



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC CASE NO 504 OF 2017

(FORMERLY NAKURU HCCC NO 346 OF 2010)

JOEL KIPKOSGEI SIGEI ALIAS JOEL SIGEI.....PLAINTIFF

VERSUS

PETER MAINA MACHARIA.....1st DEFENDANT

PERIS WAITHERA MACHARIA.....2nd DEFENDANT

JUDGEMENT

1. Before me for determination is a matter that was filed at the Nakuru High Court as Civil Case No. 346 of 2010 on the 9th December 2010, vide a Plaint dated an equal date and amended on the 9th March 2011 wherein the Plaintiff sought for the following orders:

- i. A declaration the Plaintiff is the sole registered absolute proprietor of title number Nyandarua/Mbuyu/638 and that the Defendants are trespassers therein.
- ii. An Order that the Defendants do deliver vacant possession of the suit land to the Plaintiff and in default, an order of eviction and ejection of the Defendants, their relatives, servants, agents or employees or person or persons claiming interest or authority from through or by them from the Plaintiff's title No. Nyandarua/Mbuyu/638.
- iii. A perpetual injunction to restrain the Defendants whether by themselves, their agents relatives, servants, employees and/or any other individual, individuals or persons claiming authority from them from ploughing, trespassing into, entering into erecting structures, taking possession or in any other manner whatsoever or however interfering with the Plaintiff's peaceful quiet use, enjoyment, occupation. Possession and/or ownership of his title No. Nyandarua/Mbuyu/638.
- iv. General damages for trespass
- v. Costs of the suit.
- vi. Interest at court rates.

2. Vide an application dated the 29th April 2011, the Plaintiff sought for and obtained interlocutory judgment against the Defendants for failing to file their defence within the stipulated period wherein their counsel through an application dated the 15th October 2011 sought for the said order to be set aside. Vide a ruling dated the 3rd February 2012 the application was allowed.

3. On the 17th October 2011, the Defendants filed their statement of Defence and counter claim dated the 15th October 2011 wherein they sought for:

- i. An order of rectification of the land register in respect of LR No. Nyandarua/Mbuyu/638 by cancellation of the Plaintiff's registration and substitution therefore the 2nd Defendant's names as proprietor thereof.
- ii. Costs of the counterclaim plus interest thereon at court's rates.
- iii. Any other or better relief deemed just and fit to grant.

4. A reply to the defence and counterclaim was subsequently filed on the 20th February 2012 and the matter heard. It was while the delivery

of the judgment was being awaited, than the High Court realized that it had no jurisdiction to deal with land disputes thus prompting it to forward this matter to this court for directions.

5. On the 23rd July 2018, by consent, counsel to the parties opted to have this court deliver the pending judgment. Subsequently they filed their respective written submissions.

The Plaintiff's case.

6. On the 13th June 2012, the Plaintiff, PW 1 testified to the effect that in 1994, he was offered plot No. 638 Mbuyu scheme by the Settlement Fund Trustee wherein he had accepted the same and had signed an acceptance letter wherein on the 21st October 1994 he had made a payment of Ksh 932/= to the Settlement Fund Trustee. He marked the letters of offer and acceptance and charge as MFI 1 (a-c)

7. That there after he was directed to see the District Settlement Officer who took him to the land in the company of a surveyor where he found that although there were neighbors, the place was not habited. He then fenced the place with barbed wire and chain link.

8. That he was asked by the Settlement Fund Trustee to pay a 10% deposit which he did. He produced receipts dated the 22nd August 2004 for Ksh 932 as Pf exh 2. He also produced a letter dated the 20th December 2007 as Pf exh 3, as well as a document dated the 15th January 2008 as Pf exh 4, showing the payment of the balance.

9. That he was finally issued with letter of discharge dated the 23rd December 2008 herein produced as Pf exh 5, wherein the land was transferred to him vide a letter dated 19th April 2008, herein produced as Pf exh 6.

