



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 228 OF 2018

FORMERLY NAKURU HCCC NO. 260 OF 1999

JOHN EDWARD NJERU.....1ST PLAINTIFF

MOHAMED HASSANALI SAJAN.....2ND PLAINTIFF

VERSUS

COMMISSIONER FOR LANDS.....1ST DEFENDANT

GEORGE KARANJA NJENGA.....2ND DEFENDANT

KENNETH MAINA MAKERI3RD DEFENDANT

ELIZABETH KAMAU.....4TH DEFENDANT

ISAAC MWANGI MUYA.....5TH DEFENDANT

CHARLES NJOROGE.....6TH DEFENDANT

SCHOOL COMMITTEE NAKURU TEACHERS

PRIMARY SCHOOL.....7TH DEFENDANT

MUNICIPAL COUNCIL OF NAKURU

(EDUCATION DEPARTMENT).....8TH DEFENDANT

NAKURU TEACHERS HOUSING

CO-OPERATIVE SOCIETY LIMITED.....9TH DEFENDANT

JUDGMENT

(Plaintiff suing over title to certain land; the land having originally been part of what a land buying society had purchased and as a condition for approval to subdivide, the society was requested to surrender public utility plots to the Commissioner of Lands; the suit land having been earmarked for development of a public school and surrendered to the Commissioner of Lands; Commissioner of Lands proceeding to allocate the suit land to the plaintiff for a private purpose; Commissioner of Lands later calling for a revocation of the title of the plaintiff and plaintiff filing suit; plaintiff asserting that the Commissioner of Lands was free to allocate the land to him once the society surrendered it; held that in the instance of this case, the Commissioner of Lands was acting as a trustee; the Commissioner of Lands could only allocate the land for the purpose for which it was reserved; in the same way that a proprietor of land is subject to any obligation as trustee, so too the Government and any of its institutions; plaintiff's suit dismissed; order made that the land be held in trust for purposes of a public school)

1. This suit was commenced through a plaint which was filed on 4 June 1999 and amended on 21 January 2000. The plaintiffs have pleaded that they are the registered owners of the land parcel Nakuru Municipality Block 25/1115 (the suit land). They averred that in the month of May 1999, the Commissioner of Lands, sued as the 1st defendant, through the District Land Registrar Nakuru, advised them to surrender their Certificate of Lease to the suit land for cancellation on the grounds that the 2nd to 6th defendants on behalf of their Social Welfare Committee had a claim over the suit land. It is the contention of the plaintiffs that this claim is unfounded and that the Commissioner of Lands has no power to cancel a title. It is further pleaded that in the month of May 1999, the 2nd to 6th defendants illegally entered the suit land and started making structures which were taken over by the 7th defendant as a school with approval from the 8th and 9th defendants (Municipal Council of Nakuru Education Department and Nakuru Teachers Housing Cooperative Society Limited respectively). As a result the plaintiffs aver that they have been deprived of their property. In this suit, the plaintiffs wish to have a declaration that they are the lawful owners of the suit property; a declaration that the 1st defendant has no power to cancel their title; a perpetual injunction against the defendants to restrain them from the land; vacant possession; eviction; general damages for loss of user and costs.

2. The 2nd to 6th defendants, who are all individuals, filed a joint statement of defence. They averred that they lawfully entered the suit land as members of Nakuru Teachers Housing Cooperative Society which society was claimed to be the owner of the suit land and they asked that the plaintiffs' suit be dismissed. They later on 28 September 2017, jointly with the 7th defendant, filed an amended defence and counterclaim. They pleaded that the 9th defendant (Nakuru Teachers Housing Cooperative Society Limited) purchased the land parcel LR No. 4629 from one Milka Waringa Wamagata. They then applied for subdivision, which was approved on condition that some land be set aside as public utilities, and that these be surrendered to the Commissioner of Lands. They averred that part of what was surrendered was the suit land which was for the setting up of a public school. They contend that no interest could vest in private persons. It is their position that the plaintiffs fraudulently got themselves registered as proprietors in total disregard to the rightful party's interest in the land. They have asked for orders that their surrender of the land was in favour of the Municipal Council of Nakuru Education Department; cancellation of the plaintiffs' title and for a new title to be issued to Nakuru Teachers Welfare Association (NATEWA) as the rightful proprietor; and a permanent injunction against the plaintiffs.

