



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT NAKURU

ELC NO. 5 OF 2017

ESTHER WAMBUI NJENGA..... PLAINTIFF

VERSUS

HARRISON MWANGI NYOTA & 2 OTHERS.....DEFENDANTS

JUDGMENT

(Plaintiff and defendant contesting ownership of same land; already decided in a previous suit that defendant does not deserve title to the land; this court cannot sit on appeal against that decision; defendant obtaining title after losing the case which held that he does not deserve the land; improper for defendant to have obtained title after a judgment against him; judgment entered for the plaintiff)

1. This judgment is in respect of two consolidated suits. The first suit was filed on 7 September 2000 in the High Court at Nakuru by Harrison Mwangi Nyota, and initially registered as Nakuru HCCC No. 373 of 2000. The matter was later transferred to the Nairobi High Court and registered as Nairobi HCCC No. 164 of 2004 before being transferred back to the High Court at Nakuru and re-registered as Nakuru HCCC No. 227 of 2005. The second suit was filed by Esther Wambui Njenga in the High Court at Nairobi on 19 September 2006 and was initially registered as Nairobi HCCC No. 990 of 2006. It appears have been re-registered as Nairobi HCCC No. 2004 of 2007 and later Nakuru HCCC No. 180 of 2009 after being transferred to the High Court at Nakuru. With the creation of the Environment and Land Court after the 2010 Constitution, these matters were consolidated and transferred to the Environment and Land Court at Nakuru and given the number Nakuru ELC No. 5 of 2017. In the consolidated matter, Esther Wambui Njenga is considered as the plaintiff, while Harrison Mwangi Nyota is considered as the 1st defendant. The Chief Land Registrar, and the Attorney General are considered as the 2nd and 3rd defendants respectively.

2. In the suit filed by Esther Wambui Njenga (hereinafter also referred to simply as Esther or the plaintiff) she has pleaded in her plaint that she and the 1st defendant had a dispute over the ownership of the land described as Naivasha LR No.1114/II/1 also known as Naivasha Municipality Block 5/234 (hereinafter also referred to as “the suit land” or “suit property”) and that the 1st defendant filed the suit Nakuru HCCC No. 639 of 1995 seeking inter alia that she (Esther) be restrained from dealing with the suit property. It is averred that the said suit was determined in her favour. It is the case of the plaintiff that the 1st defendant has now fraudulently caused himself to be registered as proprietor of the suit property, specifically that he forged a court order in respect of Nakuru HCCC No. 639 of 1995 and misled the Chief Land Registrar that he is the owner of the suit property. The plaintiff has pleaded that subsequently, the 1st defendant was charged in Nairobi Chief Magistrate’s Court Criminal Case No. 2482 and was convicted. In her case, the plaintiff wishes to have the following orders :-

(i) That this Honourable Court does declare the plaintiff as owner of the land parcel Naivasha Municipality Block 5/234.

(ii) That the Chief Land Registrar be directed to rectify the register to read Esther Wambui Njenga as the legal registered owner of land parcel number Naivasha Municipality Block 5/234 instead of Harrison Mwangi.

(iii) Costs of the suit.

(iv) Any other or further relief that this Honourable Court may deem fit and just to grant.

3. The 1st defendant filed a statement of defence and counterclaim to the plaintiff’s suit. He inter alia pleaded that the Certificate of Lease issued to him was not issued pursuant to any court order but pursuant to the allocation made to him of the suit property. He has further pleaded that his arrest, prosecution and conviction were based on misinformation made and perpetrated by the plaintiff and the same were a serious miscarriage of justice. He has pleaded that his conviction in the criminal case has no bearing or relevance to the ownership dispute, which can only be determined by looking at the actual allocation of the land. He has contended that his registration of the suit property is a first registration and thus indefeasible. In his counterclaim, he has asked for the plaintiff to be permanently restrained from the suit land, an eviction order against the plaintiff, mesne profits from the year 1995 and interest thereon, costs and such other relief that the court may deem appropriate. In the suit that he commenced, where he sued Esther as defendant, he pleaded in his plaint that he became registered as proprietor of the suit land through a lease dated 27 January 2000 and registered on 3 February 2000. He pleaded to have been in possession but that the defendant (Esther), while purporting to effect a court order, demolished his structures and proceeded to erect a fence. He asked

for orders that the defendant (Esther) does remove the fence and be restrained from entering or using the suit land. He also sought damages for trespass and/or mesne profits and costs.