10. That he had then proceed to the lands office where he was issued with the title deed to parcel No. Nyandarua/Mbuyu/638 in the name of Joel Sigei ID No 5242912 on the 9th April 2010. He produced a copy of the title as Pf exh 7.

11. That it was on the 5th November 2010, when he had gone to the suit land that he had found someone by the name of Peter Maina squatting there and when he had interrogated him, Peter had acknowledged that the shamba was not his and had asked for a month to vacate the same.

12. The Plaintiff had then gone to the lands office to confirm the position of the suit land wherein he had been issued with a certificate of official search dated the 21st October 2010, herein produced as Pf exh 8 confirming that he was still the registered proprietor of the suit land.

13. That the said Peter Maina, did not leave the land which then necessitated him to write a demand notice to him dated the 5th November 2010, herein produced as Pf exh 9. He received a response to the same vide a letter dated the 14th January 2011 herein produced as Pf exh 10, stating that the said Peter Maina, the 1st Defendant herein, was the son to the 2nd Defendant who was the original allottee of the suit land and that the land had been in use since 1975.

14. The second witness PW2, the Land Adjudication and Settlement Officer, testified that according to their records, land parcel No Nyandarua/Nbuyu/638 had been allocated to Joel Sigei and had an M.R receipt dated the 25th August 1994 to that effect. That the Plaintiff had been given a letter of allotment wherein had accepted the parcel of land and upon payment of 10% of the value of the land, there was a discharge of charge which he produced as Pf exh 2.

15. He confirmed that there was an appendix to Pf exh 3 in respect of Joel Sigei from January 2008 for the full balance statement. That according to their documents, all payments had been made where a discharge was issued on the 9th April 2010 and that the land had now been registered in the name of Joel Sigei. He also confirmed that the suit land had not been allocated to any other person before being allocated to Joel Sigei.

16. On cross examination, it was the evidence of this witness on the process of issuance of land by the Settlement Fund Trustee, that there was a plot selection committee based in the District which comprised of people from the area who included church leaders, administration and local political leaders. That the committee was tasked with selecting names of people to be settled wherein they would then forward the same to the Directors of Settlements for final approval.

17. That during those earlier days there were no formal applications and the plot committee would come up with a list of landless Kenyans. That Mbuyu settlement scheme started in the year 1970's but it was in the year 1982 when people started making payments wherein people from all over Kenya were allocated land thereon.

18. He confirmed that they had an accountability register which was a proposal of a list prepared by plot allocation committee and that according to his list, one Waithera Macharia was also proposed.

19. That there are several persons listed on the list who did not get land. That Plot No. 546 was in same scheme but he had not carried the parcel file because his interest was in parcel No.638. He also testified that in settlement schemes, the membership keeps on changing and that was why provisional numbers were issued by settlement before title mapping was completed and final numbers given thereafter. That the accountability register was prepared before title mapping.

20. The witness also confirmed that the ground status report dated the 13th April 2014 was prepared after a visit to plot No.638, by their office. By consent the same was produced as Df exh 1.

21. He testified that from the ground report, it was clear that the son of Waithera Macharia was the one settled on the ground. Further, there was a dilapidated pit latrine, 2 houses and a barbed wire fence around the compound. There were also several indigenous trees and several bottle brush trees making up for a live hedge. That further, two acres of the land had recently been ploughed for planting and there were remnants of maize stalks from a previous harvest present.

22. He confirmed that it was possible for land in a settlement scheme to be a subject of double allocation and that land was usually issued on certain terms and conditions including but not confined to:

- i. Payment
- ii. Cultivation of at least one acre of arable land from date of allocations
- iii. Personal settlement on the plot
- iv. Erection of a fence along the perimeter boundary just to mention a few.

23. Finally, he confirmed that there was nothing on record of the plot allocation committee showing that John Sigei had applied for a plot and neither did his name appear on the accountability list. That further, he was not aware that Government employees were not entitled to be allocated land.

24. Upon re-examination, it was the witness' testimony that the documents did not show that Waithera Macharia the 2nd Defendant had been allocated land. That plot No 638- according to local authority, legally belonged to Joel Sigei.

25. That although it is alleged that the ground status report was prepared by himself, yet he neither signed the undated report nor was his name appear on the same. He confirmed that the Defendant was allocated plot No. 546 and that it was not true that Plot No. 546 changed to No. 638.

Defence case.

26. The 2nd Defendant testified as DW1 wherein she stated that she could not recall the year she was born but that she had land in Mbuyu Scheme being No. 546 which was given to Nyakinyua traditional dancers who had once danced for late president Jomo Kenyatta.

27. That at the time she was given the land, she used to live in Mutura village which was towards Nanyuki. That they had balloted for plots measuring 2¹/₂ acres wherein they had been allocated land measuring 5 acres.

28. She produced a receipt for plot No. 546 for a farm in Mbuyu as Df Exhibit 2, which was issued for the purpose of voting. She also produced a letter of offer as Df exhibit 3 stating that her land was parcel No. 546 situate at Mbuyu and measuring 5 acres.

29. That after she had been allotted the parcel of land she had settled on the same where she had built her first house but had not fenced the same.

30. She described her land as having been between 4 posts, of which two were near the road and two posts behind. That her neighbors had also not fenced their parcels of land and that her immediate neighbor on her left was one Mbuthia while another was one Wainatu.

31. She testified further that apart from building her house thereon, she had planted crops and that her daughter in law, who was married by Maina Kigo the 1st Defendant herein lived on that land.

32. She testified that she did not know Sigei but that the Plaintiff whom she had seen in court was the same person who had chased away her son, the 1st Defendant herein, after he had found him (Sigei) cutting shrubs on their land.

33. That she had talked to the Plaintiff wherein she had informed him that she was the proprietor of the suit land. That subsequently he had complained through the court.

34. That the Plaintiff had gone to the lands office where officers had visited the suit land in her presence and thereafter made a report.

35. She confirmed that the Plaintiff had never occupied the land and that she would not move out of the land because it had no title and all persons living there have no titles.

36. She confirmed that the suit land had been vacant for about a year before her daughter in law moved there. That she had never received any notice by Settlement Fund. And that although the Plaintiff had promised to give a vehicle to the 1st Defendant to help him move out from the suit land, she had refused to accept the offer to move. She prayed that the suit land be declared hers and the title changed into her name. She also prayed for costs of the suit.

37. When the witness was cross-examined, she confirmed the testimony she had given and went further to state that she was allotted land No. 638 but that the same did not bare her name.

38. She also confirmed that she did not ballot for parcel No 638 and did not have documents to the said parcel of land.
39. When she was referred to Df exhibit 2, she confirmed that the said document was in relation to plot No 546 and that it was signed and stamped and further that it was in relation to land that measured 2½ acres.
40. She was further referred to Df. Exhibit 3 wherein she stated that she could not see very well but that it related to a parcel of land measuring 2½ acres. She confirmed further that she could not see the plot number properly and that she had no documents to prove that plot No.546 was changed to plot No. 636 which was then allotted to her.
41. She however stated that she had a similar document showing that she had been given parcel No.638 which document she had left at home.
42. She testified that the papers to parcel No. 546 had been taken back by Settlement Fund Trustee wherein she was not given an alternative land. That she had been shown land No.546 by Solomon Kigiro who was a councilor then and who knew where the land was located. That he had also taken her to parcel No. 638. That she was not aware that the Settlement Fund Trustee gave land to the Plaintiff. That she did not sue the Settlement Fund Trustee for allocating her the wrong land because she had been satisfied with it.
43. When cross examined by the 1st Defendant, she responded that she had bought the 5 acres of land for Ksh 6,000/= but that she did not have the receipts because when she had wanted to pay, she had been taken to court.
44. She confirmed that the Ksh 6,000/- was money for payment of rates, electricity and water and further that although she had never lived on the land, the same was hers. That the land No. 638 was 5 acres as informed by a surveyor whom she could not recall the name.
45. She also confirmed that parcel No. 546 had a bigger acreage than 2½ acres but that it was still registered in the name of the Settlement Fund Trustees.
46. The 1st Defendant testified as DW2 to the effect that the suit land No Nyandarua/Mbuyu/638 was his mother's land. That on 28th October 2010, at about 12:00 noon while he was in the shamba, he had been called by the Officer Commanding Station (OCS) from Ndaragwa who informed him that he wanted to arrest his wife.
47. When he went back to his house, where he had found other police officers. That was when he had been informed that the shamba was not his and that that someone else had bought it on 4th April 2010. That he had called his mother, DW1 and subsequently recorded his statement on the 13th February 2012.
48. He testified that it was a well-known fact that the suit land belonged to his mother and that he had lived on the same since 1982. That there is no document from the Settlement that the shamba belonged to the Plaintiff. That he and his siblings had tried to inquire how that land was sold to no avail. That the Plaintiff had informed them that the suit land had been shown to him by the assistant chief called Maina.
49. In Cross examination, he confirmed that the suit land was his mother's having balloted for the same as No 638 and to which she had subsequently orally gifted him.
50. He also confirmed that neither he nor his mother had a title to the same as it was yet to be issued.
51. That he did not know the owner of plot No.546 or who balloted for the same and further that it was not true that his mother had been allocated the said plot.
52. That when he received the 1st demand letter in 2010, he had been living on the suit land and had never agreed to move out. That further, he had never left the same although he had signed the chief's letter that he would leave by the 29th November 2010.
53. He also testified that although he had left the suit land at one time, his mother had gone to live there wherein upon his return on the 11th November 2015, his mother had left to go and stay with his sister's children.
54. His evidence was that he was not claiming the Plaintiff's parcel of land but his mother's land. That his neighbors included Chege Nguire, Mureka Kiarie, Njugu who lived on parcel No.639 and Mama Kahora on parcel No.657 but that they did not record any statements
55. DW3, Joseph Gatibi Kimani's evidence was that he knew that the suit land belonged to the 2nd Defendant because it had been allocated to her.
56. That he had inherited his father's land which was No.642 but that he was not there when the Plot which measured 5 acres was allocated to his father in 1973 by the Government wherein they had settled on the same since 1973. That in 1972, his father had been allotted 2 ½ acres on plot No 543 wherein in 1973 he had been allotted another parcel of land No.643 which was bigger. They had left plot No. 543 and moved to plot No 643.
57. He testified that he knew the 2nd Defendant had land in Munyu Scheme being plot No. 638 which measured 5 acres and land which she had balloted for but which he did not know whether she had papers for the same. That she had also another Plot No. 546 which measured 2 ½ acres.

58. That she had built a house on Plot No.638 but had left the land and no longer stays there. He confirmed that he did not know whether she had a title for plot No.638 or plot No.546.

59. The next Defence witness DW4 Christina Wangechi Nguchu testified that her father's land was plot No 639 having been allocated the same in the year 1973. That Peris Waithera (2nd defendant) came to Plot No. 638 in the year 1973 where they had built a semi-permanent grass thatched house. They lived as neighbors until her father died. She confirmed that Waithera still lives on the suit land with her son.

60. On Cross examination, the witness testified that in 1972, all persons were given land measuring 2¹/₂ acres before moving to the 5 acre pieces of land thereby leaving the 2 ½ acres for the 5 acres. She also confirmed that they did not have documents to the land but that Waithera's plot was No.638 and although Waithera lived at Ngarua, her son lived on the suit land. The defence closed their case wherein parties filed their written submissions which I shall summarize as follows.

Plaintiff's submission

61. After summarizing the Plaintiff's case, it was Counsel's submission that parties are bound by their pleadings. That through the evidence adduced by the Plaintiff and the exhibits therein produced, it had been clear to whom the suit land had been allocated to by the Settlement Fund Trustees

62. That the Plaintiff was the absolute proprietor of the suit land and was entitled to the protection by the law as there had been no evidence proven to show that he had been involved in or participated in any fraud, illegality or impropriety whilst acquiring the parcel of land.

63. That the Defendants did not adduce any documentary evidence proving that they were the initial allottees of the suit land and no suit had been filed against the Settlement Fund Trustee and neither were they enjoined in the suit or a counter claim.

64. That the 2nd Defendant had never occupied the suit land since the Plaintiff's registration as its proprietor as was admitted and that pursuant to the demand notice, the 1st Defendant had vacated the suit land on the 28th November 2010 before secretly returning in the year 2015 which was 5 years later in the pendency of the suit.

65. That no overriding interest was established at the the hearing. That what came up during the hearing was that indeed the 2nd Defendant had been allocated plot No. 546 which was still registered to the Settlement Fund Trustees.

66. That there was no evidence adduced supporting the allegations that Plot No. 546 was changed to plot No.638 and the ground report herein produced lacked authenticity as it was unsigned and undated.

67. The issue of double allocation or cancellation and re-allocation of the suit land herein was not supported by any evidence. The Plaintiff relied on the provisions of Section 26(1) of the land Registration Act to support their case that once a party acquired a legal title over a parcel of land, such party was entitled to not only possession but also to occupation of land.

Defendant's Submission.

68. The Defendant, in urging the suit to be dismissed and his counterclaim upheld, submitted that the Plaintiff's registration as the absolute proprietor of the suit land was effected fraudulently and/or by mistake and was therefore null and void as particularized at paragraph 4 of their defence and therefore the Plaintiff's aforesaid registration as proprietor of the same was subject to overriding interest under Section 30 of the Registered Land Act.

69. That the allegations on the Plaintiff's amended plaint have been denied. The Defendant neither entered into an agreement with the Plaintiff on the 28th October 2010 nor left the suit land at any time

70. They framed their issues for determination as:

- i. Whether the Plaintiff's registration as proprietor of the suit land was lawful
- ii. Whether the Plaintiff is entitled to the orders sought in the amended Plaint
- iii. Whether the 2nd Defendant is entitled to the orders sought in the counter claim
- iv. Who is entitled to pay the costs of the suit?

71. On the first issue, it was the Defendant's submission and while summarizing the evidence of the Plaintiff and his witness Pw 2, that from the letter of application for allotment and acceptance thereon, no specific plot number or scheme had been quoted on the application. That after the Plaintiff had fenced the land, he had neither settled on nor cultivated the same from the years 1994-2010, about 16 years.

72. That an accountability register prepared by the allocation committee had confirmed that the suit plot No. 638 had been issued to the 2nd Defendant which status was further confirmed by the ground status report, herein produced as an exhibit to the effect that the 2nd Defendant's son, the 1st Defendant herein had settled on the suit land and had put it in use.

73. That although the accountability register showed that the 2nd Defendant has been the allottee of the suit land, she had not been served with any Notice or demand letter that the same had been repossessed and therefore the Plaintiff's letter was obtained fraudulently or by mistake without revoking the previous allocation.

74. That the 2nd Defendant had produced an allotment letter dated the 3rd March 1979 and therefore it could not have been possible for the same and to have been allotted again to the Plaintiff in 1994, which was 12 years later.

