



REPUBLIC OF KENYA



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**Thananga v Nyagah & 2 others (Environment & Land Case 100 of 2023)  
[2023] KEELC 22011 (KLR) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 22011 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA  
ENVIRONMENT & LAND CASE 100 OF 2023  
YM ANGIMA, J  
NOVEMBER 30, 2023**

**BETWEEN**

**JOHN MWANGI THANANGA ..... PLAINTIFF**

**AND**

**CHARLES MWANGI NYAGAH ..... 1<sup>ST</sup> DEFENDANT**

**JOSIAH MUNENE NYAGAH ..... 2<sup>ND</sup> DEFENDANT**

**JAMES NYAGAH MWANGI ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**A. Plaintiff's Claim**

1. By a plaint dated 13.10.2009, amended on 26.11.2012 and further amended on 13.07.2023 the Plaintiff sought the following reliefs against the Defendants in the original suit:
  - a. The Defendant be evicted from the said parcel of land (Nyandarua/Mawingo Salient/1164)
  - b. A permanent injunction restraining the Defendants whether by themselves or their servants or agents or otherwise howsoever, from remaining on or continuing in occupation of the suit property and a demolition of the purported erected structures thereon and accrued mesne profits arising thereon.
  - c. Costs hereof be paid by the Defendants and interest thereon at court rates.
2. The Plaintiff pleaded that all material times the late David Thananga Gathaku (the deceased) was the legal allottee of Title No. Nyandarua/Mawingo Salient/1164 (parcel 1164). It was pleaded that sometimes in February, 2011 the Defendants wrongfully and without any colour of right entered and took possession of parcel 1164, cultivated it and erected structures thereon without any lawful justification or excuse.



3. The Plaintiff further pleaded that the Defendants had destroyed trees growing on parcel 1164 and generally wasted and damaged the land with the consequence that the estate of the deceased had suffered loss and damage for which the Defendants were liable. The Plaintiff enumerated some particulars of loss and damage in paragraph 6 of the further amended plaint. It was further pleaded that despite issuance of a demand and notice of intention to sue, the Defendants had failed to make good the Plaintiff's hence the suit.

## **B. Defendants' Response to the Suit**

4. The Defendants filed a defence and counterclaim dated 13.03.2011, amended on 29.01.2013 and further amended on 15.07.2021. By their defence, they denied the Plaintiff's claim in its entirety and put him to strict proof thereof. The Defendants pleaded that at all material times the 3<sup>rd</sup> Defendant was the legitimate allottee of Plot No. 588 – Mawingo Settlement Scheme (Plot 588) of which Parcel 1164 was a sub-division. It was pleaded that the sub-division of Plot 588 was undertaken unlawfully and without his consent or lawful justification hence the Plaintiff was not entitled to the reliefs sought with respect to Parcel 1164.
5. The Defendants pleaded that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were the sons of the 3<sup>rd</sup> Defendant and that they had lawfully been in occupation of the disputed land since 1990 and that their entry and possession was neither wrongful nor unlawful. They denied that the Plaintiff or the estate of the deceased had suffered any loss and damage and put the Plaintiff to strict proof thereof.
6. The Defendants further pleaded that the subject matter of litigation was also the subject of Nakuru HCCC. No. 68 of 2006 in which the 3<sup>rd</sup> Defendant was seeking cancellation of all title deeds issued upon the sub-division of Plot 588 including the title Parcel 1164. It was also the Defendants' contention that the instant suit was statute barred under the Limitation of Actions Act (Cap.22) since the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had been in occupation of Parcel 1164 since 1990.
7. By their counterclaim, the Defendants joined the Settlement Fund Trustee (SFT) as a 2<sup>nd</sup> Defendant and reiterated the contents of the defence. They pleaded that the Defendants in the counterclaim had in 1996 fraudulently caused Parcel 1164 to be sub-divided from Plot No. 588 after the SFT illegally purported to repossess Plot 588 in 1995 without any notice and a justifiable cause. The 3<sup>rd</sup> Defendant contended that as a result of the said unlawful and fraudulent actions he was threatened with loss of Parcel 1164 hence the counterclaim.
8. As a result, the 3<sup>rd</sup> Defendant sought the following reliefs in the counterclaim:
  - a. An order declaring the 3<sup>rd</sup> Defendant now Plaintiff to be the true, legal and sole allottee of Plot No. 588 Mawingo Settlement and that all sub-divisions including Title No. Nyandarua/Mawingo Salient/1164 from the original Plot No. 588 Mawingo Settlement Scheme are illegal, null and void hence cancellation of all resulting titles including Title No. Nyandarua/Mawingo Salient/1164.
  - b. A permanent injunction restraining all persons including the Plaintiff now Defendant and the 2<sup>nd</sup> Defendant by themselves, their servants and or agents from entering, remaining, cultivating, demolishing structures or on, dealing in and or in any other way interfering with the suit land.
  - c. Costs and interest of this suit.



### **C. Response to the Defendants' Counterclaim**

9. The Attorney General filed a defence dated 15.10.2021 on behalf of the 2<sup>nd</sup> Defendant in the counterclaim. The 2<sup>nd</sup> Defendant denied all the allegations pleaded in the counterclaim and put the Defendants to strict proof thereof. The Attorney General denied knowledge of any repossession and sub-division of Plot No. 588 and pleaded that if such was the case then all due legal procedures were followed.
10. The Attorney General denied any fraud or illegality as pleaded by the Defendants and put them to strict proof thereof. The Attorney General further denied any loss and damage and particulars thereof as pleaded in the counterclaim and put the Defendants to strict proof thereof. It was also the 2<sup>nd</sup> Defendant's defence that no demand or notice of intention to sue was served in contravention of Section 13A of the Government Proceedings Act (Cap. 40) hence the Defendants should be denied costs of the counterclaim.
11. The court has noted, however, that there is no defence to counterclaim by the Plaintiff on record even though the Plaintiff vehemently disputed the Defendants' counterclaim at the trial.

### **D. Summary of Evidence at the Trial**

#### **a. Plaintiff's Evidence**

12. The Plaintiff called 3 witnesses in support of his claim at the trial. The gist of the Plaintiff's case was that Parcel 1164 was allocated to the deceased by SFT in 1995 whereupon he paid all the required funds whereupon he was issued with a discharge of charge which facilitated his registration as proprietor thereof. It was the Plaintiff's case that the Defendants were illegally squatting on Parcel 1164 hence the beneficiaries of the estate of the deceased were unable to utilize and enjoy the use of the land.
13. It was the Plaintiff's case that although Parcel 1164 was a sub-division of Plot 588, the latter was legally and procedurally re-possessed and sub-divided by SFT upon the 3<sup>rd</sup> Defendant's breach of the terms and conditions of its allotment. It was contended that the 3<sup>rd</sup> Defendant had failed to fence Plot 588; to cultivate it; to reside thereon; and to pay necessary dues for it.

#### **b. Defendants' Evidence**

14. The 3<sup>rd</sup> Defendant testified as the sole witness for the Defendants in the original suit. The gist of his evidence was that he was the legitimate allottee of Plot 588 which was allocated to him by SFT in 1982. It was his case that he took possession of the land, fenced it and cultivated in for several years until 1990 when he put in possession his 2 sons (the 1<sup>st</sup> and 2<sup>nd</sup> Defendants) who were in possession all along. He maintained that he was not given notice of default or repossession by SFT and that he was not involved in the sub-division of Plot 588 into 3 parcels. He testified that the purported repossession, sub-division and re-allocation of his land was fraudulent and unlawful since he was never served with the requisite notices nor a demand for any outstanding dues (if any) by SFT.

#### **c. 2<sup>nd</sup> Defendant's Evidence by Counterclaim**

15. The material on record shows that despite being accorded several opportunities to tender evidence the SFT did not tender any evidence at the trial. Consequently, its case was marked as closed without any evidence being tendered on its behalf.



## **E. Issues for Determination**

16. The court has noted that the parties did not file an agreed statement of issues for determination in this suit. In the premises, the court shall frame the issues for determination as provided for in law. Under Order 15 rule 2 of the Civil Procedure Rules, the court may frame issues from any of the following:
  - a. The allegations contained in the pleadings.
  - b. The allegations contained in sworn statements made by or on behalf of the parties.
  - c. The contents of documents produced by the parties.
17. The court has considered the pleadings, the evidence and documents in this matter. The court is of the opinion that the following key issues arise for determination herein:
  - a. Whether the repossession and sub-division of Plot No. 588 by the SFT was regular and lawful.
  - b. Whether the allocation of Parcel 1164 to the deceased was fraudulent and unlawful.
  - c. Whether the Plaintiff by original action is entitled to the reliefs sought in the suit.
  - d. Whether the 3<sup>rd</sup> Defendant is entitled to the reliefs sought in the counterclaim.
  - e. Who shall bear costs of the suit and counterclaim.

## **F. Analysis and Determination**

### **a. Whether the repossession and sub-division of Plot No. 588 by the SFT was regular and lawful**

18. The court has considered the material and submissions on record on this issue. The Plaintiff submitted that Plot 588 was properly repossessed because the 3<sup>rd</sup> Defendant had breached the terms and conditions of allotment. It was submitted that the 3<sup>rd</sup> Defendant was served with a notice to remedy the breach dated 20.03.1994 and notice of repossession dated 28.03.1995. The Defendants, on the other hand, submitted that there was no evidence to show that those notices were ever served upon the 3<sup>rd</sup> Defendant hence the SFT was not entitled to repossess Plot 588 in the circumstances.
19. The court has noted that the 3<sup>rd</sup> Defendant was offered Plot No.588 in 1982 and issued with a letter of allotment in 1983. The material on record shows that he paid 10% deposit but it is not clear from the record whether he paid the balance of 90% in full or at all. He testified at the trial that he could not remember how much he paid and that his receipts were lost when his house on the suit property was destroyed.
20. Be that as it may, the main question for determination herein is not whether or not the 3<sup>rd</sup> Defendant was actually in breach of any of the terms of allotment but whether due notice was given of his breach and of the intended re-possession. The court has seen copies of the letters which were intended to serve that purpose. The court is not so much concerned with the lack of signature on the copies of those letters. The court is aware that file copies in government files are not always signed. The court is more concerned with the evidence of service of the said letters or notices.
21. It is evident from the material on record that the Plaintiff called an officer from the office of the Director of Land Adjudication & Settlement who testified as PW2. Although PW2 asserted that the requisite



notices were issued to the 3<sup>rd</sup> Defendant, he was unable to produce any evidence of service thereof upon the 3<sup>rd</sup> Defendant. During cross-examination PW2 stated thus on the letter dated 09.12.1994.

“This letter is not signed. I certified it as a copy of the original. I do not see anything irregular. The letter is addressed to James Nyaga c/o District Settlement Officer Nyandarua. I do not have a record of how it was delivered to James Nyaga Mwangi. The delivery of the notice was very crucial.”

22. On the letter dated 20.03.1995, PW2 stated as follows during cross-examination:

“This letter is also not signed. I also certified it. It is addressed to James Nyaga c/o District Settlement Officer. I do not know how it was delivered to James Nyaga Mwangi. It is important to tender evidence of how it was delivered. This is the letter that was cancelling this allotment.”

23. It is evident from paragraph 1(d) of the 3<sup>rd</sup> Defendant’s letter of offer dated 21.05.1982 that repossession had to be preceded by a notice. The said paragraph stipulated that:

“Upon any breach of those conditions the land shall become liable to forfeiture to the Settlement Fund Trustees but such forfeiture shall not be enforced by re-entry, suit or otherwise unless a notice shall have been served on the proprietor of the land.”

24. The court has noted that in its defence to counterclaim SFT did not plead that the 3<sup>rd</sup> Defendant was in breach of the terms and conditions of allotment of Plot No. 588 and no particulars of breach were pleaded in the defence to counterclaim. The SFT did not also plead that a notice to remedy any breach of conditions was ever served upon the 3<sup>rd</sup> Defendant. It was not even pleaded that he was served with a notice of re-possession or notice of cancellation of his allotment.

25. The court has also considered the decision in the case of *Arthur Matere Otieno v Dorina Matsanza* [2003] eKLR which was cited by the Defendants’ advocates on the question of service of notice of repossession by SFT. The court is not prepared to go as far as the High Court went in holding that the SFT had no power of repossession under any circumstances. The court is content to adopt the High Court’s holding on the issue of service. The court is thus of the opinion that in the absence of any evidence of service of the requisite notices upon the 3<sup>rd</sup> Defendant, the purported repossession and sub-division of Plot 588 was irregular, unlawful and of no legal consequence and did not extinguish the 3<sup>rd</sup> Defendant’s interest over Plot 588.

#### **b. Whether the allocation of Parcel 1164 to the deceased was fraudulent and unlawful**

26. The court has similarly considered the material and submissions on record on this issue. It is evident that this issue is somehow tied to the first issue since the first one impacts on the availability of the land for allocation. It is conceded by all the parties that Parcel 1164 was a sub-division of Plot No. 588. The court has already found and held that the purported repossession and sub-division of Plot No. 588 was irregular and unlawful.

27. It would, therefore, follow that the creation of Parcel 1164 was through an irregular and unlawful process. The deceased could not be lawfully allocated Parcel 1164 since it was not available for allocation in 1995. The entire Plot 588 having been allocated to the 3<sup>rd</sup> Defendant in 1982, a portion thereof could not be legally reallocated to the deceased without following due process of repossession. As a result, it is not really necessary to determine whether or not there was any fraud in its allocation since it was not available for allocation anyway.



28. The mere fact that the deceased was issued with a letter of offer, made the relevant payments, and was ultimately issued with a title deed could not validate and sanitize the irregular and unlawful manner of allocation. The fact that the deceased may not have been privy to any fraud or illegality would not avail the Plaintiff in view of the provisions of Section 26(1)(b) of the *Land Registration Act*, 2012. In the case of *Elijah Makeri Nyang'wara v Stephen Mungai Njuguna & Another* [2013] eKLR which was cited by the Plaintiff it was held, inter alia, that:

“As may be observed, the law is extremely protective of title and provides only two instances for the challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

For the first limb, it appears to me that the title of the 1<sup>st</sup> Defendant was obtained by fraud or misrepresentation. However, there is no evidence that the 1<sup>st</sup> Defendant was a party to the fraud or misrepresentation. Indeed, to me the 1<sup>st</sup> Defendant was an innocent purchaser for value. He was probably conned of his money by the 2<sup>nd</sup> Defendant and that is why he is the complainant in the first count of the criminal charges facing the 2<sup>nd</sup> Defendant. I am not of the view that he was a party to the fraud of misrepresentation that conveyed the land to him. He is a victim of the scheme employed by the 2<sup>nd</sup> Defendant. I cannot therefore impeach his title by virtue of the provisions of Section 26(1)(a).

Is the title impeachable by virtue of Section 26(1)(b). “First, it needs to be appreciated that for Section 26(1)(b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26(1)(b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26(1)(b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions.”

**c. Whether the Plaintiff by original action is entitled to the reliefs sought in the suit**

29. The court has found that the deceased did not obtain allocation of Parcel 1164 regularly and lawfully. The court has also found that his title is impeachable under the provisions of Section 26(1)(b) of the *Land Registration Act*. The court is thus of the view that the Plaintiff has failed to prove his claim against the Defendants to the required standard. As a result, he is not entitled to the reliefs sought in the suit, or any one of them.

**d. Whether the 3<sup>rd</sup> Defendant is entitled to the reliefs sought in the counterclaim**

30. The court has found that there was no lawful repossession, sub-division and re-allocation of the 3<sup>rd</sup> Defendant's Plot No. 588 of which Parcel 1164 was a sub-division. The court has also found that there was no regular, valid and lawful allocation of Parcel 1164 to the deceased in 1995 upon sub-division of Plot No. 588. The court is thus of the opinion that the Defendants are lawfully in possession of Parcel 1164 being part of Plot No. 588 hence the Plaintiff's title to Parcel 1164 should be cancelled. In the premises, the court is satisfied that the 3<sup>rd</sup> Defendant is entitled to the prayers sought in the counterclaim to the extent shown in the final orders.



**e. Who shall bear costs of the suit**

31. 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 v Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason why the successful Defendants should not be awarded costs of the action. As a result, all the Defendants shall be awarded costs of the suit whereas the 3<sup>rd</sup> Defendant shall be awarded costs of the counterclaim as against the Plaintiff only.

**G. Conclusion and Disposal Order**\_\_

32. The upshot of the foregoing is that the court finds and holds that the Plaintiff has failed to prove his claim against the Defendants on a balance of probabilities. The court also finds and holds that the 3<sup>rd</sup> Defendant has proved his counterclaim to the required standard. Accordingly, the court makes the following orders for disposal of the suit and counterclaim:

- a. The Plaintiff's suit be and is hereby dismissed in its entirety.
- b. The 3<sup>rd</sup> Defendant's counterclaim be and is hereby allowed in the following terms only:
  - i. A declaration be and is hereby made that the 3<sup>rd</sup> Defendant, James Nyaga Mwangi, is the legal and legitimate allottee of plot No. 588 Mawingo Settlement Scheme and that its sub-divisions including Title No. Nyandarua/Mawingo Salient/1164 are illegal, null and void.
  - ii. The Plaintiff's Title deed for Title No. Nyandarua/Mawingo Salient/1164 be and is hereby cancelled.
  - iii. A permanent injunction is hereby granted restraining the Plaintiff and the estate of the deceased either by themselves, their servants or agents from entering, cultivating, developing or howsoever dealing with or interfering with the suit land.
- c. The Defendants are hereby awarded costs of the suit whereas the 3<sup>rd</sup> Defendant is awarded costs of the counterclaim as against the Plaintiff by original action.

It is so decided.

**JUDGMENT DATED AND SIGNED AT NYANDARUA THIS 30<sup>TH</sup> DAY OF NOVEMBER, 2023 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.**

In the presence of:

Mr. Kinyanjui for the Plaintiff

Ms. Wangari holding brief for Mr. Waiganjo for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants

N/A by the Attorney General for the 2<sup>nd</sup> Defendant by counterclaim

**Y. M. ANGIMA**

**JUDGE**

