M'Iberi v Inspector General of Police & another (Environment & Land Case 178 of 2017) [2023] KEELC 17923 (KLR) (31 May 2023) (Judgment)

Neutral citation: [2023] KEELC 17923 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT & LAND CASE 178 OF 2017

CK NZILI, J

MAY 31, 2023

BETWEEN

HILDA MUKWANYAGA MATHIU M'IBERI .... PLAINTIFF

AND

INSPECTOR GENERAL OF POLICE .... 1ST DEFENDANT

ATTORNEY GENERAL .... 2ND DEFENDANT

JUDGMENT

1. Through a plaint dated 7.6.2007, the plaintiff, the registered owner of LR No. Meru Municipality Block 1/306 sued the defendants claiming that they had threatened her ownership rights, alleging that the suit land which she has occupied developed and operated a private school by the name Meru Junior School with the requisite approvals and permits for over 20 years belongs to the Kenya Police Dog Unit.

2. The plaintiff averred that the defendant's acts amounted to a breach or threat to her right to own and property protection. Therefore, the plaintiff prayed for (a) a declaration that LR No. Meru Municipality Block 1/306 belongs to her, and (b) a permanent injunction barring and restraining the defendants, their agents, and servants or representatives from interfering with, entering, alienating, utilizing, and in any way dealing with LR No. Meru Municipality Block 1/306. The plaint was accompanied by witness statements, a list of documents dated 7.6.2017, and a list of issues dated 5.8.2021.

3. The 1st & 2nd defendants opposed the claim by a defense dated 14.1.2019 denying that the plaintiff was a legally registered owner of the suit land. The defendants averred that the plaintiff's interest in the suit land was fraudulently and illegally procured contrary to the provisions of the *Government Land Act* and the repealed Constitution since it was reserved for government purposes. The defendants averred that the plaintiff unduly influenced the Municipal Council of Meru to allocate her the land, which was not within its mandate, and likewise induced the issuance of an irregular letter of allotment for the land

from the Commissioner of Lands. Therefore the defendants averred that the lease was secured after an allotment letter had lapsed, which was against Sections 9, 12 & 13 of repealed *Government Land Act*. The 1st and 2nd defendants denied the alleged use and further development of the suit land.

4. Additionally, the defendants averred that the land was reserved for government purposes and was never available for disposal to private entities, and due to the doctrine of radical title, it ought to revert to the government as the owner. Moreover, the 1st & 2nd defendants averred that the plaintiff knew that the suit parcel had been reserved for the Kenya Police Dog Unit and could not feign ignorance.

5. Similarly the defendants averred that they were justified to assert their right over the suit parcel since the constitutional rights over illegally and fraudulently acquired proprietary rights could not be extended to the plaintiff. The defendants denied receipt of any notice under Section 13A of the *Government Proceedings Act* but insisted that the plaint did not disclose any reasonable cause of action revealed against them. Lastly, the defendants stated they reserved a right to sue to recover the suit land. The defense was accompanied by a list of documents and witness statements dated 15.11.2021 and 2.2.2022 and contained in a paginated bundle dated 2.2.2022.

6. At the trial, the plaintiff testified as PW 1 and adopted her witness statement dated 7.6.2017 as her evidence in chief. She testified that she was a director of Meru Junior School and the registered owner of the suit land she uses as a playing field. With a complete user and possession for over 20 years. PW1 told the court that she applied to the Meru Municipality Council, and the Commissioner of Lands issued her a lease certificate. PW 1 testified that she followed all the required procedures and acquired the relevant approvals and consents from the Minister, which was communicated to her by a letter dated 8.11.1999 and therefore, an allotment letter was given on 17.7.1996, which she acknowledged receipt by a letter dated 17.2.2010/= and made payments of Kshs.234,270/= to the Commissioner of Lands. Eventually, PW 1 said that after receiving a lease agreement dated 30.6.2000, her parcel was duly surveyed under PDP department Ref No. 167/96/22 and approved by the Commissioner of Lands on 15.5.1996. She denied that the property belonged to the 1st defendant as alleged, for she had legally acquired it. She produced the certificate of the lease as P. Exh No. (1), receipt dated 30.6.2010 as P. Exh No. (2), letters dated 30.3.2010, 11.6.2010, 16.11.2009 and 27.3.2008 as P. Exh No. (3) – (6), a certificate for the school's registration as P. Exh No. (7) PDP map as P. Exh No. (8) letter dated 17.7.1996 as P. Exh No (9), consent from the Minister for Local Government dated 8.11.1995 as P. Exh No. (10), acknowledgment letter dated 17.2.2010 to the Minister as P. Exh No. (11), enclosing the cheque, no adverse comment to the Commissioner of Lands by the DC dated 5.7.1996 as P. Exh No. 12, extract of county minutes as P. Exh No. (13), no objection letter by the Town clerk dated 14.8.1998 as P. Exh No. (14), an extension of lease by the minister dated 17.8.2016 as P. Exh No. (15) cheque dated 23.8.2016 to the Commissioner of Lands as P. Exh No. (16) extract minutes from the Municipal Council Meru as P. Exh No. (17) and special conditions to the lease as P. Exh No. (18).

7. The plaintiff testified that as a lawful owner of the land since 1995, the court should confirm her ownership for she was not only serving the children in the school but also hosting other public activities including municipal games and other festivals for children since too much work without play makes John dull.

8. In cross-examination, PW 1 acknowledged that in the letter of allotment dated 17.7.1996, she complied with the conditions and terms by an acceptance letter and forwarded the requisite monies by a letter dated 11.2.2010, though the letter had given her 30 days to comply. Regarding P. Exh No. 13, PW 1 said she never attended the full council meeting and could not tell therefore who the other attendees were. Her evidence was that she followed all the proper procedures in acquiring the land, as indicated in her exhibits.

9. Arthur K. Mbatia, a physical planner, testified as DW 1 on behalf of the defendants. He adopted his witness statement dated 2.2.2022. He told the court that two Part Development Plans (PDPs) namely; Ref 167/96/22 and 167/88/2 were prepared by the Physical Planning Department, with the latter plan being approved on 20.5.1988 and assigned Approved Part Development Plan No. 65. DW1 testified that the purpose of the assigned plan no 65 was to set apart various parcels of land for public use, among them, the proposed site for the Kenya Police Dog Section under the National Police Service.

10. For Part Development Plan (PDP), Reference No. 167/96/22, DW 1 testified that it was approved on 15.5.1996 and assigned Approved Part Development Plan No. 94. He said that its purpose was to alienate land towards the proposed extension to Meru Junior Primary School. DW 1 told the court that the second PDP could not amend or supersede the earlier PDP; therefore, the former remained the effective plan for the site. DW 1 said that PDP Ref 167/96/22 could not and cannot be implemented since the land it sought to set apart land already been assigned for public use and, therefore, which land was not available for reallocation. DW 1 produced the PDP NO. 167/88/2 as D. Exh No. "1".

11. In cross-examination, DW 1 told the court that he was unaware of any fraud or undue influence exerted by the plaintiff towards acquiring the suit land. He said that since the land had already been reserved for public purposes, it was apparent that an overlap had occurred, which was only discovered in 2021. He clarified that the said fraud or illegality was never reported anywhere or recovery of the land initiated. DW 1 confirmed that the land was next to the Meru Police Station. In re-examination, DW 1 confirmed that D. Exh No. 1 was approved in 1988 as per Section 9 of the *Government Land Act* (repealed), for several government agencies, including the Ministry of Water, Attorney General offices, Registrar of Persons, and the Kenya Police Dog Section which are all government offices. He told the court that the Municipal Council of Meru had no mandate to re-allocate the land for another purpose and that PDP No. 167 could not amend an earlier PDP since the Kenya Dog Unit Section was a public purpose. DW1 termed PDP No. 167 as a mere proposal that was never implemented.

12. Answering questions posed by the court under Order 18 of the Civil Procedure Rules, DW 1 clarified that the 2nd PDP has never been withdrawn since it had also been prepared by an officer by the name of T.G Ndorongo, a physical planner, and had been certified, approved by both the Director of Physical Planning, then Commissioner of Lands a Mr. Njenga.

13. DW 1 told the court that the suit land was a fully fenced open field with no developments on it. DW 1 could not confirm if the second PDP was circulated to the relevant ministries or gazetted. He clarified that the Commissioner of Lands had allowed a change of user.

14. With the close of defense, parties were directed to file and exchange submissions by 31.3.2023. The defendants, unfortunately, filed their written submissions out of time.

15. The plaintiff has submitted that her evidence was clear that she followed due process when applying and acquiring the certificate of the lease. As to the defendants' pleadings and testimony, the plaintiff submitted that it fell short of impeaching her title as required under Sections 24, 25 & 26 of the *Land Registration Act* on account of either irregularity, illegality, fraud, or acquisition through the corrupt scheme since all her documents including the PDP plans were all approved, certified, signed and issued by government officers. Reliance was placed on *Esther Ndegi Njiru & another v Leonard Gatei* (2014) eKLR, *Vijay Morjaria v Nansigh Darbar & another* (2000) eKLR.

16. As to the reliefs sought, the plaintiff submitted that since acquiring the certificate of in 2010, she has been utilizing the land for the last 25 years; hence in the absence of proof of any fraud, illegality, and irregularity, she was entitled to the protection of her land rights under the law. The plaintiff submitted that costs should follow the events unless the court otherwise orders for good reasons. In this case, the

plaintiff urged the court to be guided by *AG v Halal Meat Products Ltd* (2016) eKLR and *Penfmain Co. Ltd v Likoni Community Development & others* (2021) eKLR and *Mohamed Hassanali & another v John Mwaura Wainaina & another* (2022) eKLR.

17. On the other hand, the defendants in the pleadings evidence and written submissions have stated that the suit land was at all material times reserved for a public purpose and in particular for the Kenya Police Dog Unit. Therefore, the defendants took the view that given the reservation on 20.5.1988, the Commissioner of Lands had acted beyond its mandate in allocating the land to the plaintiff which was not available for reallocation by a second PDP dated 15.5.1996. The defendants relied on *Kenya Anti-Corruption Commission v Online Enterprises Ltd and 4 others* (2019), *Robert Mutiso Lelli v Kenya Medical Training College & 2 others* (2021) eKLR and *Dina Management Ltd v County Government of Mombasa & 5 others* Petition No. 8 (E010) of 2021.

18. The court has carefully gone through the pleadings, evidence tendered, issues set out by the parties, and the written submissions. The issues calling for my determination are:

    i. Whether the plaintiff holds a valid title to the suit land.

    ii. If the land was available for re-allocation to the plaintiff.

    iii. If the plaintiff is entitled to the reliefs sought.

19. In trite law, parties are bound by their pleadings, and issues flow from the pleading. To this end, the primary pleadings by the parties are the plaint dated 7.6.2007 and the defense dated 14.1.2019. It appears that the plaintiff did not file a reply to the defense and specifically deny the allegations of fraud, illegality, and irregularity in the acquisition of the certificate of the lease, the doctrine of radical title, and the public interest element in the suit land.

20. In her pleadings, the plaintiff stated that she lawfully and legally obtained all the requisite approvals including; no objection letters from the relevant government departments, made payments of statutory fees, and dues. The plaintiff backed her pleadings with P. Exh No. 1 – 18. None of the said exhibits have objected to the defendants either on account of authenticity, genuineness, forgery, or not emanating from the government offices or agencies which issued them to the plaintiff.

21. DW 1 in his evidence told the court that the second PDP could not supersede or amend the earlier PDP issued in 1988 setting apart the land for public purposes. He also said that the fraud was discovered in 2022 but was not aware of any complaints made or investigations commenced, which resulted in a report to show that the plaintiff either forged documents, induced or unduly influenced or mislead the issuing authority to allot her land and subsequently issue her with a certificate of the lease. The custodian of public land under the law is the National Land Commission under Article 60 of the *Constitution*, as read together with the *National Land Commission Act*.

22. The defendants tendered no evidence that they complained to the said body to recover or invalidate the certificate of lease issued to the plaintiff. There was evidence before the court if any inquiry was made to establish the circumstances under the no-objection letters to the allocation of the land to the plaintiff.

23. As held in *Arthi Highway Developers Ltd v West End Butchery & 6 others* (2015) eKLR and *Vijay Morjaria* (supra), fraud must be pleaded and proved to a balance higher than in ordinary suits since such matters border on criminality. Other than alleging fraud, undue influence, and inducement, the defendants have not tendered any forensic or investigative report to back the particulars set in paragraph 4 of the statement of defense. The farthest the defendants went to try and impeach the title held by the plaintiff was the two PDPs, the proposed Kenya Police Dog Unit and the extension of the plaintiff's school.

24. DW 1 testified that though the second PDP plan underwent all the approvals and certification, it did not overrule or supersede or amend the earlier PDP, and therefore the suit property could not be available for reallocation for a private use since it was already set apart for a public purpose. The defendants further pleaded that the plaintiff knew the public purpose for the suit land before she sought for allocation and, therefore, could not purport to seek a certificate of the lease on government land from an allocating authority that had no power to do so under Sections 9, 16 & 17 of the *Government Land Acts* (repealed) and the retired Constitution.

25. The basis of the knowledge of these facts on the part of the plaintiff was not established by DW 1. No paper trail was put to the plaintiff that she knew the land was under the use of the police as a dog unit. No evidence was tendered that the 1st defendant before the issuance of the allotment letter was in possession of the land with effect from 1988. No site visit or inspection report had been carried out to confirm any encroachment or that the plaintiff was interfering on the affairs of the 1st defendant. Other than D. Exh No. (1) the defendants failed to produce the amended Registry Index Map as per the request made in P. Exh No. 6 for the court to conclude that the second PDP was a mere proposal that was never implemented.

26. As to which procedure and regulations that were not followed by the plaintiff, DW 1 relied on requirements under Sections 7, 9, 12 & 13 of the *Government Land Act* (repealed) and the retired Constitution.

27. The role of the Director of Physical Planning was set out under Sections 22 and 27 of the Physical Planning Act Cap 296, now repealed. The office could authorize alterations or amendments, changes of use, and the revision of physical plans. Alienation could not occur under Section 42 of the *Act* without an approved PDP plan. To this end, the defendants allege that the property was already alienated for public purposes. Even though a new Part Development Plan was procured, approved, and certified DW 1, however, terms it irregular and non-implementable since it could not cancel or amend an earlier one. The two PDPs' approvals are from the same officers working in the same office. The first one was issued in 1988 while the 2nd one was issued in 1996. The 1st defendant as the end user of the PDP was not called to testify before this court and produce any correspondence that after the first PDP was approved, the actual implementation took place, and the property was put into use for the public purpose it was intended for.

28. In *Munyu Maina v Hiram Gathiha Maina* (2013) eKLR, the court said that a registered owner must prove more beyond a certificate of title, prove legality on how he acquired the title and show that the acquisition was lawful, formal, and free from any encumbrances. Similarly, in *Chemey Investment Ltd v AG and others* (2018) eKLR, the court observed that the sanctity of title was never intended to be a vehicle for fraud or illegalities or an avenue for unjust enrichment at a public expense. Again, in *KeNHA v Shalien Masood Mughal & 5 others* (2017) eKLR, the court said a road reserve was an overriding interest that the whole world should have been aware of.

29. In their suit, the defendants relied on Sections 22, 27, and 42 of the *Physical Planning Act* 1996 which they say had not been complied with based on the Supreme Court case in Dina Management (supra).

30. There was no evidence that the defendants had complained to the Director of Surveys and the National Land Commission about any irregular dealing over their land, particularly the alleged illegal reallocation by the second PDP. Instead of calling an independent witness over the alleged reallocation, DW 1 was from the same office which prepared the two PDP's. DW1 could not even tell how, why, and on what basis his office issued two PDPs on different dates over the same piece of land, and lastly of which of the two was ever gazetted. Further, DW1 did not tell the court why his office took too long to

discover the alleged error and if any remedial measures were taken to either revoke or cancel the second PDP. See *Kipsirgoi Investment Ltd v KACC* Civil Appeal No. 288 of 2010 and *James Joram Nyaga and another v Hon. AG & another* (2019) eKLR.

31. The central question however is whether an issuance of a new PDP followed by reallocation of land initially reserved for public purpose was regular, legal and procedural. In other words, can land already alienated revert to the status of an unalienated land for a fresh allocation and if so, under what process?

32. Unalienated land is defined under Section 3 of the repealed *Government Land Act*, as government land which is not for the time being leased to any other person or on respect of which the commissioner had not issued any letter of allotment. The power to do so by the Commissioner of Lands was determined in *KACC v Online Enterprises* *(supra)*. The court said that the power of the Commissioner of Lands to alienate unalienated land under Sections 3 & 7 of the Repealed *Government Land Act* was limited. In the case of Robert Mutiso Lelli (supra), the court held that the Commissioner of Lands could not subsequently reallocate plots to the appellant without a revised PDP.

33. In this suit it was unfortunate that the second PDP was prepared, approved and certified by the very same officers who had prepared the first PDP. This court is alive to the regrettable epoch of our history when the public interest would be sacrificed at the altar of expediency with the public property being dished out left, center and right to the so-called gullible private developers. Sometimes this would happen with the connivance of government officers and the intended beneficiaries. See *Cycad Properties & others v Ministry of Roads and others and Multiple Hauliers E.A Ltd v AG & others* (2013) eKLR.

34. It is trite law that planning comes first and then the survey follows. A letter of allotment is invariably accompanied by a PDP with a definite number. It is normally taken to the Director of Survey who undertakes the surveying which once it complete is referred to the Director of Survey for authentication and approval. Thereafter a land reference number is issued in respect of the plot.

35. In this suit the subject plot had already been reserved for public purpose in 1988. It was no longer an unalienated government land by virtue of Sections 3, 12, 20 and 128 of the *Government Land Act* (repealed) which in any event even if it were, the exclusive preserve to do so was on the President. The plaintiff failed to show that the commissioner of land had the express authority to reallocate the land, if at all it had reverted to an unalienated government land capable of being reallocated for private use. In the absence of that proof, the only conclusion to be derived is that the allocation was a nullity and conferred no interest on the plaintiff.

36. Above this, there are seven key steps in which an allocation of government land must follow. Among them is the gazettement. The plaintiff failed to produce any of the gazettement made before and after the issuance of the 2nd PDP including whether there was any public notice of the available public plots for auction. See *Njilux Motors Ltd v KPLC Ltd* (2003) E.A 2006, *African Line Transport Co. Ltd v AG* (2007) eKLR, *Mako Abdi v Dolal v Ali Duane & others* (2019) eKLR.

37. In *Nelson Kazungu Chai & 9 others v Pwani University* (2017) eKLR at issue was whether the appellant's ownership was legitimate or legal. In the Court of Appeal at issue was whether the PDP was a misrepresentation or could be used to connote ownership and the aspect of due diligence in the acquisition of land. The court held that once the land was allocated to the respondent under Section 2 of the repealed *Government Land Act*, it ceased being an unalienated land and therefore the Commissioner of lands ceased to have the mandate to re-allocate it. The court cited with approval *Said Bin Seif v Mohammed Shaty* (1940) 19 1 KLR 9, on the proposition that an action taken by the Commissioner of Lands without legal authority was null and void.

38. In this suit, under section 112 of the *Evidence Act*, the onus was on the plaintiff to demonstrate that all the procedures to allocate public land under her name were followed as per the *Government Land Act*. Other than P. Exh No's. 1-18 the plaintiff failed to dislodge the fact that the government held a radical or superior title to the land. Once the defendants raised doubts on the irregularity of the certificate of title and non-protection of the same under Sections 24, 25 & 28 of the *Land Registration Act* as read together with Article 40 (6) of the *Constitution*, the plaintiff had to do more and avail all the documentation to show that the suit land reverted to an unalienated government land to be ready for re-allocation. See Henry Muthee Kathurima v Commissioner of Land (2015) eKLR.

39. The plaintiff failed to call either the issuing authority, the Land Registrar or the predecessor to the defunct Municipal Council of Meru to support her claim based on the doctrine of regularity and legality. See *Sammy Mwangangi & 10 others v Commissioner of Lands & 3 others* (2018) eKLR, *Richard Kipkemei Limo v Hassan Kipkemboi Ngeny & 4 others* (2019) eKLR.

40. In *Harrison Mwangi Nyota v Naivasha Municipal Council & 20 others* (2019) eKLR, the role of the defunct County or Municipal Council in the allocation of public land was said to be advisory following which the Commissioner of lands had to strictly adhere to Sections 11, 13 & 15 of the *Government Land Act* as to public auction, upset price terms and rent payable, binding conditions and or any special covenant. See also *Mbau saw mills Ltd v AG* (2014) eKLR.

41. It is trite law that when two equities collide, the first in time prevails. In this suit, I find that there was an attempt to allocate the land twice. Unfortunately, the second attempt was unprocedurally mistaken irregular and illegal. The first in time prevails. See *Gitwany Investment Ltd v Tajmal Ltd & 3 others* (2006) eKLR.

42. In this suit the plaintiff failed to provide material indicating that there was full compliance with Sections 9, 11, 13 & 17 of the repealed *Government Land Act* and that the plot was no longer required for the public. The plaintiff failed to prove the land reverted to an unallocated land status thereby rendering it for conversion to private usage. Once the Commissioner of Lands placed the land for reservation for a public purpose, it could not thereafter purport to reallocate it for private usage without following the due process of the law. It overstepped its mandate. On that score, I find the certificate of the lease held by the plaintiff as unprocedurally and irregularly issued. The certificate of lease held by the plaintiff is hereby recalled and cancelled. The land shall revert to the 1st defendant.

43. Costs of the suit to the defendants.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 31ST DAY OF MAY 2023

In presence of

C.A John Paul

Mbaikyatta for 1st & 2nd defendants

HON. CK NZILI

ELC JUDGE