4. On the part of the 2nd and 3rd defendants, it was pleaded in their joint statement of defence that the claims in the plaint filed by Esther, are basically denied and that she is put to strict proof. However, at the hearing of the matter, it became apparent that the plaintiff and the Attorney General took the same position, that the rightful proprietor of the suit property is the plaintiff.

5. In her evidence, the plaintiff testified inter alia that the suit property was initially occupied by her later father under a Temporary Occupation Licence (TOL) for purposes of running a timber business. The 1st defendant sought some space to operate a kiosk, but he was denied, which led him to build the kiosk at a road reserve next to the suit land. After the death of her father, the 1st defendant moved to place some beacons on the land which led into a dispute over the allocation of the land. This dispute was referred to the relevant allocating authority which commissioned an inquiry. It emerged that the 1st defendant had been given an allotment letter to the suit land and a decision was made to have the suit land allocated to the plaintiff and the 1st defendant be compensated with alternative land. The allotment of the suit land to the 1st defendant is claimed to have been cancelled. The 1st defendant may not have been happy with this decision and he filed the suit Nakuru HCCC No. 639 of 1995 which he lost. The plaintiff stated that despite losing the case, the 1st defendant went to the Commissioner of Lands, with what she claimed to be a forged order, which purported that he had won the case. Following this order, the Commissioner of Lands issued to the 1st defendant a lease which was later registered, and a Certificate of Lease to the suit land, registered as Naivasha Municipality Block 5/234, was issued to him. It is this which led to the 1st defendant being charged in the criminal matter and he was convicted. He was sentenced to 3 years in probation. She testified that she herself was issued with an allotment letter following the decision made after the inquiry and that she made the requisite payments. The allotment letter is dated 17 January 1997 and it refers to an "unsurveyed commercial plot" measuring 0.13 Ha. The term indicated is 99 years from 1 January 1997 at an annual rent of Kshs. 13,000/=. She could not however be issued with a Lease because one had already been issued to the 1st defendant. That is why she has come to court to have the registration of the 1st defendant cancelled. She did mention that she obtained an order of eviction from the case Nakuru HCCC No. 639 of 1995 which she used to evict the 1st defendant. This led to the demolition of his kiosk and other structures. The plaintiff has now put up a commercial building on the suit property. She acknowledged owning an adjacent plot being Naivasha Municipality Block 5/94 but denied that she wants to kick out the 1st defendant so as to extend her plot.

6. The plaintiff called one other witness namely Erick Nduhiu a land surveyor. His evidence was that the plaintiff approached him in the year 2016 with her letter of allotment and PDP, and asked him to process for her title to the suit land. The letter of allotment showed that it is for an unsurveyed land but when he went to check the records, the same showed that the land was already surveyed through survey plan No. 270/104, and the suit land already given the number Naivasha Municipality Block 5/234. He was then informed of this dispute. He investigated the 1st defendant's title and he found out that the 1st defendant had an allotment letter dated 11 March 1994, which was accompanied by a survey plan No. 176/96, but which survey plan he discovered was not for the suit land but was for the Plot LR No. 1144/915. He thought it was an anomaly for the 1st defendant's allotment letter to show that the land being allocated was already surveyed when survey was actually done later. He further testified that from the documents, he noted that the allotment letter of the 1st defendant to the suit land was cancelled and that he was given an alternative plot, which is noted in an allotment letter dated 9 July 1996.

