



**Nazamdin (Suing as the legal representative of Nazamdin Gulam Kadir)
v Chief Land Registrar & 5 others (Environment and Land Appeal
1 of 2022) [2023] KEELC 21455 (KLR) (30 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 21455 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI
ENVIRONMENT AND LAND APPEAL 1 OF 2022
AK BOR, J
OCTOBER 30, 2023**

BETWEEN

**NAZAKATALI NAZAMDIN APPELLANT
SUING AS THE LEGAL REPRESENTATIVE OF NAZAMDIN GULAM KADIR**

AND

**CHIEF LAND REGISTRAR 1ST RESPONDENT
NATIONAL LAND COMMISSION 2ND RESPONDENT
COUNTY GOVERNMENT OF LAIKIPIA 3RD RESPONDENT
JANET MAKENA 4TH RESPONDENT
ATTORNEY GENERAL 5TH RESPONDENT
DISTRICT LAND REGISTRAR, LAIKIPIA 6TH RESPONDENT**

JUDGMENT

1. This is an appeal against the judgment of the Honourable L. Mutai, Chief Magistrate, delivered on 30/7/2021 in CMC ELC Case No. 51 of 2018, in which she found that the Appellant did not produce documents to prove ownership of the suit land in the name of Nazamdim Gulam Kadir unlike the 4th Respondent who produced a certificate of lease, lease and an allotment letter to prove that she owned the land known as 4/62.
2. The court found that the 4th Respondent had demonstrated that she was the registered owner of parcel number 4/62 and entered judgment in terms of her counterclaim while declaring that the Appellant could not claim ownership of the suit land because the purported rights and interests of the deceased over LR No. 2787/57/XII had been extinguished. The court issued an injunction to restrain



the Appellant from dealing with the suit land or interfering with the 4th Respondent's ownership, possession and use of Nanyuki Municipality Block 4/62.

3. In the Memorandum of Appeal dated 14/7/2021, the Appellant faulted the Learned Magistrate for disregarding his evidence on record and finding that he failed to prove his claim over land reference number (LR No.) 2787/57/XII despite ample evidence which showed the suit land belonged to him. He also faulted the trial court for finding that the deceased's rights and interests over the land had been extinguished at the time the Appellant was registered and that the Appellant could not claim ownership on the basis of the deceased's title. Further, he faulted the trial court for finding that the 4th Respondent was the owner of the suit land.
4. The Appellant contended that the Learned Magistrate erred by failing to give a determination on the issues touching on LR No. 2787/52/XII. The Appellant contended that the Learned Magistrate erred by failing to give a determination on the issues touching on LR No. 2787/52/XII. The Appellant sought to have the judgment of the Learned Magistrate set aside in its entirety and substituted by a declaration that the Appellant was the owner of LR No. 2787/57/XII.
5. The appeal was canvassed through written submissions. The Appellant submitted that he proved on a balance of probabilities that Nazamdin Gulam Kadir was the proprietor of LR No. 2787/57/XII which he acquired through allocation after the land was auctioned for a term of 99 years from 1/5/1948 to 30/5/2047. He relied on the letter dated 12/5/1948 from the Commissioner of Lands, Mines and Surveys indicating the purchasers of the property in the auction and the respective properties they bought. He stated that according to the list of purchasers, Nizam Din purchased Plot No. 57/XII and Plot No. 52/XII and they were consequently allocated to him. He added that the sale and allocation was confirmed vide the letter dated 21/12/1948 by the Nanyuki District Commissioner which indicated that Mr. Nizam Din was the purchaser of Plot numbers 52 and 57 in Section XII.
6. He relied on the forfeiture notices served on the lessees and submitted that he had proved that plot numbers 52 and 57 in Block XII belonged to the deceased yet the court in its judgment stated that the evidence spoke to Mr. Nizam Din and not Nazamdin Gulam Kadir who is the deceased. The Appellant submitted that Nizam Din and Nazamdin Gulam Kadir was one and the same person and the Learned Magistrate should have considered them as such and considered the cogent evidence adduced.
7. The Appellant went further to submit that he was ready and willing to adduce evidence showing that Nizam Din and Nazamdin Gulam Kadir was one and the same person had he been called upon to do so by the trial court. He elaborated that such evidence would have included the passport of the deceased showing he went by the name Nizam Din and the Appellant's birth certificate which indicated his father sur name as Nizam din as well as the notice of change in gazette notice no. 409 showing the change of name from Nizaktali Nazamdin to Nazaktali Nazamdin.
8. The Appellant submitted that his claim was over LR No. 2787/52/XII and 2787/57/XII and that he produced the certificate of lease for LR No. 2787/52/XX showing the deceased as its proprietor. He argued that in its judgment, the trial court failed to address the ownership of that parcel of land but instead pronounced itself on LR No. 2787/52/XII yet the two different parcels of land should have been addressed separately and respectively. He faulted the Leaned Magistrate for failing to touch on the issues relating to parcel No. 2787/52/XII.
9. The Appellant submitted that the 4th Respondent could not claim ownership of the suit property because it was already allocated to Nazamdin Gulam Kadir for 99 years which term was to expire in 2047. He contended that the 4th Respondent acquired Nanyuki Municipality Block 4/62 on 2/8/2002 through illegal and unlawful means because there was no way the same property could have been



- allocated twice before the expire of the first lease. He also contended that the 4th Respondent did not adduce evidence to show that she followed due process when she acquired the suit property which in the Appellant's view demonstrated that it was illegally acquired.
10. The Appellant relied on *Joseph Kagunya v Boniface K. Muli & 3 others* [2018] eKLR in which the court found that once a letter of allotment was issued and the allottee met the conditions in the letter, the land in question was no longer available for allotment and that the letter of allotment conferred the absolute right of ownership unless it was challenged by the allotting authority or if it was acquired through fraud, mistake, misrepresentation or where the allotment was outrightly illegal or against public interest. In effect, that where land had been allocated, it could not be reallocated unless the first allocation was validly and lawfully cancelled. The Appellant submitted that the issuance of a new lease while there was a preexisting lease was tantamount to an illegality and urged the court to allow the appeal.
 11. The 4th Respondent submitted that the Appellant failed to produce the alleged search which he conducted on LR No. 2787/57/XII which would show that that land was converted to Nanyuki Municipality Block 4/64 and added that during cross examination the Appellant maintained that his claim related to LR No. 2787/57/XII. The 4th Respondent submitted that the ground of appeal relating to parcel no. 52 was an afterthought since the Appellant did not adduce evidence or make submissions inviting the trial court to make a determination in respect of LR No. 2787/52/XII. She contended that the Appellant did not produce a copy of the title over that property and so the court could not be faulted for arriving at the decision it made.
 12. The 4th Respondent submitted that the documents which the Appellant produced had grave inconsistencies in the names and added that the Appellant failed to tender evidence to prove that the two names belonged to the same person. Further, that he belatedly attempted to introduce the evidence relating to the two names in the written submissions yet such evidence should have been adduced before the trial court.
 13. Further, that the Appellant maintained that Nanyuki Municipality Block 4/62 and LR No. 2787 /57/ XII were on the same situ yet he did not produce any survey plan, map or records to support the assertion in order to discharge the burden of proof under Section 107 of the *Evidence Act*. The 4th Respondent submitted that the Appellant failed to prove fraud on her part and that she produced documents including the lease, certificate of lease and official search to prove her counterclaim besides calling the Land Registrar, Laikipia to produce the green and white cards which buttressed her counterclaim.
 14. The 4th Respondent relied on Sections 27 and 28 of the repealed *Registered Land Act*, the statute which was in force when the suit land was registered on 2/8/2002. She added that the effect of the rights acquired under the repealed Act were saved by dint of Section 107 of the *Land Registration Act*. She urged the court to dismiss the appeal and award her costs.
 15. The Honourable Attorney General informed the court that he would not be taking part in the appeal. The issue for determination is whether the court should allow the appeal and set aside the decision of the Learned Chief Magistrate made on 30/7/2021.
 16. The Appellant produced correspondence relating to the Nanyuki Auction in support of the claim that the late Nazamdin Gulam Kadir purchased plot numbers 52 and 57. The court notes that the name Nzambi was cancelled on the schedule with Nizam Din inserted for Section XII while plot number 52 has the name Nzambini entered against it. He produced letters dated 21st December and 9/11/1949 to show that plot numbers 52 and 57 were purchased by Nizam Din.



17. The burden to prove that Nizam Din changed his name to Nazamdin Gulam Kadir and that the two names referred to one and the same person fell on the Appellant. It was not for the trial court to call upon the Appellant to adduce evidence to prove this as he submitted. The documents which the Appellant mentioned in his submissions such as the deceased's passport, birth certificate and Notice of Change of Name should have been produced in evidence but not introduced through submissions. Based on the evidence which the Appellant adduced at the trial, the Learned Magistrate cannot be faulted for arriving at the determination she made regarding the names of the proprietor being different.
18. The Appellant claimed that a title had not been issued to the late Nazamdin Gulam Kadir yet he produced a grant for LR No. 2787/58/XII with some illegible maps attached to it. One of the special conditions in the grant was that the grantee had to erect a building of approved design on the plot. One of the prayers which the Appellant sought in the Further Re-amended Plaintiff dated 12/10/2018 was the eviction of the 3rd and 4th Respondents from the suit plots, which shows that these parties were in possession of the suit plots. There is no evidence to show that the late Nazamdin Gulam Kadir or Nizam Din for that matter, ever took possession of the two plots he purchased in 1948 or that he ever developed them.
19. The Appellant stated in his evidence that the two numbers related to the same plot and that he did a search on Nanyuki Municipality/ Block 4/62 in 2004 after he found people on the land. The letter from the Lands, Mines and Survey dated 9/11/1949 requested the Land Rents Section to open new folios for plot numbers 57/XII and 52/XII and gave the purchaser's name as Nizam Din. One would have expected that after Nizam Din purchased the plots in 1948 he should have taken possession of the plots and processed titles over the plots in his own name and not waited until 2004 to assert his ownership rights over the two plots. The 4th Respondent's title over what was previously known as plot 57 was issued on 2/8/2002 after the land was registered as Nanyuki Municipality/ Block 4/62.
20. The Appellant's claim was that plot number 52 was unlawfully allocated to the 3rd Respondent. He faulted the Learned Magistrate for failing to make a determination regarding this plot. This suit was initially filed as Nairobi HCCC No. 517 of 2005 and the plaint filed in court on 3/5/2005 related to parcel number 2787/57/XII and sought cancellation of the 4th Respondent's title. It did not mention plot number 52. The Nanyuki Municipal Council and the Attorney General denied the claim in the defences filed on 1/7/2005 and 5/4/2007 respectively.
21. The file was transferred to Nyeri on 17/11/08 and registered as Nyeri HCCC No. 158 of 2008. The plaint was amended on 21/8/2010 to introduce plot number 2787/52/XII registered in the name of the Municipal Council of Nanyuki. The file was later moved to the ELC and given the number ELC Case No. 679 of 2014 before ending up in the Nanyuki Chief Magistrate's Court as Nanyuki CMCCC No. 51 of 2018. In the Further Amended Plaintiff, the Appellant sought cancellation of the leases issued to the 4th Respondent and the defunct Municipal Council of Nanyuki as well as rectification of the register to have the plots registered in his name. He also sought eviction of the 4th Respondent and the County Government of Laikipia from the two plots.
22. When the matter came up for hearing on 16/12/2020, Mr. Mwangi told the court that it would be unsafe to proceed with the case against the County Government of Laikipia who may not have been aware of the date after the amendment because it was doubtful whether the pleadings had been served on the new defendant. Unfortunately some pages of the proceedings are missing from the record of appeal and the trial court's record and so one cannot tell how the trial court resolved the matter. The proceedings suggest that the hearing proceeded between the plaintiff and 4th defendant over plot



number 57. In light of these, the Appellant did not prove his claim of ownership of plot number 52 against the 3rd Respondent.

23. The Appellant failed to prove that the 4th Respondent obtained registration of the land known as Nanyuki Municipality/Block 4/62 through fraud. He failed to prove ownership of parcel number 2787/57/XII.
24. Appeal dismissed, with each party bearing its costs.

DELIVERED VIRTUALLY AT NANYUKI THIS 30TH DAY OF OCTOBER 2023.

K. BOR

JUDGE

In the presence of: -

Mr. Mugambi Mwirigi for the Appellant

Mr. Mwangi Muchiri for the 4th Respondent

Ms. Stella Gakii- Court Assistant

No appearance for the other parties