3. The 8th defendant, the Municipal Council of Nakuru Education Department, filed defence where it pleaded inter alia that the suit property was surrendered to it by the 9th defendant (Nakuru Teachers Housing Cooperative Society Limited) as a public utility plot for the benefit of the public. It pleaded that the allocation and/or registration of the land to the plaintiffs was procured through fraud inter alia for obtaining title with the full knowledge that the property was a public utility property and obtaining title without following the laid down procedure. They accused the plaintiffs of conspiring to defraud the community and the public, a vital public utility plot meant for a public Primary School. It pleaded that there is a Primary School on the land that has been operating and that construction of the school had been going on since the year 1997.

4. The 9th defendant in its defence pleaded that the suit land was not Government land at the time of allocation and thus the Commissioner of Lands could not confer good title to the plaintiffs. They pleaded that there is a school on the land known as Nakuru Teachers Primary School run by the 8th defendant.

PART B : EVIDENCE OF THE PARTIES

5. The plaintiffs' evidence was presented by the 1st plaintiff. He stated that he was previously employed as a police officer. In the year 1992, he was the Provincial Police Officer (PPO), Nyanza Province and before that he was the PPO Rift Valley Province based in Nakuru. He stated that during his stay in Nakuru, he saw a piece of land that was for school development. He was aware that he was soon to retire and he thought that he could develop it upon retirement. He found out that the plot belonged to Nakuru Teachers Union and that they had returned all public utility plots to the Government. Thus to him, this land was Government land. He then made an application to the Commissioner of Lands to be allocated the plot through a letter dated 28 October 1992. At the time, there were two plots adjacent to each other and he only applied for one plot. The application was made to the President, Retired President Moi, through the Provincial Commissioner, Nyanza Province, a Mr. Kiilu. The Head of State approved his application on 5 November 1992. He was subsequently issued with an allotment letter by the Commissioner of Lands on 18 November 1992 which referred to the land Nakuru Municipality Block 25/1115. The letter required him to pay Kshs. 216,745/= which he paid and was issued with a receipt dated 2 December 1992. On 19 November 1993, he paid Kshs. 60,100/= as land rent. On 20 January 1994, he was issued with a Certificate of Lease for the Plot No. 1115 (the suit land) measuring approximately 2 Ha (about 5 acres). He mentioned that he had applied for the whole plot which was 8 acres and he therefore wrote to the Commissioner of Lands to point out that the title he has been given was less by 3 acres. The Commissioner of Lands then issued him another allotment letter dated 6 October 1995. He was required to pay Kshs. 124,170/=. He made payment of Kshs. 250,000/= on 25 May 1999 for registration and the Certificate of Title. Other payments previously made were Kshs. 4,170/= for stamp duty and Kshs. 425/= paid on 10 May 1999 for opening a new register. On 3 May 1999, the Commissioner of Lands wrote him a letter asking him to surrender the first title so that he can get a title for the 8 acres. He did get a Lease for land of 8 acres, dated 3 May 1999, but he was not issued with a Certificate of Lease.

6. He testified that as part of his due diligence, he got a letter dated 19 August 1988, which was the surrender of public utility plots to the Government. The letter was authored by Mr. Mureithi the Honourable Secretary of Nakuru Teachers Society. He passed by the Society offices on 4 February 1993 and met one Mr. Kagunda, who informed him that he was aware that one of the plots was allocated to him, and he informed him that the Board would meet to discuss it. He was later given a letter dated 5 February 1993 about their deliberations. The letter touched on plots 1114 and 1115 and in the letter it was mentioned that they have no problem with him being allocated the plot No. 1115.

7. He testified that he wished to build a school on the land and he engaged an architect to draw the plan. He forwarded the plan to the Municipal Council of Nakuru and the plan was approved on 15 December 1998. He subsequently went to the land in order to start his development only to find a timber off-cuts structure used as a classroom. He claimed that this structure was made by the 2nd to 6th defendants. It is then that he decided to file this case. He affirmed that at the moment the land is fully developed with permanent school buildings. He stated that the Plot No. 1114, which is adjacent, is the Government school plot but nothing is built on it.

8. He stated that all correspondences that he had were copied to the Municipal Council of Nakuru and they cannot now claim that the land

belongs to them. He reiterated that when the land was allocated to him, it belonged to the Commissioner of Lands and not Nakuru Teachers Society. He asserted that once the Society surrendered the land to the Commissioner of Lands, they lost all right over it.

9. Cross-examined, he stated that he knew at the time that he made his application to be allotted the land, that the land was public utility. He believed that the Government can also set aside land for the development of private schools. He confirmed that his application to be allotted land asked for 5 acres but it was when the surveyor came to the land that it was noted to be 8 acres. It is then that he asked to be allotted the additional 3 acres. He was to surrender the Certificate of Lease for the 5 acres and be given one bearing 8 acres. He has not yet surrendered the same and he is yet to have the Certificate of Lease for 8 acres. According to him, the second allotment letter for 8 acres, cancelled the Certificate of Lease for 5 acres. He acknowledged that this second allotment letter dated 6 May 1995 required him to make payment within 30 days. He admitted that he made the requisite payment on 20 July 1998 which was out of time. The allotment letter and every other document bore his sole name without including the 2nd plaintiff. He stated that he wrote to the Commissioner of Lands to include the name of the 2nd plaintiff. He said that the 2nd plaintiff died around the year 1994/1995 and was thus already dead when this case was filed. He is not aware of anybody who may be administering his estate. He had wanted him to be his business partner hence the inclusion of his name in the Lease.

10. He was not aware of a letter from the Commissioner of Lands dated 26 May 1999 addressed to the District Land Registrar, Nakuru, asking the latter not to register the Lease for 8 acres owing to a complaint by Nakuru Teachers Society.

11. He agreed that he is not a member of Nakuru Teachers Society. He mentioned that he had not planned to visit the offices of the Society on 4 February 1993. He had gone for other business in the same building and he only popped into their office by chance where he met Mr. Kagunda, who was a friend to him. He acknowledged that he did not have a resolution from the Society which led to the letter of 5 February 1993. He was not aware of minutes of the Society of 21 September 1993 where the Society recommended the plots to be held by the Municipal Council as the best public developer.

12. He stated that he had initially planned to do a school but changed his mind and wanted to do houses for commercial purposes and the rent was going to be for his personal benefit. His application for change of use was however rejected by the Municipal Council in a meeting held on 14 September 1993. He acknowledged that even if he was to run a school, it would be run as a business. He stated that he was given the land to operate a school. He admitted that there is now a school on the land and mentioned that he can let go of the land if he is compensated. He agreed that the Society gave out the land to the Commissioner of Lands for purposes of a school but he did not know if the school was to be a public school. He stated that once the Commissioner of Lands gave him the land, it ceased being public land.

13. With the above evidence, the plaintiffs closed their case.

14. The defendants called a total of four witnesses.

15. DW-1 was Sebastian Kabui Maina, the Head Teacher of Nakuru Teachers Primary School and Nakuru Teachers ECD Centre. These two institutions are public schools and they are located on the disputed land. He stated that the Primary School was first to be established in the year 1998. There is also Natewa Secondary School on the disputed land. He testified that previously, all public Primary Schools were registered by the Municipal Councils but after the new Constitution of 2010, they came to fall under the National Government. ECDs are however under the County Government. The Primary School has 1,141 pupils, the ECD has 157 pupils, and the Secondary School has 600 students.

16. He testified that the Nakuru Teachers Housing Society (The Society) bought the larger parcel of land from Ms. Milka Wamagata, so as to subdivide it to its members. The subdivision plan was approved on condition that the Society will surrender to the Commissioner of Lands all the plots earmarked for public utilities. This was done and the Municipal Council wrote to the Commissioner of Lands, through a letter dated 24 June 1996, to explain that the Plots No. 1114 and 1115 were set aside to develop Primary Schools. The Community then started the schools and at that time, they were not aware that the property had been registered in another person's name. He stated that title ought to have issued in the name of the Municipal Council of Nakuru. It is when they began the schools that this dispute arose. The School also complained and through the letter dated 26 May 1999 the Commissioner of Lands cancelled the allotment of the land to the plaintiffs and instructed that the Lease be surrendered for cancellation. He testified that the owners of the land intended that the land be used as a public utility in the nature of a public school. He testified that on Plot No. 1114 is St. John Primary School which is also a public school.

17. DW-2 was Ms. Hellen Kharemwa, the Land Registry in charge of Nakuru Land Registry. She was aware that a lease was prepared in respect of the suit land and was also aware of some correspondences from the Commissioner of Lands over the lease. She referred to the letter dated 26 May 1999 which asked the Land Registrar, Nakuru, to cancel the plaintiffs' lease on the basis of a complaint by the Society. A surrender was drawn and the Land Registrar wrote a letter for the surrender and the Lease to be returned to the Commissioner of Lands. However these documents were given to Mr. Njeru (PW-1) to return himself and other correspondences followed where the Commissioner of Lands complained that he has not seen the documents. She stated that she has not seen any Green Card or White Card for the title in issue and thus no record to show that the land is currently registered in the name of the plaintiffs.

18. DW-3 was George Karanja Njenga, the Principal of Natewa High School. He has been Principal since the school was founded in the year 2011. He is a member of the Society and among the first persons to settle in the land that the Society purchased. He served as a Coordinator within the Society encouraging teachers to buy land with the Society. He was familiar with the purchase by the Society of the larger land and of its subdivision approval including the condition on surrender of public utility plots to the Commissioner of Lands. He testified that this was among the plots surrendered. He testified that on one Friday, he was holding an induction meeting with new members when Mr. Waweru, the Secretary of the Society came shaking, and informed them that PW-1, a Provincial Police Officer, had come to his office with a team of police officers. He stated that he had been pushed and intimidated to sign the letter dated 5 February 1993, which letter was addressed to the Commissioner of Lands, stating that the Society had no objection to Mr. Njeru being allotted the land. He stated that this letter had not been preceded by any meeting or minute and that Mr. Waweru had no mandate to change the status of public utility land. He testified that on 16 January 1993, the Society had written to the Commissioner of Lands, to inform them that the Plot be allocated to the Municipal Council of Nakuru Education Department for purposes of starting a Primary School. This letter was written by Mr. Waweru. He

stated that there was no resolution to change this position before Mr. Waweru wrote the letter of 5 February 1993, which was about 3 weeks later. He had a letter dated 12 June 1996 from the Commissioner of Lands which stated that the Plots Nos. 1109, 1114 and 1115 had been wrongfully allocated to private individuals and requested the plots to be reallocated to the Society or the Municipal Council. He testified that in the year 1999, they resolved to start the Primary School as a community school. He affirmed that currently on the land there is the Primary School and Natewa Secondary School which are public schools. He stated that when residents learnt that the land was being claimed by a private individual, they held a demonstration at the office of the Land Registrar, and that is when the process of cancellation of the plaintiffs' title started. He reasoned that the public could not give its land for a private school because that is a private business operated by an individual. He asked the plaintiffs to surrender the lease as instructed by the Commissioner of Lands. He testified that the Society paid Ms. Wamagata Kshs. 7,600,000/= for the whole land and that the disputed land forms part of what they purchased and paid for. The surrender to the Government of the public utilities was for the Government to hold as trustee. He pointed out that the suit land forms part of the land that they paid for and is their land as members. He stated that they were not consulted when the land was given to the plaintiffs. He denied that he was among the persons who entered the plot and put up the timber classrooms.

19. DW- 4 was Wilson Waweru Kinyua an administrative officer in the County Government of Nakuru. He was previously working with the Municipal Council of Nakuru as an Administrative Assistant in the Town Clerk's Office. He testified that the Municipal Council on 23 December 1987 approved the Society's application to subdivide the larger land parcel LR No. 4629. This was on condition that public utility plots would be surrendered to the Commissioner of Lands. He testified that the suit land was one of the plots which had been set aside for a school. He testified that on 14 September 1993, the Council considered an application by Mr. Njeru to change use from school to business cum residential but this was not approved. He testified further that when the public learnt that the land had been allocated to an individual there was a demonstration following which the Town Clerk wrote to the Commissioner of Lands on 24 June 1996 requesting him to allocate the land to the Municipal. This, however, was not done.

20. With the above evidence, the defendants closed their case.

PART C : SUBMISSIONS OF COUNSEL

21. I invited counsel to file written submissions which they duly did and I have taken these into account before arriving at my decision. In his submissions, Mr. Kimatta, learned counsel for the plaintiff, inter alia submitted that the surrender of the public utility plots to the Commissioner of Lands had no conditions attached and there was no provision that the Commissioner could only allocate the land subject to the consent of the 9th defendant. He further averred that through the letter dated 5 January 1993, the 9th defendant wrote to state that they had no objection to Mr. Njeru being allocated the suit land. He pointed out that his client paid all money that he was asked to pay for the land. He submitted that it was only after 1999 that the 9th defendant started claiming the land. He held the opinion that the Commissioner of Lands had the full mandate to allocate the land and did not require the consent of the 9th defendant. He submitted that upon surrender the 9th defendant lost all proprietary interest in the land and the Commissioner of Lands had the exclusive right to allocate the land. He referred me to the case of *Mwinyi Hamisi Ali vs Attorney General & Another, Civil Appeal No. 125 of 1997* and *Chief Land Registrar & 4 Others vs Nathan Tirop Koech & 4 Others, Civil Appeal No. 51 of 2016*.

22. On the part of the 1st defendant, Ms. Wangari, learned counsel, submitted inter alia that the suit land was set aside for a public purpose and such a plot cannot be allocated to an individual. I was referred to the case of *Kenya Anti-Corruption Commission vs Aerial Developers Limited & Another (2019) eKLR*. Counsel for the 2nd defendant on her part referred me to the case of *Niaz Mohamed Jan Mohamed vs Commissioner of Lands & 4 Others (1996) eKLR*; *Kenya Industrial Estates Limited vs Anne Chepsiror & 5 Others (2015) eKLR*; and *Norbixin Kenya Limited vs Attorney General (2014) eKLR*. She submitted that the 1st defendant was a trustee and that since the land was set aside for a public purpose, it ought to have been utilised for the said purpose. Counsel also questioned why the application for the land was made through the Provincial Commissioner of Nyanza, and not in Nakuru where the land is situated. It was further submitted that there is no claim for compensation by the plaintiff in case he is to lose the land.

23. On his part, Mr. Kahiga, learned counsel for the 3rd to 6th and 8th and 9th defendants, inter alia submitted that this suit is fatally defective for failure to involve the family of the 2nd plaintiff who had died by the time the suit was filed. He did not believe that what PW-1 had applied for was the suit land, for the suit land was 8 acres and not 5 acres. He was of opinion that the plaintiffs' title was acquired by fraud, misrepresentation and illegality and should be cancelled. He relied on the case of *Alice Chemutai Too vs Nickson Kipkurui Korir & 2 Others (2015) eKLR* and *Samuel Odhiambo Oludhe & 2 Others vs Jubilee Jumbo Hardware Limited & Another (2018) eKLR* where titles held to have been procured by fraud were cancelled. He submitted that the Commissioner of Lands had a moral responsibility and obligation to abide by the intended purpose. He further submitted that the plaintiff was aware that the property had been earmarked for the construction of a public primary school.

PART D : ANALYSIS AND DECISION

24. I now take the following view of the matter.

25. To begin with, some critical facts are not really in dispute. It is common ground that the disputed land was initially part of the larger LR No. 4629 which was owned by one Milka Wamagata. This land was purchased by the Society which acted as a land buying company, with the purpose of subdividing the land into smaller plots for sale and/or distribution to its members. Obviously, the land needed to be subdivided and the Society submitted a subdivision plan for approval by the Municipal Council of Nakuru. Approval to subdivide was granted through the letter dated 13 January 1988 which letter is addressed to the Society. The letter provides as follows :-

“RE : SUBDIVISION OF PLOT LR 4629

The Council at their meeting held on 23rd December 1987 considered your application on the above subject and it was RESOLVED

THAT the subdivisional plan submitted by Nakuru Teachers Housing Co-operative for plot No L.R 4629 be approved on condition that they will surrender to the Commissioner of Lands all the plots earmarked for public utilities.

Yours Faithfully,

Z.G. Kiratu

TOWN CLERK

26. These conditions of surrender of public utility plots to the Commissioner of Lands was accepted by the Society which wrote a letter dated 19 August 1988 accepting to surrender the plots to the Government free of cost. Matters remained quiet on the disputed plot until the 1st plaintiff (Mr. Njeru) wrote the letter dated 28 October 1992 to the Commissioner of Lands through the Provincial Commissioner Nyanza Province asking to be allotted the suit land, which was already by then identified as Nakuru Municipality Block 25/1115. That letter reveals that he knew quite a bit about that plot for he mentions that “the plot measures approximately 5 acres and set aside for school development” and he stated that he has adequate funds to develop the land. It does appear that the said letter was first placed before the Head of State who wrote on it “approved” and signed on 5 November 1992. An allotment letter from the Commissioner of Lands was then issued shortly thereafter on 18 November 1992. He eventually got a Certificate of Lease for the land on 20 January 1994 and the land was shown to measure 2.0 Ha, which is about 5 acres. It ended up being that the land was actually 8 acres and not 5 acres as initially thought by the plaintiff and the plaintiff went back to the Commissioner of Lands asking for the other 3 acres subsequent to which he got a second allotment letter dated 6 October 1995 which was followed by a Lease dated 3 May 1999. The same was registered on 25 May 1999. No Certificate of Lease for the 8 acre parcel of land is yet to issue.

27. In the meantime, as Mr. Njeru was chasing his first Certificate of Title in the year 1993 or thereabouts, the Society, clearly in ignorance of what was happening, wrote to the Commissioner of Lands the letter dated 16 January 1993 recommending that the Plots Nos. 1114 and 1115 which they mentioned were reserved for public utility, be allotted to the Municipal Council of Nakuru, Education Department, for purposes of developing Primary Schools. They became frantic in the year 1996 when it dawned upon them that title had been issued to the plaintiffs, and they, together with the Municipal Council of Nakuru, wrote to the Commissioner of Lands asking for the revocation of the title of the plaintiffs. I am also informed that there were demonstrations and protests held at the office of the Land Registrar Nakuru. Perhaps moved by these protests, the Commissioner of Lands asked for the surrender of the title of the plaintiffs, which is precisely what precipitated this case. While all this was happening, around the year 1998/1999, the Community proceeded to start a public school on the land and at the moment there is an ECD Centre, a Primary School and a Secondary School, all funded by the Government. In all respects, they are public schools and the land is being used for the benefit of the public.

28. The plaintiff complains that he holds good title to the land and he ought not to be asked to surrender any title. He also wants to be allowed vacant possession of the land for his private use. His main argument is that once the land was surrendered by the Society, the Society lost all interest and control of the land, and from there on, it was now the prerogative of the Commissioner of Lands to do as he wished with the land.

29. I regret to inform the plaintiff that I am not persuaded by this argument. It is clear that the land in dispute forms part of what the Society purchased using money contributed by its members. Strictly speaking all the land that was purchased ought to have been land belonging to the Society including the suit land. However, because of planning restrictions, the Society had to make provision for public utilities such as roads, schools, churches, and a community hall. These would be reserved for use by the public, and for that reason, they were to surrender the same to the Commissioner of Lands which they duly did.

30. In my opinion, this surrender to the Commissioner of Lands was not an absolute surrender that was without strings attached. It is clear that the Society was making the surrender because it could not hold public land, which could only be held by the Government through the Commissioner of Lands. The Commissioner of Lands was thus acting as a trustee or custodian on behalf of the public. He could not do as he wished with the land and indeed with the other parcels of land which were surrendered. It is apparent to me that each of the several parcels of land that were surrendered had a specific purpose tied to it. There were those portions that were surrendered specifically to be a road, and there was one that was for purposes of making a community hall. The suit land, which is Plot No. 1115, and the neighbouring plot, which is No. 1114, were surrendered for purposes of building public schools. It was stated that at the time, public Primary Schools were to be managed by the Municipal Council and that is why in the letter of 16 January 1993, the Society was asking the Commissioner of Lands to issue an allotment letter to the Municipal Council of Nakuru for the Plots Nos. 1114 and 1115, so that the development of a public Primary School could commence.

31. I am aware that in his submissions, Mr. Kimatta argued that once the land was surrendered, the Society lost all interest in it, and he relied on the cases of *Mwinyi Hamisi Ali vs Attorney General & Another*, and that of *Chief Land Registrar & 4 Others vs Nathan Tirop Koech & 4 Others*. However the facts of those two cases are radically different to the facts in our case. In the case of *Mwinyi Hamisi Ali vs Attorney General*, the appellant had aimed to purchase the disputed properties from the previous registered proprietors. These properties (which were agricultural properties) had however been surrendered to the Government in exchange for beach plots. The appellant however took possession and occupied them. Later, the Government allotted the said properties to a third party and the appellant filed suit. The Court of Appeal held that because the properties had been surrendered, the Government had no obligation to allot them to the appellant, and the court could not fault an allotment to the third party. In the case of *Nathan Tirop Koech*, the issue was whether the Petitioners, could claim compensation for land which the facts showed that they had surrendered and the Court of Appeal held that they could not. Clearly the two cases are distinguishable to the case at hand.

32. In our case, the Society handed over the properties to the Commissioner of Lands for the latter to hold on behalf of the public for purposes of developing a public school. In my view, this case is not too dissimilar to that of *Niaz Mohamed Jan Mohamed vs Commissioner of Lands* cited by counsel for the 2nd defendant. In the said case, part of the applicant’s land was acquired for purposes of making a road, which was done. Later part of the land was hived off and allocated to a private individual which prompted the suit. The Court held that because the land was acquired for a specific purpose, that is the purpose of making a road, it could only be used for that purpose and

any unutilised portions would remain as a road reserve. If it was found that if this turned out to be unnecessary, the portions would need to be surrendered back to the person from whom the land was compulsorily acquired.

33. In our case, the land was given to the Commissioner of Lands so that a public school could be developed. That was the specific purpose. That purpose continued to exist and still exists to date. The land could thus only be used for this purpose and no other purpose. If the purpose for which it was set aside could not materialise, then the Commissioner of Lands needed to return back the land to the persons who had handed it over to him to hold on behalf of the public. The Commissioner of Lands was in essence entrusted by the Society, to ensure that it keeps safe the land, and when needed, avails it for the development of a public school. In essence, the Commissioner of Lands was a trustee for the Society and what it held was property in trust.

34. The Registered Land Act, Cap 300 (now repealed) which was operative at all material times, provided as follows at Section 28 :-

28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject -

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.

35. It will be seen from the above that the registration of a person as proprietor of land did not relieve that person any duty to which he was subjected to as trustee. In the instance of this case, the Commissioner of Lands was a trustee. He was entrusted to keep the land for use by the public and he could not breach this trust by allotting the land to the plaintiffs for private use. The position of the Commissioner of Lands in this instance was no different from the position of a private proprietor of land, who holds the same as trustee. There is a long chain of authorities on this point, including the celebrated decision in the case of **Kanyi Muthiora vs Maritha Nyokabi Muthiora (1984) eKLR**. In the same way that a private individual can be held to be subject to a trust, so too the Government, and any of its institutions and agencies, including the Commissioner of Lands. It should not be forgotten that this land had actually been purchased by the Society. By passing it over to private hands, the Commissioner of Lands was in effect depriving the Society of its investment, and unjustly enriching a third party.

36. The plaintiffs asked that if they cannot get the land then they need to be compensated for it. There is no pleading in this case for compensation, and the defendants did not have an opportunity to give their view on the issue of compensation. It follows that if the plaintiffs wish to be compensated, they will have to consider their options and make a decision on how to go about it, but it cannot be done through this suit.

37. In all, I do find that the Commissioner of Lands was wrong in allocating the suit land to the plaintiffs for the plaintiffs to develop a private school, which, whichever way you look at it, is a commercial investment for private profit and not for a public purpose.

38. For the above reasons, I do order that the title of the plaintiffs to the suit land be revoked. The Society had asked that title be issued in favour of Nakuru Teachers Welfare Association (NATEWA). On this prayer, I am not too persuaded, because this again is a private entity, yet the land and the school built on the land are public utility. I am not too certain which Government entity holds land on behalf of Primary Schools, and having that doubt, I will order that title be in the name of the Government of Kenya, but the title to read that the Government holds it in trust for purposes of developing public schools. If there is another way of holding such land, the Government, or any of the parties are at liberty to apply for review of this order.

39. Costs will follow the event, thus the plaintiffs will pay the costs of this suit.

40. Judgment accordingly.

MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

DATED AND DELIVERED THIS 27TH DAY OF NOVEMBER 2019

BY

HONOURABLE JUSTICE JOHN MUTUNGI

JUDGE, ENVIRONMENT AND LAND COURT

AT NAKURU