7. Mr. Gordon Ochieng testified on behalf of the 2nd and 3rd defendants and as mentioned earlier, his evidence supported that of the plaintiff. Mr. Ochieng is the Assistant Director of Land Administration. He did acknowledge that there are two sets of allotment letters for the suit land, one issued to the plaintiff and the other issued to the 1st defendant. He did affirm that the suit land was initially occupied by the father of the plaintiff under a TOL and operating a timber yard. The dispute came about when the Commissioner of Lands issued an allotment letter dated 11 March 1994 to the 1st defendant for the same land occupied by the timber yard then identified as LR No. 1144/II/1. The allotment letter was issued upon the application of the 1st defendant for the land through a letter dated 17 November 1992. The plaintiff complained about this and the process of preparing title in favour of the 1st defendant was suspended. The Commissioner of Lands then commenced an inquiry in April 1995. The decision made was that the suit land be allocated to the plaintiff and that 1st defendant be compensated with alternative plots. The Ministry of Lands did write to the Town Clerk of Naivasha Municipality asking him to identify two plots to be granted to the 1st defendant. He testified that the 1st defendant was compensated by a number of plots, the first through a letter dated 10 November 1994 for Naivasha Municipality Block 5/235 measuring 1.466 Hectares; the second being Naivasha Municipality Block 2/815 measuring 0.0743 Hectares and the third being Naivasha Municipality Block 4/22 measuring 0.2019 Hectares. Later however, the 1st defendant presented a court order dated 25 October 1999 purporting to have been issued in Nakuru HCCC No. 639 of 1995 that he be registered as proprietor of the suit land. Believing this communication to be genuine, the Commissioner of Lands did prepare a lease on 27 January 2000 which was then registered and title issued to the 1st defendant. Under cross-examination, he did mention that the original parcel of land was LR No. 1144/II/1 measuring 0.396 Ha, but part of which was hived off to create a road before the remainder was allocated to the 1st defendant. This remainder is the land Naivasha Municipality Block 5/234 and it measures 0.2390 Ha. The Certificate of Lease issued to the 1st defendant shows a term of 99 years from 1 April 1994. The allotment letter that the 1st defendant got was to surveyed land. The allotment letter to the plaintiff issued on 17 January 1997 is to unsurveyed land and did not refer to LR No. 1144/II/1 or Naivasha Municipality Block 5/234. He also acknowledged that the plaintiff paid the requisite fees outside the 30 days period indicated in the allotment letter. He further affirmed that the first land allocated to the 1st defendant was done before the inquiry as it was made on 10 November 1994.

8. The 1st defendant in his evidence testified inter alia that in the year 1982, he was allowed by the Chairman of Naivasha Municipal Council, Mr. Kariuki Chotara, to build a kiosk on the suit land and he had what he referred to as an approved plan. After he had been here for about 10 years, he wrote to the Commissioner of Lands through a letter dated 17 November 1992 and requested for a lease for the plot and that at this time the plot had already been surveyed. He was then issued with an allotment letter on 11 March 1994 to the suit land identified as LR No. 1144/II/1. He denied that this allotment was ever cancelled and denied having been issued with any alternative plot. He denied being aware of any inquiry by the Ministry of Lands over the ownership of the suit land in 1995; he refuted being issued with any allotment letter or title to the plots said to be alternative plots. He did not think that the allotment letter displayed by the plaintiff is for the same plot and pointed at the discrepancies in the size, stand premium and annual rent, and the fact that the allotment was for an unsurveyed plot yet the plot in issue was already surveyed. He explained that what was allotted to him was 0.396 Ha but it got reduced to 0.239 Ha after a road was made splitting the plot into two and changing its shape from rectangular to triangular. On the suit Nakuru HCCC No. 639 of 1995, he was of

opinion that the same did not make any determination on the ownership of the suit land. He faulted the plaintiff for demolishing his kiosk and evicting him from the suit land pointing out that she had no counterclaim. He admitted being charged in the criminal case but asserted that he did not know of the reasons for his arrest and why he was charged. He reasoned that the dismissal of his case did not bar him from pursuing title to the suit land and denied taking any order for purposes of being issued with title. He claimed never to have seen the order that was said to be forged. He mentioned that he had no dispute with the plaintiff's late father who died in the year 1987 and denied that it was him who allowed him to put up a kiosk on the land.

9. The 1st defendant also called the Executive Officer of the court to produce the file Nakuru HCCC No. 639 of 1995, which was duly done.

10. I invited counsel to file written submissions, which they duly did, and I have taken these into account before arriving at my decision. Mr. Waiganjo, learned counsel for the 1st defendant did make some oral submissions, which I have also taken into account. One of the significant issues raised by Mr. Waiganjo, learned counsel, was that his client does not dispute the plaintiff's ownership of the land described as Unsurveyed Commercial Plot Naivasha Township measuring 0.13 Ha which is contained in the plaintiff's letter of allotment dated 17 January 1997. Mr. Waiganjo further submitted that the plaintiff has failed to prove the nexus between the unsurveyed parcel of land allotted to the plaintiff through the said allotment letter and the plots LR No. 11144/I/2, LR No. 1144/II/1 and Naivasha Municipality Block 5/234 which measures approximately 0.2390 Ha. His view was that these plots are different from the 1st defendant's land. He also reiterated a point made by his client that his title was not issued pursuant to the alleged forged court order but through the process of allotment. In his oral submissions, he reinforced the point that the plaintiff has not shown that she was allotted the suit land and that she complied with the terms of allotment and thus cannot be entitled to title to the suit land. He also was of the view that the case Nakuru HCCC No. 639 of 1995 never pronounced that the plaintiff is the owner of the suit land but what happened was that his client's case was dismissed. It is precisely at this point that I chose to start my analysis of the case before me.

11. It is common ground that the plaintiff and the 1st defendant had this previous litigation where the 1st defendant was plaintiff. In that case, the 1st defendant sought orders that the plaintiff herein (Esther) be permanently restrained from the land parcel LR No. 1144/II/1 now Naivasha Municipality/Block 5/234. In that case, the 1st defendant gave more or less the same evidence that he tendered in this case, that is, that he had a kiosk on the suit land, that he applied to be allocated the same, that he was issued with a letter of allotment and that he paid the requisite amounts due. The plaintiff herein in defending the case, also gave a more or less similar account to what she gave in this court, including the averment that her father had occupied the land under a TOL and operated a timber yard. She also pointed at the inquiry led by the Ministry of Lands into the allocation of the land, that the 1st defendant was given an alternative land and that she was later issued with a letter of allotment. This is what Rimita J, said in his judgment delivered on 14 December 1998 :-

“The evidence before me support the defendant’s case. Although her late father was allocated the disputed plot on temporary basis, the Commissioner of Lands continued demanding rates each year and the same were all duly paid to date. It is my finding that the intention of the Commissioner of Lands was to have the defendant’s father have the land formerly allocated to him at a later date. Naivasha was a growing Town at the material time.

The plaintiff when applying to the Commissioner of Lands for the allocation of the disputed plot did not disclose the truth to the Commissioner of Lands. Exhibit 1, shows that the Commissioner of Lands was misdirected and cheated by the plaintiff into allocating him the disputed plot.

I believe that after investigations by a team of officials from Naivasha Municipal Council and the Commissioner of Lands’ office, it was found that the plaintiff had fitted into the story of the Arab and the camel. But he was lucky that he was allocated an alternative plot.

The plaintiff’s counsel is relying on a technicality that the plot had not been allocated to the defendant or her father formerly. This is true. But the courts will not allow anybody’s interest in property to be taken away through deceit and without hearing those whose property is being taken away. The defendant believed that the plot belonged to her father. She had businesses on the plot. She had licences from the relevant council and the Commissioner of Lands continued to receive plot rates from her.

The circumstances of this case are such that the Commissioner of Lands should be supported for cancelling the allocation of the disputed plot to the plaintiff.

Let me say that no court will countenance the plaintiff’s actions.

I find that the plaintiff’s case has not been proved on the required standard. It is ordered dismissed with costs and interest to the defendant.”

12. It is clear to me that the High Court in the above judgment already made a decision that the 1st defendant is not entitled to the suit land. Despite the said decision, the 1st defendant still obtained title to the suit land. Now the 1st defendant claims that he got title, not because of this judgment, but because of the fact that the suit land was allocated to him. I do not understand the argument of the 1st defendant for it is apparent that in the above judgment, the court already held that he ought not to have been allocated the said land, and indeed held that he had obtained allotment to the suit land through deceit. A competent court has thus already held that the allotment of the suit land to the 1st defendant was not properly done and went further to support the cancellation of the said allotment letter by the Commissioner of Lands. Following this judgment, it follows that the 1st defendant cannot now claim to have obtained good title to the suit land because of the allotment letter that was issued to him. There is a claim that he obtained title following a forged court order which he has denied, but whatever the case, he also could not obtain a title for the suit land pursuant to the judgment above, for the said judgment was not in his favour. In essence, the 1st defendant could not obtain title through the allotment letter issued to him, for the same was affirmed as nullified by the court in the previous suit, and neither could he obtain title because of the judgment in the said suit. In fact, for all intents and purposes, the court in the previous suit already determined that Harrison Mwangi Nyota, the 1st defendant herein, was not entitled to get title to the suit

land.

13. Pursuant to the above judgment, it was wrong for the 1st defendant to push for a lease and certificate of lease to be issued in his favour. No title could issue to him because the court had already held that he was not entitled to get one. There is therefore no question that the 1st defendant's title was improperly issued, and much as he denies, I do not see how it could have been issued without some element of misrepresentation on his part, and irrespective of what happened, such title was certainly issued illegally, for there was a court decision that held that the 1st defendant is not entitled to get title to the said land.

14. If the 1st defendant strongly believed that he is fully entitled to the suit land and that the court was wrong, all he needed to do was appeal, and hope to be successful on appeal. Pursuing a title when a court has already held that the person is not entitled to one was a reprehensible act on the part of the 1st defendant which must be strongly condemned. My holding therefore is that the title of the 1st defendant cannot stand and must be cancelled. The same is hereby cancelled.

15. The other question is whether the plaintiff ought to be issued with title to the suit land. I do note the 1st defendant's argument that the plaintiff has not demonstrated any nexus between her allotment letter and the title of the 1st defendant. Before I go too far, may I be forgiven for reiterating that a competent court already held against the 1st defendant and in favour of the plaintiff. That being the position, it is not for this court to second guess the decision of the High Court, for this court has no jurisdiction to sit on appeal against the said decision. The High Court did not see anything wrong in the allotment of the land to the plaintiff and it will be against the principles of administration of justice for me to order otherwise. The only quarrel the 1st defendant has raised relates to the differences in the nature of interest given to the plaintiff in the allotment letter. I have evidence of an expert (DW-2) that the interest in the allotment letter relates to the same land in dispute. The only significant difference is the acreage of 0.13 Ha, as compared to 0.239 Ha, in the title of the 1st defendant. But let us not forget that the title of the 1st defendant is an illegal title and not much should be read into it including the acreage noted therein. If there is any discrepancy in the acreage on the ground, that is a matter which will be resolved when the surveyor goes to the measure the land for purposes of processing title to the plaintiff. I have in fact seen a letter dated 27 April 1999 produced by the plaintiff, from the Commissioner of Lands, which states inter alia that the land allocated to the plaintiff is actually 0.2390 ha and not 0.13 Ha and requests for additional payments from the plaintiff owing to this increased acreage. It is therefore wrong for the 1st defendant to claim that we are probably dealing with a different parcel of land from that of the 1st defendant but again, even if we were, the 1st defendant cannot claim the benefit of the allotment letter given to him for it was already nullified by Rimita J. I have no reason to deny the plaintiff the benefit of this land and the benefit of the title to this land.

16. The upshot of the above is that I find no merit in the suit originated by the 1st defendant and in his counterclaim but instead enter judgment for the plaintiff. For the avoidance of doubt, I do order that the title of the 1st defendant, Harrison Mwangi Nyota, to the land parcel Naivasha Municipality Block 5/234 or its former designation, LR No. 1144/II/1 be cancelled forthwith. In place, I do order that the plaintiff, Esther Wambui Njenga, be registered as the proprietor of this land and title do issue to her. I also issue an order of permanent injunction, restraining the 1st defendant from entering, being upon, utilizing, dealing, or in any other way interfering with the plaintiff's title and possession of the land parcel Naivasha Municipality Block 5/234. The 1st defendant, Harrison Mwangi Nyota, shall pay the costs of the main suit and of the counterclaim and also costs of the suit which he originated being Nakuru HCCC No. 227 of 2005.

17. Judgment accordingly.

Dated, signed and delivered in open court at Nakuru this 30th day of September 2019.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of : -

Ms.Kiongera holding brief for Mr.Korongu for the plaintiff.

Ms.Wangari holding brief for Mr.Waiganjo for 1st defendant.

No appearance for the AG for 2nd and 3rd defendants.

Court Assistant: Nancy Bor/Alfred Cheron.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU