



**Towett & 2 others v Chelagat & 3 others (Environment & Land Case
87 of 2018) [2022] KEELC 4935 (KLR) (27 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 4935 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 87 OF 2018
JM MUTUNGI, J
SEPTEMBER 27, 2022
(FORMERLY HCC NO 155 OF 2003)**

BETWEEN

**ALICE CHELANGAT TOWETT 1ST PLAINTIFF
JULIE CHEMUTAI TOWETT 2ND PLAINTIFF
VICTORIA CHEPKEMOI 3RD PLAINTIFF**

AND

**RAEL CHELAGAT 1ST DEFENDANT
DAVID NGASURA KONES 2ND DEFENDANT
GEORGE OGENGO 3RD DEFENDANT
LAND REGISTRAR 4TH DEFENDANT**

JUDGMENT

1. On May 31, 2013 Nakuru HCCC No 89 of 2011, Nakuru HCCC No 155 of 2003 and Nakuru HCCC No 2005 of 2003 were ordered consolidated on October 3, 2014 the consolidated suits were transferred to the Environment and Land Court for hearing and determination. The consolidated suit before the ELC was renumbered Nakuru ELC No 87 of 2018. This judgment is in respect of the three consolidated matters.
2. To contextualise the three consolidated suits, it is necessary to briefly highlight the facts in regard to each of them.
3. In HCCC No 89 of 2011 (George Ogengo and David Ngasura Kones v Francis Odianga & 3 others), the plaintiff claimed to be the legal owner of land parcel Nakuru/Sururu/82 and 83 and sought the



- cancellation of titles issued to one Juliet Jemutai Towett and Victoria W Chepkimoi Towett; and a permanent injunction and the eviction of the defendants from the parcel of land.
4. In Nakuru HCCC No 205 of 2003 (David Ngasura Kones v Edwin Langat Kirui) the plaintiff claimed ownership of land parcel Nakuru Sururu/82 and sought an order of permanent injunction against the defendant, general damages for trespass and eviction of the defendant. Nakuru HCCC No 155 of 2003 (Alice Chelangat Towett & 2 others v Rael Chelangat & 3 others) involved all the persons who had an interest in land parcels Nakuru/Sururu/82,83 and 84.
 5. The plaintiffs claimed ownership of the parcels of land and sought the cancellation of the titles held by the 1st, 2nd and 3rd defendants in respect to the same parcels of land. The plaintiffs also sought orders of eviction and general damages for trespass against the defendants.
 6. The 1st, 2nd and 3rd defendants filed statements of defence contending they were the rightful owners of the parcels of land and sought to be declared the rightful owners in regard to the parcels of land they were registered as owners; cancellation of the titles held in the names of the plaintiffs; permanent injunction and costs of the suit and the counterclaim.
 7. Nakuru HCCC No 89 of 2011 and Nakuru HCCC No 205 of 2003 were subsumed onto Nakuru HCCC No 155 of 2003 where all the parties were represented and the subject matter involved was land parcels Nakuru/Sururu/82, 83, and 84. The suit proceeded before this court as Nakuru ELC No 87 of 2018.
 8. The suit on November 12, 2022 was mentioned before me to take a hearing date and given the age of the matter the suit was fixed for hearing on June 29, 2021 to be heard on a priority basis. On June 29, 2021 there was no attendance by or on behalf of the plaintiffs. The hearing was adjourned to February 2, 2022 and service upon the plaintiffs directed. On February 2, 2022 the plaintiffs did not attend but the defendants attended court. On the application of the defendants the plaintiffs suit was ordered dismissed with costs for want of prosecution. The 1st, 2nd and 3rd defendants were permitted to prosecute their respective counterclaims.
 9. Although the court ordered the plaintiffs suit to be dismissed for want of prosecution, the court directed that the land registrar who was the 4th defendant in the suit to nonetheless testify in the suit as he was a neutral witness and was in any case the custodian of the land records. Mr Eric Nyamu Munene, land registrar Nakuru testified and produced records for land parcels Nakuru /Sururu/82,83 and 84. In respect of land parcel Nakuru/Sururu/82 he testified that the same was registered on July 16, 1997 in favour of David Ngarura Kones, the 2nd defendant herein. On June 16, 2004 one Julie Chemutai Towett registered a caution against the title claiming ownership interest. He stated the government later placed a caveat arising from the judgment in case No 006 of 2012 given in the [*African court on Human and Peoples Rights \(ACHPR\)*](#) commonly referred to as the Ogiek case respecting the Mau Forest complex where the court held the Ogiek community were entitled to reside within the Mau Forest without any restrictions.
 10. In regard to land parcel Nakuru Sururu/83 the land registrar stated that the land was registered in the name of George Ogengo on July 16, 1997 and a caution was lodged against the title by one Julie Chemutai Towett on June 16, 2004 and like land parcel 82 the Kenya government registered a caveat pursuant to the judgment given in case No 006 of 2012 [*African court on Human and people's Rights \(ACHPR\)*](#).
 11. Respecting land parcel Nakuru/Sururu/84 the land registrar testified that this land was likewise registered in favour of Rael Chelangat on July 16, 1997 and that like land parcels 82 and 83 one Julie Chemutai Towett registered a caution claiming ownership interest. The Kenya government also by



virtue of case No 006 of 2012 ACHPR, registered a caveat ostensibly to await the implementation of the judgment in favour of the Ogiek community issued by the *African Court on Human and Peoples Rights*. The land registrar produced certified abstracts of title (green cards) that showed the above entries.

12. In cross examination the witness indicated he did not have the particulars of the case No 006 of 2012 in the *African Court on Human and Peoples Rights* pursuant to which the government registered the caveat covering all the titles within the Mau Forest complex. He however indicated the case related to the Ogiek community who had taken the government to the African court.
13. Rachel Chelangat testified as DW2. She relied on her witness statement and the documents that she had tendered in court as part of her evidence. It was her position that she was allocated her parcel of land by the government in 1997 in the government's resettlement programme for the Land- less. She prayed for judgment in terms of her counterclaim.
14. David Ngasura Kones testified as DW3. She testified that she owned land parcel Nakuru/Sururu/82 having been allocated the land by the government. She placed reliance on her recorded witness statement and the documents she had tendered in evidence. She sought to have the plaintiffs evicted from her parcel of land.
15. George Ogengo, the 3rd defendant testified as DW4. He relied on his recorded witness statement dated March 28, 2017 and the bundle of documents as per the list dated the same date. He sought among other prayers to have the plaintiffs evicted from his parcel of land Nakuru/Sururu/83. The 3rd defendant claimed the plaintiffs had unlawfully and forcefully entered and occupied his land. He prayed that they be ordered to vacate from his land and for the costs of the counter claim.
16. Following the closure of the trial the 1st, 2nd and 3rd defendants filed their closing written submissions. I have reviewed the pleadings the evidence and have considered the written submissions. The issue for determination considering that the plaintiffs did not attend to prosecute their suit and the counterclaim proceeded by way of formal proof is whether the 1st, 2nd and 3rd defendants are entitled to the reliefs they seek in their respective counterclaims.
17. In the present suit, the plaintiffs claim ownership of the suit properties and indeed exhibited documents in their bundle of documents which indicated they were the registered owners of the suit properties. The plaintiffs annexed copies of titles, search certificates and abstract of title. The plaintiffs however did not attend court to prosecute their suit and other than the date the suit was fixed for hearing at the instance of the defendants, there was no evidence on record that the plaintiffs were ever interested in having the suit heard and determined. The defendants were all along challenging, the documents the plaintiffs had tendered claiming that the same could not be authentic since as far as they were concerned the documents they (the defendants, held were the authentic ones. In those circumstances it was essential that the plaintiffs attended court to authenticate their ownership documents. The fact that they failed to attend court to prosecute their case, meant that the ownership documents they had availed in support of their case were not authenticated and the court could not rely on them as proof of ownership. As earlier indicated in this judgment the plaintiffs suit was dismissed for want of prosecution.
18. In regard to the 1st, 2nd and 3rd defendants they asserted that they were the genuine allottees by the government of the parcels of land in respect of which they held titles. The evidence of the said defendants was corroborated by the evidence of the land registrar (DW1) who affirmed that as per the records held by the land office, the defendants were the registered owners of land parcels Nakuru/Sururu/82,83 and 84. The land registrar produced certified abstracts of title (greencards) in respect to the three parcels which showed David Ngasura Kones, George Ogengo and Rael Chelangat were



the registered owners of the land parcels respectively. The said defendants were all first registered on July 16, 1997 and issued titles. The abstracts of titles did not show that the plaintiffs were at any time registered as owners of the disputed titles and it is unclear how they acquired the titles that they had exhibited in their bundles of documents.

19. On the evidence and particularly having regard to the evidence adduced by the land registrar, the court is persuaded the defendants were validly registered as the owners of the disputed parcels of land. The defendants hold duly registered titles to the parcels of land and there is credible evidence that indeed the defendants were allocated the parcels of land by the government during the resettlement programme of the landless. Under section 26 of the [Land Registration Act, 2012](#) a certificate of title held by a proprietor following registration is *prima facie* evidence that such proprietor is the absolute owner of the land in respect of which the title has been issued. Section 26 of the Act provides: -



26.	Certificate of title to be held as conclusive evidence of proprietorship.										
(1)	<p>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—</p> <table border="1" data-bbox="858 763 1386 949"> <tr> <td data-bbox="858 763 1034 949">(a)</td> <td data-bbox="1034 763 1386 949">on the ground of fraud or misrepresentation to which the person is proved to be a party; or</td> </tr> </table> <table border="1" data-bbox="858 981 1386 1245"> <tr> <td data-bbox="858 981 1034 1245">(b)</td> <td data-bbox="1034 981 1386 1245">where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.</td> </tr> </table> <table border="1" data-bbox="858 1276 1386 1462"> <tr> <td data-bbox="858 1276 1034 1462">(a)</td> <td data-bbox="1034 1276 1386 1462">on the ground of fraud or misrepresentation to which the person is proved to be a party; or</td> </tr> </table> <table border="1" data-bbox="858 1494 1386 1758"> <tr> <td data-bbox="858 1494 1034 1758">(b)</td> <td data-bbox="1034 1494 1386 1758">where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.</td> </tr> </table> <table border="1" data-bbox="858 1789 1386 1989"> <tr> <td data-bbox="858 1789 1034 1989">(2)</td> <td data-bbox="1034 1789 1386 1989">A certified copy of any registered instrument, signed by the registrar and sealed with the seal</td> </tr> </table>	(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.	(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
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	of the registrar, shall be received in evidence in the same manner as the original.
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20. The presumption that the titles held by the defendants were valid was not rebutted with any evidence. If anything, the evidence of the land registrar fortified the defendants assertions of ownership of the disputed properties. In the absence of any challenge of the defendants evidence and given that the plaintiffs never gave any evidence to explain how they came by the titles they exhibited in their documents, the irresistible inference is that the plaintiffs titles were not valid and/or genuine. If indeed they were genuine they would have been registered in the land register of the parcels of land held by the lands office.
21. In the premises the court has come to the conclusion that the 1st, 2nd and 3rd defendants/counterclaimers are the rightful owners of land parcels Nakuru/Sururu/82,83 and 84 and are entitled to judgment on the counter claim.
22. The defendants/counterclaimers have made a claim for mense profits and/or general damages for trespass but with respect the defendants did not lay any basis for assessment of either mesne profits and/or general damages. I will decline to make any award for damages. I however enter judgment in favour the 1st, 2nd and 3rd defendants and make the following final orders :-
1. The 1st, 2nd and 3rd defends counterclaimers are hereby declared to be the rightful owners of land parcels Nakuru/Sururu/84,83, and 82 respectively subject to the caveat by the government of Kenya registered pursuant to case No 066 of 2012- *African Court on Human and People's Rights*.
 2. The plaintiffs are ordered to vacate from the said parcels of land within 60 days from the date of service of this judgment/decree upon them failing which an order for their forcible eviction to issue on application by either of the defendants.
 3. The land registrar, Nakuru is directed to cancel any title issued to the plaintiffs in regard to land parcels Nakuru/Sururu/84, 83 and 82.
 4. The defendants/counter claimers are awarded the costs of the suit and the counterclaim.
22. Orders accordingly.

JUDGMENT DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 27TH DAY OF SEPTEMBER 2022.

J M MUTUNGI

JUDGE

