



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**CIVIL APPEAL NO 156 OF 2012**

**JOHN KIRUI .....APPELLANT**

**VERSUS**

**RICHARD RONO .....RESPONDENT**

**JUDGMENT ON APPEAL**

(Being an appeal arising from the judgment delivered by Hon. Mwaniki Principal Magistrate on 8 August 2012 in Nakuru CMCC No. 1845 of 2006)

***(Appellant being registered owner of land; appellant suing respondent for eviction; respondent arguing that appellant ought not to have been registered as owner as land was set aside for resident community; respondent claiming to have an allotment for the land; claim that appellant's title was acquired when there was a stay order; further argument that respondent has overriding interest; appellant failing in his suit hence this appeal; no proof by respondent that land was set aside for resident community; no evidence from any land official that respondent was the right person to have the land; allotment letter not demonstrated to be on same land owned by appellant; no evidence that stay order was served before title of appellant was issued; trespasser cannot benefit from an overriding interest; appeal allowed; order of eviction issued against respondent)***

1. This is an appeal by the unsuccessful plaintiff in the suit Nakuru Chief Magistrate's Court, Civil Suit No. 1845 of 2006. In that case, commenced by way of plaint on 14 September 2006, the appellant sued the respondent over the ownership of the land parcel Nakuru Tinet Sotik Settlement Scheme/2296 (hereinafter described as "the suit land"). In his plaint, the appellant pleaded that he is the proprietor of the suit land and averred that the respondent (as defendant) was in illegal possession of the same. He sought orders that he be declared to be the rightful owner of the suit land and an order of eviction against the respondent.

2. The respondent entered appearance and filed defence. He denied being in illegal occupation of the suit land and pleaded that it is the appellant who is the trespasser. He pleaded that there was a judicial review suit pending before the High Court being Miscellaneous Application No. 157 of 2005. The jurisdiction of the Magistrate's Court was also denied and the respondent threatened to raise a preliminary objection.

3. A preliminary objection was indeed raised on 27 March 2008. The respondent raised the issue that the court had no jurisdiction for the reason that the Magistrate's Court could only entertain the dispute if the value of the land was below Kshs. 500,000/= and it was the view of the respondent that this was not the case. The respondent also argued that the subject matter was pending the Judicial Review case No. 157 of 2005. In his ruling, the then trial Magistrate (Hon. J.G Kingori), dismissed the preliminary objection,

being of opinion, that the value of the land in question was yet to be ascertained. He was also not convinced that there was proof that the case Judicial Review No. 157 of 2005 raised the same issues in this suit.

4. The preliminary objection having been disposed off, the matter proceeded for hearing, first before Hon. Kingori when the appellant gave evidence. The appellant testified that he is the registered owner of the suit land and he produced a title deed, a search and a green card. He stated that the respondent has planted crops on his land and has put up a temporary house. He reported the matter to the chief and District Officer. The respondent was summoned but did not honour the summons. In cross-examination, he stated that when the respondent entered the land, he was far away at his place of work. He was not aware of a High Court case regarding the land.

5. In his defence, the respondent testified that he was born here (assuming the suit land) and that the Government had embarked on settling persons in the year 2004 in the area (Tinet) . He stated that he was allotted the Plot No. 980 and was issued with a card bearing his Identity Card. The land was 5 acres and was stamped by the District Commissioner and Provincial Forest Officer. It was then endorsed by the surveyor showing that he was settled here. He stated that the appellant was an Administration Police officer at the District Officer's office. When persons were being registered for land, he saw the appellant who informed him that he wanted to be registered for the land that the respondent was living in. The surveyor foresaw a dispute. He stated that he was then called at the D.O's office where the appellant produced a title deed. The D.O said that he could not settle the matter. Later the respondent was evicted by the police. He stated that the appellant is a man from Marishoni and had already been allocated two pieces of land in Marishoni. He testified that they filed the case No. 157 of 2005 and that on 7 October 2005, the High Court gave an order that title deeds should not issue in Tinet Settlement Scheme. He stated that he did not know how the appellant got title. In cross-examination, he mentioned that the High Court case was filed on behalf of many of them and that the "plaintiff" in the said case was their representative. He stated that his allotment card has never been altered.

6. The respondent called his father, one Kipchirchir Tesut as his second witness. He testified that he has lived in Tinet all his life and that the respondent is his 2nd born son. He contended that the appellant has no house in the land under dispute. In cross-examination, he agreed that the respondent has no title to the land that he lives in.

7. His third witness was Peter Kibet Rono. He is brother to the respondent. He testified that the respondent lives on the disputed land which he said was a settlement scheme for the Ogiek community. He stated that he was present when the surveyor came to confirm the persons on the ground. The surveyor said there was a dispute over the respondent's land. He later learnt that the respondent was arrested but he was released. He testified that because of the problems, he and others filed a representative suit before the High Court, which is the suit No. 157 of 2005. He stated that on 7 October 2005, the High Court issued an order stopping the issuance of titles. He produced the order as an exhibit. He was of the view that the title of the appellant was issued after the order of the High Court. He testified that the appellant has never lived in Tinet but is from Marishoni area. In cross-examination, he agreed that the respondent was not a party in the High Court matter although there was a list of claimants. He did not know anything else about the case other than to state that the High Court stopped the issuance of title deeds.

8. After DW-3 had testified, Hon. Kingori was transferred, and the matter taken up by Hon. Mwaniki who wrote the judgment. He took the evidence of the last witness, DW-4 on 8 May 2012. DW-4 was the executive officer in charge of the High Court. His task was to give evidence on the file Nakuru High Court Misc. Case No. 157 of 2005. He testified that what he had was an application for leave to commence judicial review proceedings. Stay orders were issued on 7 October 2005 and the substantive motion was to be filed in 14 days. He was not aware whether the substantive motion was ever filed as the practice was to open a separate file.

9. In his judgment, the learned trial magistrate affirmed that it was not in dispute that the appellant was the registered owner of the suit land. He did observe that the appellant's title was issued on 12 October 2005. He was also of opinion that the respondent had been allotted the same land but never acquired a

title deed. He observed that the respondent's allotment was dated 27 August 1997. He had no reason to doubt the evidence that the respondent was born on the land. He noted that the orders of the High Court were issued on 7 October 2005 and signed on 12 October 2005 and that the appellant's title was issued on 12 October 2005 after the issuance of the said orders. He thus held that the appellant's title could be challenged on the grounds that it was acquired illegally, unprocedurally or through a corrupt scheme, following, I believe, the provisions of Section 26 of the Land Registration Act, 2012. He thus declined to issue a declaration that the appellant is the rightful owner of the suit land. He was of the view that the respondent has some proprietary rights over the suit land as both allottee and occupier. He thus proceeded to dismiss the appellant's case.

10. The appellant has founded his appeal on the following grounds :-

*(i) That the learned trial magistrate erred in law and fact in failing to find that the plaintiff is the true registered proprietor of the land parcel Nakuru Tinet Sotik Settlement Scheme/2296.*

*(ii) That the learned trial magistrate erred in law and fact in failing to find that the plaintiff has a genuine title deed over the suit parcel of land free from any encumbrances.*

*(iii) That the learned trial magistrate erred in law and fact in trying to allude that the plaintiff's title deed was acquired either fraudulently, or through misrepresentation or vide a corrupt scheme yet there was no evidence of this nature that was led by the defendant in order for the trial court to allude these findings.*

*(iv) That the learned trial magistrate erred in law and fact in not finding that the defendant was a trespasser to the plaintiff's parcel of land and that the rights of the plaintiff over the suit land are protected vide Section 28 of the Registered Land Act.*

*(v) That the learned trial magistrate erred in law and fact in finding that the defendant has proprietary rights and interest over the suit parcel of land which fact was never proved by the defendant.*

*(vi) That the learned trial magistrate erred in law and fact in finding that the defendant has proprietary rights and interests over the suit parcel of land vide an allotment letter yet the defendant did not demonstrate what form of ownership is conferred by an letter of allotment.*

*(vii) That the learned trial magistrate erred in law and fact in alluding that the plaintiff's title deed was issued contrary to the court orders issued on the 7th October 2005 yet the said court order was never served personally on the plaintiff and in which event the said orders have already lapsed.*

*(viii) That the learned trial magistrate erred in law and fact in disregarding the plaintiff's evidence and submissions.*

11. The appellant has now asked for the following orders :-

*(i) That the judgment of the learned trial magistrate together with all other consequential orders therefrom be set aside.*

*(ii) That the costs of the appeal be allowed.*

12. The appeal was argued by way of written submissions. In his submissions, Mr. Leina Morintat for the appellant, argued inter alia that the respondent never proved that he was the registered proprietor of the land. He submitted that the appellant had proved that he was the first registered owner of the land and he was protected by virtue of Sections 27, 28, 30 and 143 of the Registered Land Act (now repealed). He submitted that his ownership could not be defeated even where fraud was proved. He relied on the case of **Obiero vs Opiyo (1972) EA 454** and **Gathiba vs Gathiba (2001) KLR 208**. He submitted that the title of

the appellant could not be defeated by the respondent's allotment letter. He further submitted that an allotment letter does not accord one a proprietary interest and relied on the case of *Disa Enterprises vs Kenya Power & Lighting Company Limited (2013) eKLR* and *Marcus Mutua Muluvi & Another vs Philip Tonui & Another (2012) eKLR*. He submitted that the respondent never pleaded any fraud against the appellant and that throughout the proceedings, the respondent never led any evidence of fraud. He relied on the case of *Ratilal Gordhanbhai Patel vs Malji Makanji (1957) EA 314* on the standard of proof for fraud. He submitted that the appellant was not a party to the suit Nakuru High Court Misc. Application No. 157 of 2005 where the order stopping issuance of titles was issued and argued that the said order was never served personally on the appellant. He pointed out that the said order was extracted on 12 October 2005, the same day that the appellant's title was issued and it is likely that the title had already been issued by the time that the order was served. 13. He further averred that order was temporary in nature and there was no proof that any substantive motion for judicial review was ever filed.

14. On her part, Ms. Nancy Njoroge, learned counsel for the respondent, submitted that the title deed issued was the end result of a process where the Government degazetted parts of the Mau Forest in order to allocate to members of the Ogiek community land. She submitted that the respondent was a resident of Tinet forest and was allocated 5 acres identified as parcel No. 980. She referred to the allotment card produced by the respondent in evidence. She pointed out that the appellant never produced a document of allocation but only the title deed whose origin she questioned. She was of opinion that the appellant did not produce a crucial document showing allocation of the land as a member of the Ogiek community and as a resident of Tinet. She submitted that Section 28 of the Registered Land Act, gave overriding consideration to the absolute rights given to a title holder as the respondent was in possession of the land. She submitted that the respondent lives on the land and this is an overriding interest. She further was of opinion that the appellant's title was issued contrary to the orders issued in Nakuru Judicial Review Case No. 157 of 2005. She did not see any fault on the part of the Magistrate.

15. I have considered the matter. This is a first appellate court and I have the mandate to review the evidence and determine for myself whether the trial court arrived at a correct finding.

16. I have already laid down the pleadings of the parties at the beginning of this judgment. But let me just point out briefly, that the case of the appellant as pleaded, was that he is the registered proprietor of the suit land and that the respondent has trespassed into it. That is why he sought orders of eviction of the respondent and a declaration that he is the proper owner of the suit land. On his part, the respondent only filed a statement of defence. He never filed any counterclaim seeking to be declared owner of the suit land or seeking a cancellation of the title of the appellant. In his defence, which is quite brief, he denied being in illegal occupation and pointed out to the case Nakuru High Court Misc. Suit No. 157 of 2005 as a pending suit. I have not seen in his defence anywhere where he has questioned the legality of the title of the appellant. Nowhere is it pleaded by the respondent that the title of the appellant is an illegal title, or that it was acquired fraudulently, or through a corrupt scheme. Neither was it pleaded that the title of the appellant was acquired in violation of a stay order issued in Nakuru High Court Misc. Application No. 157 of 2005.

17. Given the lack of pleadings by the respondent challenging, or questioning the legality of the title of the appellant, it was unfair in my view, for the learned trial magistrate to hold that the title of the appellant was acquired illegally, or through a corrupt scheme. It is trite law that parties are bound by their pleadings. If the respondent wished to have the title of the appellant declared illegal or fraudulent, he needed to plead this, so that the appellant could know that he is facing such an attack for him to brace himself adequately. In absence of any pleadings, I do not see how the learned trial magistrate could proceed to hold that the title of the appellant was acquired fraudulently.

18. The lack of pleadings aside, I do not think that there was any proof of fraud tendered by the respondent. There is allegation by the respondent that the subject land was acquired from a degazettement of the Mau Forest and that the Government was allocating land to persons of Ogiek origin who were already settled in this part of the forest identified as Tinet. Apart from the evidence of the respondent and his witnesses, who I note, apart from the executive officer of the court, are his close relatives, I have absolutely no evidence that the title of the appellant was acquired through the alleged degazettement

process of the Mau Forest, or that the appellant's title fell on land that was to be given exclusively to the Ogiek community. I think the respondent needed to call a person from the Ministry of Lands and Settlement to shed light on this aspect of his case. He did not call any officer to affirm that. Neither did he call any officer to confirm that the allotment card he had, which showed the number 980, fell on the same land that the appellant has title to. It could very well be that the respondent has an allotment card to a completely different parcel on the ground. If it is the position that the allotment card refers to the same land that the appellant has title to, expert evidence needed to be given, or else the danger is that anybody can claim that he has an allotment letter to land that another person has title to without needing to prove anything further.

19. I therefore do not think that I am facing a contest of who has a better title as between the allotment card held by the respondent and the title deed held by the appellant. For it to end up being a contest of a title deed and an allotment letter, there needs to be proof that we are talking of the same land and there is no proof of this. It is not therefore necessary for me to make a determination of whether or not the respondent's allotment letter is a better title than the appellant's title deed, although the general rule is that an allotment letter does not override a title deed, as observed in the case of *Marcus Mutua Muluvi & Another vs Philip Tonui & Another (2012) eKLR*, cited by counsel for the appellant. I do not need to decide the issue in these proceedings, and I will not pretend to do so, but I think in an appropriate suit, a letter of allotment can be used as evidence to demonstrate that the title held by one party is not a legally acquired title, and to argue the point that the person properly entitled to have been issued with title is the one holding the letter of allotment. Let me go no further than this statement, for as I have said, in the circumstances of this case, it has not been shown that the allotment displayed by the respondent was a genuine allotment to the same land that the appellant holds title to.

20. There was great reliance by the learned trial magistrate on an alleged order issued in Nakuru High Court Misc. Application No. 157 of 2005. It was argued by the respondent that the said order stopped the issuance of titles in Tinet area and that the appellant's title ought therefore not to have been issued as it was in violation of the said order. I have looked at the order. What the court was dealing with was an application for leave to commence judicial review proceedings in the nature of prohibition to stop the Government from issuing title deeds in respect of allocations in Tinet, formerly part of South Western and Western Mau Forest. The court did give leave to commence the judicial review proceeding and did issue an order staying any issuance of titles pending the filing of a substantive motion within 21 days. It is not however clear whether the substantive judicial review motion was ever filed. Be as it may, there was no proof tendered by the respondent that the title of the appellant was among the titles that were affected by that order. It is not enough merely to state by word of mouth that such and such a title falls within a certain order without any further evidence. I need to repeat that the respondent needed to call an officer, to prove such allegation; it is not a matter that can be left for assumption. But even assuming that the title was among those affected by the order, and putting aside that there was absolutely no pleading to that effect by the respondent, I have seen that the order was extracted on 12 October 2005. It is the same day that the appellant was issued with title. There was no evidence produced by the appellant that the said order was served before the title of the appellant was issued. In fact, there was no proof at all that the said order was ever served. It was therefore wrong in the circumstances, for the learned trial magistrate to come to the conclusion that the title of the appellant was issued contrary to the stay order.

21. It was argued by the respondent that he has an overriding interest over the land. On the other hand, the appellant has asserted that as absolute owner, he is entitled to all proprietary rights. Section 28 of the Registered Land Act (now repealed), has been cited by both parties. I do note that the title of the appellant was issued in the year 2005 under the regime of the Registered Land Act. The pleadings were filed before the statute was repealed on 2 May 2012 by the Land Registration Act, Act No. 3 of 2012. I am of the view that Section 28 of the Registered Land Act, thus applies to this suit. The same is framed as follows :-

*26. 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.*

22. It will be observed that Section 28 above, does refer to Section 30 on rights that do not require noting in the register. These are the so called overriding interests. Section 30 is drawn as follows :-

*30. Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register -*

*(a) rights of way, rights of water and profits subsisting at the time of first registration under this Act;*

*(b) natural rights of light, air, water and support;*

*(c) rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law;*

*(d) leases or agreements for leases for a term not exceeding two years, periodic tenancies and indeterminate tenancies within the meaning of section 46;*

*(e) charges for unpaid rates and other moneys which, without reference to registration under this Act, are expressly declared by any written law to be a charge upon land;*

*(f) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;*

*(g) the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed;*

*(h) electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law:*

*Provided that the Registrar may direct registration of any of the liabilities, rights and interest hereinbefore defined in such manner as he thinks fit.*

23. I believe the respondent probably relies on Section 30 (g) which provides for the rights of a person in possession. However, for one to avail himself of Section 30 (g), he must demonstrate that "*he is entitled in right only of such possession or occupation...*". In other words, there must be a demonstration that the person has a right to be in possession. One cannot be rightfully in possession if he is a trespasser and a trespasser cannot avail himself of the Section 30 (g) right. The respondent did not demonstrate that he has any right to be in possession of land to which the appellant has title to. As far as the evidence shows, he is nothing more than a trespasser in land that is owned by the appellant. He cannot therefore seek protection under Section 30 (g) of the Registered Land Act.

24. I have already pointed out that there were no pleadings challenging the title of the appellant. It is therefore not even necessary for the appellant to cite Section 143 which protects a title that was acquired as a first registration.

25. I think I have addressed all issues in this appeal. From the above discourse, it is clear that I am of the opinion that the learned trial magistrate erred in his appreciation of the pleadings, the evidence, the facts and the law. I hereby set aside his orders.

26. What then are the appropriate orders to give ?

27. I am of the opinion that the appellant did prove that he is the rightful owner of the suit property. The respondent did not demonstrate that he has any right to continue being in occupation of the said land. The appellant is therefore entitled to the order of eviction as against the respondent. I therefore hereby order the respondent to vacate the suit property within the next 30 days and if he does not do so the appellant can apply for his formal eviction. The respondent is also hereby permanently restrained from entering, being upon, or in any other way interfering with the suit land.

28. Unless otherwise ordered by a court of law, it is hereby declared that the plaintiff is the rightful proprietor of the land parcel Nakuru/Tinet Sotik Settlement Scheme/2296.

29. The appellant has succeeded and the respondent has failed. I award costs of both the suit in the lower court and of this appeal to the appellant.

30. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 4<sup>th</sup> day of May 2017.**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT AT NAKURU**

**In presence of :-**

Mr. Mwalo holding brief for Mr. Leina Morintat for the appellant.

Ms. Nancy Njoroge for the respondent.

CA: Nelima

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT AT NAKURU**