



Kamau v City Council of Nairobi & another (Environment & Land Case 335 of 2012) [2023] KEELC 20355 (KLR) (28 September 2023) (Judgment)

Neutral citation: [2023] KEELC 20355 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 335 OF 2012
LN MBUGUA, J
SEPTEMBER 28, 2023**

BETWEEN

MICHAEL KAMAU PLAINTIFF

AND

CITY COUNCIL OF NAIROBI 1ST DEFENDANT

WOMEN FIGHTING AIDS IN KENYA (WOFAK) 2ND DEFENDANT

JUDGMENT

Pleadings

1. The Plaintiff's claim was commenced by a plaint dated June 12, 2012 which was amended on September 18, 2013 and further amended on January 30, 2018. The plaintiff avers that on or about December 6, 1985, the 1st Defendant allotted him Plot No A1-193 and after complying with the terms of the allotment, he took up possession and commenced construction by erecting a foundation. However, in the month of December 2011, he realized that the 2nd Defendant had purported to construct a building on the foundation erected thereon. He adds that the purported takeover of his property is a violation of his constitutional right to property.
2. In the alternative, he avers that if the 1st Defendant repossessed the suit plot, the manner in which the said plot was transferred to different persons and ultimately to the 2nd Defendant is fraudulent.
3. He prays for judgement against the Defendants jointly and severally for;
 - a. A permanent injunction restraining the Defendants whether by themselves, their servants or anybody claiming their authority or otherwise from trespassing and/or interfering with the Plaintiff's quiet enjoyment of Plot No A1-193 Kayole.
 - b. Damages for trespass.



- c. In the alternative, general damages for loss of use of property.
 - d. Costs of the suit.
 - e. Any or other or further relief this Honourable Court may deem fit to grant.
4. The suit is opposed by the 1st Defendant vide its amended statement of defence and reply to counterclaim dated July 3, 2015. The same is a denial of the Plaintiff's claim and the 2nd Defendant's counterclaim.
 5. The 2nd Defendant opposed the suit vide a Further Amended statement of defence and counterclaim dated June 8, 2018, where they deny the allegations leveled against them by the plaintiff. In the alternative, they aver that the 1st Defendant lawfully repossessed the suit plot from the Plaintiff and subsequently re-allocated it to one John Mekew. The suit plot was also repossessed from the said John and re-allocated to Mr Francis Wambugu Kariuki who sold the suit plot to them (2nd defendants).
 6. The 2nd defendants aver that they are bonafide purchaser for value without notice of defect in the title of Francis Kariuki, of which, they took possession of the suit plot which was amalgamated with Plot Nos A1-192, A1-622 and A1-623.
 7. The 2nd defendants, being plaintiffs in the Counterclaim prays for the following orders;
 - i. Declaratory Orders that the Plaintiff's (in the main suit) remedy if any lies in damages against the 1st Defendant in this counterclaim.
 - ii. In the alternative to prayer (1) above, special damages against the 1st Defendant in this counterclaim for the entire value of the construction put up by the Plaintiff, purchase price and the rates and all levies paid to it by the Plaintiff in the counterclaim to-date if fraud is proved and titles of the 2nd Defendant and the Plaintiff are cancelled.
 - iii. In the part alternative to prayer (ii) above, special damages against the 2nd Defendant in this counterclaim for the entire purchase price paid by the Plaintiff.
 - iv. Costs of this counterclaim against the Defendant.
 - v. Interest on (ii), (iii) and (iv) above at court rates until payment in full.
 - vi. Any other relief that this Honourable Court may deem just to grant.

The Evidence

8. The Plaintiff's case was advanced by 2 witnesses, namely himself and a valuer. PW1, Michael Kamau adopted his witness statement June 11, 2012 as his evidence. He produced 7 documents running from page 45-66, of his bundle dated May 23, 2018 as P. Exhibit 1-7 and 2 documents on page 79-78 of his supplementary bundle dated 12.2.2015 as P. Exhibit 8 and 9.
9. His evidence is that following an application for allocation of a plot to the 1st Defendant, he was called for an interview on 26.8.1985 following which he was allocated Plot No A1-193 on 6.12.1985.
10. That on 3.2.1986, he paid ksh, 800/= deposit and ksh. 300/= for water deposit. He then took up possession of the premises and has been paying the rent and or rates to the 1st Defendant. That in 1986, the Chief Land Surveyor Pointed out the beacons thereon, and the plaintiff proceeded to construct a foundation. He ran out of funds and he also fell ill, hence the construction stalled.



11. He adds that in November 2011, he regained his health and decided to pay a visit to the site with his contractor as he intended to finalize the construction. He was shocked to learn that a structure had been put up a top his foundation. Upon making inquiries, he was advised that the 2nd Defendant was alleging to be the owner of the subject premises.
12. Subsequently, he approached officials of the 2nd Defendant who could not proffer a reasonable explanations as to how they became entitled to the property and they blatantly refused to give him possession of the suit property.
13. He told the court that he never got the notice dated 23.1.1995 at page 47 of the 2nd Defendant's bundle of documents dated 11.7.2012 though it is addressed to him. Through the said notice, he was given 14 days to report to the 1st Defendant's offices or else his allocation to the suit plot would be revoked.
14. The said notice was followed by another dated 25.5.1995 addressed to him requiring him to clear arrears but he did not receive it. He further stated that he was also allegedly sent the notice dated 9.1.1996 at page 46 of the same bundle but he did not receive it and the post office box is canceled and indicated "return to sender"
15. He testified that minute 9 of the 1st Defendant's housing development committee which is at page 51 of the same bundle forwarded a list of plots recommended to be repossessed and his plot is there but there is no resolution revoking his allocation.
16. On the search dated 5.12.2007 from the 1st Defendant at page 14 of the same bundle indicating that the owner of the suit land is John W. Makew, he stated that he was not informed that his property had been revoked.
17. He also stated that according to the loan card dated 6.11.2007 at page 16 of the same bundle, the suit property moved from Francis W. Kariuki to John W. Makew yet the said Francis was an employee of the 1st Defendant, housing development as indicated in the pay slip at page 80 of his bundle of documents.
18. He points out that at page 18 of the 2nd Defendant's bundle dated 11.7.2012, there is a sale agreement dated 9.1.2008 between Francis Wambugu Kariuki and the 2nd Defendant, which raises questions as to how the land goes from Wambugu to Makew but it is Wambugu who sells it.
19. He avers that the ledger card was in his name until the year 2012.
20. It was also PW1'S testimony that he never got any notice that his property was repossessed in 2007 and that he has all his receipts of payment until year 2012, his last payment being on 19.1.2012.
21. Upon cross-examination by counsel for the 1st defendant, PW1 stated that he took possession of the suit property upon being shown the beacons. He then developed it by putting up a foundation and a wall. He stated that from 1997-2000, he was in rate arrears but he later paid and was issued with receipts.
22. Referred to a copy of a public notice dated 15.6.2006 requiring members of the public to pay requisite fees within 30 days, he stated that the notice states that there could be revocation for persons who did not pay.
23. Upon cross-examination by counsel for the 2nd Defendant, PW1 conceded that he has been in constant rate arrears but he eventually fully paid what was demanded, and he has receipts to that effect, but he has no rates clearance certificate.
24. He further stated that he developed the suit plot up to the slab, that is when he fell sick. That in 2011, he was a bit mobile, he went to the site and found a multi-storey building and from outside, one could



- see that it was put upon the foundation he had constructed and it touches his land but it also spreads out to the adjacent land.
25. He contends that the 2nd Defendant did not conduct due diligence on the suit property.
 26. Referred to the valuation report at page 81-93 of his bundle of documents, he stated that he was in agreement with the values indicated as Ksh.1.5. million.
 27. In Re-Examination, PW1 stated that the letter on page 25 of the 2nd Defendant's bundle is for amalgamation and it is addressed to Edward Mburu on 28.11.2007, so amalgamation was sought even before the property was purchased by the 2nd Defendant as the sale agreement is dated 9.1.2008, thus the 2nd Defendant was not an innocent purchaser.
 28. He further stated that the ledger card at page 49 of the 2nd Defendant's bundle of documents is cancelled and the name of Francis Kariuki is inserted, yet such accounts are supposed to be closed and new ones opened under the new owner. He points out that the ledger card starts on 1.7.2009 and repossession was done in 2007 so it does not give the true picture of the matter.
 29. PW2 was Stephen Weru Maina, a registered valuer. He testified that he valued the suit property at ksh.1.5 million on 2.6.2014 and came up with the report at page 81 of the Plaintiff's bundle.
 30. Upon cross-examination, PW2 stated that Plot A1193 was identified to him by the Plaintiff but he was also guided by a map from housing department though he did not attach it to the valuation report. However, he attached the building plans of the Plaintiff showing the dimensions of the plot.
 31. The 1st Defendant did not call any witnesses.
 32. The case of the 2nd Defendant was advanced by 2 witnesses. DW1 was Dorothy Onyango, a director of the 2nd Defendant who adopted her witness statement dated 11.7.2012 as her evidence. She also produced the following documents as their exhibits; the list of documents dated 11.7.2012- as D. Exhibit 1-10, 8 items filed in supplementary list dated 3.6.2015- D. Exhibit 11-18, list dated 6.3.2020 marked as DMFI 1 (Valuation report), and copy of lease contained in the 4th bundle dated 2.6.2021- D. Exhibit 19.
 33. It was the testimony of DW1 that the 2nd Defendant purchased the suit plot Plot No A1-193 Kayole estate, from Francis Wambugu Kariuki around January 2008 at ksh 350,000/= after undertaking a search of its ownership which revealed that the owner was John W Mekew. The 2nd Defendant also learnt that the plot had been repossessed from the said John and had earlier been repossessed from the Plaintiff and re-allotted to Francis Wambugu Kariuki.
 34. She states that the vendor then surrendered the plot card in respect of the suit plot on 8.1.2008 and paid ksh.1,000/= in respect of surrender. The vendor then donated a Power of Attorney to the 2nd Defendant in respect of all matters relating to the plot. The Defendant then took possession of the suit plot together with plot Nos. A1-623, A1-622, A1-191 and A1-192 which it purchased from other vendors and procured the amalgamation of the 5 plots for purposes of rating and development.
 35. Upon cross-examination, DW1 stated that the 2nd Defendant relied on documents appertaining to the suit property supplied by the 1st Defendant. Referred to the document at page 12 of their bundle, she stated that the suit property is not among the plots listed for re-possession, but it appears in the list at page 13 of the same bundle where it was recommended for repossession. She added that she would not recall if they actually were supplied with documents repossessing the suit plot.



36. Referred to the search certificate for the suit plot dated 5.12.2007, she stated that the suit plot was owned by John Makew at the time and under finance section, it shows arrears were ksh.35 ,000/= whereas at page 13,the arrears are indicated as ksh.9,040/= as at 19.4.2007.
37. She stated that she can't remember when the plot was repossessed from John Makew and that as per the plot card at page 16 of the same bundle, Francis Kariuki was the owner of the suit land as at 6.11.2007. A month later, they paid a search and the plot was in the name of Makew. However, they entered into a sale agreement with Francis Kariuki and as per the documents, there is a discrepancy. She was not privy to the averment that Francis Wambugu was an employee of the 1st Defendant and still is.
38. Referred to the letter dated 28.11.2007 at page 25 of the 2nd Defendant's bundle, she stated that in the said letter, the 1st Defendant was responding to the 2nd Defendant's request for amalgamation of Plots, of which, the suit plot is mentioned. Further, the sale agreement dated 9.1.2008 shows that at the time they were requesting for amalgamation, they had not purchased the suit plot but the properties sought to be amalgamated are all adjoining each other but she is not certain as to when each of them was purchased.
39. Referred to the correspondences at page 46,47 and 49 of the 2nd Defendant's bundle dated 11.7.2012, she stated that they are addressed to the Plaintiff but the postal address is not his. Further the document at page 49 of the same bundle shows personal records of plot owners and it indicates that as at 12.7.2007, the Plaintiff's name was still on record.
40. Referred to the 2nd Defendant's title, she stated that it is for LR 11344/798 "formerly Plot No A1/191 Kayole" and that they should be having evidence of amalgamation.
41. Upon re-examination, DW1 stated that 4 plots were amalgamated to A1 /191. Since it was a community project, they needed all the 4 plots together.
42. DW2 was Simon Mburuko Arua, a registered valuer. He produced a valuation report dated 5.8.2015 as D. Exhibit 20, where the value of the suit premises is pegged at sh 51.2 million.

Submissions

43. The submissions of the plaintiff are dated 27.4.2023, where he avers that he was allotted the suit plot in 1986 and the same has never been repossessed or re-allocated. It is argued that there is no clear legible address notifying him of any repossession and that the newspaper cuttings produced were not addressed to the Plaintiff and their date of issue was not shown.
44. The Plaintiff also submits that he had a legitimate expectation not to be deprived of the suit property thus he should be awarded damages. He relies on the case of *Kioa v West* [1985] HCA 81;(1985) 159 CLR 550, the case of *Multiple Hauliers East Africa v Attorney General & 10 others* [2013] eKLR as well as the case of *Diana Kethi Kilonzo & another v The Independent Electoral & Boundaries Commission (IEBC) & 2 others* to buttress his claim.
45. The submissions of the 1st defendant are dated 12.6.2023, where they address the following issues;
 - a. Whether the Plaintiff is the legitimate owner of the suit property.
 - b. Whether the Plaintiff is entitled to any of the orders sought in the Plaintiff dated 12.6.2012.
46. On the 1st issue, the 1st Defendant submits that the Plaintiff has not proved her case as required under section 107 and 108 of the *Evidence Act* to entitle him to the suit property as against the 2nd Defendant who has a title and enjoys protection under section 26 (1) of the *land Registration Act* .It points out



that the Plaintiff did not provide proof of payment of ksh.800/= and ksh.300/= he alleged to have paid, nor pictures of the construction he alleges to have put up.

47. He 1st Defendant also submits that the Plaintiff is not entitled to any reliefs sought and that damages may compensate him in any event since he has no title and may not suffer irreparable damages.
48. It is also the 1st Defendant's submission that that the Plaintiff has not proved the allegations of fraud/ conspiracy levelled against it to the required standards as set out in the cases of; *Dennis Noel Mukhulo Ochwada & another v Elizabeth Murungari Njoroge & Another* [2018] eKLR and *Vijay Morjaria v Nasingh Madhusingh Darbar & Another* [2000] eKLR.
49. The 2nd Defendant did not file any submissions.

Determination

50. Having regard to the pleadings, the evidence and the rival submissions, I proceed to frame the issues for determination as follows;
 - a. Who between the Plaintiff and the 2nd Defendant owns the suit property?
 - b. What relief is appropriate in the circumstances.
51. The Plaintiff claims ownership of the property known as Plot No A-1 193, Kayole. He produced a letter dated 13.8.1985 indicating that he was interviewed for allocation of a plot by the 1st Defendant having applied for allocation. He was then allocated Plot No A1-193 Kayole site and service scheme. and was required to pay ksh.1100/= being the plot deposit and ksh.300/= for water connection by 28.2.1986.
52. There is a water deposit receipt at page 51 of the Plaintiff's list bundle of documents indicating that he complied by 3.2.1986. He paid for deposit as indicated in the receipts at page 50 of the same bundle. At page 56-63 of the same bundle, the Plaintiff was issued with rate payment receipts up to year 2012.
53. While the Plaintiff admitted that he would fall into arrears, there is evidence that he paid the arrears which were accepted by the 1st Defendant. There is no evidence that the 1st Defendant ever revoked the Plaintiff's ownership of the suit land.
54. On the other hand, the 2nd Defendant produced a copy of lease for parcel LR No 11344/798 formerly Plot No A1-191 Kayole. It emerged that Plot No A1-191 is an amalgamation of several plots including the suit plot. That lease of the 2nd Defendant is now under challenge, thus they were required to explain its roots.
55. In *Munyu Maina v Hiram Gatbiha Maina*, Civil Appeal No 239 of 2009, the Appeal Court held that:

“ We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”
56. While explaining the root of title LR No 11344/798, DW1 admitted that there were discrepancies. She pointed out that the 2nd Defendant conducted a search before purchasing the suit property which indicated that as at 5.12.2007, it was owned by one John Mekew. As per a loan card at page 16 of the 2nd Defendant's bundle, the suit Plot was in the name of Francis W Kariuki as at 6.11.2007. This



- discrepancy has not sufficiently been explained since according to DW1, John Mekew preceded Francis Kariuki in title.
57. Further, going by the aforementioned plot search certificate at page 14 of 2nd defendant's bundle showing John Makew as the owner of the suit plot, then the sale agreement dated 9.1.2008 should have been entered into between the 2nd Defendant and John Mekew and not Francis Kariuki. Again, that discrepancy remains unexplained.
58. The inconsistencies surrounding the 2nd Defendant's title are also seen in the letter at page 25 of 2nd defendants' documents dated 28.11.2007 from the 1st Defendant deliberating on the amalgamation of the suit plot with 3 other plots. This is because at the time, the sale agreement dated 9.1.2008 had not been entered into. According to DW1, the 2nd defendants are the ones who had requested for amalgamation of the plots. How comes that they were proceeding with the process of amalgamation long before they purchased the suit plot!
59. Still on the issue of amalgamation, I find that the aforementioned letter dated 28.11.2007 refers to amalgamation of plots A1-192, A1-193, A1-622 and A1-623. At paragraph 5 of her witness statement, Dw1 mentions the above plots as what they acquired in addition to plot A1-191. The lease document identifies parcel No L.R.11344/798 as being "formerly Plot No A1-191 Kayole". Again, these are tell tale signs that the amalgamation of the suit plot A1-193 was shrouded in mysteries.
60. Further, there is no evidence that the suit plot was actually amalgamated with Plot Nos. A1-192, A1-622 and A1 - 623.
61. What I discern is that the document dated 28.11.2007 places the 2nd Defendant very far from being called an innocent purchaser.
62. On the issue of repossession of plaintiff's plot, I find that the minutes of the Housing development committee of 12.7.2007 at page 50 of 2nd defendant's bundle do not capture the suit plot A1-193 as one of the plots that were repossessed by the 1st Defendant on account of rates arrears. The minutes on the next page do indicate the suit plot as being one of those plots recommended for repossession. However, there is no evidence indicating that the recommendation was acted upon.
63. In *Republic v City Council of Nairobi & 3 Others* (2014) eKLR, the court stated that;
- “once allotment letter is issued and the allottee meets the conditions therein, the land in question is no longer available for allotment since a letter of allotment confers absolute right of ownership unless it is challenged by the allotting authority or is acquired through fraud, mistake or misrepresentation or that the allotment was out rightly illegal or it was against public interest. In other words, where land has been allocated, the same land cannot be reallocated unless the first allocation is validly and lawfully cancelled.”
64. In light of the foregoing analysis, I find that the suit plot belonged to the plaintiff, that it was not repossessed and it was therefore not available for reallocation to Francis Kariuki or John Makew, hence the 2nd defendant did not acquire any good title in respect of the said suit land.
65. What relief is available to the parties?. It has emerged that the 2nd defendant has put up a multi storey building on the suit property, apparently now worth about Sh.51 million. The plaintiff perhaps being conscious of these developments has sought for an alternative prayer for general damages for loss of use of the said property. The value of the suit plot has been pegged at ksh. 1.5 million as per the valuation report. To this end, I proceed to award a sum of ksh. 2,500,000 being general damages for loss of use of the property to the plaintiff.



66. The final rendition is as follows;

1. The Counterclaim of the 2nd defendant is dismissed.
2. Judgment is hereby entered for the plaintiff against the defendants jointly and severally for Ksh.2,500,000 as general damages for loss of use of the property.
3. The defendants are jointly and severally condemned to pay costs of the suit to the plaintiff plus interests at courts rates from the date of delivery of this judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF SEPTEMBER, 2023 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

M/s Wanyonyi holding brief for Mr. Macharia for plaintiff

Odhiambo for 2nd Defendant

