



**Ongwacho v Nyamweya & 4 others (Environment & Land Case
307 of 2014) [2023] KEELC 17537 (KLR) (25 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17537 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 307 OF 2014**

M SILA, J

MAY 25, 2023

BETWEEN

ABEL MORANGA ONGWACHO PLAINTIFF

AND

ROSEMARY NYAMWEYA 1ST DEFENDANT

PRISCILA MANYARA 2ND DEFENDANT

**PENINA NYARUNDA (SUED AS TRUSTEES OF 84 WOMEN
GROUP) 3RD DEFENDANT**

LAND REGISTRAR, KISII COUNTY 4TH DEFENDANT

HON. ATTORNEY GENERAL 5TH DEFENDANT

JUDGMENT

(Plaintiff filing suit and holding a title to the disputed land; 1st – 3rd defendants also holding title as trustees of a Women’s Group; the Women Group having applied for the suit land in 1985 and issued with an allotment letter in 1986; which they paid for; their Lease however registered in 2012; plaintiff’s predecessor in title obtaining an allotment letter in 1998 and registered as proprietor in 2005; Lessor being the County Council of Kisii; Lessor stating that the only person they recognize as Lessee is the Women Group who were paying land rates and rents from the 1980s; court holding that once an allotment letter is issued and the terms therein complied with through payment of the specified fee, the land was committed and a second allotment letter and Lease could not issue; immaterial that plaintiff’s predecessor secured registration of a lease in her favour before the Women Group; Judgment entered in favour of the Women Group; plaintiff’s title nullified).



A. Introduction and Pleadings

1. This suit was commenced through a plaint which was filed on 12 August 2014. In the plaint, the plaintiff pleaded that he is the lawful registered proprietor of the land parcel Kisii Municipality/Block I/567 (the suit property). He pleaded that he purchased it from the previous owner, one Agnes Kerubo Kenani, in June 2009, and became registered as proprietor on 3 August 2009. He pleaded that on 5 August 2014, the 1st, 2nd and 3rd defendants entered the land and damaged the fence therein and laid claim to ownership of the land. He avers that he conducted an official search which revealed to him that there is a parallel register in name of the 1st – 3rd defendants as trustees of 84 Women Group. He contends that the suit property was legitimately allocated to Agnes Kerubo Kenani and therefore the registration of the 1st – 3rd defendants is fraudulent, inter alia for misleading the office of the Commissioner of Lands to issue an allotment letter to property that had hitherto been alienated. In this suit, the plaintiff seeks a declaration that he is the lawful owner of the land parcel Kisii Municipality/Block I/567; nullification of the Certificate of Lease issued in favour of the 1st – 3rd defendants on 13 April 2012; a permanent injunction against the 1st – 3rd defendants; general damages for trespass; costs and interest.
2. The 1st – 3rd defendants, on behalf of 84 Women Group, filed defence and counterclaim. They denied that Agnes Kerubo Kenani (Agnes) was ever registered as proprietor of the suit property and averred that if the plaintiff entered into any sale agreement with the said Agnes, then he was duped. They pleaded that if there are any documents purporting that Agnes ever held title then the same are fraudulent and obtained through collusion with corrupt land officers. They pleaded that the suit property was allotted to 84 Women Group in 1986. They denied trespassing into the land and claimed that it is them who have all along been in possession, and that it is the plaintiff who on two occasions destroyed the perimeter fence. In the counterclaim, they sought orders for a declaration that it is 84 Women Group who hold the lawful title; a permanent injunction to restrain the plaintiff from the suit property; costs and interest.
3. The Attorney General filed defence on his own behalf and on behalf of the Land Registrar, Kisii. The defence more or less refutes what is pleaded in the plaint and puts the plaintiff to strict proof.

B. Evidence of the Parties

4. PW-1 was the plaintiff who described himself as a businessman. He testified that he purchased the suit property from Agnes through a sale agreement dated 27 July 2009. He was not just purchasing this one parcel but others as well which were included in the agreement. Apart from the suit property, the other properties included in the sale agreement are Kisii Municipality/Block 1/562, 563, 566. He stated that before he purchased the land, he visited it and it was vacant. He carried out a search which confirmed that title was in name of Agnes. He paid the full purchase price and title was transferred into his name. He became registered as proprietor on 30 July 2009. He contended that the Women Group could not have been properly registered as proprietors in the year 2012 since he already held title.
5. Cross-examined, he stated that he paid the purchase price in cash and acknowledged not to have produced proof of payment. He also acknowledged not to have exhibited a consent to transfer and he also did not produce a receipt for payment of stamp duty. He claimed to have paid rates but he did not have the receipts thereof. He refuted letters from the Municipal Council of Kisii and the Commissioner of Lands which are to effect that it is 84 Women Group which is the legitimate owner of the property. He testified that when he bought the land, it was already surveyed and denied that it was beaconsed in the year 2010. He denied destroying a fence put up by the Women Group.



6. Cross-examined by counsel for the State, he stated that he purchased the four properties noted in the sale agreement at Kshs. 2.3 million, each of equal value, though the consideration noted in the register was Kshs. 150,000/= for the subject property. He acknowledged not to have exhibited a copy of the search done before he purchased the property.
7. With the above evidence, the plaintiff closed his case.
8. DW-1 was Peninah Moraa Nyarunda. She is a retired teacher. She testified that 84 Women Group is a Self Help Group. In 1985 the Group applied for a plot in Kisii and they were allotted the suit plot which was described as unsurveyed Plot No. 18. They were issued with an allotment letter dated 9 June 1986 and they paid the requisite fees. The plot was later surveyed in 2010 and they were given a beacon certificate indicating the plot as Kisii Municipality/I/567. They were subsequently issued with a Certificate of Lease which is in name of the 1st – 3rd defendants, as trustees of 84 Women Group. She had a letter dated 12 May 2010 written by the Municipal Council of Kisii to the Commissioner of Lands confirming that they are the rightful owners of the plot. She also had another letter from the Commissioner of Lands, dated 4 April 2012, affirming that they are the rightful owners. She stated that they paid land rents and rates and she had receipts thereof. In 2012, they got information that the plaintiff has trespassed into the property and removed their fence. They reported to Kisii Central Police Station and the plaintiff was called to present his title documents but failed to do so. They then re-fenced the plot.
9. DW-2 was Salome Kwamboka Monda who is a retired nurse and Chairperson of 84 Women Group. She relied on a witness statement which was more or less in line with the evidence of DW-1.
10. With the above evidence, the 1st – 3rd defendants closed their respective cases.
11. DW-3 was Steve Mokaya, the Land Registrar, Kisii. He confirmed that there are two different records in respect of the suit property, one in favour of 84 Women Group, and the other in favour of the plaintiff. He testified that the lease for the Women Group was forwarded from the Land Administration office on 24 March 2011 and registration was effected on 13 April 2012. The lease is for 99 years effective 1 June 1986. On the plaintiff's title, he testified that Agnes Kerubo Kenani became registered as proprietor on 31 January 2005 and she transferred her title to the plaintiff who became registered on 30 July 2009. The plaintiff then charged the property to Ecobank to secure the sum of Kshs. 7 million on 29 October 2009. He testified that he has no records at all in support of this register and it is not supported by any document. He stated that the Green Card shows that the lessor is the County Council of Kisii and lessee as 84 Women Group. The card in respect of the plaintiff shows the lessor as the Republic of Kenya and no information on whether a lease has issued as the part thereof was blank.
12. Cross-examined, he testified that the lessor is not the Government of Kenya but County Council of Kisii. He was of opinion that the documents relating to the title of the plaintiff were planted in the registry. He testified that the title of the plaintiff has a trail of documents in support, including the lease, the survey and physical planning records. He stated that the title of the plaintiff has no trail of documents. He testified that transactions are fortified by receipts but he had none to support the title of the plaintiff. He pointed out that the lease of the plaintiff shows that it was typed and not processed from the system, and also the letter of allotment has the plot number, which is not possible, as County Councils used to allot unsurveyed land. His final opinion was that the proper title is that of 84 Women Group.
13. Cross-examined by counsel for the plaintiff, he acknowledged that he has no forensic report stating that the plaintiff's documents are forgeries. He did not have a record showing 84 Women Group applying for the land. His record did not also have the allotment letter for 84 Women Group. He had no minutes



of the County Council allocating the land. The first document he had for the Women Group was the lease received for registration on 13 April 2012 while the plaintiff's records have Agnes' lease as registered on 31 January 2005. The White Cards were put to him and he acknowledged that they both show the County Council of Gusii and not the Government of Kenya as Lessor. The white card of the plaintiff indicates a charge but he stated that he has no charge instrument in his record. He also acknowledged some payment receipts made by both plaintiff and 84 Women Group.

14. With the above evidence, the 4th and 5th defendants closed their case.
15. I invited counsel to file written submissions, which they did, and I have taken these into account before arriving at my decision.

C. Analysis and Disposition

16. This is another suit where two parties are claiming title to the same land. It is trite that one parcel of land can only have one genuine title. It is the task of this court to go through the documents provided and pronounce, which title, on a balance of probabilities, is the more reputable title. An analysis of this inevitably has to start with the root of title and the documents in support of the title being held by the current registered proprietor.
17. Starting with the plaintiff, what he has produced to support his title is a letter of allotment dated 8 January 1998 issued to Agnes Kerubo Kenani. What is being allotted is an already surveyed parcel of land identified as Plot No. Block I/567. The other document produced by the plaintiff is a lease, again in favour of Agnes Kerubo Kenani, registered on 31 January 2005. The plaintiff also produced the extract of the register of the leasehold title (the white card) which shows Agnes Kerubo Kenani as the first registered lessee on 31 January 2005. There is transfer to the plaintiff on 30 July 2009 and issue to the plaintiff of a Certificate of Lease to him, and subsequent registration of a charge on 29 October 2009. The plaintiff also produced a search showing that he is the registered proprietor, and rates payment receipts for the year 2010 and 2012.
18. On the other hand, 84 Women Group produced a letter of allotment dated 9 June 1986 for an unsurveyed plot measuring 0.0288 Ha, offering a lease for a term of 99 years from 1 June 1986. There is a receipt dated 28 July 1986 showing some payment for what is in the allotment letter. There is a letter dated 24 March 2011 forwarding the lease in favour of the Women Group for registration and the lease was duly registered on 13 April 2012. The Women Group have displayed their Certificate of Lease issued on 19 April 2012, being a leasehold title from the County Council of Gusii, as indicated in the letter of allotment.
19. Apart from these documents, the Women Group also produced two letters which, for the circumstances of this case, are of extreme significance. One is the letter dated 12 May 2010 from the Municipal Council of Kisii. That letter is addressed to the Commissioner of Lands and states as follows :-

RE : ISSUANCE OF TITLE KISII/BLOCK 1/567 – 84 WOMEN GROUP

Kindly refer to the above subject.

The above named allottee is the rightful owner of the captioned property vide the Kisii Plot Allocation Committee (P.A.C) of 14th March 1986. The allottee pays ground rent/rates to the Council.

In view of the foregoing the Council has no objection to the issuance of title to the applicant and do hereby recommend the same to you for execution.

Nyakango



For : Town Clerk.

20. The other letter is that dated 4 April 2012 from the office of the Commissioner of Lands to the District Land Registrar, Kisii and the Chief Land Registrar. That letter states as follows :-

RE : KISII MUNICIPALITY BLOCK I/567

Your letter Ref. KSI/LND/1/7/76 dated 23rd November 2011 refers.

According to the records held in this office, the above plot was allocated and letter of allotment issued to 84 Woman (sic) Group. The allottee paid our fees as required and lease document processed in favour of the 84 Women Group and sent to the Land Registrar, Kisii for registration purposes vide letter Ref. 117224/18 dated 24th March 2011.

The documents which lead (sic) to the registration of title for Agnes Kerubo Kenani never originated from this office and should therefore be expunged from the registry.

Machogo O.N

For : Commissioner of Lands.

21. . Both proprietors claim to hold leasehold titles from the Gusii County Council. The letter from the lessor thus holds a lot of weight, for it is her who leased the land. The lessor asserts that she leased the land to 84 Women Group pursuant to a meeting held on 14 March 1986. Nowhere does the Gusii County Council, the Municipal Council of Kisii, or the County Government of Kisii, acknowledge the plaintiff or his predecessor in title, as holding a lease from them. The plaintiff displayed no proof of any payment of the monies noted in the allotment letter issued to Agnes Kerubo Kenani. I have also not seen any proof of payment of land rates and land rents prior to the year 2010 before the plaintiff had obtained registration. On the other hand, the 84 Women Group produced payment receipts for annual rent dating back to 1986. There is even a demand for payment of property rates and rents dated 14 September 1994. It means that by this time, the Municipal Council of Kisii recognized the 84 Women Group as their lessee and they were receiving land rent and rates from them.
22. In his submissions, Mr. Ochwangi, learned counsel for the plaintiff, tried to fault the letter of allotment of the 84 Women Group pointing out that it is dated 9 June 1986 but the term starts from 1 June 1986. I see no problem with that for it is not unusual to run leases from the 1st day of the month. He also submitted that there was no proof of acceptance. That cannot be true because the 84 Women Group produced the receipt dated 28 July 1986 to demonstrate payment of the monies therein. He also faulted the amounts in that receipt but I see no problem. When I look at that receipt, there appears to have been other payments made before it, for there is noted an advance payment of Kshs. 1,000/= . Counsel also submitted that the registration of the plaintiff has not been questioned by the Land Registrar, which again cannot be true, for the Land Registrar did testify, and his evidence was emphatic, that the title of 84 Women Group is the genuine title and not that of the plaintiff.
23. Counsel also submitted that 84 Women Group could not be registered in the year 2012 since the plaintiff already obtained registration in the year 2009. His contention, I believe, is that since the plaintiff's title was registered first, then it must be given precedence. I am afraid that this is not one of those cases where what was registered first takes precedence. There could not have been issue of a second allotment letter to Anne Kerubo Kenani, and a lease to her, when already a first allotment letter had been issued to 84 Women Group and the terms thereof accepted. Once the offer in the allotment letter was accepted, there could not be issued another offer to another person, for there would be nothing to offer. Upon acceptance of the terms in the letter of allotment, what ought to follow was simply the formality of drawing and registration of the lease. If another person rushed, to somehow obtain



another allotment letter and a lease, and registered it, that would be fraudulent, for there would be no valid lease that he can register, given that the land had already been alienated by the acceptance of the first offer in the allotment letter. The plaintiff's predecessor could not purport to take advantage of the fact that there was delay in issuance of the lease to 84 Women Group and their registration as proprietors to now proceed to register herself as lessee. I will reiterate that once a person has accepted the terms in the allotment letter, then the land became alienated, only pending formalities of registration, and there could not issue a second grant for the same land.

24. What I am saying is actually what was prescribed in the [Government Lands Act](#), Chapter 280, Laws of Kenya (repealed). Section 2 defined unalienated Government land as follows :-

“unalienated Government land” means Government land which is not for the time being leased to any other person, or in respect of which the Commissioner has not issued any letter of allotment. (emphasis mine)”

25. From the above, once the Commissioner of Lands issued a letter of allotment to a person, the land no longer became unalienated Government land, and no second person could be allotted the said land. Though the Government Lands Act applied to Government land, the same principle, that once an allotment letter is issued and accepted, no second allotment could be made, must apply to land under the former Local Authorities as well. 84 Women Group were issued with a letter of allotment in the year 1986 which they complied with and a second grant could not issue in the year 2005.

26. Apart from the above, I observe that the letter of allotment to Anne Kerubo Kenani is not supported by any material. There is no application for the suit property, unlike 84 Women Group who produced a copy of receipt dated 11 October 1985 being payment of Kshs. 100/= as application for a plot. Further, there is no record of the Gusii County Council or Kisii Municipal Council allocating this land to Anne Kerubo Kenani. On the other hand, 84 Women Group have produced the letter dated 12 May 2010 showing that the Kisii Plot Allocation Committee sat and allotted to them the suit property on 14 March 1986. As I mentioned earlier, the local authority which was the owner of the land wrote a letter affirming that the only known lessee is 84 Women Group and this is backed up by payment of land rents way before Agnes got a letter of allotment. I have no evidence that Agnes paid any of the monies mentioned in the allotment letter. I don't know whether the letter of allotment issued to Anne Kerubo is a forgery or not, but whatever the case, it ought not to have issued in the first place, as the land was already committed and alienated to 84 Women Group as I have explained above. I see nothing wrong with the registration of 84 Women Group as the proprietors of the suit property for they subsequently obtained the formal lease which they proceeded to register and obtained formal title.

27. The long and short of it is that I am persuaded that it is 84 Women Group who are the rightful proprietors of the suit property. I proceed to cancel and nullify the purported title held by the plaintiff. I order the Land Registrar to proceed and cancel the register that bears the plaintiff as proprietor, and I issue an order prohibiting the Land Registrar from registering any disposition in that register. I am aware that there was a charge therein. I am not sure if the loan was paid. Whatever the case, with the nullification of the title, the charge therein cannot be enforced. I direct that this judgment be served upon the chargee so that she may protect her interests as chargee in other ways. I also issue an order of permanent injunction, barring the plaintiff and anybody else claiming under him from entering, being upon, using, or in any other way disturbing the quiet possession of 84 Women Group over the suit property. In essence I have dismissed the plaintiff's suit and upheld the counterclaim by 84 Women Group. The plaintiff will bear the costs of both the main suit and of the counterclaim.

28. Judgment accordingly.



DATED AND DELIVERED AT KISII THIS 25 DAY OF MAY 2023
JUSTICE MUNYAO SILA
JUDGE, ENVIRONMENT AND LAND COURT
AT KISII

