



Mugambi & another v Kariuki & 2 others (Environment and Land Case Civil Suit 991 of 2013) [2023] KEELC 16138 (KLR) (16 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16138 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 991 OF 2013**

JA MOGENI, J

MARCH 16, 2023

BETWEEN

JOSEPH KIIRU MUGAMBI 1ST PLAINTIFF

ANNE WANGECI ITINGA 2ND PLAINTIFF

AND

ANN WAMBUI KARIUKI 1ST DEFENDANT

PETER NDUMA 2ND DEFENDANT

NAIROBI CITY COUNTY 3RD DEFENDANT

JUDGMENT

1. The Plaintiffs commenced suit by way of Plaint filed on August 12, 2013 seeking the following orders; -
 - a. A permanent injunction restraining the 1st and 2nd Defendants from alienating, occupying, letting or leasing and developing erecting a fence around all those parcels known as Plot Numbers 10 and 11 Komarock Community Shopping Centre within Komarock Estate.
 - b. A declaration that Plots Numbers 10 and 11 Komarock Community Shopping Centre within Komarock Estate are owned by the 1st and 2nd Plaintiffs respectively.
 - c. Costs of the suit
 - d. Any other relief that the Honorable Court may deem fit to grant.



Plaintiffs' Case

2. The Plaintiffs' case is based on fraudulent transfer and registration of LR NO Nairobi/Block 111/2060 and Nairobi/Block 111/2061 by the Defendants thus depriving them of their rightful ownership of the said property.
3. The 1st Plaintiff's case is that he is the owner of the plot designated as Plot Number 10 (the suit property) situated within Komarock Community Shopping Centre within Komarock Estate. He contends that he acquired the suit property from the original allottee Caroline Irungu and was issued with a Power of Attorney dated September 16, 2009 which was subsequently registered at the Land's office. He avers that he was issued with the original letter of allotment from the City Council of Nairobi dated 22/11/1993 reference number HDD/1992/64.PA/CAM/LS for Plot No 10.
4. The 2nd Plaintiff case is that she is the owner of the parcel of land known as plot Number 11 (the suit property) situated at Komarock Community Shopping Centre within Komarock Estate from the original allottee Silvester Abura and was issued with a Power of Attorney on September 16, 2009 which was subsequently registered at the land's office. She contends that she was issued with the original letter of allotment from the City Council of Nairobi dated November 22, 1993 and referenced as HDD/1992/64.PA/ CAM/ LS for Plot No 11
5. The plaintiffs aver that they conducted searches at the City Council of Nairobi which established that Caroline Irungu and Silvester Abura were indeed the original allottees.
6. That they later came across allotment letters dated July 17, 2003 purportedly issued to the Defendants as owners of Plot Numbers 10 & 11 reference number HDD/64/PA/KAYOLE/NKM/MM/83 and HDD/64/PA/KAYOLE/NKM/MM/84 which they noted were allegedly issued by the Defendants as owners of Plot 10 & 11 respectively and which they contend is a forgery and fraudulent.
7. Maintaining that the registration and Title transfers were fraudulent, the plaintiffs have pleaded particulars of fraud on the part of the 2nd and 3rd Defendants. They aver that as a result of the fraud pleaded the defence of an innocent purchaser for value without notice is not available to the 2nd and 3rd Defendants.

Particulars of Forgery/Fraud of the Defendants

- a. Forging letters of allotment all dated July 17, 2003
- b. Forging letters all dated September 23, 2009 in the letter heads of Nairobi City Council purporting to request their ownership document to be accepted and filed
- c. Issuing, accepting fraud instructions and further acceptance of forged letters of allotment.

Defendants' Case

8. Only the 4th defendant filed a statement of defence. The 1st, 2nd and 3rd defendant despite being served never entered appearance. However, the 3rd defendant filed submissions dated February 24, 2023 they however never filed any defence nor called any witnesses. The evidence against them is uncontroverted.
9. Following the Notice of Motion Application made on April 15, 2021 by the Plaintiffs in which they sought an inhibition order against the 1st, 2nd, and 3rd defendants they also sought to enjoin the 4th Defendant and leave to amend their pleadings to reflect this enjoinder. The court granted this and



upon being enjoined Mr John Mucoiri Kinyua filed a Replying Affidavit dated June 10, 2021 and a statement of defence dated August 2, 2021.

10. He avers that on January 18, 1994 he was allocated Land Parcels No 10 and 11 at Komarock Community Shopping Centre also known as NAIROBI BLOCK 111/2060 and NAIROBI BLOCK 111/2061 by Nairobi City Council as it then was. Further that he paid the requisite charges that is stand premium and rates. He has continued to pay annual rates since then and he attached copies of receipts and the allocation letters.
11. He stated that he made an application and obtained the beacon certificate therefore, he avers that the plaintiffs were not allotted the suit property since he had been allotted the same and he had fully paid.
12. Further he averred that he was issued with two certificates of lease on July 15, 2019 copies of which he attached. He stated that he had constructed on the said plots a workshop and offices which are leased out. He stated that he did not know that there was any matter in court when he was applying for the certificates.
13. He averred that since he obtained a clean title the plaintiffs can pursue the 3rd Defendant. He stated that the plaintiffs should deposit security since the orders sought are adversely affecting the 3rd defendant so that should they lose they should compensate him. Further the suit should be dismissed for being an abuse of the court process and also the plaintiffs are pursuing the wrong person.
14. After pleadings closed, the matter was set down for hearing. The plaintiffs had two witness. PW1 relied on his witness statement dated August 14, 2018 as his evidence in chief and the list of documents on the even date. Therefore, Mr Joseph Kairu Mugambi who is the 1st plaintiff testified on January 25, 2023 as PW1. He is one of the plaintiffs.
15. In his evidence, the 1st plaintiff who had Authority to Act from the 2nd Plaintiff told the court that on September 5, 2002 he purchased the suit property from the original allottee, Caroline Irungu who was never invited a witness. The 1st plaintiff claimed to have obtained a Power of Attorney from the said Caroline Irungu dated September 16, 2009 which was registered at the Lands Office. He testified that he was handed the original allotment letter and receipts for payment of rates and other statutory payments in the name of Caroline Irungu and that he the registered proprietor of the suit property Plot No 10.
16. It was his testimony that the City Council of Nairobi shared the list of the registered allottees from the area and that Caroline Irungu was listed as the owner of Plot No 10 Komarock Community Shopping Centre.
17. He stated that in September 2009 an unknown person tried to encroach on the plot but the City Council intervened had the illegal structures demolished. However, around June 2013 the area member of parliament who is a brother to the 1st Defendant and a former Mayor of Nairobi City Council and a county representative for the area supervised some workers who put a fence around Plot 10 and Plot 11. That the act of fencing the two suit properties is illegal and is tantamount to alienating, grabbing and denying the plaintiff his entitlement.
18. In cross-examination, the plaintiff stated that Plot No 10 was allotted to him and that he had the original allotment letter. It was his testimony that he did not have a title to the suit property because by the time he bought the suit property titles had not been issued. He stated that he bought the suit property from Caroline Irungu who was the original allottee as a result, the receipts for payment of rates and rent were issued under the name of Caroline Irungu.



19. He testified that he had been paying land rent and rates under the name of Caroline Irungu. He testified that when he paid for transfer the 3rd Defendant told him that they could not execute the transfer since there was a court case on the matter. He stated that he had attached a letter from the Nairobi City Council reference number HDD/LEGA/092/09/EM/IK which state that the owners of Plot 10 and Plot 11 are Caroline Irungu and Sylvester Abura respectively. That the beacon certificate was paid for and he had produced the receipts in his bundle of documents.
20. PW2 – Ann Wangeci Itinga – adopted her witness statement and relied on the documents produced by PW1. It was her testimony that she had her letter of allotment, rate and rent payment receipts she however stated that she did not obtain the beacon certificates nor title. Further that the receipts are in the name of Sylvester Abura who executed a Power of Attorney with her dated September 16, 2009. In cross-examination she testified that she bought the land from one Sylvester Abura and she had a genuine power of attorney and that all the documents of the sale agreement were genuine.
21. In re-examination she testified that she did not have the beacon certificate because after she paid she was informed that there was a dispute pending between her and Peter Ndumia and Ann Wambui who are the 1st and 2nd defendants in the instant suit. She stated that the Council would not have authorized her to get letters for the beacon certificate if she had not paid stand premium, that she was given authorization letter by the City Council. With this the Plaintiffs then closed their case.
22. At this point the Counsel for the 3rd defendant indicated that they did not have any witness and that they would rely on the 4th Defendant's evidence.
23. The 4th Defendant called one witness, John Mucori Kinyua (DW1). DW 1 produced his witness statement dated August 2, 2021 and the list of documents of the even date. He testified that he was allocated the suit property Plot No 10 and No 11 also known as NAIROBI/BLOCK 111/260 and NAIROBI/BLOCK 111/261 and that it is not possible that they were allocated to the plaintiffs since he had been allocated and he has paid for them.
24. It was his testimony that he had not encroached on the said plots and that sometime in 2018 he obtained the requisite documents and he applied to the Lands Registrar wand was issued with Certificates of Lease for parcel No 10 and No 11. Komarock Community Shopping Centre.
25. He stated that he did not invade the plaintiffs' plots but that he acquired legally his plots. As a result of the acquisition he has constructed a workshop and offices which are leased out. Further that he was not aware of the pending court case since no summons, or Order was served on him That there was no fraud or illegality in the acquisition of titles for the suit properties as registration was done in accordance with the law.
26. That the suit was without merit and that the plaintiffs should deposit security for costs as the orders issued are adversely affecting him and should they lose the suit then they should compensate him for the loss.
27. In cross-examination he reiterated that he was issued with allotment letter on January 18, 1994 and since then he has been paying land rates and stand premium in his name. During re-examination, he stated that the suit was filed in 2013 and there was no injunction issued. That there was an order issued on April 28, 2021 when he was enjoined in the suit but it is dated May 2021. Therefore, he states that whatever happened between 2013 to May 2021 does not concern him since he was not party to the suit and nothing could have prevented issuance of titles since they were issued as a bloc.
28. He stated at the hearing that he had complied with legal requirements for acquisition of title and approval for development but that he did not have the development plans and neither did he have



the original certificate of lease in court and the original letters of allotment. He however stated that he would willing to produce them if the court grants leave.

29. At this point the Counsel for the 4th Defendant closed the defendant's case.
30. The court directed the parties to bring to court the following original documents
 - a. The original Allotment Letters
 - b. The Original Lease Certificates
 - c. The Original Land Rate, Rent and Stamp Premium Receipts
 - d. The ID card for the two plaintiffs.
31. When the parties attended court on February 7, 2023 the plaintiffs were not able to produce original allotment letters, original lease certificates nor original rent, rate, stand premium and beacon certificate receipts except their ID cards. This is because the original documents were not handed over to them by the original allottees. The 4th Defendant produced the following documents, Original Allotment Letter for Plot No 10 dated January 18, 1994 Ref HDD/1993/64PA/CAN/LS, Original Allotment Letter for Plot No 11 dated January 18, 1994 Ref HDD/1992/64.PA/CAM/LS, Original Lease Certificate for Plot No 10 registered on 15/07/2019, Original Lease Certificate for Plot No 11 Registered on July 15, 2019, Stand Premium, Original Receipt and ID card for the 4th Defendant.
32. After the close of the defendant's case, the advocates for the parties agreed to make closing submissions in writing. Which I have considered in writing this judgment.

Issues for Determination

The following are the issues that arise in this suit for determination:

- a. Who, as between the Plaintiffs and the 1st, 2nd and 4th Defendants, is the lawful owner of the suit property.
- b. Whether to issue an order of permanent injunction restraining the 4th Defendant from trespassing, constructing in or in any other way whatsoever interfering with the Plaintiffs' possession and or ownership of the suit property.
- c. Who shall bear the costs of the suit and interest.

Analysis and Determination

Who, as between the Plaintiffs and the 1st, 2nd and 4th Defendants, is the lawful owner of the suit property.

33. Both the Plaintiff and the 4th Defendant went to great lengths to convince this court that they are the lawful owners of the suit property. On their part, the Plaintiffs told the court that they bought the suit property from the original allottees namely Caroline Irungu and Sylvester Abura vide the sale agreements dated September 5, 2002 which they produced in court. The plaintiffs produced letters from the City Council of Nairobi, one of the letters dated November 30, 2009 stated that Plot 10 and Plot 11 Komarock Shopping Centre were allotted to Caroline Irungu and Sylvester Abura and in they are advised to see the Surveyors for issuance of beacon certificate.
34. The plaintiffs produced copied of allotment letters dated November 22, 1993 referenced HDD/1992/64.PA/CAM/LS to Caroline Irungu and to Silvester Abura which indicated that these



were commercial plots. The plaintiffs then produced in evidence two copies of Power of Attorney executed between the 1st Plaintiff with Caroline Irungu for a consideration of Kshs 250,000 and dated September 16, 2009 for Plot No 10. The same was registered on October 16, 2009 at the Department of Lands. Further the Power of Attorney between the 2nd Plaintiff and the original allottee Mr Silvester Abura for Plot No 11 for a consideration of Kshs 250,000 was registered at the Lands department on October 15, 2009 and it is dated September 16, 2009. The plaintiffs produced the two Power of Attorney documents, the letters of allotment and the stand premium and rent, rate receipts and beacon certificate receipts which were in the names of the original allottees, namely Caroline Irungu and Silverster Abura. The validity of these documents was not challenged by the defendants. Further the plaintiffs also produced a copy of an internal Memo from the Chief Counsel, Housing Development Department of the 3rd Defendant, dated October 1, 2009 which states that Plot Nos 10 and 11 belonged to Caroline Irungu and Silverster Abura respectively. Again the 3rd Defendant never controverted the documents produced by the plaintiffs.

35. It was the plaintiffs' testimony that they were awaiting issuance of titles since by the time they purchased the suit properties titles were not being issued yet.
36. On the other hand, the 4th Defendant also claimed ownership of the suit property. It was his evidence that he was allotted the suit property on January 18, 1994 and he was subsequently issued with the certificate of lease on July 15, 2019. He stated that he commenced construction in 2009 whereas the instant suit was filed in 2013 and there was no injunction issued. The defendant has not filed any documents to attest to the development approval obtained by the 4th defendant to construct on the suit property.
37. I note that on November 6, 2018 an injunction was issued against the 1st to the 3rd defendants. Despite the existence of the injunction the 3rd defendant processed certificates of title for the 4th defendant on September 15, 2019. Copies of Letters of Allotment for Plot No 10 show that there was an allotment letter to the 1st defendant dated July 17, 2003 and Plot No 11 bear the name of the 2nd defendant dated July 17, 2013. Interestingly though despite being duly served by substituted service they neglected to enter appearance and/or file defence and or file any responses. The 3rd defendant entered appearance and filed a s statement of defence dated August 21, 2013 but never called any witnesses.
38. I have scrutinized the letters of allotment produced by the 4th defendant and noted glaring anomalies. The copy for the letter of for allotment for Plot No. 11 the reference is HDD/1992/64.PA/CAM/LS whereas the original copy that the 4th Defendant produced in court bears the Reference HDD/1993/64.PA/CAM/LS. Further the copy produced by the 4th defendant is worded thus for the date 'January 18,1994' yet the original allotment letter of the same plot on the narrative of the date is worded as thus '18th January, 1994'. This is not all on the term the copy produced by the 4th Defendant reads as thus '99 years' residue of this Council's term less three days thereof.' The original copy produced in court read as thus on the Term 'Residue of this council's terms less three days.'
39. Further whereas the copy of the allotment letter for Plot No 11 provided the Stand Premium as Kshs 12,000, the Original Allotment Letter indicated the amount as Kshs 10,000, the Rent from January 1, 1994 was indicated as Kshs 2,400 on the copy of the allotment letter the original of the same copy indicated 2,000 and the Rent date is indicated to be from October 1, 1993-December 31, 1994. The last discrepancy is that the copy of the allotment letter indicates the Total to be at Kshs 14,400 the original allotment letter produced in court indicated the Total to be Kshs 12,000.
40. Section 65 (1) defines primary evidence as a document itself and it follows that a copy of the document itself must be the same. An examination of the allotment letter for Plot 11 itself and the copy showed a difference in the content and the order of information for example the copy which was produced earlier



during PTC as is required by law indicated the User as Residential/commercial, on the other hand when the original letter of allotment for Plot 11 was produced and the court examined it the User was indicated as Commercial/residential. There was no explanation as to why the original allotment letter was different from the copy produced in court. Section 63 of the Evidence Act states that a 'photograph of an original is secondary evidence of its contents.'

41. Further, the 4th Defendant produced a summary statement of accounts from t Nairobi City County which indicate that the Stamp Premium for Plot No 10 was paid twice on June 9, 2015 and April 19, 2012 long after the 30 days allocated in the letter of allotment dated January 18, 1994 was long overdue. This applies to the summary statement of accounts for Plot No 11. He also did not produce any approved drawings for the construction of the office and workshop that he stated to have set up on the suit property. The defense that the 4th Defendant put before the court was that he was an innocent purchaser for value without notice.
42. The 3rd Defendant though choosing not to call any witnesses stated that they will align with the evidence of the 4th defendant. Meaning that they recognized the 4th Defendant's alleged proprietary interest in the suit property as against the Plaintiffs. In their submissions, they have not provided any information on how the 4th Defendant acquired the suit properties.
43. As I already pointed out whereas the 4th Defendant has stated that he was allotted a clean title and has gone ahead to construct, there is no development permission and or approved building plans that were granted prior to the alleged construction. Further there was no lease agreement attached to attest to the evidence given that he has leased out the offices constructed.
44. There were many pointers to the fact that the transaction for the alleged allotment of the suit property between the 3rd Defendant and the 4th Defendant was suspect. The documents produced in evidence by the 4th Defendant which I have mentioned above all point to an illegality. The 4th Defendant may be the holder of a Certificate of Lease in respect of the suit property but I am not convinced that he was indeed allotted the suit property and is therefore a holder of a clean title.
45. The position of the holder of a title deed over a parcel of land is well stated in Section 26(1) of the Land Registration Act which provides as follows:

' The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer 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, 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.'

46. In this particular suit, it is alleged by the Plaintiffs that the 4th Defendant's Certificates of Lease were acquired illegally and unprocedurally. I have raised several issues with regard to the process but also the documentation relating to how 4th Defendant acquired the title which point to illegality. I seek to rely on the following observation of the court in the case of Daudi Kiptugen versus Commissioner of Lands & 4 Others (2015) eKLR:

' In order to determine the question whether the lease held by the plaintiff is valid, it must be demonstrated that it was properly acquired. It is not enough that one waves a Lease or a



Certificate of Lease and assert that he has good title by the mere possession of the Lease or Certificate of Lease. Where there is contention that a Lease or Certificate of Lease held by an individual was improperly acquired, then the holder thereof must demonstrate through evidence that the Lease or Certificate of Lease that he holds was properly acquired. The acquisition of title cannot be construed only in the end result; the process of acquisition is material. It follows that if a document of title was not acquired through the proper process, the title itself cannot be said to be a good title. If this were not the position, then all one would need to do is to manufacture a Lease or Certificate of Title at a backyard or the corner of a dingy street and by virtue thereof claim to the rightful proprietor of the land indicated therein. It is therefore necessary for this court to determine how the plaintiff ended up having a Lease and Certificate of Lease in his name and further determine if the Government did intend to issue the plaintiff with a Lease over the suit land.'

47. The 3rd Defendant is the one which has custody over the records for, among others, the suit property. In its pleadings, the 3rd Defendant confirmed that it allotted the suit property to the 4th Defendant. From the documents produced, the 4th Defendant does not appear to have done a search with the 3rd Defendant because if he did, he would have come to know that the suit property had already been allotted to the Plaintiffs. In the case of *Republic versus City Council of Nairobi & 3 Others (2014) eKLR*, Odunga, J. had this to say about land that has already been allotted:

' Once allotment letter is issued and the allottee meets the conditions therein, the land in question is no longer available for allotment since a letter of allotment confers absolute right of ownership unless it is challenged by the allotting authority or is acquired through fraud, mistake or misrepresentation or that the allotment was out rightly illegal or it was against public interest. In other words, where land has been allocated, the same land cannot be reallocated unless the first allocation is validly and lawfully cancelled.'

48. No evidence was produced by the Defendant that the Letter of Allotment issued by the original allottees who vide the power of attorney donated their power over the suit property to the plaintiffs in respect of the suit property was ever cancelled or was invalid in any way. Had he conducted that search in the records of the 3rd Defendant, he would have found out that the plaintiffs through the power of attorney were the rightful owner of the suit property. He proceeded to deal with the 3rd Defendant and even the transaction with the 3rd Defendant is riddled with inconsistencies which I have highlighted above.

49. Further the 3rd Defendant deliberately refused to call any witnesses knowing too well that they had misled the 4th Defendant in illegally allotting him parcels of land that were not available. The 4th Defendant proceeded to construct offices and a workshop as he testified on the suit property without obtaining approval of the 3rd Defendant. This whole scenario paints a picture that the 4th Defendant was aware that the transaction was not above board.

50. Overall, this court finds that the Plaintiffs are the rightful owners of the suit property and the Certificates of Lease held by the 4th Defendant over the suit property are invalid and of no legal effect for the reason that they were obtained illegally and unprocedurally.

Whether to issue an order of permanent injunction restraining the 4th Defendant from trespassing, constructing in or in any other way whatsoever interfering with the Plaintiff's possession and or ownership of the suit property.

51. With the above finding it follows that the Plaintiffs are entitled to have exclusive use and possession of the suit property to the exclusion of the 4th Defendant. I therefore issue an order of permanent



injunction restraining the 4th Defendant from trespassing, constructing in or in any other way whatsoever interfering with the Plaintiff's possession and or ownership of the suit property.

Who shall bear the costs of the suit and interest.

52. In light of the above, Judgment is entered in favour of the Plaintiffs as set out herein with costs. The Plaintiffs are entitled to impose interest at court rates on their costs of this suit until the same are paid in full.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 16th DAY OF MARCH 2023.

MOGENI J

JUDGE

