

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ELC APPEAL NO. 1 OF 2020

ANGELO NJERU.....

APPELLANT

VERSUS

NGOROI MITA & 15 OTHERS.....

RESPONDENTS

*(Being an appeal from the Judgment of Hon. S.K Mutai
PM delivered on 10th July 2018 in Embu CMCC No. 345
of 1998)*

JUDGMENT

1. The Respondents had instituted suit against the Appellant in the trial court vide a Plaint dated 18/12/1998, claiming to be the lawful owners as allottees of the Embu Municipal Council of various stalls within the area known as Shauri in Embu Municipality, which they averred had been registered as plot No's Embu Municipality/1112/1102/1103 and 35. They sought to restrain the Appellant from evicting them from the said plots.
2. The Appellant, on the other hand, filed a Defence and Counterclaim dated 10/05/1999. In the said Counterclaim, the Appellant sought eviction orders against the 1st, 2nd, 3rd, 4th, 15th, and 16th Respondents jointly, as well as mesne

profits or damages for trespass. They claimed that they were the registered proprietors of Plot Nos. Embu/Municipality/1112/1102, 1103, and 35 within Embu Municipal Council, and that they held a better title than any other person. They further claimed that the 1st, 2nd, 3rd, 4th, 15th and 16th Respondents had unlawfully trespassed upon and occupied the said plots, and had refused to vacate despite notice being issued to them.

3. The 4th Respondent, Justus Njoka filed a reply to the Defence and Counterclaim dated 23/09/2011 and averred that he had been legally in occupation of his plot since 1974 when the Municipal Council of Embu allocated it to him and that he was the lawful owner of the said property as an allottee. He averred that he had been paying rent and rates to the allotting authority, the Municipal Council of Embu upto 2010 without any notice from the said authority of change of ownership. He denied that he was a trespasser.
4. The record shows that the Respondents suit was dismissed for want of prosecution on 27/06/2008 leaving only the Counterclaim for determination.
5. When the former suit came up for directions, the parties agreed to proceed with the hearing by way of documentary evidence and written submissions.
6. Upon analyzing the suit, the trial court, in its judgment, found that the Appellant's counterclaim lacked merit and had not been proved to the required standard, since the

Respondents were the original allottees of the suit plots from as far back as 1974, the same having been allotted to them by the Municipal Council of Embu. In contrast, the Court found that the certificates of lease issued to the Appellant were dated 1991 and had been issued by the County Council of Embu, which was not in charge of the Municipality. The court further found that the Respondents had been paying land rent and rates to the Municipal Council, as opposed to the Appellant, who tendered no evidence on the issue of land rent and rates.

7. The Appellants' were aggrieved with the impugned decision and preferred the present Appeal on the following grounds;
 1. That the Learned Principal Magistrate erred in law and fact by finding that the Appellant's Counterclaim lacked merit and had not been proved to the required standard against the weight of the evidence tendered by the Appellant.
 2. That the Learned Principal Magistrate erred in law and fact when he failed to realize that letters of allotment relied on by the Respondents were not for the land registration numbers Embu/Municipality/1112/1102 & 1103 which were the subject matter of the Counterclaim.
 3. That the Learned Principal Magistrate erred in law and fact when he came to the conclusion that the County council of Embu was not in charge of the Municipality

and thereby disregarding the Certificates of Lease that had been issued to the Appellant by the Government, whereas the same had neither been pleaded nor proved by the Respondents.

4. That the Learned Principal Magistrate erred in law and fact when he failed to realize that Certificates of lease are issued by the Government and not the County Council as purported in the judgment.
5. That the Learned Principal Magistrate erred in law and fact by failing to realize that the Appellant is the legal owner of the suit lands as a Certificate of Lease is conclusive evidence of proprietorship of a leasehold and not letters of allotments.
6. That the Learned Principal Magistrate erred in law and fact by failing to realize that based on the evidence tendered before him, the Respondents are unlawfully occupying and trespassing the suit lands and thereby ought to be evicted.
7. That the Learned Principal Magistrate erred in law and fact by purporting to determine the plaint which had since been dismissed for want of prosecution.
8. The Appellant sought to have the Judgment of the trial Court set aside, the appeal allowed with costs and the orders sought in the Counterclaim granted.
9. When the appeal came up for directions, the parties agreed to canvass the appeal by way of written submissions. The

Appellant filed submissions dated 26/03/2025 through the firm of Joe Kathungu and Company Advocates whereas the Respondents did not file any submissions. The Appellant submitted that the trial Magistrate erred by failing to realize that the letters of allotment relied on by the Respondents were not for the land registration No's. Embu Municipality/1112/1102 and 1103 which were the subject matter of the Counterclaim. They further submitted that a letter of allotment is not conclusive evidence of ownership of land and that it cannot override a certificate of lease. In support of that contention, they relied on the cases of Gladys Wanjiru Ngacha versus Teresia Chepsaat and 4 others (2008) KF HC 622 KLR, Mbau Saw Mills Ltd versus Attorney General for and on behalf of the Commission of Lands and 2 others (2014) Eklr and Njuwangu Holdings Ltd v Langata KPA Nairobi West Trading Co Ltd & 5 others [2014] KEELC 551 (KLR).

10. They averred that the letter of allotment issued to the Respondents lapsed due to their failure to comply with the conditions on it and that it could not be revived by making payment. They contended that the trial Magistrate erred by considering the Respondents evidence of paying land rent and rates to the Municipal Council. They submitted further that they had demonstrated that they were the rightful owners of the suit plots whereas the Respondents had not produced any

evidence of ownership and therefore they ought to be evicted for illegal occupation and trespass. They maintained that the Respondents never appealed against the orders dismissing their suit for want of prosecution and therefore there was no suit against the Appellant thus the Counterclaim ought to have been allowed. They urged that the appeal be allowed with costs.

11. Upon careful consideration of the pleadings, the evidence on record, the rival submissions, and the judgment of the trial court, the issue for determination is whether the trial court erred in finding that the Appellant's Counterclaim lacked merit and dismissing the same.

12. The Appellant claimed that he is the lawful owner of Plot Nos. Embu Municipality 1112/1102 and 1103 and that the Respondents had trespassed and continued to occupy the said plots despite being given notice to vacate. Plot No. 35 was said to belong to the late Samuel Kagunyi, who was never substituted in the lower court proceedings. The Appellant produced certificates of lease for the said parcels of land which showed that he was registered as a lessee over the said parcels of land on 03/06/1991 and 22/04/1997 respectively.

13. The Respondents, on the other hand, claimed that they were the

lawful allottees of the said plots, alleging that they had been allocated stalls which were later registered as the suit parcels of land. The Respondents did not produce any evidence to prove that they had been allotted the said plots, and instead relied on sketch maps and minutes of the Municipal Council of Embu dated 17/06/1993, which the Court has examined and found that they did not relate to the suit plots herein. The 4th Respondent produced receipts for payment of rates and rent, but the Court notes that the same related to Plot Nos. Shauri Yako 169 and Shauri Yako T19 and T14, and not the suit plots herein.

14. In the circumstances, the Court finds that the Appellant duly discharged the burden of proof of ownership of the suit properties by producing certificates of lease in respect of the respective parcels. In contrast, the Respondents failed to establish any nexus between their alleged allotment and the suit parcels. The trial court therefore erred in finding that the Respondents were the original allottees of the suit properties in the absence of any evidence. The Court further finds that the Respondents' continued occupation of the suit parcels constitutes trespass.

15. With regard to the claim for mesne profits, it is well settled that such relief is in the nature of special damages which must be specifically pleaded and strictly proved. In the present case,

the Appellant neither particularized the claim nor adduced any evidence in support thereof. Consequently, no award is made under this head. However, the Court is satisfied that the Appellant is entitled to general damages for trespass, and hereby awards the sum of one hundred thousand (Kshs. 100,000/) under that head.

16. Consequently,
this appeal succeeds in part. The cost of the counterclaim before the trial Court as well as the costs this Appeal shall be borne by the Respondent.

17. Orders
accordingly.

**DATED, DELIVERED AND SIGNED AT EMBU THIS 16TH
day of APRIL, 2026.**

**HON. E.C CHERONO
ELC JUDGE**

In the presence of;

1. Mr. Joe Kathungu for the Appellant
2. Respondent/Advocate-absent
3. Diana Kemboi C/A