



Reriani (Suing in her capacity as administrator of the Estate of James Reriani Gachagua (Deceased) v Attorney General & 5 others; Equity Bank Limited (Interested Party) (Environment & Land Case 234 of 2017) [2023] KEELC 22279 (KLR) (30 November 2023) (Judgment)

Neutral citation: [2023] KEELC 22279 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 234 OF 2017
EK WABWOTO, J
NOVEMBER 30, 2023**

BETWEEN

FRANCISCA WAMBUI RERIANI (SUING IN HER CAPACITY AS ADMINISTRATOR OF THE ESTATE OF JAMES RERIANI GACHAGUA (DECEASED) PLAINTIFF

AND

THE HON ATTORNEY GENERAL 1ST DEFENDANT

PERMANENT SECRETARY, MINISTRY OF INTERIOR & COORDINATION OF NATIONAL GOVERNMENT 2ND DEFENDANT

INSPECTOR GENERAL OF POLICE 3RD DEFENDANT

CHAIRMAN (CDF) EMBAKASI WEST CONSTITUENCY 4TH DEFENDANT

HON GEORGE THEURI (MP EMBAKASI WEST CONSTITUENCY) 5TH DEFENDANT

HON MARTIN KINYANJUI (MCA MOWLEM WARD) 6TH DEFENDANT

AND

EQUITY BANK LIMITED INTERESTED PARTY

JUDGMENT

1. The Plaintiff instituted this suit vide a plaint dated 5th April, 2017 and amended on 24th March, 2023 wherein the following reliefs were sought.

i. Permanent injunction to restrain the Defendants whether by themselves or their agents, servants from trespassing, developing or in any way interfering with the Plaintiff's quiet



possession of the parcel of land known as Land Reference Number 11344/1598 (I.R No. 139430) Mowlem section, Dandora Estate, Nairobi County.

- ii. Permanent mandatory injunction directed to the Defendants their servants or agents to forthwith vacate and demolish any and all developments constructed on the parcel of land known as Land Reference Number 11344/1598 (I.R No.139430) Mowlem section, Dandora Estate, Nairobi County.
 - iii. A declaration that any allotment /ownership document issued to the defendants if any are illegal and void.
 - iv. Costs of this suit with interest thereon.
 - v. Such other or further relief as this Honourable Court may deem just and fit so to grant.
2. The suit was contested by the 1st, 2nd and 4th Defendants who filed a statement of defence dated 5th September 2018.
 3. The Interested Party supported the Plaintiff's suit having been joined to this suit by virtue of being the holder of subsisting registered charge over the suit property.

The Plaintiff's Case.

4. The suit was initially filed by James Reriani Gachagua who unfortunately passed away before its conclusion and was substituted by Francisca Wambui Reriani. It was the Plaintiff's case that at all material times, the Plaintiff was vide a 99-year term lease the registered owner and proprietor of all that parcel of land known as land Reference Number 11344/1598 (I.R. No. 139430) Mowlem Section, Dandora Estate, Nairobi County hereinafter referred to as the suit property.
5. It was averred that or about the 27th March, 2017, the Plaintiff while on an inspection of the above-mentioned suit property, discovered that the 4th Defendant, in collaboration with the 5th and 6th Defendants had without any lawful justification or colour of right encroached and trespassed on the suit property and commenced to construct police post therein ostensibly to be used by officers from the 2nd and 3rd Defendants.
6. It was also averred that the Plaintiff purchased the suit property from Umitag investments who were the original allottee from the defunct City Commission on or about August 1996, he was issued with an allotment letter Ref No. CP & ARCH/001066 and he has been paying all the land Rates /rent to the Nairobi City Council and to its successor the County Government of Nairobi.
7. The said parcel of land is vide a charge dated 21st July 2016 and registered on 28th July 2016 currently charged to Equity Bank (the interested party) as security for loan advanced to the Plaintiff.
8. At the hearing herein, James Reriani Gachagua testified as PW 1 and the sole Plaintiff witness. He relied on his witness statement dated 5th April, 2017 as his evidence in chief. He also produced the following documents in support of his case during his evidence in chief:
 - a. Letter of allotment P.Exhibit 1
 - b. Agreement for Sale: P.Exhibit 2
 - c. Letter of allotment from Nairobi City Commission – P.Exhibit 3.
 - d. Letter Confirming plot ownership – P.Exhibit 4
 - e. Receipts for payment of rates – P.Exhibit 5



- f. Copy of the lease P.Exhibit 6
 - g. Deed of rectification P.Exhibit 7
 - h. Charge from Equity Bank P.Exhibit 8
 - i. Photographs P.Exhibit 9
 - j. Valuation report P.Exhibit 10
9. He also added that despite the defendants trespassing on his land, they have not shown him any documentation demonstrating their interest in respect to the said parcel.
 10. During cross-examination by Counsel for the 1st, 2nd and 3rd Defendants, he stated that he was allocated the land by the then Nairobi City Commission though he could not remember when he accepted the offer. He also stated that he has been paying the outstanding rates as and when they fall due. He also stated that he was stopped from using the property by the police in 2017 and that he had gotten the title of the property earlier in the year 2012.
 11. When re-examined, he stated that he paid a premium of Kshs 80,000.00 upon being allocated the property.

The Defendant's Case:

12. Upon being served with the Plaint and summons to enter appearance, only the 1st, 2nd and 3rd defendants filed a statement of defence dated 5th September 2018. No pleadings were filed by the 4th, 5th and 6th Defendants. None of the said defendants called witnesses to testify on their behalf during trial.

The Case of the Interested Party

13. Mary Katoni Mbithi, the Credit Manager of the Interested Party testified on their behalf. She relied on her witness statement dated 4th October, 2019 and stated that she was aware that on 22nd June, 2016, the Plaintiff approached the Interested Party herein, with a view to acquire a loan facility payable to Merge Enterprises Limited for the sum of Kshs 13,000,000/-. This was to be secured by registration of a legal charge facility over all that parcel of land known as LR No. 11344/1598, the suit property herein, registered in the name of the Plaintiff.
14. Prior to the registration of the charge and disbursement of the funds, the Interested Party carried out a search at the Lands Registry and confirmed that the Plaintiff was the registered owner of the suit property. Having satisfied itself of this, the Interested Party on 28th July 2016, proceeded to register a legal charge over the suit property as security for disbursement of the sum of Kshs 13,000,000/- to Marge Enterprises Limited. The sum of Kshs. 12,585,360.68 is still owing from the Plaintiff under the said charge.
15. She also added that she was aware that some people were illegally undertaking some construction works on the suit property which was later designed as a police post.
16. She also produced the following documents in support of the Interested Party's Case; Copy of Certificate of lease, Valuation report dated 8th July, 2016 and the Plaintiff's loan account statement.
17. When cross examined, she stated that the bank did due diligence before charging the property which confirmed that the Plaintiff was the owner of the property and subsequently thereafter disbursing funds to the Plaintiff.



The Plaintiff's Submissions

18. Following the close of the parties' respective cases, the court directed the parties to file and exchange written submissions for consideration. The Plaintiff's written submissions were filed by Mwangi Wambugi & Co. Advocates dated 23rd August, 2023.
19. In the Plaintiff's written submissions, counsel identified three issues for determination which were outlined as follows:
 - i. Whether the Plaintiff is the bona fide and registered owner of the suit property and therefore entitled to the prayers sought in the plaint.
 - ii. Whether the Defendants have any legitimate claim over the suit property to justify their continued occupation and why they should not be evicted.
 - iii. Who should bear the costs of the suit.
20. It was submitted that the plaintiff has clearly demonstrated that he is the bona fide, legitimate registered owner of land Parcel No. 11344/1598 (IR NO.139430). Reliance was made to Section 24(b) of the [Land Registration Act](#) which provides as follows:

“The registration of a person as the proprietor of a lease shall vest in that person leasehold interest described in the lease together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.”
21. Counsel also cited Section 26 (1) of the [Land Registration Act](#) which further provides:

“...That the certificate of title issued by the registrar upon registration or to a purchaser of land upon transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate.....”
22. Counsel urged the court to find that the evidence on record shows that the suit Land is registered in the name of the plaintiff and he is therefore entitled to the protection under Sections, 24, 25 & 26 of the [Land Registration Act](#). Reliance was placed on the case of [Willy Kipsongok Morogo v Aibert Morogo](#) (2017) eKLR.
23. It was also submitted that there was no evidence on record from the Defendants for evaluation by the Court and hence the averments contained in their defence are unsubstantiated. It was further submitted that the Plaintiff has discharged his burden of prove on the balance of probability and the Defendants have failed to controvert his case by failing to call evidence. Reliance was placed in the case of [Kiplangat Shelisheli Mutarakwa v Joseph Rotich Kones](#) [2018] eKLR.
24. It was further submitted that Article 40 of the [Constitution](#) of Kenya protects a person's interest or right over their property. It was submitted that the Defendants unlawfully without any colour of right or lawful justification, trespassed and forcefully entered and used public resources to construct a police post on his land despite his cry for justice.
25. The Court was urged to grant the reliefs sought since the plaintiff had proved his case to the required standard.



The Submissions Of The 1st, 2nd And 3rd Defendants:

26. The 1st, 2nd and 3rd Defendants filed written submissions through Motari Matunda, Principal Litigation Counsel. Counsel submitted on the following issues:
 - i. Whether the Plaintiff procedurally acquired the suit land from Umitag Investments.
 - ii. Whether the suit land was available for allocation to private parties
 - iii. Costs.
27. It was submitted that the plaintiff's evidence demonstrates that he is the lawful owner of the suit land and that he purchased the suit land from Umitag Limited who had been allocated the suit parcel by the Nairobi City County and he produced a letter of allotment dated 26 October 1992.
28. That the purchase of the letter of allotment preceded with another letter of allotment dated 19th August 1996 which was issued after 4 years and contained various conditions that were to be complied with by both Umitag Investments and or the plaintiff.
29. In the cause of the hearing, no evidence was produced to demonstrate that indeed either Umitag Investments nor the Plaintiff ever complied with the said conditions that were contained in the letter of allotment to constitute a mutual contract in the offer.
30. It was submitted that failure to comply with the conditions on the letter of allotment within the stipulated timelines invalidates the process behind the letter of allotment and no lease would be capable of being issued as the letter of allotment constituted an offer to mutual contract where the Plaintiff did not perform his part of the contract to make the process binding. Reliance was placed in the Supreme Court Petition No. 5 of 2022 between *Torino Enterprises Limited v Attorney General* and *National Social Security Fund v Attorney General*.
31. It was also submitted that the suit land was an open space that had never been developed till the CDF office developed a police post on the suit land. The County Government of Nairobi did not oppose the said construction that were being carried out by the 4th, 5th and 6th defendants and hence the presumption which is true that the suit land was public land.
32. It was submitted that there was no wrong doing by the 1st to 3rd Defendants and the Court was urged to find as such and declare the suit land to be public land and revoke the Plaintiffs title.
33. It was also submitted that the Defendants should not be condemned to pay costs for the reasons that the genesis of the litigation herein has been the illegal and unlawful acquisition of public land.

The Submissions of the Interested Party

34. The Interested Party filed written submissions dated 29th September, 2023 through the Law firm of Muri Mwanike Thige & Kagari LLP Advocates. The Interested Party submitted in support of the plaintiff's case. It was submitted that the Defendants did not call any witness at the trial nor submitted any documentation in evidence and hence the Plaintiff's case and evidence remains uncontroverted.
35. It was submitted that the Bank advanced a sum of Kshs 13,000,000.00 to Marge Enterprises Limited which was secured by a Charge over the property known as L.R. No. 11344/1598 which was registered in the names of the deceased Plaintiff. It was also submitted that the bank did its due diligence prior to disbursing the funds by carrying out an official search at the Lands Registry and confirmed that the deceased Plaintiff was the registered owner of the suit property. The Court was urged to grant the reliefs sought by the Plaintiff.



Analysis and Determination

36. Having evaluated the pleadings on record, oral and documentary evidence adduced together with written submissions filed, this Court outlines the following issues for determination:

- i. Whether the Plaintiff is the bonafide registered owner of the suit property.
- ii. Whether the Plaintiff is entitled to the reliefs sought.

37. Article 40 of the Constitution elaborates on the protection of right to property.

- “(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—
- (a) of any description; and
 - (b) in any part of Kenya.
- (2) Parliament shall not enact a law that permits the State or any person--
- (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
 - (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).
- (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation-
- (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
 - (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that
 - (i) requires prompt payment in full, of just compensation to the person; and
 - (ii) allows any person who has an interest in, or right over, that property a right of access to a Court of law.”

38. Indefeasibility of title is provided for in Section 26 (1) (b) of the Land Registration Act which states;

“The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer ... shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner ... and the title of that proprietor shall not be subject to challenge, except –

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or



(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

39. In the instant case, deceased Plaintiff adduced evidence that he was the registered owner of the suit property L.R. No. 11344/1598 (I.B. No. 139430) having purchased the same from Umitag Investments who were the original allottee from Defunct City Commission on or about August, 1996. He also adduced evidence that he was paying all the land rates to the County Government of Nairobi.
40. The court also observed that the said property was charged to Equity Bank on 21st July, 2016 when a sum of Kshs 13,000,000.00 was advanced to the Plaintiff.
41. It is worth noting that the Defendants never called any witness to controvert the evidence adduced by the Plaintiff. Therefore, the Defendants’ defence remains mere allegations as the Plaintiff’s testimony was not rebutted. Article 40 (3) of the Constitution provides that:
- “The state shall not deprive a person of property of any description or of any interest in or right over property of any description, unless the deprivation
- a. Results from an acquisition of land or an interest in a land or conversion of an interest in land, or title to land, in accordance with chapter five or.
 - b. is for public purpose or in public interest and is carried out in accordance with this constitution and any Act of parliament that requires: -
 - i. requires prom payment in full, of just compensation to the person; and
 - ii. Allows any person who has an interest in, or right over, that property a right of access to a court of law.”
42. If the defendants were desirous of compulsorily acquiring the suit land for purposes of building a police post or any other use they ought to have followed the law, the due process and the laid down procedure for compulsory acquisition including full and commensurate compensation. The forceful and illegal entry by the defendants or officers or persons, contractors acting under them into plaintiff parcel of land is an affront on the plaintiff’s proprietary rights enshrined in the constitution.
43. In the circumstances, the defendants have failed to demonstrate by way of evidence any plausible or legitimate claim over the suit property to justify their continued occupation of the same.
44. It is not in doubt that the Plaintiff is still the registered owner of the suit property. The Court having analyzed the evidence adduced herein, it is satisfied and finds that the Plaintiff is the bonafide registered owner of the suit property L.R. NO. 11344/1598 (I.R. No. 139430).

Issue No. 2 Whether The Plaintiff Is Entitled To The Reliefs Sought

45. The Plaintiff sought for various reliefs as outlined in the amended plaint dated 24th March, 2023. As stated earlier, this Court is satisfied that the Plaintiff’s case was proved to the required standard and as such, the Plaintiff is entitled to the reliefs sought. In the instant case, the Defendants did not adduce any evidence to substantiate the averments contained in their defence or to rebut or controvert the Plaintiff’s case. The Defendants despite being notified of their action did not act in any manner to remedy the situation and in the circumstances the court will proceed to grant the Plaintiff the prayers sought.



46. In respect to costs of the suit, as a general rule, the successful party is entitled to costs unless otherwise directed by the court and in the instant case, the Plaintiff having been successful, this Court shall proceed to award costs of the suit to the Plaintiff.

Final Orders:

47. In conclusion, it is the finding of this court that the Plaintiff's case has been proved to the required standard and this Court makes the following orders:
- a. A Permanent injunction is hereby issued restraining the Defendants whether by themselves or their agents, servants from trespassing, developing or in any way interfering with the Plaintiff's quiet possession of the parcel of land known as Land Reference Number 11344/1598 (I.R. No. 139340) Mowlem Section, Dandora Estate, Nairobi County.
 - b. A mandatory injunction is hereby issued directing the Defendants, their agents or servants to vacate and demolish any and all developments constructed on land known as L.R. Number 11344/1598 (I.R. No. 139430) Mowlem Section, Dandora Estate, Nairobi County within one hundred and twenty (120) days from today.
 - c. Costs of the suit are awarded to the Plaintiff.

Judgment accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30TH DAY OF NOVEMBER, 2023.

E. K. WABWOTO

JUDGE

In the virtual presence of:

Mr. Mwangi for the Plaintiff.

Mr. Motari for the 1st, 2nd and 3rd Defendants.

No appearance for the other parties.

Mr. Kariuki for the Interested Party.

COURT ASSISTANT: CAROLINE NAFUNA.

