



Mudimba & another (Suing as the Legal Representative of the Estate of Francis Mudimba Andanda) v Ominde & 3 others (Environment & Land Case 13 of 2021) [2023] KEELC 19887 (KLR) (21 September 2023) (Judgment)

Neutral citation: [2023] KEELC 19887 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAAYA
ENVIRONMENT & LAND CASE 13 OF 2021
AY KOROSS, J
SEPTEMBER 21, 2023**

BETWEEN

**KENNETH ODUOR MUDIMBA 1ST PLAINTIFF
MARY ATIENO MUDIMBA 2ND PLAINTIFF
SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF FRANCIS
MUDIMBA ANDANDA**

AND

**SUSAN AKINYI OMINDE 1ST DEFENDANT
MANNUEL OMINDE 2ND DEFENDANT
THE HONOURABLE ATTORNEY GENERAL (SUED ON BEHALF OF THE
COMMISSIONER FOR LANDS) 3RD DEFENDANT
YALA TOWN COUNCIL 4TH DEFENDANT**

JUDGMENT

1. Francis Mudimba Andanda (‘deceased’) instituted suit against the 1st and 2nd defendants through his plaint dated 27/09/2012. He claimed to be the allottee of land parcel no. Uns. Business-Residential Plot 14-Yala which measured 0.0497 Ha (hereinafter referred to as ‘the suit property’). By an amended plaint dated 02/12/2013, he joined 3rd defendant as a party to these proceedings. The 1st and 2nd defendants are respectively wife and husband.
2. Upon the deceased’s demise on 18/09/2014, he was substituted by Kenneth Oduor Mudimba and Mary Atieno Mudimba who were respectively his son and wife who filed a further amended plaint dated 18/11/2015.



3. It was the plaintiffs' case that despite the deceased being allocated the suit property on 31/01/1997 and making all requisite payments for the allocation and paid rates, the 1st and 2nd defendants had illegally encroached on the suit property, fenced it off, commenced construction without permission or authority and denied them a right to access and enjoy it.
4. They pleaded illegality against the defendants and more particularly the issuance of another allotment letter to the 1st defendant which had caused them loss and damages. The plaintiffs prayed that the deceased be declared the rightful owner of the suit property, permanent injunction and costs of the suit.
5. By a defence and counterclaim dated 04/02/2013 filed by their counsel Olel, Onyango, Ingutiah & Company Advocates, the 1st and 2nd defendants denied the allegations made in the plaint, put the plaintiffs to strict proof and stated that if the deceased was indeed the registered owner, then he acquired the suit property fraudulently and illegally.
6. Among the particulars of fraud, the 1st and 2nd defendants claimed the deceased applied for plot B/F5 but was allocated the suit property, the deceased had paid rates on the suit property which had already been allocated to the 1st and 2nd defendants, the deceased had uttered false documents and by unscrupulous means had used council employees to tamper with the records.
7. The 1st and 2nd defendants contended the suit against them lacked merit, offended the provisions of law, was vexatious, frivolous and should be struck out with costs.
8. In the counterclaim, the 1st defendant stated that she was the 1st allottee of the suit property and she had duly paid all requisite fees to the 3rd defendant and any subsequent allotment was void ab initio.
9. The 1st defendant prayed that she be declared the lawful owner of the suit property, permanent injunction, the 3rd defendant do issue her with a lease over the suit property, general damages for loss or mesne profits.
10. The plaintiffs filed a reply to defence and defence to counterclaim dated 12/03/2021 in which they reiterated the averments of the plaint, denied the averments in the counterclaim and put the 1st defendant to strict proof.
11. The 1st defendant filed a reply to defence to counterclaim dated 23/11/2021 in which she reiterated her averments made in the defence and counterclaim.

Plaintiffs' case

12. Mary Atieno Mudimba testified as PW1. Her evidence was composed of her oral evidence, witness statement dated 26/10/2021 and documents she produced in support of the plaintiffs' case.
13. It was her testimony on 23/11/1995, the deceased applied for a plot land reference no. B/F5 from the 2nd defendant in the counterclaim (hereinafter referred to as 'the council'). Upon making payments on the same date, the deceased was issued with a receipt for ksh. 600/= being serial no. 16243 and receipt for kshs. 1250 for plot deposit of serial no. 17976. By a letter dated 27/12/1995, the council allocated the deceased the suit property subject to him making itemised payments of kshs. 5000/= within 30 days. The deceased settled these amounts.
14. On 14/08/1997, the council notified the deceased to collect the allotment letter dated 31/01/1997 that had been issued by the then commissioner for lands (Commissioner). The allotment indicated the size as 0.0497 Ha and required the deceased to issue an acceptance and pay remittances of kshs. 12,220/=. Two items; rates for the year 1997 and road and drains were to be paid on demand.



15. According to PW1, the deceased paid for the amounts sought in the allotment letter. An acceptance was made on 23/06/1999. The deceased always paid annual rents and had even applied for permission to develop the suit property which had been approved by the department for physical planning.
16. The deceased in conjunction with Kenya Forest Service (KFS) had utilised the suit property, the latter having permitted him on 24/04/2009 to fell trees that were on the suit property. It was during the exercise that a melee ensued whereby the 2nd defendant together with goons roughed up the deceased. In a letter dated 23/09/2009, the council asserted the suit property belonged to the deceased.
17. The 1st and 2nd defendants had illegally encroached on the suit property and had commenced developments. According to PW1, the documents held by the 1st defendant were suspect.
18. On cross examination, PW1 testified the deceased applied for the plot on 23/11/1995 and the allotment was issued in 1997. Whereas he had applied for a different plot, the allotment committee issued him the suit property. She did not have minutes of the meeting allotting the suit property to the deceased but had surveyed the suit property and put beacons on it.
19. There was no letter from the commissioner showing the deceased was the first allottee of the suit property. The dates and allotment numbers on the deceased's and 1st defendant's letters were similar. The deceased paid for allotment on 03/11/1999 while the 1st defendant paid for allotment on 17/09/1999.

1st and 2nd defendant's case

20. With the authority of the 1st defendant, the 2nd defendant testified as DW1. His evidence was composed of his oral evidence, witness statement dated 23/11/2021 and documents he produced in support of their case.
21. It was his case the 1st defendant applied for the suit property on 10/11/1995 from the council and on the same date paid kshs. 650/= . By a letter dated 23/12/1995, the council allocated the suit property to the 1st defendant on condition she paid ksh. 5000/- within 30 days. The 1st defendant paid on 27/12/1995 and a serialised receipt no. 13138 was issued to her.
22. He and the 1st defendant immediately took possession, fenced it off and planted trees. On 18/08/1996, the council demanded kshs. 3000/= towards deposit on sewer, consent and clearance certificate which the 1st defendant paid on 18/08/1996.
23. On 12/08/1997, the council notified them to collect the letter of allotment from the commissioner and demanded they pay kshs. 11,870/- which they paid on the same date to the council. They paid ksh.4710/- to the commissioner and paid all outstanding rates and a clearance certificate was issued on 04/11/1999.
24. They prepared a building plan which was approved on diverse dates of 07/09/1999 and 28/09/1999. The 1st defendant was the legal owner of the suit property since her allocation was first in time. Some documents were issued to him by the council on weekends.
25. On cross examination, DW1 admitted he was once a councillor in the council. His DEX3 did not have a serial no. or did it disclose the suit property. His DEX4 which was a letter dated 23/12/1995 by the council allocating the suit property to the 1st defendant was issued on a Saturday and it referenced YTC/LND/CONF/AL.LET/1 which he did not have in court. This referenced no. was found in the plaintiffs PEX6. DEX6 and DEX7 were issued to the 1st defendant by the council on 18/08/1996 which was on a Sunday.



26. They neither had a letter by the council requiring the 1st defendant to collect her allotment letter nor did the 1st defendant issue a letter of acceptance to the commissioner. He was uncertain if the 1st defendant completed payments as demanded in the allotment letter. He did not have evidence of payments for rent for years 1995 to 1999 and trees on the suit property belonged to KFS.

3rd defendant's case

27. Notwithstanding the 3rd defendant had been sued on behalf of a defunct body, the court issued witness summons against the chief land registrar. Gordon Ochieng who was the director land administration in the ministry of lands, public works, housing and urban development who allegedly authored the deceased's and 1st defendant's allotment letters testified as DW2. His evidence was composed of his oral evidence, witness statement dated 20/02/2023 and documents he produced in support of his case.
28. It was his testimony file no.257903 was for a property in Embu Municipality and he was unable to trace the file. The deceased's allocation was authentic since the size tallied with the valuation requisition form held by his office which showed the size to be 0.0497 Ha.
29. On cross examination by the plaintiffs' counsel, it was his testimony the 1st defendant's allotment letter showed the suit property was 0.0505 Ha which was at variance with its records on the size of the suit property. Though the deceased's and 1st defendant's allotment letters bore his names, the signature in the deceased's allotment letter belonged to him while that in the 1st defendant's was not his. On cross examination by the 1st and 2nd defendants' counsel, he reiterated his evidence.

Plaintiffs' submissions

30. Their counsel, Mr. P. D. Onyango filed written submissions dated 04/05/2023. Counsel identified 4 issues; (a) whether or not the suit property belonged to the plaintiffs or the defendants (b) whether or not the plaintiffs should be granted the reliefs sought (c) whether or not the counterclaim should be dismissed and (d) who should bear the costs of the suit and counterclaim.
31. On the issues, counsel submitted the deceased followed due process in allotment of the suit property which had been substantiated by the PW1's documents which had not been challenged. It was counsel's submission DW1's documents were a forgery and his evidence was contradictory. Counsel submitted the deceased's allocation had not been revoked, the plaintiffs had proved their case, the reliefs sought should be granted, counterclaim dismissed and costs of the suit and counterclaim be awarded to the plaintiffs.
32. It was counsel's submission that the suit property was protected by Section 24 of the [Land Registration Act](#) and placed reliance on Joseph Kagunya v. Boniface K Mulli & 3 others [2018] eKLR where the court cited with approval Republic vs. City Council of Nairobi & 3 others [2014] eKLR which held: -

“Once an allotment letter is issued and the allottee meets the conditions herein, 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.”



Defendants' submissions

33. Despite clear directions from court, none of the defendants filed written submissions. If at all they will be filed, this court will not consider them.

Analysis and determination

34. I have considered the parties' pleadings, their oral testimonies and plaintiffs' written submissions. I have also perused and considered provisions of law and authorities relied upon by the plaintiffs' counsel and I adopt the issues identified by the plaintiffs' counsel as the issues falling for determination. I will address the issues in a sequential manner.

Whether or not the suit property in dispute belonged to the deceased or the 1st and 2nd defendants

35. Section 107 of the *Evidence Act* provides as follows;

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.'

36. It is paramount I lay down the procedure for issuance of allotment letters. It is not in dispute the processes alluded to by the plaintiff and 1st defendant took place prior to *the Constitution* of Kenya, 2010. At the time, public land was managed under the Government *Land Act* (Repealed) and public land could only be disposed of by either the commissioner or president in his exercise of special powers.
37. With the enactment of the 2010 Constitution, the role that was vested on these two persons were vested with the national land commission. At the time the commissioner was being joined to these proceedings, his office had ceased to exist by virtue of the *National Land Commission Act* and the suit against him is hereby struck out. The correct party should have been the national land commission.
38. In the allotment process, the council would recommend land for allocation to the commissioner; an offer letter by the council had to be ratified by the commissioner. The commissioner would under Section 52 of the Trust *Land Act* (Repealed) administer land on the council's behalf including executing documents, issuing leases and licenses. The commissioner did not have a free hand and within Section 52 (b)(i) of the Trust *Land Act* (Repealed), he had to act according to the general directions of the council.
39. Upon such recommendation, the commissioner would allocate it in accordance with Section 5 of the Government *Land Act* (Repealed). Such an allotment could only be ratified by the commissioner which could only take place if a Part Development Plan (PDP) had been approved. An allottee was required to fulfill the terms of the allotment, a cadaster survey would be conducted and approved and a beacon certificate would ensue. The last process would be issuance of a certificate of lease. On these processes see Leah Magoma Ongai v Attorney General [2015] eKLR.
40. These regulatory and statutory processes were well summarized by Cherono J in Mako Abdi Dolal v Ali Duane & 2 others (Supra) as follows: -

'...it is emergent that a litigant basing their interest in land on the foundation of an allotment letter must provide the following proof: First, the allotment letter from the Commissioner



of Lands; Secondly, and attached to the allotment letter, a part development plan; Thirdly, proof that they complied with the conditions set out in the allotment letter, primarily that the stand premium and ground rent were paid, within the specified timeline. It would also help a litigant's case, although this may not be mandatory based on the stage of the transaction, to have a certified beacon certificate.'

41. From the pleadings, both the deceased and 1st defendant allegedly held documents from both the council and the commissioner.
42. In a terse letter dated 23/09/2009 to the commissioner, the council was categorical the suit property belonged to the deceased when it stated 'Records held in this council indicates that the above mentioned plot was registered in the name of one Mr. Francis Mudimba who has been servicing the same since the date of allocation...incidentally it seems someone is claiming ownership of the same plot.' In a letter addressed by the council to the deceased on the same date, it stated 'the council has not sanctioned councilor ominde's action records held in this council indicates that the plot in reference herein belongs to you...'
43. DW2 who allegedly signed the deceased's and 1st defendant's allotment letters both dated 31/10/1997 on behalf of the commissioner testified that though his names appeared in both allotments, the signature in the 1st defendant's allotment letter was not his but that contained in the deceased's allotment was his. Further, the valuation requisition in the chief land registrar's office showed a schedule of parcels of land from the council and the suit property's size was 0.0497 Ha which tallied with the size disclosed in the deceased's allotment whilst that of the 1st defendant depicted the size of the suit property as 0.0505 Ha which was a strange acreage.
44. These letters by the council and documents produced by DW2 were not challenged. DW2's testimony was consistent and unchallenged. The council and DW2 who allegedly authored the allocation and allotment letters have denounced the documents held by the 1st defendant. In other words, the two crucial offices on allotments deemed the 1st defendant's documents as fraudulent and forgeries.
45. An analysis of the evidence shows that although the deceased applied for land plot no. B/F5, the council on a Wednesday the 27/12/1995 allocated him the suit property and required him to make payments within 30 days. Albeit outside the timelines, he paid kshs. 4000/- on diverse dates of 05/02/1996 and 13/10/1997 and was issued with receipt serial nos. 16310 and 6436. It appears there is an outstanding balance of kshs. 1000/= which was to be paid on demand. From the council's letter dated 14/08/1997, the council had not demanded for kshs.1000/- towards road and drains.
46. From the produced documents, it would appear the deceased paid the total sums demanded under the allotment letter except the stand premium of kshs. 5000/- and executed an acceptance letter. These were evidenced by serialised receipt nos. 6418 and 6436 issued by the council on diverse dates of 19/09/1997 and 13/10/1997, a copy of a cheque dated 03/11/1999 to the commissioner, a letter of acknowledgment of money order by the commissioner dated 15/07/1999 and a receipt serial no.E458822.
47. The deceased had paid the 1st land rent on a Monday 13/10/1997 and had consistently paid for it, the last one having being made on 16/01/2012 which was the year he filed suit. Various invoices were raised by the council demanding various payments from the deceased. All the receipts produced by PW1 had printed provisos on a serial no., the payer, date, purpose of payment, code and signature. These printed provisos were inserted by hand except the code which were usually left blank.
48. On the other hand, DW1's documents revealed the 1st defendant paid kshs. 600/= to the council on 10/11/1995, this receipt was unserialised. No invoices were ever issued to her by the council. The



- allocation letter by the council was issued to the 1st defendant on a Saturday, 23/12/1995. She paid for sewer, consent and clearance certificate twice; on 27/12/1995 and Sunday, 18/08/1996.
49. A demand letter was issued to her by the council on Sunday, 18/08/1996. DW1 never produced the letter dated 12/08/1997 where the council requested her to collect the allotment letter and never produced the receipt dated 12/08/1997 evidencing payment of kshs. 11,870/- as alleged.
 50. The receipt allegedly issued to her by the ministry of lands towards fulfilment of partial payments of the allotment letter were at variance with the terms of the allotment; the allotment letter respectively demanded kshs.220 and kshs.150 towards stamp duty and planning but she paid kshs. 530 towards the former and 660/- on the latter.
 51. The rent payment receipt for kshs.15000/- issued to her on 25/07/1997 did not disclose the years of payment and there is no evidence she paid any rent subsequent thereafter until 27/03/2014 which was after the suit had been filed. This was issued by the County Government of Siaya vide serial no. 39431. Except this last receipt, all the receipts produced by DW1 did not have a printed proviso on the dates.
 52. PW1's testimony was consistent and while DW1's was contradictory. While DW1 testified he had planted trees on the suit property, on cross examination, he admitted they were planted by KFS. This lends credence to the plaintiff's testimony the trees were planted by KFS in conjunction with the deceased. PW1's documents prove KFS facilitated the deceased's felling of the trees. This affirms the deceased was in occupation of the suit property and the 1st and 2nd defendants were intermeddlers and or trespassers.
 53. The documents produced by DW1 were suspect. There were variances between his oral testimony on amounts paid and actual receipts. His testimony was unsupported by the documents he either produced or did not produce. Some documents were allegedly issued to the 1st defendant by the council on weekends. The council was a public body and this court takes judicial notice public offices do not operate on weekends and public holidays.
 54. The receipt from County Government of Siaya which was produced by DW1 affirms the printed date proviso were usually provided for in the council's receipts as evidenced by the PW1's receipts yet the ones DW1 produced did not have such printings on dates. The council and the chief land registrar who either had custody of records or privy to dealings over the suit property affirmed the 1st defendants' records were non-existent or tainted with forgery.
 55. Although the 1st and 2nd defendants stated that the deceased's allotment letter was fraudulent, they not prove this to the required standard. PW1 satisfactorily explained how the suit property was allocated to the deceased. If anything, PW1 neatly laid out the process the deceased went through in acquiring the suit property.
 56. I find the suit property was legally allocated to the deceased and the deceased held an allotment letter issued by the commissioner and the 1st and 2nd defendants illegally trespassed on the suit property. I find neither the commissioner nor the council were culpable in the 1st defendant's illegal dealings. I find the plaintiffs proved their case on a balance of probabilities while the 1st and 2nd defendants did not prove their counterclaim to the required standards.

What orders should this court issue?

57. Notwithstanding the suit property has not been repossessed and or reallocated and considering PW1 did not satisfy the court that either the deceased or herself paid the stand premium as demanded by the council and commissioner, the court is reluctant to declare her the rightful owner of the suit property.



Having found the deceased held an allotment letter over the suit property, the plaintiffs are entitled to permanent injunctive orders. The suit against the 3rd defendant is struck out. It is trite law costs follow the event. In the absence of special circumstances, I award the plaintiffs the costs of the suit and counterclaim.

58. For the foregoing reasons and findings, I issue the following final disposal orders: -
- a. a permanent injunction is hereby issued restraining the 1st and 2nd defendants, their agents, servants and representatives and anyone authorised by them from trespassing, encroaching, selling, transferring, subdividing or working on or interfering with Uns. Business-Residential Plot 14-Yala.
 - b. The suit against the 3rd defendant is hereby struck out.
 - c. The 1st and 2nd defendants' counterclaim is hereby dismissed.
 - d. Costs of the suit and counterclaim shall be borne by the 1st and 2nd defendants.

DELIVERED AND DATED AT SIAYA THIS 21ST DAY OF SEPTEMBER 2023.

HON. A. Y. KOROSS

JUDGE