75. The Defendants relied on the decided case of **Otieno vs Matsanza [2003] KLR** which laid down the procedure for repossession of land by the land Settlement Fund Trustees as well the decided case of **Daniel Maina Kibage (duly registered Attorney of Gabriel Githiga vs Kenya Forest Service [2018] eKLR** to submit that where title to a parcel of land was under challenge, it was not enough to dangle the instrument of title as proof of ownership but one needed to go further to establish how the same was acquired to prove that the same was free from any encumbrances. In the present instance, allocation of the suit to the Plaintiff when the same had already been allotted to the 2nd Defendant in 1979 was either fraudulent or mistaken and the title could therefore not stand.

76. That further in the case of **Cecelia Nyambura Ndungu vs Ol Kalou Farmers Co-operative Society [2018] eKLR** this court had held that there was double allotment of the suit land and the blame therefore lay squarely on the Settlement Fund Trustee. This notwithstanding, in the case of **M'Ikiara M'Rinkanya & Another -v- Gilbert Kabeere M'Mbijwe, (1982-1988) 1KAR 196**, the court held that where there was a double allocation of land, the first allotment would prevail. There was therefore no power to allot the same property twice.

77. On the second issue for determination, the Defendants relied on the submissions made herein above relating to the 1st issue for determination.

78. On the 3rd Issue, it was the Defendant's submission and while relying on his earlier submissions that by the time the Plaintiff processed his registration as proprietor of the suit land, he knew that the same was already in occupation and but did not bother to inquire into the interest claimed by the 2nd Defendant.

79. That although the 2nd Defendant's interest in the suit land remained unregistered, yet she has been in occupation of the same since 1982 and had documents to prove that she had been allocated the suit land.

80. That under Section 82 of the Land Registration Act, the rights provided under any written law were overriding interests to which any registered land is subject. That the 2nd Defendant's occupation of the suit land was pursuant to the rights acquired under the Agricultural Act and were therefore legally protected under Section 28(j) of the Land Registration Act.

81. That there having been no repossession of the suit land by the Settlement Fund Trustees, there was no room for a second allocation to the Plaintiff. They urged their counter claim to be allowed with costs thereof in both the counter claim and the suit.

Analyses and Determination.

82. I have considered the evidence on record, the exhibits produced, and the submission by the parties Counsel as well as the authorities attached therein.

83. From the foregoing pleadings, the following issues emerge for determination:-

- i. Whether there was double allocation
- ii. Whether the Plaintiff's title was obtained through fraud.
- iii. Whether the Defendants are entitled to reliefs sought in the counter-claim?
- iv. Whether the Plaintiff is entitled to the reliefs sought in the plaint
- v. Who is liable to pay costs of the suit

84. On the first issue as to whether there was double allocation, of the present parcel of land, it was the Plaintiff's evidence that in 1994, he was offered plot No. 638 Mbuyu scheme by the Settlement Fund Trustee wherein he had accepted the same, signed an acceptance letter wherein on the 21st October 1994 he had made a payment of Ksh 932/= to the Settlement Fund Trustee. That after re-payment of the loan, he had been issued with letter of discharge dated the 23rd December 2008 wherein the land was transferred to him vide a letter dated 19th April 2008. That he had then proceeded to the lands office where he was issued with the title deed to parcel No. Nyandarua/Mbuyu/638 on the 9th April 2010. The evidence of this witness was supported by PW2 the Settlement officer and was not challenged in cross-examination.

85. There was also evidence from PW2 that although the 2nd Defendant's name had appeared on their accountability register, yet there was nothing to show that she had been allotted the suit land

86. The 2nd Defendant's evidence on the other hand was that she had been allocated land in Mbuyu Scheme No. 546 and produced the letter of offer as Df exhibit 3 and that after she had been allotted the parcel of land she had settled on the same where she had built her first house but had not fenced the same. That the number to the said parcel of land No 546 was later changed to parcel No. 638 but that she did not have

documents to prove the same. She neither produced documents of acceptance of the allocation nor documents of discharge of the loan. The documents she had produced, being the letter of allotment and a ballot receipt all showed that the parcel in reference as plot No. 546 which was quite different from Plot No.638. The Defendant placed nothing more of value before the court on the dispute.

87. The Court finds that there is no evidence of any double allocation as submitted by the Defendant.

88. On the second issue as to whether the Plaintiff's title was obtained through fraud, the onus was on the Defendant to prove these allegations. Fraud is a serious matter which must be proved to the required standard. In **R.G Patel vs Lalji Makanji 1957 E.A 314**, the Court of Appeal stated as follows:

“Allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required”.

89. In the case of **Arthi Highway Developers Ltd vs West End Buthery Ltd & Others C.A Civil Appeal No. 246 of 2013 (2015 e K.L.R)**, the Court of Appeal cited the following passage from **Bullen & Leake precedents pleadings 13th edition** at Page 427:

“The statement of the claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice”.

90. I have no doubt in my mind that the Defendant herein has distinctly pleaded the facts on which fraud is alleged against the Plaintiff. The next step however was for them to prove those allegations to the required standard. I will therefore interrogate all those allegations of fraud, and/or mistake as submitted by the Defendants.

91. At paragraph 4 of their statement of defence the Defendants pleaded that the Plaintiff's title was obtained through fraud the same having been allotted to the Plaintiff whilst it had been allotted to the 2nd Defendant in the first instance and the allotment having not been cancelled or revoked.

92. As stated herein above, the letter of offer that was produced as Df exh 4 as well as the ballot receipt therein produced as Df exh 3 were all in relation to parcel No 546 which was distinct from the suit parcel of land, further the court having found that there was no double allocation herein above, this line of submission and/or defence must fail.

93. The Defendants had also sought that the court finds that although the 2nd Defendant's interest in the suit land remained unregistered yet she has been in occupation of the suit land since 1982. That the said occupation having been acquired under the Agricultural Act, her rights were overriding interests and were therefore legally protected under Section 28(j) of the Land Registration Act.

94. Section 174 of the Agricultural Act now repealed by the Agriculture and Food Authority Act No. 13 of 2013 stipulates as follows:

Where an advance has been made and secured upon any land under this Part, the Settlement Fund Trustees, or any person duly authorised by the Trustees in writing in that behalf, may exercise all such remedies for the recovery of the advance as the Agricultural Finance Corporation is empowered to exercise under the Agricultural Finance Corporation Act (Cap. 323).

(2) If any sum of money, whether principal or interest, due in respect of any advance made by the Settlement Fund Trustees, such advance not being secured upon any land under this Part, is unpaid, that sum shall be a civil debt recoverable summarily.

(3) If any sum of money, whether principal or interest, due in respect of any advance made by the Settlement Fund Trustees, such advance not being secured upon any land under this Part, is unpaid for more than six months, whether or not action has been taken under subsection (2), the Settlement Fund Trustees may, without recourse to any court, terminate any interest (whether express or implied) in land in respect of which the advance was made and which is vested in or deemed to be vested in the person to whom the advance was made, and there upon that interest shall vest in the Settlement Fund Trustees, who may thereupon take possession of the land in question

98. Section 28 of the Land Registration Act provides as follows:

Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—

(a) deleted by Act No. 28 of 2016, s. 11(a);

(b) trusts including customary trusts;

(c) rights of way, rights of water and profits subsisting at the time of first registration under this Act;

(d) natural rights of light, air, water and support;

(e) rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law;

(f) deleted by Act No. 28 of 2016, s. 11(b);

(g) charges for unpaid rates and other funds which, without reference to registration under this Act, are expressly declared by any written law to be a charge upon land;

(h) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;

(i) electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law; and

(j) any other rights provided under any written law,

Provided that the Registrar may direct the registration of any of the liabilities, rights and interests hereinbefore defined in such manner as the Registrar deems necessary.

95. The Defendant's approach into this matter is two pronged to the effect that on one hand they claimed to have been allocated the suit land by the Settlement Fund Trustee and therefore the re-allocation to the Plaintiff constituted double allocation. On the other hand, they claimed that even if title was yet to issue, they were nonetheless entitled to the land by virtue of occupation under the Agricultural Act.

96. Having found that the suit land herein was neither allocated to the 2nd Defendant nor was there double allocation, it therefor follows that the provisions of Section 174 of the Agricultural Act is immaterial in the circumstance.

97. As stated earlier, and by the Defendants' own admission, no allotment letters were ever issued in their favour in respect of the suit property nor did they have the title. Their ownership was pegged on occupation, and therefore entitlement to the land. I find that the mere occupation of the suit land did not confer ownership to the Defendants. Thus in order for this court to *protect their right to the suit land, it was incumbent on them to establish proprietary right or interest in Land* capable of protection.

98. The Defendants counterclaim did not plead an overriding interest over the suit property and no prayer was made in the counterclaim claiming any declaration to the effect that they had a vested overriding interest over the suit property. What the Defendants sought in the counterclaim was that there be an order of rectification of the land register in respect of LR No. Nyandarua/Mbuyu/638 by cancellation of the Plaintiff's registration and substitution therefore with the 2nd Defendant's name as proprietor thereof by virtue of equitable rights arising from their open, exclusive and continuous occupation of the suit land

99. In the case of **Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another [2018] eKLR** the Supreme Court held that an entitlement in right only of possession and occupation refer to rights arising under customary law. It was held by the court that;

Be that as it may, it is undeniable that such rights of a person that subsisted at the time of first registration, as evidenced by his being in possession or actual occupation, are rooted in customary law. They arise under African customary law. They derive their validity from African customary law. They are "rights to which one is entitled in right only of such possession or occupation". They have no equivalent either at common law or in equity. They do not arise through adverse possession, neither do they arise through prescription. For if they did arise through these processes, they would be overriding interests, not under Section 30(g), but under Section 30(f) of the Registered Land Act, which recognizes:

"rights acquired or in the process of being acquired, by virtue of any written law relating to the limitation of actions or by prescription."

It is customary law and practice that clothes the rights of a person in possession or actual occupation, with legal validity. If customary law and practice, does not recognize such possession or actual occupation, then it cannot be a right to which a person is entitled.

100. From the Defendant's pleadings it is clear that suit land was not ancestral land and therefore this limb of submission must fail

101. The provisions of Section 26 of the Land Registration Act make a Certificate of Lease issued to a party as conclusive evidence of proprietorship and that such Certificate of Title issued by the Registrar upon registration shall be taken by all courts as *prima facie* evidence that the person named is proprietor of the land and is the absolute and indefeasible owner.

102. However as has also been held by courts, this court inclusive that that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. That the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances, in the instant case, I find that the Plaintiff lawfully acquired title to the suit property and therefore the same was without encumbrances.

103. Lastly on the issue as to whether the Plaintiff is entitled to the reliefs sought in the plaint. The court has already found that he lawfully acquired the suit property. The court has also found that the Defendants failed to prove the particulars of fraud, illegality or irregularity pleaded in their counterclaim. It would, therefore, follow that the Plaintiff is entitled to the reliefs sought in the plaint.

104. To this effect, I find as follows:

i. That the Plaintiff herein has proved his case on a balance of probabilities, and consequently I find for the Plaintiff against the Defendants as prayed in the *Amended Plaint of 9th March 2011*.

ii. The Court further directs that the *Defendants* do *give vacant possession* of the suit land to the Plaintiff within a period of *45 days* from the date of this *Judgment*, *in default*, the *Plaintiff* to *apply* for an *eviction order*.

iii. **The Defendants' counter claim is hereby dismissed.**

iv. **Costs to the plaintiff**

Dated and delivered at Nyahururu this 18th day of June 2019.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE