far apart as per the sketch at page 32. He pointed out that plot no. 889 in the RIM in the defendant's bundle corresponds to the location of plot 50 in the Mutation Sketch. He testified that plot no 889 was never at any point owned by the Nakuru County Government.
16. He stated that he was not engaged by Kwale Self Help Group as a surveyor. That the Part Development Plan at pages 14 and 15 of the defendant's bundle is not signed and neither does it indicate which plot it is in respect of. He reiterated that the suit property is a subdivision of plot no. 265 and not plot no. 64. He admitted that he is facing criminal charges where the complainant is the defendant and which case is still ongoing; that the certificate of official search dated 26/09/2012 that is at page 23 of the defendant's list of documents shows the Plaintiff as the owner of the suit property which fact the defendant knew but she did not file any case.
17. On cross-examination he admitted that he has never seen any title to the property in the name of Put Saragevo which was a company. He also admitted that he has never seen the transfer signed by the directors of Put Saragevo since the company did not have title to the land. He confirmed that the initial allottees were not given any documents to show ownership. He admitted that he has been charged in court with forgery in respect to the allotment letter for plot 50 which is at page 25 of the defendant's bundle. He further confirmed that the plaintiff has the title to the suit property but he did not know if she paid stamp duty or transfer fee for the same. He was referred to page 31 of the defendant's bundle which is a mutation form with three names of the officials of the self-help group. He confirmed that No. 3 on the mutation form is the name of Rosemary Wangui Mwendia who was present in court as a witness for the defendant and that she was the treasurer of the self-help group. He also denied that he was engaged by the group to re-establish the beacons and that the sketch map at page 17 of the defendant's bundle has plot 65 on it but its location did not correspond to plot 289 in the sketch map.
18. On re-examination, he stated that the plaintiff has been farming on the land since she was issued with a title deed and pointed out that he has never seen the document at page 25 of the defendant's list of documents prior to that day as it was not issued to the plaintiff to acquire the suit property. That the sketch at page 17 does not show who prepared it and neither was it signed and it is in respect of plot No. 34 while the suit property is a sub division of plot No. 265.
19. He stated that the self-help group did not engage him and that he doesn't know if plot 265 was in the name of Put Saragevo and that it is plot number 50 that appears in the mutation form of the Defendant's bundle.
20. The plaintiff's case was then closed.



The Defendant's evidence

21. Reuben Njuguna Kinuthia testified as DW1. He adopted his witness statement dated 7/10/2019 as his evidence-in-chief. It was his evidence that Plot No. 65 Quarry Subukia measures approximately 50 by 100 feet. He testified that in 1994 he applied to the County Council of Nakuru to be allocated land in the name of his daughter. He testified that an allotment letter (P. Exh. 1) was issued to his daughter Elizabeth Wambui Njuguna, who is the defendant, on 19/05/1994.
22. It was also his evidence that after allocation he was shown the plot on the ground by a surveyor of the Council by the name Laban Otieno; that he was issued with a sketch of the property which is at pages 14 and 15 of the defendant's bundle. He testified that he took possession of the property dug a pit latrine and fenced it in the year 1994.
23. That no one claimed the property between the years 1994 to 2012 and that an issue arose in 2012 when his daughter wanted to develop the land and did a search which showed that the land was registered in the name of the plaintiff. He testified further that he purchased a map from the Principal Surveyor Nakuru which is the same as P.Exh 10 that showed that his daughter's plot was now land parcel No. Subukia/Subukia Block 13/889. According to his evidence, he conducted a search on the property and obtained a certificate of search dated 26/09/2012 which he produced as P. Exh 2 and it reflected the name of the plaintiff as owner; that the name 'Muya' led him to the plaintiff's family as he was aware that Mr. Muya had been involved in the survey to confirm the plot numbers; that he called her and reported the matter to the Directorate of Criminal Investigations at Subukia who conducted investigations and charged the plaintiff and her husband in Nakuru CM Criminal Case Number 2834 of 2019 with the offence of forgery and that the case was slated for further hearing on 22/07/2021. He stated that the DCI showed him an allotment letter in the plaintiff's name which is at page 25 (DMFI-3) of the defendant's bundle which stated that her plot was No. 50. It was his evidence that he also obtained a mutation form which had his plot number 65 replaced with no. 50; that plot number 65 in the mutation is at a different location from where his plot is and further that the new plot 65 is smaller than his parcel No. 65; that the mutation was signed by Mr Muya and upon inquiry from Regina Wamaitha Waititu and Rosemary Wangui who are also alleged to have signed the mutation, they denied signing it. He then produced three photographs that showed the fence around the property as P.Exh 5A, 5B and 5C. He stated that the plaintiff has never been in occupation of the plot and that he was the one who made various payments for it at the County Government. He produced the receipts as D.Exh. 6A, 6B and 6C.
24. Upon cross-examination, he confirmed that he made an oral application for the plot and that at the time the plot was known as Plot No. 65 Quarry Subukia. He admitted that P. Exh. 1 which stated that the plot was at Subukia Trading Center and is not dated; nonetheless, he stated that he received it on 25/05/1994; that Kwale is an extension of Subukia Trading Center, and that he orally requested the County Council to issue an allotment letter in the name of his daughter.
25. He was referred to the sketch at page 14 and 15 of the defendant's documents and stated that it has two plot No. 65s; that his plot is in the residential area while the other plot no. 65 is in the commercial area; that no ground survey report was prepared when he was shown the land and he has been in occupation to date. He admitted he was allocated the land as an individual but for him to acquire the title to it he had to go through the Kwale Self Help Group.
26. DW1 admitted that the self-help group did not have a members register and was not issued with a membership number. Upon referral to the sketch at page 17 of the defendant's bundle he pointed out that it made reference to two plots bearing the number 65 and it shows that the plots were as a



- result of subdivision of plot No. 34. He admitted that upon conducting a search on the property on 26/09/2012, the search showed that the plaintiff was registered as the owner on 6/06/2000 but he did not lodge any caution against that title. He also confirmed that he did not commence any civil proceedings until 2019 and that he had no receipt for payment of Kshs. 9,300/= specified in D. Exh. 1; that the receipt marked as DExh.6B is for payment of rates which amount he paid in 2012 but he did not pay for plot number 889 because it was not in his name; that he has always been in occupation and that he was not aware that the Deputy Registrar filed a report indicating that there is no pit latrine on the land.
27. On re-examination he reiterated that the sketch at page 14 and 15 of the defendant's bundle of documents has both a residential and a commercial plot; that he was familiar with its location on the ground and that is why he identified it on P. Exh. 10.
 28. Rosemary Wangui Mwendia testified as DW2 and adopted her witness statement dated 24/01/2020 as her evidence. She testified that she has a plot at Kwale which she was allocated in 1994 by the Council of Nakuru and to date she does not have a title to the same. She testified further that the plot is 50 feet by 100 feet and that the allottees were 1700 in number. It was her evidence that they had a group to seek title for the land and they engaged PW2 since he was a surveyor to assist them and was paid Kshs. 20,000/= for his services. She testified that she doesn't know Agnes Nyokabi Muya, the plaintiff, and she has no plot at Kwale. She further testified that plot No. 65 belonged to DW1 who is known as "Baba Chege" or "Baba Njuguna" as he had bought it for his daughter. She stated that they had inspected the plot's beacons and that DW1 informed her that the title had been issued in someone else's name.
 29. It was her evidence that for the ten years she has lived on the plot she has never seen the plaintiff and she only came to see her when the court officials went to the ground; that the plot was fenced by DW1 and it has a toilet on it. When she was referred to the mutation at page 31 on the defendant's bundle of documents, she confirmed that her name is on page 1 of the bundle but denied that she signed it. She stated that the mutation had yielded titles and that Regina Wamaitha Waititu named on the front page of the document is the wife to PW2, that she worked with the Nakuru Council and she had a plot there.
 30. It was further her evidence that Erick Muchemi Ndungu was the secretary and is deceased and that Regina is not an official of the group; that the plot allocated to DW1 was plot No. 50 as indicated on the mutation form and not plot 65. That plot No. 65 is 15 x 30 feet around "Lokab" area, which is very small. She testified that she does not know how Agnes got the title and yet the plots were sold to them by the Council.
 31. On cross-examination, she admitted to being a member of Kwale Group and stated that she purchased Plot No. 138 from the Nakuru County Council and was given an allotment letter which she did not have in court. She confirmed that they bought the land and formed groups to enable them get titles to the property but to date she does not have the title. She also confirmed that she never signed the mutation form but it was signed by Regina who is the wife to PW2. She further confirmed that they appointed Mr Muya to assist them get titles to the land but also admitted to having nothing in court to show that they had instructed Mr Muya.
 32. DW2 stated that when she became sick, the chairman and the secretary to the Self Help Group went on with the process and that the secretary informed her that Mr Muya had been paid for his services. When she was referred to the mutation in the defendant's bundle, she indicated that plot No. 65 and 50 are far apart. She asserted that she owns plot No. 138 which is not in the mutation form; she stated that she does not know where it was "taken."
 33. On re-examination, DW2 stated that she never signed any transfer in favor of the plaintiff and that it is only Muya who conducted the survey and the mutation came out as a result of his survey work.



34. Simon Gitau Ngugi testified as DW3. He adopted his witness statement dated 24/01/2020 as his evidence. He went on to testify that he knows Subukia Kwale as he stays near there and that he had two plots in 1994 given to him by the County Council. It was his evidence that he knows plot No. 65 Kwale as it belonged to DW1, Reuben Kinuthia. He testified that he collected his allotment letter together with DW1's allotment letter from the Subukia County Council Offices which had been issued in the name of Elizabeth Wambui Njuguna.
35. He was referred to D. Exh. 1 and confirmed that it was the one. He testified that plot No. 65 was known to him on the ground and that DW1 fenced it and dug a pit latrine. When he was shown the mutation, it was his evidence that it was for the plot with respect to which he had taken the allotment letter for and it was indicated as plot 50 and that it was not in the place marked as 'Plot No. 65'. He reiterated that the County Council issued plots and that he sold his plots in the year 1999.
36. He testified that the others he left formed a committee and made the mutation. He admitted to knowing PW2 and that it is not true that the land belonged to Put Sarajevo. According to the witness, a certain Mr. Mwau from the Physical Planning office at Ardhi House came to the land and subdivided it; the land measured eight acres and it belonged to Kianwe Company Limited; he does not know how the Council came to deal with it; he did not know the plaintiff. He claimed that the suit land is vacant at present, just as it was in 1984.
37. Upon cross-examination, he stated that he was issued with plot no's 102 and 104 by the Council but confirmed that he did not have copies of the letters of allotment. He also admitted that he collected the allotment letter for plot No. 65 and after being shown the mutation, he opined that the proper order of things is that plot No. 65 ought to be at the location where plot No. 50 at present is. He admitted to not knowing the owner of plot No. 50 and to not knowing on what plot Put Sarajevo Ltd had established a quarry. He reiterated that the current land used to belong to Kianwe and that he would know how the Council acquired it. He admitted to not having the list of members of Kwale Self Help Group and that therefore he had no evidence that Agnes was not a member.
38. On re-examination, he stated that the land has been vacant from the year 1994.
39. Elizabeth Wangui Njuguna testified as DW4. It was her evidence that the suit property belongs to her after acquiring it from her father Reuben Njuguna who applied for it from the County Council of Nakuru. She referred to D.Exh 1 and testified that it is an allotment letter to the suit property. The plot was fenced by the time her father gave it to her and they have been farming on it to date. It was her evidence that in by the year 2000 she had known that Agnes had taken the suit property but was not in possession. It was further her evidence that they reported the matter to the CID and instead of the plaintiff reporting to that office, she filed the present suit.
40. On cross-examination, she stated that plot No. 65 belongs to her as she had paid the premium fees through her father. When she was referred to the mutation form, she stated that it states plot no. 50 and plot No. 65. She was referred to D.Exh 2 and she stated that it was not signed and neither did it have a name. She admitted that she knew Agnes had a title deed in the year 2018 but after being shown her statement, she admitted that she knew in the year 2000 after conducting a search. She stated that she reported the matter to the CID and that there is a criminal case pending.
41. On re-examination she was referred to a certificate of search dated 26/09/2012 and she stated that it was after that search that they found out that the plaintiff had a title. She then sought that the plaintiff's case be dismissed and her counter claim allowed.



Submissions

42. The plaintiff in her submissions filed on 17/02/2022 gave a summary of the case, the evidence adduced and addressed the court on the following issues: whether or not the plaintiff is the registered owner of Subukia/Subukia Block 13/889 (Kianwe); whether the certificate of title of Subukia/Subukia Block 13/889 (Kianwe) was acquired fraudulently by the plaintiff and which reliefs can be granted in the circumstances.
43. The defendant through her submissions filed on 17/03/2022 gave a background of the matter, a summary of both the plaintiff's and the defendant's case and addressed the court on the following issues: whether residential plot No. 65 Subukia in the allotment letter of the defendant is the same as plot Subukia/Subukia Block 13/889 (Kianwe); whether the plaintiff acquired a valid title for Subukia/Subukia Block 13/889 (Kianwe) and who is entitled to be declared the rightful owner of the suit property.

Analysis and Determination**

44. After considering the pleadings, evidence and the submissions, I have found that the issues for determination that arise are as follows:
 - a. Whether the plaintiff is the owner of land parcel No. Subukia/Subukia Block 13/889(Kianwe);
 - b. Whether the plaintiff is entitled to the orders sought in the plaint;
 - c. Whether the defendant is entitled to the orders sought in her statement of defence and counter claim;
 - d. Who should pay the costs of this litigation?

The issues are addressed as herein under.

45. It was the plaintiff's case that she was a business woman selling foodstuff to workers of Put Sarajevo Company Ltd who were constructing the Nakuru-Nyahururu road in the 1980's. It was her evidence that the company known as Put Sarajevo owned plot number 265 where they used to extract construction material. That after it completed construction, it abandoned the site and the plaintiff and other traders formed a group known as Kwale Self Help group and acquired the said property which they later subdivided amongst themselves.
46. In support of her case the plaintiff produced a copy of the title deed for land parcel No. Subukia/Subukia Block 13/889 (Kianwe) in her name issued on 7/06/2000 which shows her land measures approximately 0.0326 Ha. She also produced a copy of the green card for the suit property which showed that it came about as a result of subdivision of land parcel No. 265. The first entry is therein dated 6/06/2000 and is in favour of Kwale Self Help Group which entity was registered as the owner and on the same day, the same appears to have been transferred to Agnes Nyokabi Muya, the plaintiff and she was then issued with a title deed.
47. The plaintiff did not produce any evidence to show that plot No. 265 was registered in the name of Put Sarajevo and neither did she produce evidence to show how the Kwale Self-Help Group acquired it. Further, apart from the title deed and the green card, no evidence was produced as to how plot No. 265 was subdivided and eventually registered in the name of the plaintiff.
48. The defendant's case on the other hand is that her father Reuben Njuguna Kinuthia applied to the Nakuru County Council for allocation of a plot in the year 1994. It was the defendant's case that she



was allocated Plot No. 65 Quarry, Subukia measuring about 50 by 100 feet and an allotment letter was issued. The defendant produced a letter of allotment (P.Exh 1) which indicated that she had been allocated residential plot No. 65 at Subukia and was required to pay Ksh. 9,300/= within 30 days after which she would be issued with a title deed. The defendant did not produce any evidence to show whether the said Kshs. 9,300/= was paid.

49. It was the defendant's case that when she got a desire to develop the land, she found out that the property was now known as Subukia/Subukia Block 13/889 and the plaintiff had been registered as the owner; that the plaintiff's husband was a surveyor who had assisted in confirming the plot numbers and that they reported the matter to the CID and upon investigations being done, the plaintiff and her husband were charged in Nakuru CM Criminal Case No. 2834/2019 with the offence of forgery.
50. It was the defendant's case that the forgery mentioned in the Criminal Case was in respect of an allotment letter in the plaintiff's name that stated that her plot was No. 50. The defendant however did not produce the said allotment letter, but the plaintiff in her evidence admitted that she was charged together with her husband in the aforementioned criminal case for forgery of an allotment letter for plot No. 50. It was further the defendant's case that upon allocation in the year 1994, she took possession, dug a pit latrine, commenced farming and she has been using the land to date. The defendant stated that he had been paying rent for the plot and produced receipts dated 14/02/2019 and 28/12/2012 that were in respect of plot No. Subukia/65 Kianoe residential.
51. Both the plaintiff and the defendant are claiming ownership of land parcel No. Subukia/Subukia Block 13/889(Kianwe). The plaintiff alleges that she got the land as a member of Kwale Self Help group and has produced a green card that as pointed out earlier shows that the suit property was initially registered in the name of the Self-Help Group before it was registered in the name of the plaintiff. The defendant on the other hand alleges that she was allocated Plot No. 65 Quarry Subukia by the then local authority and when she wanted to develop it, she found out that it was now known as Subukia/Subukia Block 13/889 (Kianwe) registered in the name of the plaintiff.
52. The defendant alleges that the plaintiff acquired the suit property through fraud. The Court of Appeal in the case of *Arthi Highway Developers Limited Vs. West End Butchery Limited & 6 others* [2015] eKLR stated as follows:

“It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this passage from Bullen & Leake & Jacobs, Precedent of pleadings 13th Edition at page 427:

‘Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged...’
53. The defendant alleged that the plaintiff forged an allotment letter for plot No. 50 and obtained the title while knowing that the suit property belonged to the former.
54. A scrutiny of the documents of the defendant shows that her case depends primarily on a letter of allotment (DExh 1) stating that the district plots allocation committee of the Nakuru County Council had at its meeting held on 19/5/1994 allocated her a residential plot no 65 at Subukia, and a proposed part development plan (D. Exh 2) that, strangely, has two plots bearing number 65. DExh 1 is signed by an official from the then Nakuru County Council. DExh 2 which purports to emanate from the Physical Planning Department of the Ministry of Lands and Settlement, is not. On its face, it lacks the regular approvals that feature in any valid part development plan and in this court's view, that



disqualifies it from being the basis for issuance of any title and it therefore lacks any probative value in these proceedings. Lastly, no evidence was called by the defendant to demonstrate that the two exhibits are connected in any way.

55. The defendant did her claim considerable damage by giving recognition of the Kwale Self Help Group a wide berth in her defence. Instead, she asserted that her plot and other plots were allocated by the County Council of Nakuru. Furthermore, if the suit land ever belonged to the County Council such that it could be deemed to have had the mandate to issue a letter of allotment over it to the defendant, her evidence never demonstrated that. Indeed, DW3 stated that the original plot from which the subdivisions were carved did not belong to Put Sarajevo but to Kianwe Company Ltd., and that he does not know how it came to be owned by the Council. The plaintiff categorically stated that the land never at any time belonged to the Council and that she did not acquire it by way of an allotment letter from that local authority. DW2, the plaintiff's husband, a surveyor, stated that Put Sarajevo purchased the land from Kianwe Farmers Co Ltd and utilized it during road construction and after the road construction, Put Sarajevo left the land vacant and the self-help group was formed and the whole land parcel was mysteriously registered in its name, which it later subdivided to create the suit plot among others.
56. What must be stated here is that perchance the land been owned by the Council, then the same would not have been capable of subdivision at the instance of individual citizens without the involvement of the Council. The mutation form executed by those individual citizens brought about the subdivisions including the suit land. The rates payment receipts and rates payment requests from the County Government of Nakuru produced by the defendant do not help to prove that its predecessor, the Council, had owned the suit land. I have indeed often noted that the often cash strapped devolved governments will receive any monies paid by uninformed citizens even when that payment was not deserved. In the light of the foregoing, I therefore am not convinced that the Country Council of Nakuru either owned or had mandate to subdivide the suit land and allocate the resultant sub-plots to any person.
57. In the evidence of DW1, it is admitted that indeed the Self-Help Group had a role to play in the allocation of the plots. Upon cross-examination by Mr Opar, DW2 acknowledged that it is the mutation (DMFI 4) that yielded the suit plot among other subdivisions. It is on the basis of that mutation that the plaintiff's title appears to have been issued; however, the evidence of the defence witnesses is that in the mutation, the suit land that is plot no 65 ought to be at the location where plot no 50 is.
58. This court observes that what is lacking in the defence case is evidence of a system by which titles for the subdivisions of Land Reference No Subukia/Subukia /235 were acquired. If the defence witnesses had been allocated plots, by the Council and had letters of allotment and had paid to the Council, and the land previously belonged to the Council, why did they not produce the documents in support thereof?
59. The plaintiff's evidence is that while Put Sarajevo was constructing the Nakuru – Nyahururu highway in the 1980's, she used to sell porridge and githeri amongst other things on the suit plot. She testified that the District Officer visited the people who were trading on the said plot, of whom she was one, and advised them to form a group. The group, comprised of 108 persons, was formed with the help of the District Officer and christened "Kwale Self Help Group" and PW1 was registered as Member No. 50. Despite this evidence, the defence witnesses, who also aver that their plots were allocated to them by the Council, appear to recognize the defendant and her father as the owners of the suit land. DW3 averred that DW1 (the defendant's father) fenced the suit plot and dug a pit latrine. The defendant asserted that she has farmed on the suit land since 1994 without any interruption by anyone including the plaintiff, who she states has never been in possession. At the time of the hearing the plaintiff conceded in her



evidence-in-chief that she was no longer farming on the suit land. She has not demonstrated that there are any developments effected on the suit land through her resources. She did not have any copy of the transfer that she presented at the land registry for her title to issue, nor any receipts evidencing payment to the government. She did not give any evidence that would show that she was truly a member of the Kwale Self Help Group yet her membership was under challenge. Notably, if she was not a member of the Self-Help Group, then it would not be possible for the group to execute a transfer in her name as that would be irregular.

60. But then questions about the defendant's own claims: she did not produce any application to the Council for allocation of the suit land to her; her father stated that he applied orally for allocation of the land and he was given P. Exh 1 in the name of her daughter the defendant. He voluntarily applied orally for it to be issued in the defendant's name. It is noteworthy that the defence evidence did not establish that the plaintiff's title was issued to her on the strength of any letter of allotment issued by the Council.
61. Though DMFI 4 was not produced in evidence, what is clear to this court is that by the defendant's own evidence the original land parcel no 235 was proved to have been subdivided to create the suit land subject of the dispute in the present case.
62. This court's opinion that the defendant has not established the nexus between plot No. 65 and land parcel No. Subukia/Subukia Block 13/889. Further there has been no conviction of the plaintiff on a charge of forgery.
63. Perchance this court were to be overly sympathetic and agree with the defendant that the council had mandate to allocate and that the land identified as plot number 50 should be hers, her letter of allotment reads Plot No 65 and the registered mutation shows that latter parcel to be elsewhere away from plot no 50. Unless the defendant established the criteria upon which the plots were allocated by the council while they were allegedly owned by the self-help group, her counterclaim must fail; further, unless the defendant can demonstrate that the plots were allocated on the basis of ground occupation and that she was in occupation by the time of the creation of the mutation, her claim can not succeed. Regarding the last point, it is worthy of note that in the early days of this litigation, the Deputy Registrar at the order of this court visited the suit land in the presence of the parties and made a report that stated that save for a barbed wire fence, the plot was neither "developed nor ploughed." This court is persuaded that the fence is that erected by the defendant as per paragraph 7 of the plaint. Contrary to the Defendant's claims, the land had not been ploughed and there is no pit latrine thereon.
64. For good reasons, this court must limit itself to the evidence of the parties in this case and pronounce judgment despite the conundrum that surrounds the transfer of the main parcel of land from Put Sarajevo to the Self Help Group and the Council's apparent superfluous involvement in issuing letters of allotment for its subdivisions. That may be fodder for another piece of litigation in future if it arises. To resolve the instant dispute between the present parties, this court satisfies itself by referring to the provisions of Section 26 of the [Land Registration Act](#) which provides as follows:

"26.

- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in



the certificate, and the title of that proprietor shall not be subject to challenge, except—

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”

65. In this case, the evidence of the defendant is not in my view sufficient to prove fraud on the part of the plaintiff and on that basis, I would refrain from issuing any orders declaring the defendant the proprietor of or cancelling the plaintiff’s title to Land reference Subukia/Subukia Block 13/889 (KIANWE).

66. In conclusion, it is this court’s opinion that the plaintiff has, within the confines of this litigation, proved her case on a balance of probabilities and that she should be granted the orders she seeks. The defendant on the other hand has failed to prove her counterclaim and the same should be dismissed. As to costs, the strange circumstances of this case demand that each party bear their own costs. I therefore enter judgment for the plaintiff and I dismiss the defendant’s counterclaim and I issue the following final orders:

- a. An order of permanent injunction is hereby issued restraining the Defendant, her agents, servants or any person from interfering with the Plaintiff’s quiet possession of LR. No. Subukia/Subukia Block 13/889 (KIANWE)
- b. An order that Land Reference Number Subukia/Subukia Block 13/889 (KIANWE) belongs to the Plaintiff.
- c. In view of the uncertainties that have been laid bare in the instant suit, each party shall bear their own costs of these proceedings.

It is so ordered.

DATED, SIGNED AND ISSUED AT NAKURU VIA ELECTRONIC MAIL ON THIS 21ST DAY OF JUNE, 2022.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

