



**Muhindi v Maina (Environment and Land Case Civil Suit
922 of 2013) [2023] KEELC 19300 (KLR) (26 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 19300 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 922 OF 2013
LC KOMINGOI, J
JULY 26, 2023**

BETWEEN

BOB RAEDON MULIMU MUHINDI PLAINTIFF

AND

NGUNJIRI MAINA DEFENDANT

JUDGMENT

1. By a plaint dated 26th May 2000, the Plaintiff prays for judgement against the Defendant for;
 - a. A permanent injunction restraining the Defendant, his servants, agents and/or employees from entering, managing, building, claiming ownership or in any other way interfering with plot No.A26.27 Umoja Innercore Sector 1-3.
 - b. General damages for trespassing on the Plaintiff's land.
 - c. A declaratory order that the Plaintiff is the legal and bonafide proprietor of the suit plot.
 - d. Costs of this suit with interest at court rates.
 - e. Any further relief the court may deem fit to grant.
2. It is Plaintiff's case that the suit plot was allocated by the City Council of Nairobi to one Kirtesh P. Shah who later sold it to him. His case is that the Defendant has encroached, entered and/or interfered with his quiet possession of the suit premises claiming that the same belongs to him but without any justifiable reason.



The Defendant's case.

3. The Defendant's statement of defence is dated 12th May 2000. He contends that he bought the suit land from one Fredrick Kamau a long time before the Plaintiff allegedly bought it from Mr. Kirtesh Shah and that if he (plaintiff) indeed bought it, he did so as a second buyer.
4. The Defendant also contends that Mr. Shah whom the Plaintiff alleges to have bought the suit plot from owns a plot within the locality of the suit premises. The same is known as plot No.A26.22 and it is probable that it is the plot that the Plaintiff bought.

Evidence of the Plaintiff.

5. PW1, Jim Amudavaga Muhadia told the court that the Plaintiff who is his cousin left the country for The United States of America in 1997 and he gave him a Power of Attorney dated 31st May 2000 to represent him in his suit. He testified that between April and May 2000, the Plaintiff told him that he wanted to buy a plot at Umoja Inner core and even though he was not present during the transaction, the Plaintiff later showed him the plot.
6. He further testified that that when he went to the suit plot, he found it empty without any structure and also found another man from City Council of Nairobi who introduced himself as Charles and who explained to the Plaintiff how to draw a plan for a house but he could not remember whether he was shown the beacons.
7. It was his testimony that the Plaintiff showed him documents which included a sale agreement dated 14th April 2000 between him and Kirtesh Shah who was the seller for Plot Number A26-27 Umoja Inner core Section 1-3. The Plaintiff also gave him a receipt with which he made payments for rates, survey & plot and a letter of allocation from the City Council of Nairobi dated 22nd November 1993 allotting the suit plot to Kirtesh Shah. It was signed by Mrs. Wandera, Town Clerk, J.F Otieno Advocate and Director of Housing Nairobi City Council .He testified that he was also given a letter dated 7th April 2002 addressed to Kirtesh shah by Kaganya and a ledger document from the council showing the name of the allottee of the suit plot as Kirtesh Shah, the number of the plot and payments made.
8. PW1 also stated that the Plaintiff requested him to look for workers to dig a foundation on the suit plot and that while working on the plot in May 2000, a stranger whom he later identified as the Defendant confronted them claiming the suit plot was his.PW1 halted digging the foundation awaiting clarification only to return a week later and find that the Defendant was undertaking construction but he was stopped by the court.
9. When he was cross-examined, he told the court that he has never met Mr. Kirtesh Shah. When probed on whether he had Documents with the Plaintiff's name as owner of the suit land, he stated that he did not have but they have not changed the names in title because of this pending case. When referred to the memo dated 5th June 2000 from Nairobi City Council stating that Mr. Fredrick Kamau was allocated the suit plot, he stated that by the time it was issued, the Plaintiff had already entered an agreement with Mr. Kirtesh Shah. He added that he does not know if someone else has any documents relating to the suit plot. He also stated that he went to the Director-Housing who told him Fredrick Kamau is a stranger to him while Kirtesh Shah is owner of the suit plot.
10. PW2; Timothy Mwanzah Mwondi was a licensing officer with Nairobi City Council .He told the court that the Plaintiff was introduced to him by a colleague named Mrs. Jane Mudanya, as someone who was looking for a plot. He assisted in identifying one. He then approached a friend called a Mr. Kimani who



- was a broker dealing in property. Mr. Kimani then brought in Mr. Gichere who helped them identify a plot that was for sale and it belonged to Mr. Kirtesh Shah, a former councillor. All of them were shown the site plan of the property by Mr. Gichere before they proceeded to the site at Umoja Innercore where Mr. Gichere showed them Plot A 26-27 Umoja Innercore Sector 1-3 which was vacant.
11. He further stated that they agreed to go to Dandora Housing office which is a branch of City Council of Nairobi handling housing matters in that area for purpose of verification of documents. They went to the office of the assistant director who looked through the record and told them, the owner of the suit plot was Kirtesh Shah. They paid a sum of ksh.30, 000/= and were handed a receipt dated 7th April 2000.
 12. PW2 also stated that when they went back to Mr. Gichere's office at Kariobangi South, the Plaintiff paid Mr Gichere ksh.350,000/= less what was paid to the council. PW2 then went home at the point where Mr. Gichere and the Plaintiff decided to go to a lawyer to reduce the agreement into writing.
 13. When he was cross-examined, he stated that the purchase price agreed upon was Ksh.320,000/- which was paid by the Plaintiff in dollars but no agreement was signed between the Plaintiff and Mr. Gichere.
 14. When referred to the sale agreement dated 14th April 2000, he stated that it shows that the purchase price of the suit land was ksh.100,000/= and the seller was Mr. Kirtesh Shah whom he did not know personally. He further stated that he had seen him generally but did not see him during the transaction .He added that he never signed any document as a witness during the transaction and that he was not paid any commission for any services as he was only helping but Mr. Gichere was paid as a broker.
 15. When he was re-examined, he stated that there were two brokers in the transaction; Mr. Kimani and Mr. Gichere but he does not know how much the brokers were paid and was not there when the sale agreement was drafted. He added that he believes Mr. Gichere was an authorized agent of Kirtesh Shah and believes he represented Mr. Kirtesh Shah as an agent.
 16. PW3; Antony Maina Gichere told the court that the Plaintiff was introduced to him by Mr. Kimani, an agent, in March 2000 as a client who was looking for property to buy at Umoja Innercore. He met the Plaintiff at his offices at Outer Ring Road, Kariobangi Light Industries he was accompanied by one Tim (PW 2), a staff at Nairobi City Council. He then informed them about the properties that were available for sale, among them the suit property which the Plaintiff showed interest in.
 17. It was PW3's testimony that they went to the site and the Plaintiff agreed to buy the undeveloped suit plot. He told the court that he had been authorized to sell the suit plot by the owner, Mr. Kirtesh Shah, who was a former councillor, Wetlands ward. Mr. Kirtesh had given him an original letter of allotment to the suit plot and he had gone to City Council of Nairobi and confirmed that the plot had not been double allocated and it belonged to Kirtesh.
 18. He told the court that he had sold many properties before and had previously advertised the suit plot together with other plots. He stated that he gave Mr. Kirtesh's original letter of allotment dated 22nd November 1993 to the Plaintiff and Tim so that they could go to Nairobi City Council Director of Housing Department at Dandora office to confirm ownership of the plot and confirm the proper allottee thereof. After confirmation, they agreed on a purchase price of ksh.350,000/=.He informed Mr. Kirtesh who said that he could not complete the transaction until the Plaintiff cleared all dues owed to City Council. Dues were paid by the Plaintiff and receipts issued. They then went to M/S Kamau Kinga & Co. Advocates with Tim and the Plaintiff where the sale agreement dated 14th April 2000 was executed and Mr. Kirtesh who was paid his money and PW3 was paid 5% commission.



19. PW3 also stated that the plaintiff introduced his brother Jim Muhadia for the reason that there was an assignment being drafted at the City Council and he had to take Jim there to get it but Jim never went back to him. It was his testimony that in the year 2005, he was approached by a councillor called Fred Chege Kamau who was also his client. The said Fred Chege Kamau told him he had a plot he wanted to sell at Umoja Inner core No.26.27 and when he gave him the plot's map, he discovered that it was the same he plot he had sold to the Plaintiff. PW3 then told Fred Chege Kamau that the Plot belonged to Kirtesh Shah and that he had sold it to the Plaintiff.
20. When he was cross-examined, he stated that he has known Mr. Kirtesh Shah who was a councillor residing in Parklands since 1993 and that he had not given him any other plot to sell at Umoja Inner core. PW3 further stated that he owns Plot No.A26.22 at Umoja Inner core. When referred to the sale agreement dated 14th April 2000, he stated that the suit plot was not sold for ksh.100,000 as indicted on the agreement as Kirtesh Shah was paid ksh.332,500/= while he was paid 17,500 being commission.
21. He further stated that the suit plot belonged to Dandora Housing Development and that is where the dues were paid and if there was any double allocation at City Council, he would have known. When referred to the memo dated 5th June 2000 indicating that the suit plot was allocated to Fredrick Kamau, he stated that it is computer generated and could not be genuine. When referred to the allotment letter addressed to Fred Kamau dated 22nd November 1993 he stated that it is a forgery of the Town Clerk; Wandera's signature.

Evidence of the Defendant.

22. DW1 Francis Ngunjiri Maina, the Defendant testified on 18th March 2019. His witness statement dated 1st August 2013 was adopted as part of his evidence in chief while the documents in his bundle of documents dated 1st October 2013 were adopted as exhibits. He told the court that in 1999, he bought a plot from Fredrick Kamau Being Plot A27.26 Umoja Inner Core Section 1-3 and that they executed a sale agreement at the offices of Mary N.Ngethe Advocates on 20th August 1999. He testified that he paid Kshs.400,000/= being the full purchase price. The vendor had a beacon certificate dated 15th March 1994, Power of Attorney dated 20th August 1999, release letter from the City Council dated 20th August 1999 and a letter of allotment dated 22nd November 1999.
23. It was his testimony that in the year 2000, he went to the suit plot with his wife where they met people digging trenches. He had some documents indicating that the seller was Mr. Kirtesh Shah who had gone to India and the Plaintiff had gone to United States of America. They then found Mr. Jim Muhadia, a relative of the Plaintiff who had the Power of Attorney to handle the Plaintiff's issues. He showed him the sale agreement dated 4th April 2000.
24. He further stated that he searched the alleged seller's Identification number contained in the aforementioned sale agreement and found the seller's Identification Number 7337554 belongs to Shamsherali Mohammed Lalani. He told the court that the suit plot is in his possession and that he has developed it upto the 2nd floor though there is an injunction issued eighteen (18) years ago. He testified that he has a register of allottees from the City Council in Umoja area which does not show that the suit plot was allocated to Kirtesh Shah. He added that the allotment for the suit plot issued to Mr. Kirtesh Shah is altered and all the documents relating to his ownership are fraudulent. He pointed out that the Power of Attorney donated by the Plaintiff to PW1 is purportedly issued in the United States of America without a stamp of the notary public.



25. When he was cross-examined, he stated that he is not aware that the injunction issued herein was issued pending determination of the suit. When referred to the sale agreement dated 20th August 1999, he stated that the original can be traced and that it was entered into the offices of Mary Ngethe Advocates.
26. When referred to the inconsistencies in the date of the sale agreement in his witness statement he states that he bought the suit plot on 20th August 1999, he stated that he bought the suit plot on 10th August 1999 and that he did not manufacture the documents as they were executed by Ms.Ngethe, as an Advocate of the High Court.
27. When he was re-examined, he stated that the sale agreement between him and Fredrick Kamau is dated 10th August 1999 and that the Power of Attorney dated 20th August 1999 is properly executed and duly registered. When referred to the Plaintiff's sale agreement dated 14th April 2000, he stated that he has never seen the seller who is referred to as Mr. Kirtesh Shah.
28. DW 2 Fredrick Kamau Chege's witness statement dated 27th September 2019 was adopted as part of his evidence in chief. He told the court that in 1992-1993, he was a ward Councilor for Huruma Ward and he was a member of Housing Development department. He was allocated the suit plot vide an allotment letter dated 22nd November 1993 .He then made payments and produced receipts as D Exhibit 1(a).He produced a letter from the City Treasury dated 20th August 1999 as D. Exhibit 1 (b).He testified that a beacon certificate dated 15th April 1994 was issued to show the position of the plot.
29. It was his testimony that he sold the suit plot to the Defendant vide a sale agreement dated 10th August 1999 and donated to him the Power of Attorney dated 20th August 1999.
30. When he was cross-examined and referred to his witness statement, he stated that he does not state therein that he was a Councilor between 1992 to 1997 but his allocation was preceded by the applications by those Interested. He further stated that the allocation was an infill scheme where subdivision is not done but it is submitted to the committee to carry out allocation.
31. DW3 Filbert Liwa was a fingerprint officer from the National Registration Bureau. He told the court that on 20th January 2021, the office received summons from this court in respect of this case with a request for verification of ID No.7337554.He testified that according to their records, the holder of the Identification card is Shamsherali Mohammed Lalani. He produced a report showing the initial records used by the Applicant while applying for the Identification card as D exhibit 2. He also testified that one Identification card number cannot be held by two different people thus Kirtesh P. Shah cannot be holder of that Identification Number.
32. When he was cross-examined and referred to the report, he stated that it is a duplicate report as the records show a replacement of what was initially issued .He added that the first registration was not computerized. He further stated that Shamsherali Lalani has not replaced the Identification issued in 1997 nor lost it.
33. He also told the Court that ID Number 7337554 belongs to Shamsherali Mohammed Lalani and not Kirtesh Shah. When referred to the Power of Attorney dated 15th April 2000 donated by Kirtesh P.Shah of Identification Number 7337554 to the Plaintiff herein, he stated that a fingerprint cannot be fabricated and reiterated that the person issued the ID stated therein is Shamsherali Mohammed Lalani. He added that the report has not been interfered with and that they do not keep copies of Identifications of individuals thus he cannot comment about Kirtesh Shah.
34. When he was re-examined, he reiterated that Identification number 7337554 belongs to Shamsherli Mohamed Lalani and that no two people can have the same identification number.



35. At the close of the oral testimonies, parties tendered final written submissions.

The Plaintiff's Submissions.

36. They are dated 4th November 2022. The Plaintiff submits that he has proven his case on a balance of probabilities while the evidence both oral and documentary that was adduced by the 3 Defendant's witnesses had glaring inconsistencies. He points out that there are inconsistencies between the Defendants sale agreement and the Power of Attorney donated to him by Fredrick Kamau as regards consideration of the suit plot.
37. He further submits that there are stark differences between the alleged letter of allotment from Nairobi City Council to Fredrick Kamau and the one that was issued to Kirtesh Shah who sold the suit property to the Plaintiff.
38. He submits that P.Exhibit 3 has been countersigned by Nairobi City Council's Counsel at the time, J.F Otieno, Advocate and equally has a signature for "confirmed ownership" by the aforementioned Director of Housing, Nairobi City Council, unlike the Defendant's exhibit which only has an alleged signature of Mrs. Wandera who was to testify as PW4 but he passed on.
39. He submits that DW3 did not fit the criteria of an "expert witness" who would have the authority to authenticate the contents of a National Identity card and that the report he produced was fake and should be struck out. He adds that a perusal of the signature that is contained in the said report clearly shows that DW3 must have tampered with records at the National Bureau to change the names that appear on ID No.07337554 to have it appear as one belonging to Shamsherali Mohamed Lalani and not Kirtesh P. Shah.

The Defendant's Submissions.

40. They are dated 16th September 2022. They raise the following issues for determination;
- a. Whether the suit herein is merited?
 - b. Who should bear the cost of these proceedings?
41. The Defendant submits that the suit has no merit as the Plaintiff failed to discharge the burden of proof imposed on him by the framework in Section 107, 108 and 109 of the *Evidence Act*. He relies on the case of *Wareham T/A A.F Wareham & 2 others Kenya Post Office Savings Bank*[2004] 2 KLR 91 as well as the case of *Place Investment Ltd v Geoffrey Kariuki Mwenda & Another* [2015] eKLR for that position.
42. He argues that he has demonstrated to the court that he is the owner of the suit land and relies on his evidence on record and that of his witnesses.
43. On the issue of costs, he relies on the Supreme Court case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* [2014]eKLR to submit that costs follow events thus the court should be guided in dismissing the suit.

Analysis and determination.

44. I have considered the pleadings and the evidence on record. I have also considered the written submissions and the authorities cited. The issues for determination are;
- i. Who between the plaintiff and defendant is the owner of Plot No. A26-27 Umoja Inner core Section 1-3?



- ii. Who should bear costs of this suit?
45. In the case of *Caroline Awinja Ochieng & Another v Jane Anne Mbithe & 2 Others* (2015)eKLR the court stated;
- “In determining the above issue, it would perhaps be appropriate to first state that tracing ownership of unregistered land is dependent on tracing the root of title. Unlike registered land where ownership is domiciled and founded in the register of titles, ownership of unregistered land and the ascertainment or confirmation thereof involves the intricate journey of wading through documentary history.”
46. The Plaintiff has led evidence through PW1 that he purchased the suit plot from one Kirtesh Shah. The said Kirtesh Shah was not called as a witness. PW3 who told the court that Kirtesh Shah authorized him to sell the suit plot to the Plaintiff did not have such evidence. Whereas there is a letter of allotment dated 22nd November 1993 issued to the said Kirtesh Shah, his alleged identification number 7337554 belongs to Shamsherali Mohamed Lalani according to DW3, a witness from the National Registration Bureau. The sale agreement dated 14th April 2000 between the Plaintiff and the said Kirtesh Shah indicates that the purchase price of the suit property was ksh.100,000/= while PW3 told the court that Kirtesh Shah was paid ksh.350,000/= less 15 % which was paid to PW3 as agency fees. PW1 and PW2 could not confirm the alleged transaction between the Plaintiff and Kirtesh Shah as they did not witness it. The Plaintiff and Kirtesh did not testify either and as earlier stated, PW3’S testimony is wanting as he has no evidence linking him as Kirtesh agent.
47. On the other hand, the Defendant led credible evidence that he bought the suit plot from Fredrick Kamau who testified to that effect as DW2. He was the original allottee from Nairobi city Council vide the letter of allotment dated 22nd Novembers 1993. There is a sale agreement dated 10th August 1999 between them with the Defendant as vendor of the suit plot for ksh.400,000/= There is also a letter dated 5th June 2000 from Nairobi City Council indicating that the suit plot belongs to Mr. Fredrick Kamau.
48. The Defendant told the court that he purchased the suit property for Fredrick Kamau Chege who was the original allottee. He produced a sale agreement dated 10th August 1999 as exhibit – D3.
- He also produced an Allotment letter dated 22nd November 1993 in the name of Fredrick Kamau Chege, the letter dated 20th August 1999 from the Nairobi City Council. Receipts from the Nairobi City Council to Fredrick Kamau Chege. There is also a letter dated 5th June 2000 by the Nairobi City Council confirming that the plot belonged to Fredrick Kamau.
- There is a ballot dated 15th April 1994 to Fredrick Kamau for Plot A2627. The Power of Attorney dated 26th August 1997 in favour of the defendant was also produced.
49. DW2 Fredrick Kamau Chege confirmed that he sold the suit property to the Defendant. He also gave an elaborate testimony on how he had acquired the same.
50. DW3 Filbert Liwa a finger print officer told the court that the Identification Number 7337554 said to belong to Kirtesh P. Shah infact belongs to someone else by the name Shamsherali Mohamed Lalani.
51. I am satisfied that the Defendant’s testimony is consistent with the documents he has produced before this court.
52. The evidence of the Defendant and his witnesses was not shaken. I find that he was able to demonstrate how he acquired the suit property.



53. The plaintiff's documents on the other hand are full of inconsistencies. There is doubt as to the existence of Kirtesh P. Shah, the purported original allottee of the suit property.
54. I find that the plaintiff has failed to prove his case as against the Defendant on a balance of probabilities.
55. I find that the owner of Plot Number A26-27 Umoja Innercore Section 1-3 is the defendant.
56. In conclusion I find no merit in the Plaintiff's suit and the same is dismissed with costs.

I rely the case of *Jasber Singh Rai & 3 Others v Talochan Singh Rai & 4 Others* (2014) eKLR where it was stated that

“.....the award of costs would normally be guided by the principle that, “costs follow the events”; the effect being that the party who calls forth the event by instating suit, will bear the costs if the suit fail.....”

57. Accordingly, the plaintiff's suit is dismissed with costs to the defendant.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 26TH DAY OF JULY 2023.

L. KOMINGOI

JUDGE.

IN THE PRESENCE OF:

N/A FOR THE PLAINTIFF.

N/A FOR THE DEFENDANT.

COURT ASSISTANT – MUTISYA.

