



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 295 OF 2014

NANCY WANJIRU KUNYIHA (Suing as the Administrator of the

Estate of AUGUSTINE KUNYIHA).....PLAINTIFF

VERSUS

SAMUEL NJOROGE KAMAU.....DEFENDANT

JUDGMENT

(Suit by plaintiff claiming that she is the person entitled to own a leasehold title that is held by the defendant; land being a lease from the Municipal Council; allotment letter issued to plaintiff's husband; no lease prepared or forwarded to the Land Registry for preparation of a certificate of lease; land register showing that a title was issued and transferred to the person who sold the land to the defendant; in absence of a lease no register could be prepared for the leasehold title of the land; no leasehold title could issue to the defendant's predecessor as none was ever issued by the head lessor; plaintiff being the person recognized by the head lessor; title of the defendant illegally issued and cancelled; judgment entered for the plaintiff)

PART A: INTRODUCTION AND PLEADINGS

1. This suit was commenced by way of a plaint which was filed on 27 October 2014. The plaintiff has brought this suit on behalf of the estate of Augustine Kunyiha (deceased), of which she is administrator. She has pleaded that the estate of the deceased is entitled to the land parcel Nakuru Municipality Block 1/828 (Langalanga) (hereinafter referred to as the suit property) originally known as Plot No. B-392 Race Track Site. She has averred that this plot was allocated to her late husband by the Municipal Council of Nakuru on 7 June 1984, and that the deceased paid the requisite fees, and was issued with the relevant clearance certificates. She has pleaded that she unfortunately did not vigorously pursue issuance of title and the land was left vacant as she did not have the resources to develop it. Her quarrel against the defendant is that the defendant has now obtained title to the suit land and holds a Certificate of Lease.

2. In the suit, the plaintiff has asked for the following orders (slightly paraphrased) :-

(a) A declaration that the plaintiff is the lawful owner of the land parcel Nakuru Municipality Block 1/828 (Langalanga).

(b) A permanent injunction against the defendant in relation to the suit land.

(c) An order of cancellation of the defendant's title and Certificate of Lease to the suit land.

(d) Costs of the suit.

3. The defendant filed a defence and counterclaim. He pleaded inter alia that his title is genuine and that he obtained it legally. He pleaded that he purchased the suit land from one Geoffrey Kamiri Wadahi on 15 November 2013. He averred that all necessary consents, transfer, and/or other legal procedures were followed in obtaining the suit land without any illegality, fabrication, fraud, forgery or misrepresentation on his part. In the counterclaim, he sought the following orders (slightly paraphrased) :-

(a) A permanent injunction against the plaintiff.

(b) Orders of eviction against the plaintiff.

(c) A declaration that the defendant is the legal owner of the suit land.

(d) *Costs of the suit and interest.*

4. The plaintiff filed a Reply to Defence and Defence to Counterclaim and reiterated that the defendant's title is fraudulent and illegal.

PART B : EVIDENCE OF THE PARTIES

(i) The plaintiff's evidence

5. The plaintiff testified and stated inter alia that the suit land was allocated to her late husband, and she produced an allotment letter dated 7 June 1984. She produced receipts to show that the deceased paid for the land and also paid council rates. She also produced documents demanding for rates from the Municipal Council of Nakuru, issued in the years 1988, 1990, 1993, 1997 and 1998. She stated that the plot, which was identified as Plot No. 392, was later registered as Nakuru Municipality Block 1/828.

6. In the year 2009, she wished to develop the plot and had building plans drawn and approved. She then commenced development in the year 2014. As she was continuing with the development, the defendant emerged and claimed to own the plot. He also filed a criminal case of trespass against the plaintiff and her workers on site. In the course of all these, the defendant filed a Judicial Review Case, being Misc. Application No. of 2014 against the County Government of Nakuru, complaining that the County Government has refused to issue him with a rates clearance certificate. The plaintiff referred to the reply of the County Government in which it justified its refusal to issue the defendant with a rates clearance certificate, stating that he did not own the plot.

7. In cross-examination, she stated that her husband died in the year 1994 and that after his death, she continued paying the rates. She was questioned inter alia on the description of the plot in the allotment letter, which showed Plot No. B392 and the payment receipts which showed Plot No. 392. She stated that from the year 2003, she was paying for the land Nakuru Municipality Block 1/828.

8. PW-2 was one James Nganga Kuria, the officer in charge of rates at the County Government of Nakuru. His duties are to keep records of properties and charge levies on them. 9. He started working with the now defunct Municipal Council of Nakuru in the year 1981, and he affirmed that he is familiar with the suit land. He testified that according to their records, the property belongs to Augustine Kunyiha and a transfer was later effected to the plaintiff and one Mary Kunyiha. He could recognize the allotment letter dated 7 June 1984, produced by the plaintiff. He stated that rates for the scheme where the property is situated started being charged in the year 1987 and he testified that according to their records, the rate payer was Augustine Kunyiha. He produced the rate card as an exhibit. He pointed out that the names of the defendant and Godfrey Kamiri Wadahi do not appear in it. He explained that the plot is situated in a scheme which was previously unsurveyed and the Plot was then identified as Plot No. 392. Upon survey, it became registered as Nakuru Municipality Block 1/828 and he produced the conversion table. He also produced the valuation roll which identifies Augustine Kunyiha as owner of the property.

10. He testified that the property had no issue, until the year 2012, when some persons came to his office with intention to transfer to their names. They came with copies of a Certificate of Lease and an Identity Card. He insisted that Mr. Wadahi (the seller), do appear in person and the individuals never came back. He produced the documents that they presented for transfer of the property. He stated that the defendant later came to his office in the year 2013, and asked for a clearance certificate and consent to transfer which he refused to give. The clearance certificate and consent to transfer which the defendant relies on were put to him. He pointed out that the consent is dated 15 November 2013, yet the clearance was paid for on 19 November 2013 and supplied on 23 November 2013. He explained that a consent cannot precede a clearance certificate since clearance is first issued before a consent can be availed. He denied that the documents were issued from their offices and stated that the appropriate procedure was never followed.

11. He testified that the defendant filed his judicial Review motion on 31 March 2014, seeking the County Government to be compelled to issue him with a clearance certificate and he mentioned that the position of the County Government in the case, was that it could not issue a clearance certificate, because they had already issued one to the plaintiff. The Judicial Review motion was later withdrawn.

12. He asserted that the defendant did not acquire his title procedurally. He pointed out that the acreage in the title is also different from that in their valuation roll, the title showing 0.0224 Ha whereas their valuation roll shows 0.0283 Ha. He explained that the lessor of the land was the Municipal Council of Nakuru, and before a Certificate of Lease is issued, they do prepare a Lease document and send it to the Lands Office for registration. It is then that a Certificate of Lease is issued. He testified that they have no lease leasing the property to a Mr. Njoroge (first lessee in the defendant's title). According to him, no lease has ever been prepared by them since the conversion table shows a blank. He testified that for any transfer, the Municipal Council is the entity that needed to issue consent to transfer since they are the head lessors.

13. Cross-examined, he stated that the allotment letter identifies the land allotted as Racetrack Site & Service Scheme B392. He acknowledged that the first rate card shows the Plot as 392B but the continued, 2nd rate card, only shows Plot No. 392, missing the B, which he explained must have been an omission. He was also questioned on the conversion table which indicates Plot No. 392 without the "B" and his explanation was that the surveyors did not write the "B". He ruled out there being separate plots No. 392 and No. 392B. He testified that the rates cards show the names of Mr. Kunyiha, and his payment of rates is up to date, and there was no parallel rate card. He stated that in respect of the suit land, it is the Municipal Council of Nakuru, which was the allotting authority and all clearances and consents must be issued by them. He testified that no lease has ever been drawn by them over the suit land and no lease has ever been registered. He wondered how the defendant could have paid for rates in his name as their records only have the name of Mr. Kunyiha. He was cross-examined on the defendant's consent to transfer and reiterated that it could not have been properly issued on 15 November 2014, since it was requested for on 19 November, paid for on 20 November, and prepared and checked on 21 November, from the defendant's records.

14. With the above evidence, the plaintiff closed her case.

(ii) The defence case

15. DW-1 was Ms. Nancy Ombima, a Registrar in the Land's Office Nakuru. She produced the records in their office indicating the

ownership of the land. She produced the register abstract which shows that it was opened on 23 September 1991. She stated that the land is owned by the Municipal Council of Nakuru, and according to her records, the Council leased it out to one Samuel Kamau Mwangi on the same day the card was opened, that is 23 September 1991. The lease was later transferred to Godfrey Kamiri Wadahi on 7 December 2000. The lease was subsequently transferred to the defendant on 11 December 2013 and the Certificate of Lease was issued to the defendant on 19 December 2013. She produced the Green Card and the Certificate of Lease as defence exhibits. She testified that prior to the Certificate of Lease being issued, they got a transfer document, consent to transfer from the County Government of Nakuru dated 15 November 2013, and a Rates Clearance Certificate dated 20 November 2013.

16. Cross-examined, she stated inter alia that for properties under the (former) Municipal Council, to prepare a Certificate of Lease, they must first receive the Head Lease from the Municipal Council and a letter of introduction from the Municipal Council, introducing the person to whom they have issued the lease. The letter of introduction also informs the Lands Office to prepare a Certificate of Lease in the name of the person indicated in the letter. She stated that they do not have in their records the Head Lease and the Letter of Introduction. She nevertheless testified that she could use the register abstract as a document of reference and movement books. She however did not have the latter. She acknowledged that a clearance certificate is first issued before a consent to transfer, and further acknowledged that the consent they have in their possession, was issued before the clearance. She also conceded that if the County did not give a letter for the preparation of the Certificate of Lease, the Certificate of Lease would be invalid.

17. The defendant testified as DW-2. He stated that he purchased the suit land from Godfrey Kamiri Wadahi. The seller gave him a copy of the Certificate of Lease and he proceeded to verify the document from the Rates Office of the County Government of Nakuru. He stated that he was issued with a demand notice for rates, showing that the rate payer is Godfrey Wadahi, although the document was not produced as an exhibit. He also applied for a search from the Lands Office and the same showed that the property was owned by Mr. Wadahi. He stated that they entered into a sale agreement with Mr. Wadahi on 15 November 2013, and since Mr. Wadahi had not paid rates for the year, the payment was less the amount of rates for the year, which he paid for. He also paid for a clearance certificate. He testified that he also received the consent to transfer. He paid stamp duty and the property was transferred to him of which he received the Certificate of Lease in December 2013.

18. He mentioned that when he purchased the land, the same was vacant. He stated that he took possession and put up a barbed wire fence and engaged an architect to make a plan for development. His building plans were however rejected by the County Rates Officer (PW-2). He wrote to the police and also complained to the County Secretary. The CID initiated investigations and were of the opinion that the land properly belongs to him. He testified that the plaintiff pulled down his fence and started construction and he filed a criminal case against her. He also filed the Judicial Review case against the County Government. He initiated the case because the County Government refused him to pay for rates and clearance certificates when he lodged his building plans.

19. Cross-examined, he affirmed that his residence is within the vicinity of the suit land. It was put to him that there is no such person as Godfrey Wadahi and that the said person is fictitious, but he asserted that he exists, and that he met him in person. He stated that he did not pay the seller through a bank, but paid in cash, because that is what the seller preferred. Challenged to produce evidence that he actually withdrew this money, he stated that he availed the same in his Judicial Review matter. He could not comment on how the consent to transfer was issued before the clearance certificate as he did not know the procedures within the County Government. He agreed that he was informed to bring the seller which he did not. He denied that he intended to grab the land, since it was empty, and refuted the claim that he entered into a scheme to prepare fictitious documents. Re-examined, he stated inter alia that it was not his duty to take the vendor to the County Offices and asserted that the requisite clearance and transfer documents were properly issued. He pointed at the search and the demand for rates which bore the names of Godfrey Wadahi.

20. DW-3 was Veronica Wambui Kabaiku. She is a clerical officer at the Rates Office of the County Government of Nakuru. She could recall that in November 2013 she dealt with rates over the suit property. She stated that a person who identified himself as Godfrey Kamiri Wadahi came to their office to pay rates. He paid the rates and also paid Kshs. 3,000/= for a clearance certificate. These were paid on 19 November 2013. Later, a person by the name of Njoroge, requested for the clearance certificate on 20 November 2013 and clearance was issued. It is her who checked and signed the clearance certificate. She stated that she issued the same in good faith, but testified that this was a mistake on her part, as the plot was not of Godfrey Kamiri Wadahi but Augustine Kunyihya. She stated that she issued the documents on the strength of a Certificate of Lease, Sale Agreement and PIN, which were presented to her by the seller and buyer.

21. Cross-examined, she testified that the name of Mr. Wadahi and that of the defendant do not appear in their rates card. She stated that at the time she issued the clearance certificate, the rates card was under lock and key, and she could not access it. She issued the clearance because the person who asked for it had the ownership documents that one would be expected to have. She stated that she should not have issued the clearance as in their records, there was already a clearance certificate issued in the name of Mr. Kunyihya in the year 2008. She mentioned that the County does not have a lease in favour of the defendant's documents.

22. With the above evidence, the defendant closed his case.

PART C : SUBMISSIONS OF COUNSEL

23. In his submissions, Mr. Githiru, learned counsel for the plaintiff, inter alia submitted that the defendant hatched a scheme to unlawfully acquire a fake title to the suit land by purporting to enter into a sale agreement, and purporting to register a lease to himself, without a genuine clearance certificate and consent to transfer. He submitted that in the year 2014, the plaintiff's building plans were approved and it was only in late November that the defendant emerged claiming to be the owner of the plot. He pointed at the rate card as showing no entry in favour of the defendant or his claimed predecessors in title. He submitted that the defendant took advantage of the absence of PW-2 to obtain the rates clearance certificate and consent to transfer. He pointed out that DW-3 testified that these were issued by mistake. He submitted that there was no evidence of a head lease from the Municipal Council and thought that it is telling that the defendant withdrew his Judicial Review case. He also thought that Mr. Wadahi is non-existent and questioned why the defendant did not call him as a witness. He wondered how a consent to transfer would have been issued before the clearance certificate. He further questioned why the defendant paid stamp duty on Kshs. 1,000,000/= yet his sale agreement was for Kshs. 1,800,000/=. He submitted that the law does not protect property which has been unlawfully acquired and he referred me to Article 40(6) of the Constitution. He also relied on the cases of *KENHA vs*

Shalien M. Mughal & Others, Court of Appeal, Nairobi Civil Appeal No. 327 of 2014 and a dictum of Maraga J (as he then was) in the case of **Republic vs Minister for Transport & Communication & 5 Others ex-parte Waa Ship Garbage Collectors & 15 Others, Mombasa, HCMA No. 617 of 2003 (2006) 1 KLR (E&L) 563**. He also relied on the case of **Munyu Maina vs Hiram Gathiha Maina (2013) eKLR**. He submitted that his client has been in possession of the land since the year 1984 and is protected by Section 30(7) of the Registered Land Act. He further relied on the case of **Giella vs Cassman Brown (1973) EA 358** to state that his client has more than a prima facie case, will suffer irreparable loss and the balance of convenience tilts in her favour.

24. On his part, Mr. Mukira, learned counsel for the defendant, reviewed the evidence and inter alia submitted that it was not properly explained how the Plot B392 Racetrack was not included in the grant of letters of administration held by the plaintiff. He also submitted that what was allotted to the deceased was Plot No. B392 Racetrack, but that there does not exist a plot by that identity, and that no relationship has been shown between the said plot and the land Nakuru Municipality Block 1/828 (Langalanga). He submitted that there was no evidence that the deceased was allotted the Plot No. 392 Racetrack and therefore no proof that the suit land was allotted to the deceased. He also submitted that the plaintiff has not met the test laid down in the case of **Giella vs Cassman Brown (1973) EA 358**. He also relied on the case of **Gladys Wanjiru Ngacha vs Teresa Chepsaat & 4 Others (2008) eKLR**. He submitted that the plaintiff failed to specifically plead nor did the plaintiff particularize the involvement of the defendant in the purported fraud, and relied on the case of **Nabro Properties Ltd vs Sky Structures Ltd & 2 Others (2002) 2 KLR 299**. He submitted that the standard of proof for fraud is, much higher than that of probability of success and was of the view that fraud had not been proved against the defendant. He relied on the case of **Urmila w/o Mahendra Shah vs Barclays Bank Internation Ltd & Another 91976-1980) KLR 1168**. He submitted that there was no allegation that the previous owners had acquired the land illegally or corruptly. He also pointed me at Section 26 of the Land Registration Act, and the cases of **Warui & 2 Others vs County Council of Kirinyaga (2010) KLR and Cheruiyot vs Bartiony (1988) KLR 422**.

PART D : ANALYSIS AND DECISION

25. Before I go far, I wish to address one point, which is the reliance by both counsel on the case of **Giella vs Cassman Brown (supra)**. That case only has application in respect of an application for an interlocutory injunction, that is, an injunction pending the hearing and determination of the suit. The said authority outlines the principles which will guide the court in determining the application for interlocutory injunction. That case does not apply when it comes to a final judgment of the matter, and the principles therein have no relevance, when a court wishes to consider whether or not a party is entitled to a permanent injunction against the other. I have thought of making this clear at this early stage, because I have seen an emerging trend, where counsel place reliance on the case of **Giella vs Cassman Brown (supra)** when dealing with final arguments on the matter, which is certainly misplaced. One cannot argue to have established a prima facie case with a probability of success at the end of a hearing. You will either have succeeded in the case or failed; the probability of success has completely no place. Neither does one need to prove irreparable loss to be entitled to judgment in his favour, and of course, the court does not consider the balance of convenience in weighing whether or not one party should succeed. Judgment is not based on convenience but on the facts and the law. At this level, the court looks at the merit of the case as a whole, and the principles for grant of an interlocutory injunction, certainly do not apply. Let me now go to the merits of the case.

26. The gist of the matter before me is that both plaintiff and defendant claim title to the suit land. At the moment, it is the defendant who is registered as proprietor of the leasehold title, which is a lease from the Municipal Council of Nakuru. The plaintiff claims that it is her husband who was allotted this plot and thus the person who ought to have been registered as proprietor. On the other hand, the defendant claims to have purchased the property from the previous registered proprietor and thus asserts good title to the suit land.

27. The plaintiff's claim to the suit land emanates from a letter of allotment which she contends was issued to her late husband. I have seen the letter of allotment which was produced as an exhibit. It is dated 7 June 1984. In brief, it does state that Mr. Kuniyiha has been allocated Plot No. B-392 Race Track Site and Service Scheme. I have evidence that Mr. Kuniyiha paid for this plot and paid for the rates for the said plot. It was stated by PW-2, that this plot was then converted and registered as Nakuru Municipality Block 1/828. I have seen the conversion register, the valuation roll, and the rate card, which relate to the suit land. Although Mr. Mukira, learned counsel for the defendant, tried to make heavy weather of the identification of the allocated plot as Plot B392 and at times 392, and tried to argue that are different plots, I am not persuaded. The evidence before me is overwhelming that the Plot B-392 or 392-B, is the same plot also described as Plot 392, and indeed I have no evidence before me that these are different plots. The defendant did not bring any witness nor give any evidence to state that these are different plots and do not refer to the same land. He could easily have called evidence to say, here, Plot No. 392 was converted to this number, and Plot B392 (or 392B) is different, and was converted to this other number, and you see, they are different plots. I have no such evidence. I therefore have no doubt in my mind that the Plot B392, or 392-B, or simply 392, is the same plot, and that this plot, however described, is what was converted and registered as the land parcel Nakuru Municipality Block 1/828. It is the same land that is in issue in this case.

28. I have absolutely no doubt that this plot was allotted to Mr. Kuniyiha. The allotment letter is testimony enough and it is not challenged. How the register ended up reflecting the name of one Samwel Kamau Mwangi, as its first lessee, is not clear to me. There is no allotment letter which is in the name of Samwel Kamau Mwangi, and most significantly, there is no lease that was ever drawn in favour of Samwel Kamau Mwangi. According to PW-2, the Municipal Council of Nakuru, and now the County Government of Nakuru, have never formally drawn and registered any lease over this parcel of land. The evidence of PW-2 is not challenged by any contradictory evidence. DW-1, whom the defendant called, did not have any record of any lease in the land parcel file. Neither was there any letter, introducing Samwel Kamau Mwangi, as lessee of the said plot, and neither was there any record of any request by the Municipal Council of Nakuru, instructing the Lands Office at Nakuru, to issue a Certificate of Lease to Samwel Kamau Mwangi. There is absolutely nothing to back the registration of Samwel Kamau Mwangi as the first lessee of the suit property, save only, that his name appears in the register.

29. I am afraid that this is one instance where I have to question the integrity of the land register in respect of this parcel of land. If the Municipal Council of Nakuru (now the County Government of Nakuru), the holder of the head lease, states that it has never issued a lease in respect of this land, and there is no record of any lease having been so issued, how can this court hold that there was actually a lease granted to Samwel Kamau Mwangi? The only reason that I would have to doubt this evidence is if I was given the actual lease of Samwel Kamau Mwangi, or a letter of allotment to him over this plot. I have absolutely nothing. The holder of the head lease has stated that it issued an allotment letter to Mr. Kuniyiha, and never issued any lease to one Samwel Kamau Mwangi. I cannot wish away this strong evidence which is not controverted. I am therefore persuaded on a balance of probabilities, that the plot herein was allotted to Mr. Kuniyiha, and no lease was ever drawn in favour of Samwel Kamau Mwangi. The registration of Samwel Kamau Mwangi as proprietor of the leasehold title, on 23

September 1991, was either erroneous or outrightly fraudulent.

30. I have seen from the register that the said Samwel Kamau Mwangi, was succeeded as proprietor, by Godfrey Kamiri Wadahi, on 7 December 2000. The entry of Godfrey Kamiri Wadahi as proprietor was therefore either fraudulent, erroneous or illegal. It is indeed telling that neither Samwel Kamau Mwangi, nor Godfrey Kamiri Wadahi, if at all they exist, ever took steps to take possession of the suit land, which all along was with the plaintiff, until the defendant emerged flashing a Certificate of Lease in his name. As late as the year 2009, the plaintiff did make building plans, which were approved by the Municipal Council of Nakuru, which indicates that she was the one in possession of the suit land.

31. The defendant is claiming a leasehold title pursuant to a register which is not backed up by any lease. The register is thus clearly fraudulent and/or fictitious. The Certificate of Lease held by the defendant is merely a paper document, not acknowledged by the head lessor and the necessary documentation, and cannot stand. It follows that Godfrey Wadahi never had any title to transfer to the defendant.

32. Mr. Mukira, tried to shelter his client under the provisions of Section 26 of the Land Registration Act, but I do not see how the said law can assist his client. The said Section 26 is drawn as follows :-

26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

33. Section 26 above, does provide at Subsection (1) that the Certificate of title is to be taken as prima facie evidence of proprietorship, but it will be seen that such title, is subject to challenge if, the same was acquired through fraud or misrepresentation to which the party is proved to be a party, or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. In my view, when title is being attacked under Subsection (1) (b), it is not necessary for it to be proved that the title holder is a party to the vitiating factors mentioned therein. In the circumstances of this case, it is apparent to me, that the title herein was acquired illegally, unprocedurally or through a corrupt scheme. It is not a legal title because the head lessor does not recognize it, having not issued it in the first place. It could not have been acquired procedurally, as no lease has ever been issued, and it cannot be said that any was registered, so as to produce the title held by the defendant. That being the case, it can certainly be subject of challenge. Although I have no concrete evidence of fraud on the part of the defendant, I have my doubts on the alleged sale with the mentioned Godfrey Wadahi. Curiously, the whole purchase price was paid in cash, which is rather unusual, and neither is there is any evidence of the movement of this money.

34. The manner in which the consent to transfer was procured is also quite suspect. Again, the consent to transfer was issued before the clearance certificate. It could happen that there may be some small lapses which can occur, and I cannot say that it is in all cases that a consent to transfer will be rendered null, merely because the clearance certificate was issued later, but in the circumstances of this case, I think this is rather suspect. In fact, the defendant's own witness, DW-3, disowned the very documents that she issued to the defendant. She did however explain how she issued the same, that is, that in good faith, having seen the Certificate of Title that the defendant held, she believed that the proprietor showed therein was the proprietor in their records, which happened not to be the case. Her explanation, to me is a plausible explanation.

35. Mr. Mukira tried to argue that no fraud has been proved against his client. As I said, the title herein is liable to be cancelled following the provisions of Section 26(1) (b) and it is not necessary to prove fraud on the part of the proprietor. The title of the defendant, as I have explained, was not legally acquired. There was also an attempt to claim that the grant of letters of administration held by the plaintiff is not a good grant. I have seen nothing wrong with it, and even if there were, it is not in doubt that the plaintiff is administrator of the estate of Mr. Kuniyha and can bring suit on behalf of his estate. Neither does any defect in the said grant, if at all there is one, which I have not seen, change the fact that the defendant does not have a good title.

36. I have also looked at the authorities supplied by Mr. Mukira, and none of them are helpful to his client. I have already stated that the case of **Giella vs Cassman Brown** is completely misplaced. In the other cited case of **Gladys Wanjiru Ngacha vs Teresia Chepsaat & 4 Others**, the facts are at a complete variance with this case. In the said case, the plaintiff had claimed that she was issued with a letter of allotment jointly with the 1st defendant, and that later, the 2nd defendant (the husband of the 1st defendant), sold her (the 1st defendant's) half share to her. The case was dismissed, as the title that was recognized was one held by the 3rd defendant and not the 1st defendant or plaintiff. The court also held that even if a letter of allotment had been issued to her, she had not complied with its terms. The case of **Nabro Properties Ltd vs Sky Structures & 2 Others**, concerned a sale by the 1st defendant to the plaintiff. The plaintiff sued for specific performance but lost the case, as he had not completed the transaction within the completion date. Their contract was also held to be invalid and unenforceable for failure to have it executed by two directors as required by its memorandum and articles of association. The facts are nowhere near what we have in this case. The case of **Urmila Shah vs Barclays Bank** merely advises of the standard of proof in case of fraud. I wonder why I was referred to the case of **Cheruiyot vs Bartiony** which is a case where a sale was held to have been invalid for want of Land Control Board consent, which is not the position in this case. It is completely irrelevant to this case. In essence, counsel has not persuaded me in his submissions and authorities, that the title of the defendant is not one that is liable to be cancelled.

37. Having not been persuaded that the title of the defendant is a good title, and not having been persuaded that the same cannot be cancelled, I have no reason not to allow the plaintiff's case, and in the same vein, the counterclaim by the defendant must be dismissed.

38. Before I close, I am alive to the fact that the plaintiff and her workers face criminal proceedings for trespass. I direct that a copy of this judgment be served upon the DPP and the Magistrate handling the criminal case for them to consider whether it is appropriate to continue the criminal charges.

39. I have dealt with all issues herein and now make the following final orders :-

(a) That a declaration is hereby issued, that as between the plaintiff and the defendant, it is the plaintiff who is the rightful proprietor of the land parcel Nakuru Municipality Block 1/828 (Langalanga).

(b) That a declaration is hereby issued, that the Certificate of Lease held by the defendant, is not one that is legally recognizable and the same is hereby cancelled.

(c) That an order is hereby issued to the Land Registrar Nakuru, directing the Land Registrar to cancel the register relating to the land parcel Nakuru Municipality Block 1/828 (Langalanga) and open a fresh register for the said leasehold title as may be directed by the County Government of Nakuru, the head lessor of the property.

(d) The plaintiff shall have the costs of this suit and of the counterclaim.

40. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 22nd day of February 2018.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of :

Ms. Oseko instructed by M/s Githiru & Company Advocates, for the plaintiff.

Mr. Mukira instructed by M/s Mwangi, Mukira & Company Advocates for the defendant.

Court Assistant :Nelima Janepher.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU