



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

**AT NYERI**

**ELC CASE NO. 233 OF 2014**

**MARION MUTHAMIA KIARA (*Suing on behalf of the estate of*  
**MUTHAMIA KIARA (DECEASED) ..... PLAINTIFF****

**- VERSUS-**

**DR. BEN MUTUNGI MUTHIORA ..... DEFENDANT**

**JUDGMENT**

**Introduction**

1. By a plaint dated **14th September, 2010** the plaintiff herein seeks judgment against the defendant, Dr. Ben Mutungi Muthiora, for:

**a) A declaration that the parcel of land known as LR No. 2787/1274 and IR No.56777 delineated on land survey plan No. 167555 in Nanyuki Municipality in Nanyuki District (“the suit properties”) forms part of the estate of Erastus Muthamia Kiara (deceased) and therefore the defendant is a trespasser thereat.**

**b) A mandatory and perpetual injunction to compel the defendant by himself, his servants, employees or anybody else acting on his behalf to forthwith remove themselves from the portion of the suit properties they occupy.**

**c) Damages for trespass including aggravated damages thereof.**

**d) In the alternative, an order compelling the defendant to compensate and pay the plaintiff the market value of the portion of the suit properties he occupies.**

**d) Costs and interest.**

2. The plaintiff whose husband is the registered proprietor of the suit properties contends that the defendant’s occupation of the suit properties is illegal/unlawful (that is to say amounts to trespass to land).

3. In his statement of defence the defendant denies the plaintiff’s claim and avers that he is the legal owner of a portion of the suit property.

4. The defendant explains that he was allocated the suit property by the Commissioner of lands in 1991.

Arguing that due process was followed in allotment of the portion of the suit properties he occupies to him, the defendant explains that he has extensively developed it.

5 It is the defendant's case that he was unaware of the plaintiff's competing interest to the suit property.

6. Terming the plaintiff's claim against him time barred, and arguing that he has acquired the portion of the suit property he occupies by adverse possession, the defendant points out that he has been in occupation of the portion he occupies for over 18 years.

7. The defendant further contends that the plaintiff's case is tainted with fraud, illegality and irregularity.

## **EVIDENCE**

### **The plaintiff's case**

8. In her testimony, the plaintiff told the court that she does not know how her husband (deceased) got the land. She stated that she got to know about the defendant's occupation of the suit property after her husband passed on and did not know when the developments thereon were erected or whether her husband was aware of the defendant's presence in the suit property. She further stated that she did not know that a letter of allotment was issued to the defendant on 3rd December, 1991 or that the Government had discovered that the plots were allocated to her husband by mistake. She stated that she was not aware that her husband had been asked to surrender the suit properties in order to be offered alternative land and that nobody had approached her to surrender the titles in respect of the suit properties.

9. She told the court that once she learnt about the developments by the defendant erected on the suit property, she asked the defendant to either vacate the suit property or pay her the market value of the portion he occupies.

10. Concerning a claim for compensation, she told the court that she had no idea about the current market price of the suit property.

### **The Defence Case**

11. On his part, the defendant told the court that following an advertisement of plots by Nanyuki local authority, he balloted and got allocated plot No B1 No. 8 Nanyuki Municipality. He paid the consideration required and the property was surveyed by a private surveyor. However, a title deed could not be issued in his favour because it was discovered that another person had a title deed to the property.

12. He stated that he began development on the suit properties in 1993 and occupied it in 1995.

13. The defendant informed the court that nothing happened on the ground until 2006, when the plaintiff approached him with a proposal to buy the plot, which proposal affected other neighbours, and he rejected the proposal.

14. The defendant further informed the court that he contacted Ecoplan Kenya for advice on how to get a title deed to the portion he occupies. Ecoplan Kenya did a report, through which he learnt that the suit property was also allocated to another person.

15. He admitted that he did not take any action against the double allocation because he did not know who he was dealing with. He also thought the County Council of Nanyuki would correct the situation.

16. Concerning his failure to challenge the deceased's interest in the suit property vide the succession proceedings instituted by the plaintiff, he explained that he was not aware of the succession proceedings.

17. D.W.2, **Alexander Mwangi**, an employee of County Government of Laikipia testified that he was in

possession of records from the former office of the town clerk, County Council of Nanyuki. Among the documents in his possession, was a letter of allotment in the name of the defendant and a Part Development Plan map (PDP) of 9 plots (subdivided from the suit property).

18. He informed the court that he was not aware of any amendments to the PDP Map and that no communication on such amendments had been received from the office of Director of Survey.

19. Regarding the payment of rates, he stated that the defendant was in arrears of rate payment for two years although he had been issued with a demand notice.

20. **D.W.2**, was stood down to enable him obtain minutes by the plot allocation committee Nanyuki which had approved the defendant's allocation of the plot he occupied.

The defence counsel did not recall this witness.

21. D.W.3 Josphat Wasilwa, an employee of National Land Commission, based at Laikipia County, took the court through the allocation process. He told the court that the suit property was allocated to the defendant in a meeting of the allocation committee chaired by the District Commissioner, Laikipia on 29th May, 1991 vide Min/Pac/1/91. After plot allocation a PDP map was drawn. The minutes were then forwarded to the Commissioner of Lands who issued a letter of allotment to the defendant. According to DW3, the defendant fully complied with the conditions set out in the letter of allotment, though belatedly.

22. D.W.3 informed the court that another PDP map was prepared in Nairobi leading to issuance of a title deed to the plaintiff's husband.

23. According to D.W.3, there was an error in issuance of a second allotment letter to the plaintiff's husband. The error was discovered and the Commissioner of Lands wrote to the Physical Planner Nanyuki to prepare an alternative plot for the plaintiff's husband. As a result, an alternative plan was developed for an industrial plot.

24. D.W.3 opined that the plaintiff's remedy lies with the Commissioner of Lands, to wit allocation of alternative land. Terming the allocation of the suit properties to the plaintiff's husband irregular, D.W.3 explained that the plaintiff's husband had been allocated an industrial plot within a residential area. He also contended that drawing of a second PDP map was done irregularly because the subject matter of that PDP was already committed.

25. The foregoing notwithstanding, he admitted that between an allotment letter and a lease, a lease is superior.

He informed the court that although a lease is revocable under **Section 14** of the National Land Commission Act, which came into operation in 2014, the lease issued in favour of the plaintiff's husband has not been revoked, though revocation was underway. He further admitted that before a title can be cancelled any party involved must be given an opportunity to be heard.

26. Arguing that the defendants' occupation of the suit property is lawful/proper, he pointed out that his developments on the suit property were approved by the County Government.

### **Plaintiff's submissions**

27. On behalf of the plaintiff, it is submitted that the certificate of lease produced by the plaintiff is legally binding because it has not been revoked or challenged by any regulatory authority.

28. It is further submitted that the Letter of allotment relied on by the defendant is said to be irrelevant because there exists a lawful title in respect of the suit properties (The certificate of lease overrides the letter of allotment). Besides, it is contended that the defendant's letter of allotment was issued

unprocedurally (when a title in respect of the suit property existed).

29. It is pointed out that consideration in respect of the allotment was paid after the time stipulated in the letter of allotment had lapsed.

30. It is further pointed out that because the defendants are in occupation of the suit properties without the plaintiff's permission, they are said to be trespassers thereon.

31. In support of the plaintiff's case, reference is made to the cases of **Harun Muchai Kithongo v. Job Kagwe Njage & Another Kitale ELC Case No.77 of 2013** and **Gitwany Investment Limited v. Tajmal Limited & 3 Others (2006)e KLR.**

32. In **Gitwany Investment Limited v. Tajmal Limited & 3 Others** (supra) Lenaola J., (as he then was) *inter alia* observed:-

**“the position as at now is that both Gitwany and Tajmall claim and in fact have title to the same piece of land. Which title should prevail? The one issued on 24.7.1995 or the one issued on 24.2. 2001? I would agree with the submissions by counsel for the 1st defendant that it is S23(1) of the Registration of Titles Act Cap 281 that this court must turn to. That section reads as follows:-...**

**I have taken the pain in this judgment to set out exactly how each party obtained title.....Sadly none has offered any evidence that Gitwany or the 1st defendant in any way acted fraudulently or that any of them misrepresented any fact and which then led them to obtain fraudulent titles. In fact the entire mess in which those parties find themselves in is the creation of and a matter that must squarely fall at the door step of the Commissioner of Lands, the 3rd party...to my mind the legal possession established by Gitwany entitles it to possession against all other parties that have shown no better title than its own. The 1st defendant falls in that category and once its title is found to be invalid it can only be termed a trespasser...”**

33. Based on the above cited authority, it is submitted that the law takes precedence over all other equitable claims to property.

### **Defendant's submissions**

34. On behalf of the defendant, reference is made to the averments in paragraphs 10 and 14 of the plaint hereto and submitted that the plaintiff's claim is founded on the tort of trespass to land. Title to the suit property having been obtained on 22nd October, 1992, and the defendant having been in use and occupation of the suit property since 1991 (for over 18 years); it is submitted that the plaintiff's claim is time barred.

35. On whether the defendant is a trespasser on the suit property, it is submitted that he is not. The following reasons are given for that contention:

(i) That the defendant is not an intruder in the suit property because he is thereon with the permission of the commissioner of lands; and

(ii) That the plaintiff's claim against the defendant is time barred.

36. It is further submitted that there is nothing upon which the court can make the declaration sought in prayer (a) in the plaint because the plaintiff's title has been extinguished by operation of the law.

### **Analysis and determination**

37. From the pleadings and the submissions, I find the issues for determination to be:-

a) Whether the plaintiff's claim is time barred?

b) If the answer to (a) above is negative, whether the plaintiff has made up a case for being granted the orders sought or any of them?

c) What orders should the court make?

**Whether the plaintiff's case is time barred?**

38. On whether the plaintiff's claim is time barred, despite there being evidence that the defendant was in occupation of the suit property for more than the time stipulated in **Sections 4** of Cap 22 for bringing a claim based on the tort of trespass to land, being of the view that the tortious act herein is a continuing one, that section cannot be relied on to defeat the plaintiff's claim, if it is determined that the defendant occupation of the suit property is unlawful. In this regard see the case of **Janendra Raichand Shah & 2 Others v. Mistry Valji Naran Mulji (2008)eKLR** where it was held:

**“On this, the Court draws an analogy from continuing trespass. Clerk & Lindsell on Torts (17<sup>th</sup> Edition at paragraph 17.02) states;**

**“Every continuance of a trespass is a fresh trespass, in respect of which a new cause of action arises from day to day as long as the trespass continues.”**

**The Defendant was in continuous wrongful possession from 1<sup>st</sup> January 1990 (a day after the lease determined) up to 24<sup>th</sup> November 2004 when the Plaintiffs sold the premises to Vantage. Yet in respect to the Plaintiffs, their cause of action first arose in June 1985 when they became owners of the property. So from June 1985 to 24<sup>th</sup> November 2004 a new cause of action arose each day the Defendant continued to be in wrongful possession....”**

39. As to whether the title held by the plaintiff's late husband has been extinguished by the defendant's alleged adverse possession of the suit property, I note that the defendant neither urged nor proved a case for being declared to be in adverse possession of the suit property. That being the case and given the fact that mere occupation and use of land does not establish adverse possession, I am not persuaded that the plaintiff's title to the suit property has become extinguished. In this regard see the case of **Mistry Valji v. Janendra Raichand & 2 others (2016)eKLR** where the Court of Appeal observed:-

**“...the mere occupation and use does not establish adverse possession.”**

40. On whether the plaintiff has made a case for being granted the orders sought or any of them; this being a case of double allocation of land, and the defendant having failed to lead any evidence capable of proving that the plaintiff's husband was party to the alleged fraud in registration of the suit property in his favour I can do no better than adopt the decision of **Mutungu J.** in the case of **Muthithi Investments Limited v. Andrew S. Kyendo & 22 others (2014)eKLR** where he held:-

**“In regard to issue number (iv) I have already held that the plaintiff is validly registered as proprietor of L.R. NO. 23917 and as such is entitled to enjoy the rights of proprietorship as conferred under section 25(1) of the Land Registration Act NO.3 of 2012.... The Defendants admit in their evidence that they entered into possession of the suit land and caused the same to be subdivided whereupon they allocated their members sub plots on which they started to effect developments. The Defendants place reliance on the alleged letter of allotment as giving them authority to enter and occupy the suit land. As I have stated above the letter of allotment purported to allot plot L.R.NO. 11344/R whose location on the ground was not shown. The land on which the defendants entered and commenced to put up developments was the land that was leased out to the plaintiff pursuant to the court order being L.R. NO. 23917 Nairobi. To the extent that the plaintiff is the registered owner of this land the entry possession and occupation of the same by the Defendants was unlawful. In my view even if**

the defendants had a letter of allotment of the same property the letter of allotment until there was acceptance and compliance with the terms of the allotment remained just an intention on the part of the City Council which the council could rescind. Further on the basis of competing interests the interest of the holder of a validly registered title would be superior to that of the holder of a letter of allotment over the same property even if the letter of allotment may have been issued earlier than the title.

The plaintiff referred the court to a ruling in the case of Lilian Waithera Gachuhi –vs- David Shikuku Mzee (2005) e KLR where the Judge in a ruling delivered on 13<sup>th</sup> July 2005 stated thus:-

“I have no doubt that legally, a letter of allotment is an intention by the Government to allocate land. It is not a title. Therefore, a letter of allotment cannot be used to defeat title of a person who has been registered as the proprietor of the land.....”.

I equally would state that where it is established a valid title has been issued and the proprietor registered as the proprietor of the land a letter of allotment cannot dislodge that title. In a recent ruling of this court delivered on 2<sup>nd</sup> May 2014 in the case of Njuwangu Holdings Ltd –vs- Langata KPA Nairobi & 5 others (ELC NO. 139 OF 2013) the court considered the status of a letter of allotment vis-à-vis a registered title. In the suit I rendered myself as follows:-

“As matters now stand the plaintiff who has a registered title over the suit property has a superior title to that of the 1<sup>st</sup> Defendant who only holds a letter of allotment. I am in agreement with the decision of the court of Appeal in the case of Satya Investments Ltd – Vs- J.K. Mbugua Civil Appeal NO. 164 of 2004, where the court held that a temporary occupation licence could not override a registered title under the Registration of Titles Act Cap 281 Laws of Kenya (repealed). Equally it is my view that a letter of allotment cannot override a duly registered title under the Act and where there is a registered title and a letter of allotment over the same property barring any fraud on the part of the party holding the registered title, a letter of allotment must of necessity give way. The rights of a party who holds the registered title have crystallized as opposed to those of the party holding a letter of allotment which are yet to crystalize.

Thus it is my finding and holding that the Defendants are in illegal and unlawful occupation of the Plaintiff’s Land Parcel L.R. NO.23917 Nairobi and are therefore trespassers and they ought to vacate and deliver vacant possession of the suit premises to the plaintiff ...”(Emphasis supplied).

41. The upshot of the foregoing is that the defendant’s continued occupation of the suit property is unlawful.

42. That notwithstanding, owing to the special circumstances of this case, to wit, the defendant took possession and developed the suit properties on the mistaken belief that he had a good claim to it and given the fact that the plaintiff is not opposed to giving the defendant an opportunity to redeem their interest in the suit property, I find and hold that it is just and equitable to give the defendant an opportunity to redeem his interest in the suit property by paying to the plaintiff the current market price of the land he occupies.

43. Since the plaintiff did not adduce any evidence of the current market value of the suit properties, I direct that the plaintiff commissions a valuation of the suit properties by a registered valuer.

44. In determining the market price of the land, I direct that the valuer takes into account the value of the land only (should disregard the improvements effected thereon by the defendant).

45. The report of the valuer to be filed with the court, within 45 days from the date of this judgment, to

enable it assess the compensation due to the plaintiff.

46. The defendant may, if he so desires, commission an independent valuation of the portion he occupies and have the report filed with the court within the time intimated herein above.

47. In the event that the defendant is not willing to redeem his interest in the suit property, he shall vacate the suit property within 45 days of delivery of this judgment, failing which the plaintiff shall be at liberty to have him forcibly evicted therefrom.

48. As the plaintiff has succeeded in his claim against the defendant, she shall have the costs of the suit and interest at court's rate.

49. ELC 233 of 2014 being a test suit, the judgment entered herein shall apply to HCC 119 of 2016 and HCC 120 of 2010.

50. Orders accordingly.

**Dated, signed and delivered at Nyeri this 6<sup>th</sup> day of December, 2016**

**L. N. WAITHAKA**

**JUDGE**

In the presence of:

Mr. Gichuki h/b for Mwangi Kariuki for the defendants

N/A for the plaintiff

Court Assistant - Esther