



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 70 OF 2006

(FORMERLY HCCC No. 70 OF 2006)

BEATRICE NGONYO NDUNGU

CYRUS CHARLES KAMAU (Suing as legal representatives

of the estate of FRANCIS NDUNGU NJUGUNA (deceased).....PLAINTIFFS

VERSUS

SAMUEL K. KANYORO.....1ST DEFENDANT

ATTORNEY GENERAL (sued on behalf of the

COMMISSIONER OF LANDS).....2ND DEFENDANT

COUNTY GOVERNMENT OF NAKURU.....3RD DEFENDANT

JUDGMENT

1. This suit was filed on 27th March 2006 through plaint dated 23rd March 2006 by Francis Ndungu Njuguna. He later passed away on 21st August 2015 whereupon the current plaintiffs were substituted in his place. The plaint has seen several amendments the last of which is the "Further Further Amended Plaint" filed in court on 20th July 2016.

2. It is averred in the said plaint that the deceased purchased a parcel of land known as Plot No. 100 Business Jewathu from one Ben Otube who was allotted the plot by the County Council of Nakuru. It is further alleged that the 1st defendant fraudulently and unlawfully caused himself to be registered as the proprietor of the same plot under title number Njoro Township Block 1/1144. The 2nd and 3rd defendants are alleged to have aided the 1st defendant in the process. The plaintiffs therefore seek judgment against the defendants jointly and severally for:

a) A declaration that the plaintiff (sic) is the lawful allottee of the plot No. 100 Business Jewathu site and that the court do issue a mandatory injunction compelling the 2nd defendant, his servants and/or agents to cancel title Njoro Township Block 1/1144 issued in respect of the land claimed by the plaintiff (sic).

b) Rectification of the land register to cancel the 1st defendant's proprietorship of land title Njoro Township Block 1/1144 and that the court do issue a permanent injunction restraining the 1st defendant, by himself, servant and/or agents from claiming ownership, trespassing and or otherwise interfering with the plaintiff's (sic) land i.e. plot No.100 Business Jewathu.

c) In the alternative judgment against the 3rd defendant with an order that the 3rd defendant do indemnify the plaintiff (sic) for the value of plot No. 100 Jewathu and the semi-permanent house erected thereon.

d) Costs and interest of the suit.

3. The defendants filed defences denying the deceased's claim. Additionally, the 1st defendant filed a counterclaim wherein he sought a mandatory injunction to restrain the deceased from interfering with legal possession of Njoro/Township Block 1/1144, an eviction order against the deceased and general damages and costs. He averred that Plot No. 100 Njoro Township was allocated on 1st October 1994 by the Commissioner of Lands to Mr. Francis Marindany. Marindany later transferred the plot to the 1st defendant on 9th May 1995. The 1st defendant was later issued with a certificate of lease for the plot under the number Njoro/Township Block 1/1144. He maintained that the deceased's use and occupation of the plot is illegal and hence sought the relief stated above.

4. The matter proceeded to hearing partly before Ouko J. (as he then was) and partly before Mshila J. The matter ultimately landed before me and by then plaintiff's and 2nd defendant's cases had been heard and closed. The 3rd defendant's case was closed before me without any witness being called. Parties had agreed that hearing proceeds from where it had reached.

5. The deceased testified on 3rd November 2010 as PW1 before Ouko J. He told the court that Ben Otube sold to him the parcel of land known as No.100 Jewathu Site and Service on 22nd July 1996. He produced an allotment letter dated 20th December 1990 issued to Ben Otube by the County Council of Nakuru as well as a transfer form for the plot. He also produced a sale agreement between himself and Otube. He began to develop the plot in by fencing, building a toilet and rental houses. On completion he brought in tenants. The County Council of Nakuru approved his building plan for purposes of building stone houses. Sometime in 1997 one Francis Marindany came and claimed that the deceased was building on his land. The deceased told him that he bought the land from Otube. But Marindany insisted that the deceased was shown the wrong plot and he asked the deceased to move his buildings. Six years later Marindany returned with the 1st defendant and some people from the county council. The deceased gave them his (deceased's) documents whereupon the county council officials said that the plot was the deceased's.

6. He further testified that that the council confirmed through two letters dated 4th June 1999 that he (the deceased) was the owner of the plot. He added that he severally paid rent for the plot to the council and was issued with receipts. He produced a total of 11 receipts. He also produced a Clearance Certificate from the council dated 15th March 2001 to support the contention that he had paid all rents. When he took the Clearance Certificate to Ardhi House in Nairobi he was however not given a title deed. Subsequently on 8th October 2001 another letter was written to the Commissioner of Lands by District Lands Officer Nakuru to the effect that the suit plot was allocated to the deceased. He added that parties went to the suit plot with the surveyor as ordered on 17th February 2010. They however did not go to the second plot.

7. Under cross examination, the deceased stated that he did not ask Otube to take him to the suit plot at the time of purchase. He also stated that he did not find any reason to ask the council to show him the plot because he knew where it was. He added that knew Njoro well and that there is no place known as Jawathu Trading Centre. Instead, there is a village in Njoro known as Jawathu. The distance from Njoro town to Jawathu is over 1km.

8. The deceased also called Mr. Laban Otieno Ayanga, who described himself as a Planning Officer with the County Council of Nakuru, as PW2. He stated that Plots Nos. 100 Jawathu Site and Service and 100 Njoro Township are one and the same plot. The names Jawathu and Njoro Township were used interchangeably. He added that he did not know who besides the County Council of Nakuru, owns the plot. Procedurally, the commissioner of lands can only allocate if directed by the council. According to him, the procedure is that the council gives allotment letter then writes to the commissioner to indicate that land has been allocated to an individual. In this case, the council had not taken allotment letters to the commissioner to issue title deed. PW2 was therefore surprised that one party is claiming to have a title deed.

9. PW3 was Mr. Bernard Simiyu Otube from Nakuru. He told the court that he is a surveyor and that Plot No.100 Jawathu Site was allocated to him by Nakuru County Council as payment for survey work which he had done for the council. He later sold it to the deceased. He added that though he paid showing fees to the council in 1996, he was shown the plot in 1990 without paying because he had offered services to the council. Upon being questioned by the court he stated that Plot No.100 Business Jawathu is not the same as 100 Njoro Township or 100 Jawathu site and service.

10. The deceased's last witness was PW4 - Maritha Wangechi, a business lady in Njoro occupying plot No.74B Njoro Business. The suit plot is 2nd after PW4's plot. She told the court that she sought to be issued with a deed for her plot but was informed there was none.

11. That marked the close of the deceased's (plaintiffs') case.

12. For his case, the 1st defendant testified as DW1. He told the court that on 9th May 1995, Francis Marindany who was his friend sold to him Commercial Plot No. 100 Njoro Township at KShs 145,000. Marindany informed the commissioner of lands about the sale through letter dated 9th May 1995. He also gave the 1st defendant documents pertaining to the plot such as an allotment letter dated 1st October 1994, letter of consent from the Commissioner of lands dated 14th June 1994, receipt in respect of payment of the stand premium and other allotment charges among others. He later applied for the title deed and was issued with a Certificate of Lease on 13th January 2006 after notices for planning purposes had been in the Daily Nation of 24th March 1999 and Kenya Gazette of 10th November 2000.

13. About one year after the 1st defendant had been shown the plot the deceased approached the 1st defendant and told him that he (the deceased) had purchased the plot from Otube. Both the deceased and the 1st defendant were summoned to the office of the District Land Officer where they were told that the 2 plots were distinct and in different places. The District Land Officer wrote a letter dated 7th June 1999 to the District Physical Planning Officer explaining as much. In 1998 the 1st defendant discovered that the deceased was putting up temporary houses on the plot. He issued a demand letter to the deceased through his advocates M/s Mirugi Kariuki demanding that the deceased vacates. The letter was copied to the council. The council replied through letter dated 4th September 1999 confirming that Plot No. 100 Njoro Township was allocated to Francis Marindany and that the deceased should look for his plot at Jewathu. He also produced a report from the District Surveyor dated 4th April 2007 showing that plots 100 Jewathu and 100 Njoro Township are distinct plots. He therefore urged the court to dismiss the deceased's case and to grant the orders sought in the counter claim.

14. The 2nd defendant called Charles Birundu a Land Registrar based at the Nakuru Land Registry who testified as DW2. He stated that Njoro/Township Block 1/1144 belonged to Government of Kenya which allocated it and later issued a certificate of lease in respect of it to the 1st defendant on 13th January 2006. He added that due procedures were followed when taking out title and that the 1st defendant is the rightful owner of the said plot. Under cross examination, he stated that he did not have the Part Development Plan (PDP).

15. Parties filed written submissions save for the 2nd defendant in respect of whom the Attorney General failed to file any submissions despite being given ample opportunity to do so. In submissions filed on behalf of the plaintiff it was argued that Plot No. 100 Business

Jewathu and Plot No. 100 Njoro Township are one and the same and that the 1st defendant's certificate of lease had been obtained illegally, unprocedurally or through a corrupt scheme. Accordingly, counsel for the plaintiffs urged the court to grant judgment as prayed by the plaintiffs.

16. For the 1st defendant, it is submitted that Plot No. 100 Business Jewathu and Plot No. 100 Njoro Township are two separate and distinct plots and that this is borne out by the particulars in the two letters of allotments. Consequently, it is argued that the plaintiffs' case is not proven and ought to be dismissed and that the 1st defendant's counterclaim be allowed.

17. Counsel for the 3rd defendant submitted that the plaintiffs failed to establish any negligence against the 3rd defendant, that the deceased had a duty to ascertain the location of the plot that he bought and that he failed to perform this obligation and that the deceased was the author of his own misfortune.

18. I have carefully considered the pleadings, the evidence and the submissions in this matter. The issues that emerge for determination are firstly, whether Plot No. 100 Jewathu Site & Service is the same one as Plot No. 100 Njoro Township; secondly, whether the 1st defendant obtained registration of Njoro/Township Block 1/1144 fraudulently and unlawfully; thirdly, whether the plaintiffs are entitled to the reliefs they have sought and; finally, whether the 1st defendant is entitled to the reliefs he has sought.

19. So as to determine the first issue, it is important to review the respective letters of allotment and the ensuing transfers. It is the plaintiffs' case that the deceased purchased Plot No. 100 Jewathu Site & Service from Ben Otube who had been allocated the plot by the County Council of Nakuru through letter of allotment dated 20th December 1990. The letter states that "following secret ballot conducted at Jewathu Site & Service Trading Centre", Mr. Otube was allocated "Business Plot No. 100 at Jewathu Site & Service". Subsequently, to an undated Sale Agreement, Otube sold to the deceased "his plot at Njoro – Jewathu Plot No. 100 Business". Pursuant to transfer dated 22nd July 1996, Otube transferred to the deceased "Plot No. 100 Buss" located at Njoro. I note that whereas Otube was allocated a plot stated to be located at Jewathu Site & Service, what he transferred is not described in the transfer as being at this exact location.

20. What about Plot No. 100 Njoro Township? The letter of allotment dated 1st October 1994 states that "Uns. Commercial Plot No. 100 - Njoro Township" was allocated to Mr. Francis Marindany by the Commissioner of Lands. Pursuant to letter dated 9th May 1995, Marindany informed the Commissioner of Lands that he had transferred "Plot No. 100 Njoro Township" to the 1st defendant. By letter dated 14th June 1995, the Commissioner of Lands consented to the transfer.

21. Though there are conflicting testimonies as to whether or not Otube was shown Business Plot No. 100 at Jewathu Site & Service by the County Council upon its allocation to him, I note that even though the letter of allotment indicated that showing fees were to be paid so that he could be physically shown the plot, no showing fees were paid until 26th October 1999 when receipt number V817853 of that date was issued to the deceased. It seems therefore that the physical location of Business Plot No. 100 at Jewathu Site & Service was not identified by the County Council to either Otube or the deceased until or after 26th October 1999. There is therefore a real possibility of Otube or the deceased being mixed up as to the location. This possibility is further buttressed by the contents of the surveyor's report dated 4th April 2007 wherein it is stated that the distance between Plot No. 100 Jewathu Site & Service and Plot No. 100 Njoro Township is about 1.5 kilometres. Further, I note that in the respective allotment letters Business Plot No. 100 at Jewathu Site & Service is stated as being located at Jewathu Site & Service Trading Centre where its ballot was conducted while Plot No. 100 Njoro Township is specifically identified as being in Njoro Township. I also note that under cross examination, the deceased conceded that he did not ask Otube to take him to the suit plot at the time of purchase, that he did not find any reason to ask the council to show him Plot No. 100 Jewathu Site & Service, and that Jewathu is a village located 1 kilometre from Njoro town. In view of all the foregoing I find and hold that Plot No. 100 Jewathu Site & Service is not the same plot as Plot No. 100 Njoro Township. They are two distinct plots at different locations.

22. Now to the second issue as to whether the 1st defendant obtained registration of Njoro/Township Block 1/1144 fraudulently and unlawfully. There is no dispute that since 13th January 2006, the 1st defendant holds a Certificate of Lease in respect of Njoro/Township Block 1/1144. The lease is for a term of 99 years from 1st October 1994. As registered proprietor, he is entitled to the full benefits conferred by **Section 25** of the **Land Registration Act** which provides as follows:

25. Rights of a proprietor

(1) The rights of a proprietor, whether acquired on first registration or 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.....

23. The 1st defendant's title can only be defeated as provided under section 26 of the aforesaid Act which states:

26. Certificate of title to be held as conclusive evidence of proprietorship

(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.

24. As was observed by Munyao J. in Elijah Makeri Nyangw'ra v Stephen Mungai Njuguna & another [2013] eKLR

... the law is extremely protective of title and provides only two instances for the challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

25. I have anxiously reviewed the evidence herein as regards the plaintiffs' allegations that the 1st defendant obtained registration of Njoro/Township Block 1/1144 fraudulently and unlawfully. The 1st defendant bought the plot from an allottee. The Commissioner of Lands duly consented to the transfer of the plot to the 1st defendant. The 1st defendant exhibited in court the paper trail in respect of the plot right from allotment to payment of the stand premium and other allotment charges, to his application for a title deed, publication of notices for planning purposes in the Daily Nation of 24th March 1999 and Kenya Gazette of 10th November 2000 and ultimately issuance of Certificate of Lease. Needless to state, the Commissioner of Lands who is a party to this case has not contested the validity of the 1st defendant's title. In the circumstances, I find and hold that the 1st defendant obtained registration of Njoro/Township Block 1/1144 lawfully.

26. On the third issue as to whether the plaintiffs are entitled to the reliefs they have sought, I note that the plaintiffs seek a declaration that they are the lawful allottees of Plot No. 100 Business Jewathu site, rectification of the land register so as to cancel the 1st defendant's proprietorship of Njoro/Township Block 1/1144 and in the alternative an order that the 3rd defendant do indemnify the plaintiffs for the value of plot No. 100 Jewathu and the house erected thereon. In view of my finding that Plot No. 100 Jewathu Site & Service is not the same plot as Plot No. 100 Njoro Township and that the 1st defendant obtained registration of Njoro/Township Block 1/1144 lawfully, it is axiomatic that the plaintiffs have failed to establish their case. They cannot get the reliefs that they seek against any of the defendants. I therefore dismiss the plaintiffs' case with costs to the defendants.

27. The final issue for determination is whether the 1st defendant is entitled to the reliefs he has sought in the counterclaim. He sought a mandatory injunction to restrain the deceased and the plaintiffs from interfering with legal possession of Njoro/Township Block 1/1144 and an eviction order against the deceased and the plaintiffs. As a registered proprietor, the 1st defendant is entitled to the full benefits of section 25 of the Land Registration Act which is quoted above and section 24 of the Act which states:

24. Interest conferred by registration

Subject to this Act—

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;

28. In the case of Joseph N.K. Arap Ng'ok v Moiwo Ole Keiwua & 4 others [1997] eKLR the Court of Appeal stated as follows with regard to the rights of a registered proprietor:

The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.

29. I have already found that the 1st defendant obtained registration of Njoro/Township Block 1/1144 lawfully. The plaintiffs admit that they constructed upon the 1st defendant's said land and that they still occupy it. The court must uphold the 1st defendant's rights over his land.

30. In the end, I make the following orders:

- a) I dismiss the plaintiffs' case with costs to the defendants.
- b) I grant a mandatory injunction restraining the plaintiffs, their agents and servants from interfering with the 1st defendant's possession and use of the parcel of land known as **Njoro/Township Block 1/1144**.
- c) I order that the plaintiffs, their agents and servants to vacate the parcel of land known as **Njoro/Township Block 1/1144** within thirty (30) days from the date of delivery of this judgment. In default, the plaintiffs, their agents and servants be evicted from the said property. The eviction to be done in accordance with the provisions of section 152G of the Land Act, 2012.
- d) I award the 1st defendant the costs of the counterclaim and interest.

31. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 3rd day of May 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Ms. Methane holding brief for Mr. Mbeya for the plaintiffs

No appearance for the defendants

Court Assistants: Gichaba & Lotkomoi