REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO.95 OF 2017

MARY NJERI MUNGAI.....PLAINTIFF

Versus

TEKET OLE MUNITET.....1ST DEFENDANT

PAUL SITIYIO MUNTE.....2ND DEFENDANT

JUDGMENT

(Suit by plaintiff claiming ownership and possession of certain land; land being situated in a settlement scheme; plaintiff being offered the suit land by the SFT, paying the purchase price, and being issued with title; defendants claiming to also have been allotted the same land; allotment letter of defendant being from Provincial Commissioner's office; no follow up allotment by the SFT; plaintiff's title not fraudulent; judgment entered for the plaintiff)

PART A: INTRODUCTION AND PLEADINGS.

1. This suit was commenced through a plaint which was filed on 8 March 2017. In her plaint, the plaintiff has pleaded that she is the owner of the land parcel Naivasha/Moi Ndabi/452 which she obtained after being issued with a letter of offer by the Government through the Ministry of Lands at Naivasha, for the Moi Ndabi Settlement Scheme. She averred that she was issued with title on 16 January 2013 and embarked on farming. On 26 October 2016, she has pleaded that she sent a neighbor to check on the late and it was found that a structure had been erected by the defendants. In this suit, the plaintiff has sought the following orders (slightly paraphrased for brevity) :-

(a) A declaration that she is the legal owner of the suit land.

(b) An order of permanent injunction against the defendants restraining them from the suit land

(c) Costs and interest of the suit.

2. The defendants filed a joint statement of defence and counterclaim vide which they contested the plaintiff's ownership of the suit land. They pleaded that they are the legitimate owners of the suit land having benefited from the Moi Ndabi Settlement Scheme. They averred that vide a letter of offer from the office of the Provincial Commissioner dated 22 December 1994, they were offered the suit land. They pleaded that the Settlement Scheme was meant to allocate land to persons displaced from Enosopukia and other regions affected by the ethnic clashes witnessed in the year 1992. They pleaded that their letter of offer has never been voided nor revoked. They further averred that the plaintiff never carried out proper due diligence before purchasing the land and the plaintiff cannot claim to be an innocent purchaser. They averred that the title of the plaintiff was thus procured through fraud and the following particulars of fraud are pleaded :-

(a) Making documents without authority to procure registration of the suit land in her name.

(b) Forging signatures on documents to procure registration of the suit land in her name.

(c) Procuring registration of the land on which the defendants have inhabited for over 23 years.

(d) Obtaining title without due process.

(e) Res ipsa loquitor.

3. They pleaded that they have been on the suit land for over 23 years, and that if the plaintiff has title, then it has been extinguished by operation of law.

4. In the counterclaim they sought the following orders (paraphrased) :-

(a) An order for the revocation of the title of the plaintiff.

(b) Costs of the suit and interest.

(c) Any other suitable or appropriate relief that this suit may deem fit to grant.

PART B : EVIDENCE OF THE PARTIES

5. The plaintiff testified that she is a social worker and in the year 2010, she was living in Naivasha where her husband worked. Pursuant to her training, she did happen to be working with communities in Maiella area and she did come to learn that the Government was allocating land in Moi Ndabi within Maiella. She then applied for land and was given a letter of offer dated 6 December 2010. She stated that she was allocated the Plot No. 452. Upon receiving the letter of offer, she proceeded to get a surveyor to show her the suit land and the same was shown to her. The beacons were then fixed. She testified that the land was neither occupied nor cultivated and there was no structure on it. She was required to pay money within 90 days of the letter of offer which she did pay on 1 March 2011. She obtained a discharge of charge and a transfer. She then took possession of the land and embarked on farming. She later obtained the title deed in the year 2013 and she exhibited a search showing that the land is registered in her name. She testified that she did farming on the land between the years 2011 and 2016 without any problem. On 24 October 2016 she planted a crop, and on 26 October, she sent her neighbor to check on the land and see the progress of the crop. Instead, he found the defendants on the land and they were hostile and denied him access. She then travelled to see for herself the situation and she found the defendants. She reported the matter to the police station, and when confronted, the defendants produced their allotment letter to the land. She stated that the defendants have now refused to leave the land. Cross-examined, she did affirm that she applied for the land and was not an internally displaced person.

6. PW-2 was one James Muthee Wachira, the Sub-County Settlement Officer in charge of Naivasha and Gilgil. He produced a letter of offer, a discharge of charge and transfer documents in relation to the suit land. All of these were in favour of the plaintiff. On the history of the Moi Ndabi Scheme, he testified this was former Agricultural Development Corporation (ADC) land. The first letters of offer were issued by the Provincial Commissioner on 22 December 1994. He identified what the defendants held as one such letter of offer. The persons who received these letters of offer were identified by the Provincial Administration and came from Kericho, Narok, Enosopukia and Maella. When the Settlement office took over, they realigned the boundaries, and it was also noted that some of the persons identified for allotment of land by the Provincial administration were not on the ground. The Settlement office then issued their own letters of offer based on who was on the ground. Before they issued the second lot of allotment letters, they visited the ground to ascertain that the first allottees were not on the ground. A report was then prepared on the ground status. He did not however have one in his file in respect of the suit land. He later prepared a report of the ground status on 27 February 2018 upon instructions of the Director of Settlement. The defendants were in occupation at that time. He testified that no letter of offer nor charge was ever issued by the Settlement office to the defendants as they were never documented. According to him, it was probable that they left the ground at some point.

7. With the above evidence, the plaintiff closed her case.

8. DW-1 was Teket Ole Muntet, the 1st defendant. He testified that in the year 1992, he used to live in Enosokuiya also known as Enosopukia. They moved from Enosokuiya to Maella as internally displaced persons (IDPs). He lived in Maella for one year and was then moved by the Government to the suit land. He was issued with the letter of offer which required him to pay Kshs. 13,000/= to the Lands office but he did not pay as he had no capacity to do so. Later, after about 5 years, he tried to make payment but the same was declined. He testified that he lived on the suit land with his family and proceeded to do some farming on the land, planted maize and beans and kept 5 goats and 2 cows. He testified that he has never vacated the land since it was allocated to him. He asserted that the plaintiff has never cultivated on the suit land and nobody else has come to claim the land. He testified that he planted trees as required in the allotment letter but they dried up owing to lack of water. He denied that he vacated the land and went to heard cattle in Narok area.

9. DW-2 was Paul Sintiyio Muntet, a son of the 1st defendant. He testified that he was born in the year 1984 in Enosopukia where his parents used to live. They left Enosopukia in the year 1992 and came to live in Moi Ndabi in the year 1994 where they were settled. His father built a mud walled house with grass thatch and they put up a mabati roof in the year 1998. He stated that they have been on the suit land since then and have never left the land. He stated that the plaintiff later came to claim the land and had them arrested. He thought that the title deed issued to the plaintiff was issued to her irregularly as the land belongs to his father.

10. I invited counsel to file written submissions which they did and I have taken note of this in arriving at my decision.

PART C: ANALYSIS AND DECISION.

11. What I have before me is a competing claim over ownership of the land parcel Naivasha/Moi Ndabi/452 which is land measuring 5 acres. The person with title to the said land is the plaintiff, and it is clear that she obtained title after being offered the land by the Land and Settlement Office, and abiding by the conditions of offer. On the other hand, the 1st defendant claims to be the rightful owner by virtue of a letter of allotment issued to him by the Provincial Commissioner's Office, Rift Valley Province, which letter is dated 22 December 1994. The sole question is who ought to be entitled to keep the title to the suit land.

12. From the evidence of PW-2, it does appear that some persons were profiled for settlement at the Moi Ndabi Settlement Scheme by the Provincial Administration in the early 1990s. These persons were issued, by the Provincial Administration, with the letters dated 22 December 1994. These letters required the recipient to pass them over to the Provincial Surveyor so that the surveyor could identify to the

recipient the ground allotted to him. The recipients were also required to plant trees around the land and follow good farming practices as may be directed by the Agricultural officer. I have no reason to doubt that the 1st defendant was allotted the land by the Provincial Commissioner's office as he did produce the same in evidence. From it, I can see that he was allotted the Plots No. 454 and 455 measuring 2.5 acres. My own reading of this letter is that each plot was 2.5 acres and since the 1st defendant was allotted two plots, he benefited from a total of 5 acres.

13. At the outset, I am not persuaded that the suit land is actually the plot that was allocated to the 1st defendant by the Provincial Commissioner. I have already pointed out that the plot indicated in his allotment letter shows plots No. 454 and 455. The land that is in dispute is the land parcel No. 452. This land is what is registered in the Registry Index Map, and the defendants have not offered me any explanation on why they feel that this land parcel No. 452, is the same land that covers the Plots No. 454 and 455 in their allotment letter. In the ordinary course of events, the same plot in the allotment letter would bear the same plot upon registration, and where there is discrepancy, this ought to be explained; maybe by a change in the numbering sequence or by amalgamation. It is an important piece of evidence which the defendants did not present, and by failing to do so, they did not demonstrate to me the connection between their plots No. 454 and 455 in their allotment letters, and the land parcel Naivasha/Moi Ndabi/452. It may very well be that the defendants are claiming ground which is not the same ground in their allotment letter. What the defendants needed to do was to bring a conversion table, or a similar document, which they never brought, to demonstrate that the plots No 454 and 455 in their allotment letter, were actually converted to the land parcel Naivasha/Moi Ndabi/452. Such document would of course be easily available at the Land Adjudication and Settlement offices or the offices of the Provincial Administration.

14. Secondly, I am not persuaded that the defendants actually settled on the suit land. The 1st defendant of course does insist that he settled on the land, planted some trees, cultivated maize and beans, and kept some livestock, but I have serious doubts on his claimed settlement. If indeed he moved with his family to this land as he alleges in the year 1992 (or even the year 1994 which is what is in the allotment letter), I would expect that there be a more elaborate evidence of settlement. If he had a wife or wives and children, one would expect serious evidence of settlement with households. From the evidence tendered it does seem that it is only the 1st defendant and his son who are now on the land living in two semi-permanent structures and nobody else. I ask myself, where is the rest of the 1st defendant's family, if he indeed settled all of them on this land in the year 1994? No evidence of this was led by the defendants. My own analysis of the evidence leads me to the persuasion, on a balance of probabilities, that the 1st defendant never actually settled on this land or if he did so, he was only here for a very short period of time.

15. Now, even assuming that the allotment letter that the defendants hold refers to the suit land, it is common ground that the suit land was part of a settlement scheme. It follows that for one to get title, the land had to be allotted afresh by the Director in charge of land adjudication and settlement and such schemes fall under the Settlement Fund Trustees (SFT). Such parcels of land are ordinarily under the encumbrance of a charge in favour of the SFT, and after one makes full payment for the land, the SFT issues a discharge of charge and a transfer in favour of the allottee. The allottee is then registered as proprietor of the land in question. Titles to land under the SFT are not issued by the Provincial Administration as these would need to be processed through the Land Adjudication and Settlement office. At most, what the provincial administration could do, was to profile the persons to be issued with title by the Land Adjudication and Settlement office, or by the Lands office. This is exactly the explanation that was given by PW-2 and it is the correct position on the practice employed in issuance of titles to persons in a settlement scheme.

16. In our case, the 1st defendant may have been profiled by the Provincial Commissioner's office as a person to be allotted land. However, the title of the 1st defendant still needed to be processed through the Land Adjudication and Settlement office. The 1st defendant himself stated that he was required to pay Kshs. 13,000/= which he never paid. He does not state that he presented himself to the Land Adjudication and Settlement Office at the time the land was allocated so that he can also be identified by the said office for preparation of a charge and/or issuance of title. To me, he seems to have disappeared immediately, or soon after being issued with the letter of allotment by the office of the Provincial Commissioner. He was most likely not on the ground when the settlement officers came round to verify the occupation on the ground and that is why he was never recognized by the land adjudication and settlement office. If indeed he was allocated the suit land, plot No. 452, (assuming that his allotment is not to the land parcels No. 454 and 455) then he only has himself to blame for not being on the ground, and one cannot fault the land adjudication and settlement office for allocating the land to someone else, in this instance, the plaintiff. The defendants have attempted to rely on a ground report made on 22 February 2018 but this cannot help him as it is a report made after the invasion of the suit land by the defendants and does not give a picture of the position of the land at the time that the same was allotted to the plaintiff by the land adjudication and settlement office.

17. From the evidence tendered, what I believe happened is that the land settlement office saw that this ground was empty and opted to allocate it to a person that they thought is deserving of land and the plaintiff fitted the bill. I have seen no evidence of fraud, any illegality or any malpractice, in the manner in which the plaintiff was allocated the land.

18. Mr. Wairegi, learned counsel for the defendants, in his submissions, referred me to the decision of Odeny J, in the case of ***Toroitich Misoi Mereng vs Mohamed Ali & Another, ELC Eldoret Case No.95 of 2017***, but that case is clearly distinguishable from this one. In that case, the plaintiff sued for the recovery of certain land in Kuinet Settlement Scheme. He had been issued with a letter of allotment by the Settlement Fund Trustees and a charge and was in occupation of land. The SFT then issued a second letter of allotment and charge to the 1st defendant. The court held that this was irregular. That is not what we have in this suit. The defendants do not have any allotment letter or any charge from the SFT and it cannot therefore be argued that this is a second irregular allotment by the SFT. Counsel also referred me to my dicta in the case of ***Daudi Kiptugen vs Commissioner of Lands & 4 Others (2015) eKLR*** where I held that it is important, where a title is in question, for the title holder to demonstrate how he acquired it. That is not what we have in this case. The plaintiff has clearly demonstrated how she acquired the suit land. She testified that she applied to be allotted the land and the same was allotted to her. The letter of offer, the money she paid for the land, the discharge of charge, the transfer of the land to her, were all produced as exhibits. It cannot therefore be said that there was any illegal, or irregular allocation of the suit land to the plaintiff.

19. To enable me cancel the title of the plaintiff, I must be persuaded that the test laid down in Section 26 of the Land Registration Act, has been met. The said provision of the law 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.

20. Title can only be nullified on the ground of fraud or misrepresentation to which the title holder is proved to be a party, or where the certificate of title has been acquired illegally, unprocedurally, or through a corrupt scheme. I have no evidence that the title of the plaintiff was acquired through fraud or misrepresentation at all. In their allegations of fraud, the defendants pleaded that the plaintiff made documents without authority, forged signatures, procured registration where the defendants have been resident for over 23 years, and obtained title without due process. I have no such evidence before me. I have not been shown any documents made by the plaintiff without authority nor any documents that she forged. The claim that her title was procured without due process is completely unsupported, as from what has revealed itself, due process was followed. On the issue of their occupation of the land, I have already held that this is not the case. In essence, I have no material before me which would lead me to cancel the title of the plaintiff, and from the evidence tabled, the title of the plaintiff to me, appears to be a good title.

21.Being a good title, the same must be protected, and the title holder must be accorded the rights that such title carry. Under Section 24 (a) of the Land Registration Act, *"the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto".* It is the title holder who carries the right of use, possession, ingress and egress and other such rights. The defendants do not hold any of these rights. They therefore have no right to be in occupation of the plaintiff's land and have no right to use the same. They must vacate the land as it is the plaintiff who holds these rights.

22. I think I have said enough to demonstrate that the plaintiff's case must succeed and the defendants' suit must fail and I now make the following final orders :-

(i) That it is hereby declared that as between the plaintiff and the defendants, it is the plaintiff who is the rightful owner of the land parcel Naivasha/Moi Ndabi/452.

(ii) That the defendants are hereby ordered to vacate the suit land forthwith and no later than 14 days after the delivery of this judgment.

(iii) That a permanent injunction is hereby issued, barring the defendants and/or their servants/agents or anybody claiming under them, from entering, being upon, occupying, using, or in any other way, interfering with the plaintiff's use and possession of the land parcel Naivasha/Moi Ndabi/452.

(iv) That the defendants' counterclaim is hereby dismissed.

(v) That the plaintiff shall have the costs of this suit and the costs of the counterclaim.

23. Judgment accordingly.

Dated, signed and delivered in open court at Nakuru this 3RD day of July 2018.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In Presence of : -

Ms. Macharia holding brief for Mr. Ikua for the plaintiff

Ms. Cheruiyot holding brief for Wairegi for the defendant

Court Assisant :Nelima Janepher.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU