



National Cereals and Produce Board Ltd v Muranga & 3 others (Environment & Land Case 294 of 2018) [2023] KEELC 19857 (KLR) (19 September 2023) (Judgment)

Neutral citation: [2023] KEELC 19857 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 294 OF 2018
A OMBWAYO, J
SEPTEMBER 19, 2023**

BETWEEN

NATIONAL CEREALS AND PRODUCE BOARD LTD PLAINTIFF

AND

JAMES MURANGA 1ST DEFENDANT

PETER WACHIRA 2ND DEFENDANT

STEPHEN MWENJE 3RD DEFENDANT

JULIUS KAMUNYU MWANGI 4TH DEFENDANT

JUDGMENT

1. National Cereals and Produce Board (hereinafter referred to as the plaintiff) came to High Court in the year 2005 against James Muranga and three (hereinafter referred to as the defendants) others claiming that at all material times the plaintiff was and still is the registered proprietor of all that parcel of land known as plot No. Subukia Block 13/2 measuring about 1.689 Hectare.
2. The plaintiff laments that without any color of right, and without the plaintiff's prior/subsequent license, express or implied, the defendants invaded and erected permanent and semi-permanent structures on the plaintiff's aforesaid parcel of land and are about to erect even more developments thereon. The plaintiff avers that the defendants' aforesaid acts constitute trespass and unlawful invasion of the plaintiff's inalienable and indefeasible legal proprietary rights over the suit property. The Defendant's aforesaid trespass had denied the plaintiff its lawful enjoyment and user of its parcel of land and has hamstrung the plaintiff's expansion plans.
3. Despite several demands to pull down the said unlawful developments and vacate from the plaintiff the defendants have failed, refused and/or neglected to pull down the said unlawful developments/



or vacate the plaintiff's subject property herein hence necessitating this suit. The plaintiff prays for an order of eviction and mense profits plus cost and interest from the date of judgment.

4. The defendant filed defence and counter claim stating that they were allotted the land by the County Council of Nakuru that bought the land from Kianoe Co Ltd. The defendant averred that the plaintiff was registered as the proprietor of the land fraudulently because the land belonged to the defendants. The defendants prayed that the suit be dismissed with costs and counter-claimed for a declaration that the title the plaintiff holds for the suit-land is subject to the overriding rights of the defendants and an order that the plaintiff do excise land from the suit-land in actual occupation of the defendants. Lastly the defendants pray for costs of the suit. When the Environment and Land Court was established the case was transferred to the court and it became ELC 294 of 2018.
5. The matter came up for hearing on 17th April 2023. PW1 Alexander Mulei Mutaingili, the regional manager National Cereals and Produce Board Northern Region relied on his statement as his evidence in chief. He further testified that the plaintiff is the owner of the suit property. There was a suit between the National Cereals and Produce Board and the County Council of Nakuru and the court decided that the property belonged to the plaintiff. He produced the judgment and decree. The parcel of land is still registered in the plaintiff's name. On cross examination, he conceded that the land is fenced and that the defendant are in possession and that there are permanent structures.
6. DW1, Stephen Mwenje testified on behalf of the defendants and adopted his statement as evidence in chief. And added that he entered the land in 1989. The land was allocated to them by Nakuru County Council. They took possession and have built on the land. They live on the land and no one has ever asked them to vacate the land. The said witness testified that the National Cereals Produce Board took title in respect of their land. On cross examination he admitted that they do not have title to the land but they have allotment letters. The parties filed written submission. The plaintiff submits that he is the rightful and legal owner of the property as the same is registered in his name. He relies on the provisions of section 24, 25 and 26 of the *Land Registration Act*, No 3 of 2012. The plaintiff submits that the defendants have allotment letter issued by the County Council of Nakuru which the court found that it was not entitled to the property in the judgment in Nakuru HCC No.34 of 2001. The plaintiff submits that the Nakuru County Council did not have a good title to the property. The plaintiff relies on the principle of *nemo dat quod non habet* that one cannot give what he does not have. The plaintiff argues that the allotment letters are null and void. The plaintiff argues that he is entitled to the reliefs sought.
7. The defendant in the Counter claim stated that at the time of the plaintiff's title was issued they were in actual occupation of the land which they occupy to-date hence have an overriding interest in the land. They were allocated the land in 1990 the plaintiff fraudulently obtained title to the land. The defendants pray for a declaration that the plaintiff holds the suit land in trust for the defendants and is subject to the overriding interest of the defendants and pray for an order that the plaintiff do excise the land in actual occupation by the defendants and title be issued to the defendants. The defendants argue that the portion of the suit property the defendant are occupying was allotted in 1990 to them hence the title deed issued in 1999 was subject to the overriding interest of the defendants. The plaintiff therefore holds the suit property in trust for the defendants.
8. The defendant further argues that a constructive trust has been established and the plaintiff is estopped from claiming the land. The defendant argue that they are entitled to the counter claim having proved that the plaintiff holds title to the property.
9. I have considered the pleadings, evidence on record and rival submissions and do find that the plaintiff is the registered proprietor of the suit property. The register for the suit property was opened on 3rd



January 1998 and title deed was issued to the plaintiff on 26th March 1999. The County Council of Nakuru claimed the property to be theirs and this prompted the plaintiff herein to sue the County Council of Nakuru in Nakuru HCC No. 34 of 2001. The case was concluded and the land was found to be legally owned by the plaintiff. The Nakuru County council was permanently restrained from trespassing on the land. The decree was issued on 24th March 2005.

10. The defendants herein produced plot allotment letters from the Nakuru County Council. The defendant argue that the equitable doctrine of trust protects their overriding interests on the suit property.
11. This court finds that the defendants were allocated the land by the County Council of Nakuru which did not have the authority to do so due to the fact that the land was not theirs having allocated the same to the plaintiff which public land as the plaintiff is a state organ. I do find that there is no element of trust in this matter especially due to the fact that the National Produce and Cereals Board was issued with title and that there is no nexus between the plaintiff and the defendant that can be construed as a trust. This is a case where this court is inclined to enforce the full force of section 24, 25, and 26 of the Land Registration Act No. 3 of 2012. Section 24 provides: -

25. Rights of a proprietor

- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
 - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

Section 26 provides :

26. Certificate of title to be held as conclusive evidence of proprietorship

- (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.

12. The defendants claim that they are entitled to the suit property under the equitable doctrine of trust as provided for in section 28 of the *Land Registration Act* no 3 of 2012 that repealed the Registered Land Act Cap 300 Laws of Kenya that provides for the overriding interests. The section provides that unless the contrary is expressed in the register, all registered land shall be subject to overriding interests that may for the time being subsist and affect the same without being noted on the register and these are trusts including customary trusts. Section 30 of the repealed Cap 300 is applicable in this case as the matter is based on trust and that the defendants occupied the property when the said law was in force.

13. The defendants came into possession of the land through the allotment letters issued by the County Council of Nakuru and are neither seeking ancestral rights nor customary rights. The fact that the land being claimed initially belonged to the County Council of Nakuru and allocated to the plaintiff shows that the same was public land before allocation and therefore any occupation or possession before issuance of title does not create a constructive trust. This court finds that occupation and possession of registered land per se does not create a trust but one has to prove some interest in the land such as ancestral, customary or purchase rights. The High Court in in *James N. Kiarie v. Geoffrey Kinuthia & Another* (2012) eKLR stated as follows and do agree:-

“...While occupation may be relevant and has been found to be relevant in some cases in raising the inference of a trust, it is not ... a necessary ingredient for a trust to be established.

14. The import of the above is that one must prove the existence of a customary trust or any other trust which depends on the facts of the case. The defendants claim the existence of a customary trust but this court does not see any as the defendants allege that the property was allotted to them by the County Council but there is no evidence that the process was concluded as allotment per se is an offer and does not confer any rights. There is no evidence produced by the defendant that payment was made for the allotment by the county council and that the defendants were put in occupation by the County Council Nakuru. Moreover, the land belonged to the County Council of Nakuru and therefore possession and occupation of the same could not confer customary rights against the county as the right procedure was to be followed. Each case is to be determined on its own merit on the understanding of parties. In this case there is no nexus of any intention between the plaintiff and the defendants to enable the court impute a trust. There is no relationship between the plaintiff and the defendants in relation to the suit property other than the fact that both were allocated the land but the plaintiff was ultimately registered. The defendant has not discharged the burden of proof that there exists either a customary or constructive trust.

15. In the case of *Njenga Chogera v Maria Wanjira Kimani & 2 Others* [2005] eKLR, which quoted with approval the holding in the case of *Muthuita v Muthuita* [1982 – 88] 1 KLR 42, the Court of Appeal held that :-

“customary trust is proved by leading evidence. Trust is a question of fact, which must be proved by whoever is claiming a right under customary trust. A trust can never be implied by the Court, unless there was intention to create a trust in the first place.



16. In *Peter Ndungu Njenga v Sophia Watiri Ndungu* [2000] eKLR, the Court held,

“The concept of trust is not new. In case of absolute necessity, but only in case of absolute necessity, the Court may presume a trust. But such presumption is not to be arrived at easily. The Courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust is implied.”

17. In *Juletabi African Adventure Limited & Another v Christopher Michael Lockley* [2017] eKLR, the Court also held that

“It is settled that the onus lies on a party relying on the existence of a trust to prove it through evidence. That is because:-“The law never implies, the Court never presumes, a trust, but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.”

18. In *Isack M'inanga Kiebia v Isaaya Theuri M'lintari & Another* (2018) Eklr the Supreme Court of Kenya held as follows:-

“Flowing from this analysis, we now declare that a customary trust, as long as the same can be proved to subsist, upon a first registration, is one of the trusts to which a registered proprietor, is subject under the proviso to Section 28 of the Registered Land Act. Under this legal regime, (now repealed), the content of such a trust can take several forms. For example, it may emerge through evidence, that part of the land, now registered, was always reserved for family or clan uses, such as burials, and other traditional rites. It could also be that other parts of the land, depending on the specific group or family setting, were reserved for various future uses, such as construction of houses and other amenities by youths graduating into manhood. The categories of a customary trust are therefore not closed. It is for the court to make a determination, on the basis of evidence, as to which category of such a trust subsists as to bind the registered proprietor.

Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in *Kiarie v. Kinuthia*, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:

1. The land in question was before registration, family, clan or group land
2. The claimant belongs to such family, clan, or group
3. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.
4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.



5. The claim is directed against the registered proprietor who is a member of the family, clan or group.”

19. I do find that the plaintiff has proved his case as the registered owner of the suit property and that the defendants are trespassers and therefore, I do allow the plaintiff's claim save on the claim for mesne profits which the plaintiff has not led evidence, and that the defendant have not proved the existence of trust against the plaintiff and therefore, I do dismiss the counter claim. I do find that the plaintiff has proved his case on a balance of probabilities and do grant the order that the defendants vacate the suit-land within a period of 100 days failure of which they be evicted upon being issued with one month's notice.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 19TH DAY OF SEPTEMBER 2023.

A O OMBWAYO

JUDGE

