



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

CIVIL SUIT NO. 12 OF 2008

NAKURU WATER AND SANITATION

SERVICES COMPANY LIMITED.....PLAINTIFF

VERSUS

PRAKASH SHAH.....1ST DEFENDANT

COMMISSIONER OF LANDS.....2ND DEFENDANT

CONSOLIDATED WITH

CIVIL SUIT NO 18 OF 2008

PRAKASH SHANTILAL SHAH.....PLAINTIFF

VERSUS

NAKURU WATER AND SANITATION SERVICES CO. LTD.....DEFENDANT

CONSOLIDATED WITH

ELC NO 348 OF 2013

FORMERLY HCC NO 310 OF 2011

PRAKASH SHAH.....PLAINTIFF

VERSUS

THE ATTORNEY GENERAL.....1ST DEFENDANT

COMMISSIONER OF LANDS.....2ND DEFENDANT

DISTRICT LAND REGISTRAR.....3RD DEFENDANT

COUNTY GOVERNMENT OF NAKURU.....INTERESTED PARTY

JUDGMENT

(Suit over land which was claimed to have been set aside as a water treatment plant; plaintiff purchasing the land from the previous proprietor and now having title to it; defendants claiming that the original parcel of land had never been subdivided to produce the title to the suit land and that all along the suit land was within land that was a water treatment area; from the evidence, clear that the land was set aside for water treatment works; the original grant forbidding any subdivision of the land and forbidding any use of it other than for water treatment works; not clear how plaintiff's title came about as the original mother title was still in the hands of the County Government of Nakuru; apparent that the plaintiff's title is illegal or was issued by mistake; order made that the plaintiff's title be nullified)

(a) Introduction and Pleadings

1. This is a consolidated judgment in respect of three suits.
2. The first suit was filed on 18 February 2008 and registered as Nakuru HCCC No. 12 of 2008 where Nakuru Water and Sanitation Services Company Limited (NAWASSCO) is the plaintiff and Prakash Shah and the Commissioner of Lands are the defendants. The second suit was filed on 21 February 2008 and registered as Nakuru HCCC No. 18 of 2008. In this suit, Prakash Shah is the plaintiff whereas NAWASSCO is the defendant. The third suit was filed on 25 October 2011 by Prakash Shah against the Attorney General, the Chief Land Registrar and the District Land Registrar, Nakuru. All these cases revolve around the ownership of the land parcel Nakuru Municipality Block 11/672 (the suit land).
3. In the first of the three cases, NAWASSCO averred that it operates a water treatment plant, known as Mereroni Water Works, in the suit land. It averred that the water works was designated to be in Plot No. 56, but that in the year 1998, this plot was illegally renamed as Nakuru Municipality Block 11/674 after which it was subdivided into several plots including the suit land (plot No.672) which was then allocated to one J.C. Cheruget who transferred it to Prakash Shah (Mr. Shah) who had embarked on constructing it. In the suit they wished to have Mr. Shah permanently restrained from the land and an order of cancellation of Mr. Shah's title.
4. I think the second suit was filed by Prakash Shah without him being aware of the first suit, for in that case, he has averred that he is the registered owner of the suit land and that on 14 February 2008, employees of NAWASSCO came to the land, destroyed his fence and basically wished to take it over. He asked that NAWASSCO be permanently restrained from interfering with his quiet possession, general damages for trespass and costs.
5. The third suit was prompted by the action of the Chief Land Registrar, of Gazetting, through Gazette Notice No. 15574 of 26 November 2010, that he has revoked the title of Mr. Shah. Mr. Shah complained that this is without any legal basis and he sought an order that the Gazette Notice is null and void. He also sought a declaration that he is the lawful owner of the suit land and costs.
6. These suits were consolidated and transferred to the Environment and Land Court after its creation following the 2010 Constitution. Generally, Mr. Shah is considered as the plaintiff, whereas NAWASSCO and the Attorney General, on behalf of the Chief Land Registrar and the District Land Registrar, as defendants.
7. In the course of the proceedings, the County Government of Nakuru sought to be enjoined to the cases as interested party and the application was allowed. They did avail a witness who testified on their behalf.

(b) The Plaintiff's Case

8. Mr. Shah testified that he saw the suit property advertised by an agent in November 1999 and he asked his advocates to conduct a search which showed the owner as Jane C. Cheruget. He entered into a sale agreement with her on 6 December 1999 where he paid Kshs. 750,000/= for the land and transfer to him

was effected on 30 December 1999. He was then issued with a Certificate of Lease which indicates that the lessor is the Municipal Council of Nakuru. He then commenced payment of land rent and rates. He took possession in 1999, planted a K-Apple fence and gate, and used the land to grow vegetables.

9. In the year 2008 he wanted to erect a stone wall and deposited building materials when persons came and disrupted his development. It is then that he filed his suit to stop the interference. He mentioned that he intended to put up a residential house on the plot. He stated that he is a stranger to the claims of the defendant. On the Gazette Notice, he stated that he was never called for any hearing and in fact it was placed when the previous two suits were pending. He stated that through Nakuru HCCC JR No. 3 of 2011, the Gazette Notice was quashed.

10. Cross-examined, he acknowledged that he did not carry the search, nor produce evidence of approval of the wall. He also did not have evidence of payment of the purchase price. Neither did he have any evidence of an application for consent, nor the consent to transfer from the Municipal Council of Nakuru. He had no evidence of payment of any stamp duty for the transfer and neither did he produce the transfer instrument. He testified that there were no developments when he bought the plot and that the land is still vacant. He refuted the claim that the land was a public utility since to him there was nothing on this land.

(c) The Defendants' Case

11. DW-1 was James Nganga Gacathi, the Managing Director (MD) of NAWASSCO. He joined NAWASSCO in the year 2007 and prior to him becoming MD, he was the Technical Manager. He explained that NAWASSCO has the mandate of supplying water and sanitation services in Nakuru and is an agent of Rift Valley Water Services Board. It is wholly owned by the County Government of Nakuru, and previously by the Municipal Council of Nakuru. He stated that all parcels of land that NAWASSCO uses were owned by the Municipal Council of Nakuru and now the County Government of Nakuru. He testified that it is on the suit land where treatment of water takes place. The treatment plant is within the vicinity of the suit land and on the suit land are four big pipes which bring 60% of the water supplied to the treatment plant. He mentioned that the treatment plant and the water pipes have been here even before the 1960s. He testified that the suit land is not developed since this land was reserved for the future expansion of the treatment plant or pipes. He explained that this plot was originally comprised in a Plot No. 56 measuring 6 Ha and which had been reserved for the water plant. The plot No. 56 was then subdivided into several plots being plot Nos. 663, 664, 665, 666, 667, 668, 669, 670, 671, 672 (the suit land), 673, 674 675, and 676. Only Plot No. 674 was left for the treatment plant. He stated that this subdivision was irregular as it was not meant to further the purposes for which the plot No. 56 was set aside. He asserted that this land was reserved for a public purpose, that is, as a water utility plot. He averred that if there is to be construction on the disputed plot, there is risk of water being contaminated and there will be no room to expand the treatment plant yet Nakuru town is growing. He produced a lay out plan for the treatment plant and offered that the suit land is planned to accommodate an expanded tank following the Itare Dam project. They placed a chain-link fence around the whole of the former Plot No. 56 in the year 2007-2008. He stated that when the issue came to the attention of the Council, they passed a resolution cancelling the titles.

12. Cross-examined, he stated that titles were held by the Municipal Council and now the County Government. He explained that NAWASSCO is an agent of the County Government for purposes of supplying water. He was not familiar with the considerations that the Council would make before issuing a lease. He stated that there was no development other than the buildings used for treating water in the original land. He acknowledged that the surrounding land (not within the original plot No. 56) is built with homes.

13. DW-2 was Mr. Ngali Valai who served as a nominated councillor in the Municipal Council of Nakuru between 1998 and 2002. He testified that on 6 May 2002, he wrote to the Provincial Commissioner complaining of irregular deals at the Municipal Council of Nakuru including the Mireroni Water Works. He complained because the water plant land had been subdivided and allocated to individuals leaving only the area where the water tanks were situated, thus offering no room for expansion despite the fact that the town was growing. He held the view that residential houses could be built elsewhere but not on

this land. He explained that the name Mireroni was derived from a big dam established in Dundori, in a place called Mireroni, and that this plant was an extension of the original Mireroni for purposes of cleaning water from the said dam.

(d) The Interested Party's Position

14. The Interested Party, called Wilson Waweru Kinyua as her witness. He is an administrator in the County Attorney's office and there before, he worked for the Municipal Council of Nakuru as an administrative officer. He testified that in the year 2002, a complaint was made by Mr. Valai, that the land earmarked for supplying water had been subdivided. The Kenya Anti-Corruption Commission got engaged and the owners of Plots Nos. 669 and 670 surrendered their plots. He explained that in the previous regime, there needed a Council resolution to change public land into private land. The resolution would need the Minister's approval. He was not aware of any such resolution for this plot in dispute. He testified that after devolution, LR No. 451/648, which is the same land as Nakuru Municipality Block 11/56 (Plot No. 56) was one of the assets handed over to the County Government of Nakuru and the original title was handed over. He had the original title of LR No. 451/648 with him in court. He pointed out that the grant had special conditions one of which was that the land and buildings were to be used only for purposes of water works. There was also a condition that the grantee (the Municipal Council of Nakuru) was not to subdivide the land and also was not to sell or transfer the land or any part thereof except with the consent of the Governor (later the President). He testified that the purpose of the grant was water works and in his view the subdivision and allocation of the land was irregular. He testified that for a proper subdivision, the original title would have to be surrendered for issuance of new titles. He averred that this was not done since the County still holds the original title deed. He offered that this land is of great public interest as it supplies water to Nakuru Municipality and needs to be preserved.

15. Cross-examined, he stated that the land that was subdivided to bring forth 14 plots was LR No. 451/648 (same as Nakuru Municipality Block 11/56) and the suit land is one of the subdivisions. He asserted that the entire land was reserved for the water works and was registered in the name of the Municipal Council of Nakuru. He affirmed that the land is used by NAWASSCO. He stated that the suit land is not billed rates as it is not known to them, but that if there is any payment of rates, that would be out of a mistake. He reiterated that without the Council resolution, the subdivision would be irregular and he was at a loss as to who did the subdivision. He explained that NAWASSCO is the beneficial owner of the land and not the registered owner. As far as the County Government is aware, the subdivided titles were cancelled. He stated that they do not have a title to Nakuru Municipality Block 11/56 since they have not surrendered the grant to LR No. 451/648.

16. With the above evidence, the hearing of the matter closed and I invited counsel to make written submissions.

(e) Submissions of Counsel

17. In his submissions, Mr. Kisilah Gor, learned counsel for the plaintiff inter alia submitted that his client is an innocent and bona fide purchaser and that no illegalities or fraud in obtaining the title have been proved by the defendant. He pointed out that the root of the plaintiff's title is traceable from the seller J.C Cheruget. He did not believe that the defendants have proved any fraud against his client and submitted that there was no evidence put forward to suggest that the plaintiff acquired his title illegally. He submitted that the plaintiff deserves to be protected and urged me to grant the order of permanent injunction. He relied on several authorities to support his position.

18. On behalf of NAWASSCO, Mr. Kipkoech Ng'etich, inter alia submitted that it is their client's position that the title of the plaintiff was obtained fraudulently. He pointed out that the plaintiff did not avail evidence of payment of stamp duty or consent to transfer, and that no transfer instrument was produced. He submitted that there is evidence that the mother title has never been surrendered and wondered how the plaintiff acquired title. He further submitted that his client has always been in possession of the property and no issue of trespass can arise. He did not believe that the plaintiff has made out any case against the defendants.

19. For the interested party, Mr George Kinuthia, the County Attorney, inter alia asserted that the land was illegally subdivided and referred me to the conditions of the original grant. He submitted that under Article 40 (6) of the Constitution, land that is unlawfully acquired cannot be protected. He also referred me to Section 26 of the Land Registration Act, Act No. 3 of 2012. He also raised issue on the term of the lease of the plaintiff which appears to go beyond the term in the mother title and also pointed out that the mother title has never been surrendered. He also submitted that there was no Council resolution to have the land alienated.

(f) Analysis and Decision

20. What I have derived from the evidence, is that the suit land was originally part of the land parcel LR No. 451/648 which is a title issued under the Registration of Titles Act, Cap 281 (repealed). The land where this grant falls, is also identified as Nakuru Municipality Block 11/56 , under the Registered Land Act (RLA) (Cap 300) (repealed) , but I have no evidence that there was ever issued a formal RLA title. This land was at some point , which date is not very clear to me, subdivided into 14 parcels of land bearing the titles Nakuru Municipality Block 11/663-677. Among the subdivisions is the suit land which is Nakuru Municipality Block 11/672. I have deduced that the first owner of the suit land was one J.C Cheruget though I have not seen any evidence of any title that she may have held. Ms. Cheruget then sold the suit land to Mr. Shah sometimes in the year 1999 and thereafter Mr. Shah was issued with a Certificate of Lease for a term of 99 years from 1 January 1997. Mr. Shah asserts that he has a good title and further claims to have been an innocent purchaser and ought to be protected. This is of course hotly disputed by the defendants and interested party, who have argued that the suit land is one that was set aside for use as a water works, and that his title is irregular.

21. I have evidence that LR No. 451/648 was a grant from the Government to the Municipal Council of Nakuru prepared on 23 February 1956 when the country was still a colony and the Grant was thus issued by the Governor of the colony. This grant was issued under some special conditions which are as follows :-

- 1. The Grantee shall maintain the existing buildings in good and substantial tenable repair and condition.*
- 2. No further buildings shall be erected until plans (including block plans showing the positions of the buildings) drawings elevations and specifications thereof shall have been approved in writing by the Commissioner of Lands.*
- 3. The land and buildings shall only be used for the purposes of a Water Works.*
- 4. The Grantee shall not subdivide the land.*
- 5. The Grantee shall not sell or transfer the land or any part thereof except with the prior consent in writing of the Governor.*
- 6. The Grantee shall construct at its own expense all roads and drains and sewers serving or adjoining the land.*
- 7. The Grantee shall pay such rates taxes charges duties assessments or outgoings of whatever description as may be imposed charged or assessed by any government or local authority upon the land or the buildings erected thereon including any contribution or other sum paid by the Governor in lieu thereof.*
- 8. The Governor or such person or authority as may be appointed for the purpose shall have the right to enter upon the land and lay and have access to water mains service pipes and drains telephone or telegraph wires and electric mains or all descriptions whether overhead or underground and the Grantee shall not erect any building in such a way as to cover or interfere with any existing alignments or main or service pipes or telephone or telegraph wires and electric*

mains.

22. The term of the grant is 99 years from 1 September 1933, meaning that it is to expire on 1 September 1932. The Municipal Council of Nakuru was clearly not the head lessor but a lessee of the land from the Government of Kenya. It follows, and I need not cite any authority, that any departure from the special conditions needed to be sanctioned by the Lessor, who is the Government, for the grant was issued subject to these conditions. Key for the purposes of this case is the condition against subdivision (condition 4) and the condition that the land is only to be used for the purposes of Water Works (condition 3). Given these conditions, it was illegal for the Municipal Council of Nakuru to proceed to subdivide the land, and it was illegal for the Municipal Council of Nakuru to allow the land, or any part of it, to be used for any other purpose other than a Water Works, unless the Government, as head lessor, allowed for a variation of the conditions of the grant subject to the provisions of the Government Land Act, Cap 280, Laws of Kenya (repealed). There is no evidence before me that the Government ever sanctioned the variation of these conditions. It is for that simple reason that I must hold that the subdivision of the land was illegal and so too the use of the land for other purposes other than Water Works. That would mean therefore that the title of Mr. Shah is illegal, for it was a result of a process that was not permissible under the original grant.

