



**Nyaguthii Transporters Limited v Kariuki & 5 others (Environment & Land
Case 108 of 2019) [2023] KEELC 18641 (KLR) (28 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18641 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 108 OF 2019**

**A OMBWAYO, J
JUNE 28, 2023**

BETWEEN

NYAGUTHII TRANSPORTERS LIMITED PLAINTIFF

AND

MICHAEL KIMANI KARIUKI 1ST DEFENDANT

HILLARY KIPROTICH NGETICH 2ND DEFENDANT

JANE KOSEN 3RD DEFENDANT

COMMISSIONER OF LANDS 4TH DEFENDANT

DISTRICT LAND REGISTRAR, NAKURU 5TH DEFENDANT

ATTORNEY GENERAL 6TH DEFENDANT

JUDGMENT

1. Nyaguthi Transporters Limited (hereinafter referred to as the plaintiff) has come to court against Michael Kimani Kariuki and 5 others (hereinafter referred to as the defendants) in respect of Land Registration number Molo Township Block 1/1 measuring 0.7835 Ha Old No L K 533/464 (herein after referred to as the suit property). The plaintiff avers that at all times material to this suit, particularly the on the 24th day of April, 1996 the 4th defendant, the Commissioner of Lands lawfully allotted the plaintiff with an un-surveyed residential plot within Molo town then identified on plan No R,52/96/6 doted March 20, 1996. As a condition for the said allotment, the plaintiff was required to pay Kshs 71, 150/- for various fees and other charges which it did on April 30, 1996.
2. Pursuant to the foregoing, the 4th defendant, the Commissioner of Lands granted the plaintiff a lease of 99 years with effect from May, 1996 at an annual rent of Ksh 2,600 (revisable) for the plot that had by then been surveyed and registered as title No Molo Township Block 1/1 measuring 0.7835 HA (Old No LR/533/464). The Plaintiff was then registered as proprietor as lessee of all that parcel of



land previously known as Land Reference No LR/533/464 but now re-registered and known as Molo Township Block1/1.

3. The 4th defendant has now without any colour or right and without any legal basis purported to issue a parallel lease in respect of the suit parcel of land being land parcel No Molo Township Block1/1 in favour of the 1st, 2nd and 3rd defendants and the 5th defendant have also without any legal basis purported to issue a parallel certificate of lease in favour of the 2nd, and 3rd defendant.
4. The plaintiff avers that the parallel lease and parallel certificate issued to the 1st, 2nd and 3rd defendant cannot hold in view of the letter of allotment and lease previously issued in its favour upon meeting all the conditions for granting of the said lease.
5. The plaintiff avers that it has been in occupation of the suit land since April 24, 1996 to date and the purported claim of ownership by the 1st, 2nd and 3rd defendants cannot hold.
6. The plaintiff contends that the parallel lease and certificate of lease in possession of the 1st, 2nd and 3rd defendants was obtained fraudulently by the said 1st, 2nd and 3rd defendants in cohorts and in collusion with the officials of the 4th and 5th defendants. The plaintiff prays for a declaration that the purported lease and certificate of lease purportedly issued in the name of the 1st, 2nd, and 3rd defendants for the land parcel No Molo Township Block1/1 was fraudulently obtained.
7. Moreover, the plaintiff seeks cancellation of the purported lease and certificate of lease purportedly issued in favour of the 1st, 2nd and 3rd defendants in respect of land parcel No Molo. Township Block1/1 and issuance of a certificate of lease in favour of the plaintiff. Last but not least, the plaintiff seeks a permanent injunction to restrain the 1st, 2nd and 3rd defendants, their servants, workmen, agents, allottees and all who claim by or through them be restrained by injunction from entering onto or remaining therein, or wasting, selling, charging, surveying, allocating any portion thereof or in any manner whatsoever engaging in in any way interfering with the plaintiff's quiet enjoyment of it, plus costs of the suit
8. The 1st, 2nd and 3rd defendants filed a defence denying the allegations in the plaint and claimed to be in possession of the suit property and were legally allocated the land, signed a lease and issued with a certificate of lease and therefore he is the lawful owner of the property. The 1st, 2nd and 3rd defendants stated that they are the 1st registered owners and therefore entitled to the property.
9. I have not seen the defence and witness statement and list of documents of the 4th, 5th and 6th defendants.
10. PW1, Edward Nduati Njenga testified that at all times material to this suit, particularly the 24th day of April, 1996 the 4th defendant the Commissioner of Lands lawfully allotted the plaintiff with an un-surveyed residential plot within Molo town then identified on a plan No R 52/96/6 dated March 20, 1996.
11. As a condition for the said allotment, the plaintiff was required to pay Kshs 71,1 50/- for various fees and other charges which it did on 30th February, 1996. Pursuant to the foregoing, the 4th defendant the Commissioner of Lands granted the plaintiff a lease of 99 years with effect from May 1, 1996 at an annual rent of 12,600/= (revisable) for the plot that had by then been surveyed and registered as Title No Molo Township Block 1/1 measuring 0.7835 HA (Old No LR/533/464).
12. On the plaintiff's application the land was converted from a holding under the *RTA* to *Registered Land Act* and the number changed from LR 533/464 to Title no Molo Township Block I / I.
13. In the year 2001 the Commissioner of Lands informed the plaintiff after survey that the land in question was found to measure 0.7635 ha and not 0.680 ha as previously believed. As a result of this



difference in acreage the stand premium was increased from Kshs 54,000/= to Kshs 63,000/= and the land rent from Kshs 10,500/= to Kshs 12,600/=.

14. As a result of the above the plaintiff was required to pay an additional legal fees, stand Premium and land rent so that the lease could be processed and registered and the/ plaintiff paid up an additional sum of Kshs 245,705.00 as required. The Plaintiff was then registered as proprietor as lessee of all that parcel of land previously known as Land Reference No LR/533/464 but now re-registered and known as Molo Township Block 1/1 on September 28, 2005.
15. The 4th defendant has now without any colour of right and without any legal basis purported to issue a parallel lease in respect of the suit parcel of land being land parcel no, Molo Township Block 1/1 in favour of the 2nd and 3rd defendants and the 5th defendant has now also without any legal basis purported to issue a parallel certificate of lease in favour of the 1st, 2nd and 3rd defendant.
16. Upon discovery of the above illegality the plaintiff wrote to the Land Registrar Nakuru who wrote to the chief Land Registrar asking for advice. The parallel lease purportedly issued by the 4th defendant in favour of the 1st / 2nd & 3rd defendants and the parallel certificate of lease issued by the 5th defendant in favour of the 2nd, 3rd and 4th defendant cannot hold in view of the letter of allotment and lease previously issued in the plaintiff's favour upon meeting all the conditions for granting of the said lease. The plaintiff has been in occupation of the suit land since April 24, 1996 to date and the purported claim of ownership by the 1st, 2nd and 3rd defendants cannot hold.
17. The parallel lease and certificate of lease in possession of the 1st, 2nd and 3rd J defendants was obtained fraudulently by the said 1st, 2nd and 3rd defendants in cohorts and in collusion with the officials of the 4th and 5th defendants. On August 31, 2012 the 1st defendant attempted to sub-divide the suit land by going to the suit land with land surveyors.
18. DW1 , Michael Kimani Kariuki, testified that on April 28, 1996, they were allocated land number LR No 533/464 Molo Township. This was surveyed land. The Survey had been done way back in 1988. They took possession of the land immediately with the intention was to subdivide the same amongst the three once title was issued. They were issued with a certificate of lease on May 5, 2004. The land had now become known as Molo Township/ Block 1/1 since sometime back in 2000 when the process of preparing the title commenced. All this time, they were enjoying quiet and peaceful possession of the land.
19. Sometime in 2005, a group known as Nyaguthii Transporters Limited sued the Molo Town Council claiming that the land in question belonged to them on the mistaken belief that the Council owned the land. This was in Molo SRMCC No 145/05 which suit was struck out. They then appealed to the High Court in Nakuru which appeal also failed. During this time, they took down the fence that the defendants had put up. They were also unable to do anything on the land or concerning it including subdividing it because of the court case. The case ended sometime in 2011.
20. They have been in possession of the same since the time of allocation in 1996. Further the land was surveyed way back in 1988 and therefore there is no way the group Nyaguthi could rightfully or legally have been issued with a lease or title for unsurveyed land. Further, they were issued with their title on May 5, 2004 while the group attempts to suggest that it was issued with a certificate of lease on September 19, 2006. DW2 produced the survey map.
21. I have considered the rival evidence and submissions on record and do find that the plaintiff, 1st, 2nd and 3rd defendants both have allotment letters for the suit parcel of land. The plaintiff was issued with the allotment letter Ref T P19/IV/180 on April 24, 1996 in respect of an unsurveyed plot in Molo which



is the land in dispute. Whereas the 1st, 3rd defendant were issued with an allotment letter Ref No 22720 XIV on April 28, 1996 for LR 533/464, being the same land. Both parties were required to pay Kshs 71,150 which they paid albeit after the expiry of the time given in the allotment letters. Both allotment letters had Part Development Plans attached and both parties executed leases. The plaintiff executed a lease on the September 13, 2005 and the same was certified on September 19, 2006. Whereas the 1st, 2nd and 3rd defendants executed a lease on December 2, 2002 and the same was certified on March 29, 2004. The 1st, 2nd and 3rd defendants lease was registered on March 29, 2004. Do this facts depict fraud?

22. Sections 109 and 112 of the Evidence Act provide that:

"109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

...

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

23. The law is clear as found in the case of Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR, where Tunoi, JA (as he then was) stated as follows:

"It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts."

24. As regards the standard of proof, the court of Appeal in the case of Kinyanjui Kamau vs George Kamau [2015] eKLR expressed itself as follows:-

"...It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo vs Ndolo (2008) 1 KLR (G & F) 742 wherein the Court stated that: "...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts."(Emphasis ours)

25. The onus was therefore on the plaintiff who sought to rely on fraud on the part of the defendants and alleged forgery on their documents to prove to the court that the documents relied upon by the defendants in support of their case were forged.

26. I do find no evidence of fraud committed by the 1st, 2nd, 3rd defendant together with the 4th, 5th and 6th defendant as the documents relied on by the parties are all genuine and issued by the government officers in their official capacities.

27. I do find that the plaintiff, and the defendants number 1,2,3 had competing equities in respect of the parcel of land in issue. It is trite law that where the equities are equal the first in the time prevails. In this case, both parties had the privilege to obtain title in the suit property and therefore the first in time to be registered prevailed. The courts in Kenya have made a myriad of decisions on this issue thus:-



In the case of *M’ikiara M’Rinkanya & Another –v- Gilbert Kabeere M’Mbijiwe*, (1982-1988) 1KAR 196, the court held that where there was a double allocation of land, the first allotment would prevail. That therefore there was no power to allot the same property again.

28. In the case of *Hubert L Martin & 2 others v Margaret J Kamar & 5 Others* [2016] eKLR, Munyao J held as follows;

‘A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one’s case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.’

29. This position was emphasized in the case of *Wreck Motors Enterprises vs. The Commissioner of Lands and Others* Civil Appeal Civil Appeal No 71 of 1997, where the court held that:

‘Where there are two competing titles the one registered earlier is the one that takes priority’

30. The same position was held in the case of *Gitwany Investment ltd vs Tajmal Ltd & 3 Others* (2006) eKLR where the Court held that:-

‘...the first in time prevails, so that in the event such as this one whereby a mistake that is admitted, the Commissioner of Lands issues two title in respect of the same parcel of land, then if both are apparently and on the face of them issued regularly and procedurally, without fraud save for the mistake then the first in time must prevail’

31. The law is very clear on the position of a holder of a title deed in respect of land. Section 26 (1) of the *Land Registration Act* provides as follows:

"26 (1) the Certificate of Title issued by the Registrar upon registration, to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all counts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of the 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
- b. Where the Certificate of Title has been acquired illegally un-procedurally or through a corrupt scheme"



32. The Court of Appeal in the case of *Munyu Maina vs Hiram Gathiba Maina* [2013] eKLR, held as follows:

"We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register."

33. Section 80 (1) of the *Land Registration Act* provides that:-

80 (1) "Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake."

34. From the above provisions it is clear that the court has powers to order rectification of a register by directing that the registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake. However in this case I do find no evidence of fraud.

35. The upshot of the above is that I do find that the plaintiff has failed to prove his case on a balance of probability and the same is dismissed with costs.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 28TH DAY OF JUNE 2023.

A. O. OMBWAYO

JUDGE

