



**Waweru v Attorney General & 2 others (Environment & Land Case
106 of 2017) [2023] KEELC 18960 (KLR) (20 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18960 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT & LAND CASE 106 OF 2017**

**YM ANGIMA, J
JULY 20, 2023**

BETWEEN

ISABELLA WANGUI WAWERU PLAINTIFF

AND

HON. ATTORNEY GENERAL 1ST DEFENDANT

CLEMENT MUNGAI 2ND DEFENDANT

MARY ANN WANJIRU 3RD DEFENDANT

JUDGMENT

A. The Plaintiff's Claim

1. By a plaint dated June 20, 2013 and amended on December 3, 2013 the Plaintiff sought the following reliefs against the Defendants:
 - a. A declaration that the Plaintiff is the lawful and beneficial owner of all that parcel of land formerly known as Plot No 3 Mbuyu/Laikipia Settlement Scheme and now known as Plot Nos 289, 290 and 291 Mbuyu/Laikipia Settlement Scheme registered in the name of Settlement Fund Trustees.
 - b. A declaration by the honourable court that the Settlement Fund Trustees holds title to the above stated properties in trust for the Plaintiff.
 - c. An order directing the Defendant to transfer to the Plaintiff plot Nos 289, 290 and 291 Mbuyu/Laikipia Settlement Scheme.
 - d. That the honourable court be pleased to issue an order of perpetual injunction restraining the Defendants from sub-dividing, allotting, transferring to



anybody else other than the Plaintiff and/or dealing in any other way with Plot Nos 289, 290 and 291 Mbuyu/Laikipia Settlement Scheme.

e. Costs of this suit.

2. The Plaintiff pleaded that sometime in 1978 she was allocated Plot No1 in Lenginet Settlement Scheme (Plot No1) measuring about 500 acres and that later in 1984 she was asked by the Department of Land Adjudication and Settlement (DLAS) to surrender 200 acres in exchange for allocation of Plot No 3 in Mbuyu/Laikipia Settlement Scheme (Plot No 3). She further pleaded that she accepted the arrangement and took possession of Plot No 3 upon payment of a deposit of Kshs 10,771/= to the SFT.
3. It was the Plaintiff's case that she was advised by DLAS to continue paying for Plot No 1 in full and that the excess payments would be set off against her dues for Plot No 3. It was also her case that she was to be issued with a letter of allotment later on.
4. The Plaintiff pleaded that sometime in 2003 or thereabouts she discovered that Plot No 3 had been fraudulently and illegally subdivided into Plot Nos 289, 290 and 291 the first two of which were allocated to the 1st and 2nd Defendants whereas Plot No 291 was registered in the name of SFT. It was further pleaded that the 1st and 2nd Defendants later on transferred their parcels to the SFT whereafter DLAS subdivided all the 3 plots and allocated them to internally displaced persons (IDPs).
5. It was the Plaintiff's case that the purported sub-division of Plot 3 did not take place on the ground as it was only done on paper. It was her case further that she came to learn that the DLAS had in fact excised 230 acres out of Plot No 1 instead of 200 acres and that Plot No 3 measured about 179 acres instead of the 300 acres she was promised.

B. The 1st Defendant's Defence

6. The Attorney General filed a defence dated January 24, 2009 denying liability for the Plaintiff's claim. The 1st Defendant admitted that the Plaintiff was allocated Plot No 1 but denied knowledge of all other allegations made by the Plaintiff with regard to the surrender of a portion of Plot No 1 in exchange for Plot No 3.
7. The 1st Defendant pleaded that Plot Nos 289 and 290 were lawfully allocated to the 1st and 2nd Defendants following a successful application for allocation who duly paid for the allocations. The 1st Defendant denied all the allegations and particulars of fraud and illegality pleaded in the amended plaint and put the Plaintiff to strict proof thereof. It was further denied that IDPs had been settled on Plot No 3 as alleged by the Plaintiff and the Plaintiff was put to strict proof thereof.
8. The 1st Defendant denied that the Plaintiff had made any payments for Plot No 3 and pleaded that all the payments made by the Plaintiff were in respect of Plot No 1 as there was no documentary evidence to demonstrate otherwise. Consequently, the 1st Defendant prayed for dismissal of the Plaintiff's suit with costs.

C. The 2nd & 3rd Defendants' Defence

9. There is no evidence on record of the 2nd and 3rd Defendants having entered appearance or filed any defence to the action. The material on record shows that the 2nd and 3rd Defendants were served by substituted service through a tiny newspaper advertisement in the Daily Nation of August 1, 2018 more than 5 years after filing suit. There is also no evidence on record to show that the Plaintiff ever sought or obtained an extension of the validity of summons to enter appearance which were last issued in 2015.



D. The Plaintiff's Reply to Defence

10. The record shows that the Plaintiff filed a reply to defence dated May 21, 2014 in which she joined issue upon the 1st Defendant's defence and reiterated the contents of her amended plaint. The Plaintiff reiterated that the purported sub-division and reallocation of Plot No 3 was unlawful and fraudulent. The court was consequently asked to dismiss the 1st Defendant's defence and allow the Plaintiff's claim.

E. Summary of Evidence at the Trial

a. The Plaintiff's Evidence

11. At the hearing hereof, the Plaintiff testified on her own behalf as the sole witness. She adopted the contents of her witness statement dated July 17, 2017 and further statement dated July 17, 2019 as her evidence in-chief and produced the documents in her list of documents dated July 17, 2019 and further list dated February 5, 2021 as exhibits in support of her claim.
12. The gist of the plaintiff's evidence was that she was asked by the DLAS to surrender 200 acres out of Plot No 1 in exchange for 300 acres comprised in Plot No 3. She testified that she paid a deposit of 10% for Plot No 3 in 1990 but she was not given a timeline for payment of the balance. She further stated in cross-examination that she was never given any documentation for the exchange and that the transaction was done orally with officials of DLAS. It was the Plaintiff's evidence that Plot No 3 was legitimately hers and that the Government of Kenya had unlawfully and fraudulently reallocated it to the 2nd and 3rd Defendants who later on sold it back to the government for settlement of IDPs.

b. The 1st Defendant's Evidence

13. The 1st Defendant called Michael Nyamai (DW1) who was a Deputy Director of Land Adjudication and Settlement as its sole witness. He adopted the witness statement of PK Mwangi dated April 28, 2019 as his evidence in-chief. The said PK Mwangi was the Director of Land Adjudication & Settlement at the time of recording the statement. His evidence was to the effect that the Plaintiff merely paid 10% deposit for Plot No 3 without a letter of allotment. He further stated that legal documents such as a charge could not be prepared on the basis of a receipt alone. It was his evidence that Plot No 3 measured only 179.1 acres according to the area list and there were no records in their office of its allocation to the Plaintiff.
14. It was also the evidence of DW1 that there was nothing illegal or fraudulent about the sub-division and reallocation of Plot No 3 since it was never allocated to the Plaintiff and it was never paid for. He confirmed that the government subsequently subdivided what was previously Plot No 3 and allocated it to IDPs for settlement. It was also his case that Plot No 1 was supposed to be repossessed in its entirety since the Plaintiff had failed to take possession thereof and develop it in violation of the terms of the letter of offer. He was thus of the view that the Plaintiff ought not to be compensated for her own default.

F. Directions on Submissions

15. Upon conclusion of the trial, the parties were granted timelines within which to file and exchange their respective submissions. The record shows that the Plaintiff's submissions were filed on February 16, 2023 whereas the 1st Defendant's submissions were filed on March 3, 2023. The 2nd and 3rd Defendants did not file any submissions since they did not enter appearance to the suit.



G. Issues for Determination

16. The court has noted that the parties did not file an agreed statement of issues for determination. Whereas the Plaintiff framed 7 issues in her written submissions, the 1st Defendant framed 3 issues. In the premises, the court shall frame the issues for determination as stipulated under Order 15 rule 2 of the *Civil Procedure Rules*, 2010.
17. Under Order 15 rule 2 of the said *Rules* the court may frame issues from any of the following:
 - a. The allegations contained in the pleadings or in answers to interrogatories.
 - b. The allegations contained in sworn statements made by or on behalf of the parties.
 - c. The contents of documents produced by the parties.
18. The court has considered the pleadings, evidence and documents on record in this matter. The court is of the opinion that the following are the key issues which arise for determination herein:
 - a. Whether the Plaintiff was allocated Plot No 3 in Mbuyu/Laikipia Settlement Scheme.
 - b. Whether the sub-division and allocation of Plot No 3 to the 2nd and 3rd Defendants was illegal and fraudulent.
 - c. Whether the Plaintiff is entitled to the reliefs sought in the suit.
 - d. Who shall bear costs of the suit.

H. Analysis and Determination

a. Whether the Plaintiff was allocated Plot No 3 in Mbuyu/Laikipia Settlement Scheme

19. The court has considered the evidence and submissions on record. The Plaintiff submitted that she was requested by the DLAS to surrender a portion of about 200 acres out of Plot No 1 in exchange for 300 acres comprised in Plot No 3. At the trial, she testified that that arrangement was not made in writing but there was an oral agreement to that effect. She further testified that upon being shown Plot No 3, she took possession and developed the same. It was her case that even though she was never issued with a letter of offer she paid a deposit of 10% for Plot No 3. It was also her evidence that she never paid the remainder of 90% because there was an agreement to the effect that the excess payment for Plot No 1 would be credited towards Plot No 3.
20. The 1st Defendant, on the other hand, submitted that there was no evidence on record to demonstrate that the alleged exchange took place. It was submitted that no documents were produced to demonstrate the exchange; that no letter of offer for Plot No 3 was ever issued to the Plaintiff; that no charge documents were ever prepared to secure payment of the balance of 90%; and that the payment of the 10% deposit was irregularly made without a supporting letter of offer.
21. It is evident from the material on record that the Plaintiff was indeed allocated Plot No 1 in 1978 or thereabouts. There is evidence to show that she paid 10% deposit as required and that a charge was issued to secure the payment of the balance of 90%. What is lacking, however, is official documentation on the alleged surrender and exchange the subject of the proceedings. There are no official documents to show the terms and conditions of the transaction. As the Plaintiff conceded



during cross-examination the transaction was oral as she was never issued with a letter of offer or charge document for the alternative Plot which was identified as Plot No 3.

22. There is no official documentation to show how the balance of 90% on Plot 3 was to be paid and there was no evidence on record to show that any amount paid for Plot No 1 was to be credited to Plot No 3. It is not even clear from the evidence on record how the Plaintiff was able to pay 10% deposit without a letter of offer in the first place. The mere fact that the Plaintiff took possession of Plot 3 or a portion thereof is not necessarily evidence that there was a valid allocation to her or that all dues for the plot were duly settled.
23. The Plaintiff relied heavily upon the letter dated March 6, 2013 by a retired Provincial Land Adjudication and Settlement Officer, Samuel Mwangi which supported her claim for an exchange. The said Mr. Mwangi was, however, deceased by the time the suit came up for trial. The court has noted that the said letter was done by a former public officer long after retirement and shortly before the filing of the instant suit. The said letter cannot be taken as an official government communication or as representing the position of the government. It is strange that the said officer did not document the said process of exchange and allocation of an alternative plot in the ordinary course of his duty when he served as a Provincial Land Adjudication and Settlement Officer since he claimed to have been directly involved in the process. The court is thus unable to accord much probative value to the said letter.
24. The Plaintiff also relied upon a letter dated May 4, 1990 from the District Land Adjudication & Settlement Officer, Nyeri requesting the Director of Land Adjudication & Settlement Officer to prepare legal documents for the Plaintiff with respect to Plot No 3 measuring 179.1 acres on the basis that she had paid 10% deposit for the Plot. It is not clear why the plot size indicated therein is 179.1 acres as opposed to the 300 acres the Plaintiff was claiming as her entitlement. The evidence of DW1 on this request was that legal documents such as a charge could not be prepared on the basis of a receipt alone without any supporting letter of offer. The court agrees with DW1's explanation that a legal charge could not be prepared by SFT on the basis of a receipt alone. There should be some supporting documents such as an agreement for an exchange or a letter of offer.
25. The court is thus of the opinion that even though there may have been some informal, oral agreement between the Plaintiff and the DLAS the same was never documented and formalized in the manner in which the SFT dealt with allocation of land in settlement schemes. The fact that the Plaintiff settled on a portion of 5 acres within Plot No 3 may have been pursuant to the informal arrangement. In the absence of an agreement for a surrender and exchange, letter of offer, and charge document the court is unable to agree with the Plaintiff's claim that she was allocated Plot No 3 and that she had acquired a legal interest therein. The Plaintiff may well have been given an oral promise for alternative land which may have been broken. But breach of such a promise cannot entitle the Plaintiff to ownership of Plot No 3.

b. Whether the sub-division and allocation of Plot No 3 to the 2nd and 3rd Defendants was illegal and fraudulent

26. The Plaintiff's contention that the sub-division and allocation of Plot No 3 to the 2nd and 3rd Defendants was unlawful was premised on the supposition that she was the legitimate allottee thereof. Her contention was that since she had already been allocated Plot No 3, then the same was not available for re-allocation without following due process of revocation of her allotment. Since the court has found and held that there is no evidence on record to demonstrate such allocation to the Plaintiff then the SFT was at liberty to allocate the same property to any other person. In the premises, the Plaintiff's allegations of fraud and illegality cannot stand.



c. Whether the Plaintiff is entitled to the reliefs sought in the suit

27. The court has already found that the Plaintiff has not proved that she was allocated Plot No 3. The Plaintiff's claim was hinged upon her allocation of the said property and the alleged fraudulent and illegal re-allocation of the same to the 2nd and 3rd Defendants. All the reliefs sought in the suit were also hinged upon the Plaintiff proving her claim. It would, therefore, follow that the Plaintiff is not entitled to the reliefs sought in the suit.

d. Who shall bear costs of the suit

28. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the Civil Procedure Act (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons vs Twentsche Overseas Trading Co Ltd* [1967] EA 287. The court has taken into account the peculiar circumstances of the case and the fact that the transactions which precipitated the suit were conducted informally as between the Plaintiff and the DLAS. There was a failure by the concerned government officials to properly document the process to the extent that one of them purported to commit the government long after his retirement from public service. The court is thus of the opinion that the Attorney General is not entitled to costs. The court shall consequently order that each party shall bear his own costs.

I. Conclusion and Disposal Order

29. The upshot of the foregoing is that the court finds and holds that the Plaintiff has failed to prove her claim to the required standard. Consequently, the Plaintiff's suit is hereby dismissed in its entirety. Each party to the suit shall bear his own costs.

It is so decided.

JUDGMENT DATED AND SIGNED AT NYAHURURU THIS 20TH DAY OF JULY, 2023 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

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Y. M. ANGIMA

JUDGE