23. I am aware that Mr. Shah has argued that he is an innocent purchase for value but I am not too convinced about this. One can only claim to be an innocent purchaser for value if he can demonstrate that he did due diligence and it was not fathomable that it was possible to discern the predecessors defective title. In our case, a simple investigation of the head lease would have revealed the conditions which I have copied above, and would have put any reasonable purchaser into inquiry. At some point in my life, I would have thought that a simple search is good enough but I am prepared to change that opinion. I think that given where we stand as a country, and given the prevalence of land fraud, it behoves upon a purchaser to go beyond a mere search when investigating title. In our case, warning signs were there. The larger land was already fenced off and even if it was not, it was clearly adjacent to a water treatment plant. An inquiry at the water plant would also have revealed that there is something wrong with this land. I am thus not persuaded that Mr. Shah did due diligence given the circumstances surrounding this matter.

24. In the circumstances of this case, there is not only a clear breach of the conditions pursuant to which the grant was issued, but there is even doubt as to whether the subdivision of the land was properly done. The interested party's witness has stated that they have never converted the land into the regime of the RLA and still hold the original RTA title. For the land to be subdivided, there would have needed to be a surrender of this title, which does not appear to have happened, for the County Government of Nakuru still holds the original RTA title. I have not been shown any registered mutation or survey plan which subdivided the land. I have also not been shown any evidence that there was ever any lease issued to Ms. J.C Cheruget or any register that may have been opened in respect of this land. There is also the issue of how Mr. Shah got a lease for 99 years from 1999 which would go beyond the term of the grant which is set to expire in the year 1932. There are simply too many questions surrounding the title of Mr. Shah, but all that Mr. Shah thought fit to produce was his Certificate of Lease. That clearly was not good enough given the circumstances of this case.

25. I really do not see the point of saying more in this case for it clear to me that the title of Mr. Shah was issued, if not by fraud, then by mistake, for there was a specific violation of the conditions of the grant. I have no option but to proceed and cancel the same. The matters herein arose, and even the suits herein were filed, at a time when the Registered Land Act was in force. In our case, Section 143 is operative and it states as follows :-

143. (1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or

caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.

26. It will be noted that the RLA gave the Court power to cancel a title and I have already held that Mr. Shah at the very least was negligent in not undertaking full due diligence hence cannot be protected by Section 143 (2) above. Neither am I persuaded that he was in possession of the land at all material times.

27. The result is that the title of Mr. Shah to the land parcel Nakuru Municipality Block 11/672 is hereby cancelled. I further declare that this land forms part of the land parcel LR No. 451/648 issued under the RTA. I thus order the Land Registrar, Nakuru, to proceed and cancel the whole of the register of the land parcel Nakuru Municipality/Block 11/672 and no dispositions should be undertaken under this title of land.

28. I have not forgotten that Mr. Shah had sued for the illegal cancellation of his title vide the Gazette Notice 15574. On this he may have a point for it was improper for the Registrar to proceed and Gazette his title in this fashion. But this victory is otiose because I have already held that his title is not a good title and I have proceeded to cancel it as above. The only saving grace is that in respect of the suit 310 of 2011, I will make no orders as to costs. I am in fact not persuaded to make any orders as to costs even in respect of the other two cases, for one can argue that Mr. Shah, having been issued with a title, was perfectly entitled to try and protect it.

29. The result is that Mr. Shah's case is dismissed, and his title reading Nakuru Municipality Block 11/672, is nullified but there will be no orders as to costs.

30. Judgment accordingly.

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MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

DATED AND DELIVERED THIS 27TH DAY OF NOVEMBER 2019

BY

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HONOURABLE JUSTICE JOHN MUTUNGI

JUDGE, ENVIRONMENT AND LAND COURT

AT NAKURU