



**Maundu v Karanja & another (Environment & Land Case
37 of 2019) [2023] KEELC 18333 (KLR) (14 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18333 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 37 OF 2019**

**TW MURIGI, J
JUNE 14, 2023**

BETWEEN

YVONNE KANINI MAUNDU PLAINTIFF

AND

FRANCIS KARANJA 1ST DEFENDANT

MARIETTA MOVE KAVITHI 2ND DEFENDANT

JUDGMENT

1. By a Plaint dated May 28, 2019, the plaintiff prays for judgment against the defendants jointly and severally for:-
 - a. An eviction/demolition order against the 1st and 2nd Defendants from land parcel No. 692 Kiboko C Settlement Scheme to be supervised by the OCS Makindu Police Station.
 - b. Costs of the suit and interest.
 - c. Any other relief that this Honourable Court deems fit to grant.
2. The 1st Defendant opposed the suit vide the Statement of Defence dated June 29, 2019. He urged the Court to dismiss the suit with costs.
3. The 2nd defendant filed a statement of defence dated October 17, 2019 and denied the Plaintiff's claim.

The Plaintiff's Case

4. The Plaintiff testified as the sole witness in support of her case. She adopted her statement dated 28/05/2019 as her evidence in chief. She also produced the documents in her list of documents as PEX 1-5 respectively.



5. The Plaintiff testified that she is the registered owner of the suit property having been allocated the same by the Land Adjudication and Settlement Department. That after acquiring the suit property, she discovered that the Defendants had encroached and trespassed onto her land while claiming ownership over the same.
6. She told the Court that due to the violation of her right to own property, she instituted Makindu PMCC No. 286 of 2010 where she sought for a permanent injunction to restrain the Defendants from interfering with the suit property. That upon the hearing and determination of the case, the court in its judgment issued a permanent injunction restraining the 2nd Defendant and anyone claiming under them from trespassing, cultivating and or building structures on the suit property after confirming that she was the registered owner of the suit property. She told the Court that she instituted the present suit because the Defendants have refused to vacate from the suit property. She urged the court to grant the orders sought in the Plaint.
7. In cross examination by Ms. Kaloki, she testified that the Defendants are husband and wife. She further testified that in Makindu Case No. 286 of 2010, the 1st Defendant stated in his Defence that he has no claim over the suit property. She reiterated that she instituted the instant suit against the Defendants because they have refused to vacate from the suit property.
8. In cross examination by Mr. Kithuka, she testified that the court order issued in Makindu PMCC No. 286 of 2010 was binding on the 2nd Defendant even though she was not a party to the proceedings. It was her testimony that during the trial in Makindu Case No. 286 of 2010, the Land Adjudication Officer testified that there was a double allocation of the suit property.

The 1st Defendant's Case

9. The 1st Defendant testified as the sole witness in support of his case. He adopted his statement as his evidence in chief and produced the documents in the list of documents as DEX 1 and 2. It was his testimony that he does not know the Plaintiff or the 2nd Defendant. He admitted that the Plaintiff had sued him in Makindu Case No. 286/2010. He denied that the 2nd Defendant is his wife and added that he does not reside on the suit property.
10. In cross examination by Mr Muthiani, he reiterated that he does not know the 2nd Defendant or the Plaintiff. It was his evidence that they did not appeal against the judgment delivered in Makindu PMCC No. 286 of 2010.

The 2nd Defendant's Case

11. The 2nd Defendant called one witness in support of her case. She adopted her statement as her evidence in chief. She also produced the documents in her list of documents as DEX 3 to 6 respectively.
12. It was her testimony that she was allocated the suit property by the survey office. She further testified that she has been residing and cultivating on the suit property for more than 10 years. It was her testimony that the Plaintiff has not instituted any other proceedings against her except the instant suit.
13. In cross examination, she testified that she does not know the 1st Defendant and denied that he was her husband. It was her testimony that after she applied to be allocated land, she received a letter of offer from Kibwezi Lands Office, paid for the same and was subsequently allocated the suit property. It was her testimony that she does not know the Plaintiff and only saw her in court.
14. DW3, the District Land Adjudication Officer Kibwezi testified that the Plaintiff and the 2nd Defendant were issued with letters of offer for the suit property on the same day and by the same office. She testified



that the Defendant paid for the suit property on 22/04/2010 while the Plaintiff's letter of acceptance is dated 12/03/2009.

15. She confirmed that there was a double allocation of the suit property because the same was allocated to the Plaintiff and to the 2nd Defendant. She informed the court that in cases of double allocation, they usually advise and recommend for the sub division of the property between the allottees or give preference to the person who is in occupation of the property. She produced the report dated 13th June, 2022 in which the office of the Land Adjudication and Settlement recommended as follows:-
 - i. The land be shared equally between the two allottees.
 - ii. The person settled on ground to be documented on the land while the one not on the ground seeks a refund of the money paid.
16. In cross examination, she testified that the two offers for Plot No. 692 were issued to the Plaintiff and the 2nd Defendant on the same date and by the same office. That according to their records, the Plaintiff accepted the offer before the Defendant since her acceptance is dated 12/03/2009 while the Defendant's acceptance is dated 22/04/2010. She testified that the Plaintiff did not present the payment receipt issued from the Nairobi office to the Kibwezi office for filing. It was her testimony that the court in Makindu awarded the Plaintiff the suit property.
17. On further cross examination, she reiterated that the two letters of offer were issued on the same day by their office in Nairobi.
18. She confirmed that they did not have the Plaintiff's payment receipt because the allottee did not present it to the Kibwezi office for filing.
19. In re-examination she testified that the file held by Kibwezi Land Adjudication and Settlement office contains the Defendant's payment receipt and the Plaintiff's full balance statement. She reiterated that the Plaintiff did not present the payment receipt to the Kibwezi office for filing.
20. After the close of the hearing the parties tendered their respective written submissions.

The Plaintiff's Submissions

21. The Plaintiff's submissions were filed on 5th July, 2022.
22. Counsel for the Plaintiff identified the following issues for the court's determination: -
 - i. Whether the Plaintiff has any proprietary rights over the suit parcel of land;
 - ii. Whether the 2nd Defendant has any proprietary rights over the suit land;
 - iii. What remedies are available to the parties.
23. On the first issue, Counsel submitted that the Plaintiff accepted the offer for the suit property vide the acceptance letter dated 12/03/2009 which has never been revoked or challenged. It was further submitted that the Plaintiff paid all the requisite charges. Counsel further contended that the Plaintiff was also confirmed as the legal proprietor of the suit property vide the judgment delivered in Makindu PMCC No. 286 of 2010.
24. On the second issue, Counsel submitted that the 2nd Defendant developed structures on the suit property while Makindu PMCC No. 286 of 2010 was ongoing. Counsel argued that such actions were malicious and were meant to defeat the ends of justice. To buttress this argument, Counsel relied on the



case of Cecilia Nyambura Ndungu Vs Ol'kalou Farmers Co-operative Society [2018] eKLR. Counsel maintains that the 2nd Defendant has no proprietary interest in the suit property.

25. Counsel further argued that in accordance with the law of equity, the first in time prevails. Counsel asserted that Plaintiff retains a valid title to the suit property because her letter of acceptance preceded the 2nd Defendant's letter of acceptance. To buttress this argument, Counsel relied on the case of Gitwany Investment Limited Vs Tajmal Limited & 3 Others [2006] eKLR. Counsel contended that the 2nd Defendant's letter of acceptance has no legal basis as the suit property was no longer available for allotment. Counsel urged the Court to allow the Plaintiff's claim.

The 1st Defendant's Submissions

26. The 1st Defendant submissions were filed on 2nd September, 2022.
27. On behalf of the 1st Defendant, Counsel submitted that in Makindu PMCC No. 286 of 2010, the issue for determination was, whether the Plaintiff in that suit is the legal owner of the suit property, was decided in the Plaintiff's favour. That the only difference in the proceedings before the subordinate Court and instant proceedings is the inclusion of the 2nd Defendant herein. Counsel submitted that by virtue of Section 7 of the Civil Procedure Act, this Court is barred from determining the suit against the 1st Defendant when a judgment against him already exists. Counsel urged the court to dismiss the Plaintiff's suit with costs to 1st Defendant.

The 2nd Defendant's Submissions

28. The 2nd Defendant's submissions were filed on 28th July, 2022.
29. Counsel for the 2nd Defendant identified the following issues for the court's determination: -
- i. Whether the 2nd Defendant is the legal owner of Plot No. 692 Kiboko "C" Settlement Scheme.
 - ii. Who is in possession and rightfully entitled to the suit property?
 - iii. Whether the Plaintiff is entitled to the prayers sought.
30. On the first issue, Counsel submitted that the 2nd Defendant's letter of acceptance dated 22/04/2010 confirmed her as the legal owner of the suit property. Counsel further submitted that the 2nd Defendant produced payment receipts to confirm that she had complied with the terms and conditions set out in the letter of offer. Counsel contended that the Plaintiff had not adduced evidence to demonstrate that the 2nd Defendant's letter of acceptance was cancelled so as to bestow on her the sole proprietary rights to the suit property.
31. To buttress this argument, Counsel relied on the following authorities: -
- i. Mbau Saw Mills Limited Vs Attorney General & Another [2015] eKLR.
 - ii. Republic Vs City Council of Nairobi & 3 Others [2014] eKLR.
32. On the second issue, Counsel submitted that the 2nd Defendant took possession of the suit property upon being issued with a letter of acceptance. Counsel further submitted that the 2nd Defendant had proved through the photographic evidence that she is in possession of the land.
33. Counsel argued that despite both of them being allocated the same parcel of land, it was the 2nd Defendant who immediately took possession of the suit property and made developments thereon. Counsel argued that equity aids the vigilant and not the indolent. To buttress this argument, Counsel



relied on the case of *Mwangi & Another Vs Mwangi* [1986] KLR 328. It was submitted that the 2nd Defendant being in possession of the suit property since 2005, has equitable rights which cannot be dislodged in the manner sought in the Plaintiff.

34. On the final issue, Counsel argued that the 2nd Defendant had a legitimate expectation that she would be the sole proprietor of the suit property. That after meeting all the conditions in the letter of offer, the 2nd Defendant developed the suit property in the hope that she would subsequently be issued with a title deed to the suit property. On this submission, Counsel relied on the case of *Nelson Kazungu Chai & 9 Others Vs Pwani University College* [2017] eKLR. Counsel urged the Court to dismiss the Plaintiff's claim with costs to the 2nd Defendant.

Analysis and Determination

35. Having considered the pleadings, the evidence on record and the rival submissions, the only issue that arises for determination is who as between the Plaintiff and the 2nd Defendant is the owner of the suit property.
36. From the evidence on record it is crystal clear that the dispute herein is centred on the ownership of land parcel No. 692 Kiboko 'C' Settlement Scheme (the suit property herein). The Plaintiff and the 2nd Defendant are claiming ownership over the suit property. The record, clearly shows that the dispute is between the Plaintiff and the 2nd Defendant.
37. The 1st Defendant has no claim of ownership over the suit property. The court will therefore proceed to determine the issue at hand which is between the Plaintiff and the 2nd Defendant. The Plaintiff's claim over the suit property is based on the letter of offer dated 15th November, 2005. The Plaintiff testified that she was offered the suit property by the Ministry of lands and accepted the same.
38. In this regard she produced the letter of offer dated 15th November, 2005 from the Ministry of Lands and Housing (Land Adjudication and Settlement Department Nairobi) PEX1, the letter of acceptance dated 12/03/2009 PEX2 and the payment receipt dated 09/09/2001(PEX4) and a bundle of vouchers from the Settlement Fund Trustees(PEX5).
39. The 2nd Defendant's claim over the suit property is equally based on the letter of offer dated 15th November, 2005. The 2nd Defendant testified that she was allocated the suit property by the survey office. In this regard she produced a letter of offer dated 15th November, 2005 (DEX1), a letter of acceptance dated 22/04/2010 (DEX3) and a payment receipt dated 22/04/2010 (DEX2). According to the letter of offer issued to the Plaintiff and to the 2nd Defendant, it is evident that both of them were allocated the same parcel of land(the suit property herein).
40. This was confirmed by the evidence tendered by the District Land Adjudication Officer Kibwezi. It is crystal clear that the suit property was offered to the Plaintiff and to the 2nd Defendant on the same date and from the same office.
41. The record shows that the Plaintiff and the 2nd Defendant complied with the terms and conditions set out in the letter of offer dated 15th November, 2005.
42. They both accepted the offer by making payment for the consideration thereof. It is evident from the letters of acceptance that the Plaintiff accepted the offer before the 2nd Defendant. Upon acceptance of the offer and making payment thereof, the Plaintiff and the 2nd Defendant were allocated the suit property.



43. As correctly stated by the Land Adjudication Officer, the offer issued to the Plaintiff and the 2nd Defendant is a clear case of double allocation of the suit property. The Plaintiff testified that after she realized that the Defendants had trespassed and encroached on her property, she instituted Makindu SPMCC Case No. 286 of 2010 where she sought and was granted a permanent injunction restraining the Defendants from interfering with the suit property. That she instituted the present suit after they failed to vacate from the suit property.
44. I have carefully looked at the certified copies of the proceedings in Makindu PMCC No. 286 of 2010 PEX6, the certified copy of the judgment in Makindu PMCC No. 286 of 2010 PEX7 and a copy of the order PEX9 produced in support of the Plaintiff's case. According to the proceedings (PEX6), it is evident that the Plaintiff had only sued the 1st Defendant in Makindu PMCC No. 286 of 2010. The 2nd Defendant was not a party in Makindu PMCC No. 286 of 2010.
45. According to the judgment (PEX7), the Plaintiff had sought for a permanent injunction to restrain the Defendant from trespassing, cultivating and or building structures on the Plaintiff's land parcel No. 692 Kiboko (c) Settlement Scheme.
46. Vide the judgment delivered on 13/07/2018, the Court granted a permanent injunction restraining the Defendants and any one claiming under them from trespassing, cultivating and or building structures or interfering with the Plaintiff's quiet possession of the suit property.
47. The Plaintiff produced a court order issued in Makindu PMCC No. 286 of 2010 (PEX8). It was her testimony that the order is binding against the 2nd Defendant as it was addressed against her. As earlier noted the 2nd Defendant was not a party to Makindu PMCC No. 286 of 2010. The Plaintiff and 2nd Defendant were allocated the suit property by the Land Adjudication and Settlement Department. They did not contribute to the mess that they have found themselves in. Both of them accepted the offer and paid for the suit property. None of the allocation documents produced by the Plaintiff and the 2nd Defendants were proved to be forgeries and therefore, neither the Plaintiff nor the 2nd Defendant can be blamed for the blunder caused by the Land Adjudication and Settlement Department.
48. The 2nd Defendant testified that she has been in occupation of the suit property for the last 10 years. In this regard, she produced photographs (DEX4) to demonstrate that she is in actual possession of the suit property.
49. It is not in dispute that the Plaintiff and the 2nd Defendant were offered the suit property on the same day and by the same office. It is also not in dispute that they both accepted the offer by making the requisite payment. This Court finds and holds that the Plaintiff and the 2nd Defendant have an equitable interest in the suit property. It is therefore the finding of this court that the Plaintiff and the 2nd Defendant are vested with equitable ownership of the suit property.
50. Accordingly, in the interest of justice, this Court hereby orders that the suit property be sub divided equally between the Plaintiff and 2nd Defendant. Each party to bear its own costs.

HON. T. MURIGI

JUDGE

JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 14TH DAY OF JUNE, 2023.

In the Presence of:-

Muthiani for the Plaintiff.



Ms. Kyalo for the 2nd Defendant.

M. Mutuku for the 1st Defendant.

