



**Wanjohi v Ndubi & 2 others (Environment & Land Case E264 of 2017)
[2023] KEELC 22492 (KLR) (22 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22492 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E264 OF 2017
MD MWANGI, J
DECEMBER 22, 2023**

BETWEEN

MARIANA WANGUI WANJOHI PLAINTIFF

AND

PETER MANANI NDUBI 1ST DEFENDANT

JACOB MANANI 2ND DEFENDANT

EMBAKASI RANCHING COMPANY LIMITED 3RD DEFENDANT

JUDGMENT

Background

1. The Plaintiff's case is premised on the amended Plaint dated 6th March, 2020. The Plaintiff pleads that she is the rightful owner of Plot No. F.56 (Embakasi Ranching Company) which she inherited from her mother Tabitha Njoki, Share Certificate No. 5622 issued on 28th November, 1982 after her death in 1979.
2. It is the Plaintiff's case that her brother by the name of Mambo Watitu was residing in the suit property until 20 years ago when he disappeared without trace. The Plaintiff then took over from her brother, developed the property and fenced it.
3. The Plaintiff denies that the Defendant (1st and 2nd Defendants) own the suit property. She alleges that the Defendants have invaded it and dug a hole in it laying a claim of ownership over it.
4. At Paragraph 11 of the amended plaint, the Plaintiff stated that she was in the process of Succession to change the Certificate (share certificate) to her name. However, in paragraph 12, she alleges that she has completed the process of succession and the plot is hers absolutely. She therefore prayed for an order of permanent injunction against the Defendants to restrain them from interrupting/interfering or evicting her from the suit property. She further prayed for the costs of the suit.



Responses by the Defendants

5. The 1st Defendant filed a statement of Defence and Counter-claim dated 1st December 2021. He denied that he Plaintiff was the registered owner of the suit Property and put her to strict proof. He denied the Plaintiff's claim in its entirety.
6. The 1st Defendant asserted that he is the owner of Nairobi Block 136/8909 (Plot 5396), which plot he had purchased in the year 2016, effected transfer at the 3rd Defendant's offices and was issued with a share certificate number 3663. He affirms that after the purchase, he lawfully took possession of the suit property and has been in occupation since then.
7. The 1st Defendant in his Counter-claim prayed for a declaration that he is the legitimate owner of the Nairobi Block 136/8909 (Plot 5396). He further prayed for an order of permanent injunction against the Plaintiff. Her agents, servants and or employees from trespassing, transferring or interfering with the 1st Defendant's ownership and enjoyment regarding Nairobi Block 136/8909 (Plot 5396) as well as costs of the counter-claim.
8. In his amended statement of Defence, the 2nd Defendant asserted that plot F56 (Embakasi Ranching Company) is distinct from plot No. P5396 (now Nairobi Block 136/8909) which is owned by the 1st Defendant. He states that the plot No. 5396 was pointed out to the owner by the Surveyors from Embakasi Ranching Company who also beaconed it. Since then, the Defendants have been in occupation. It is the 2nd Defendant's position that the Plaintiff should direct his claim to the 3rd Defendant, it at all.
9. The 3rd Defendant in its statement of Defence dated 13th March, 2023, denied the Plaintiff's claim in its entirety putting her to strict proof.
10. The 3rd Defendant asserted in its Defence that it is the sole allocating authority of the suit land herein hence the only entity that can verify the genuine allottee of the property in dispute. In this instance, the 3rd Defendant averred that the suit property was legitimately transferred to the 1st Defendant and as such, he has the liberty to utilize the property as he deems fit.
11. The Plaintiff in her Defence to the Counter-claim by the 1st Defendant asserted that the 1st Defendant never undertook due diligence. She accused the 3rd Defendant of fraudulently selling the suit property to the 1st Defendant despite being aware that it had sold the suit property to Tabitha Njoki in 1979.
12. In responding to the 3rd Defendant's Statement of Defence, the Plaintiff asserted that she had documents to support the fact that she was the rightful owner of the suit property, Plot F56 having inherited it from her mother, the late Tabitha Njoki Waititu and put the 3rd Defendant to strict proof.
13. Though the Plaintiff admitted that the 3rd Defendant was the sole allocating authority, she vehemently denied the 3rd Defendant's claim that it was the only entity capable of verifying the genuine allottee of the property in dispute.

Evidence adduced at the trial

14. The case proceeded to hearing with the Plaintiff testifying in her case as the first witness. She called two other witnesses. The 1st and the 2nd Defendants too testified as witnesses in their respective cases. The 3rd Defendant called one witness.
15. The Plaintiff in her testimony reiterated the averments in her amended Plaintiff adopting her amended witness statement dated 8th July 2022 as her evidence in chief.



16. In cross-examination by the Advocate for the 1st and 2nd Defendants, the Plaintiff confirmed that though her mother had been allocated the plot in 1979, she only completed payments for it in 1988. She was allegedly shown the plot by the Chairman of the company and surveyors. She couldn't however recall the name of the surveyor who showed her the land. She had accompanied her mother but she was a little girl then. Her mother was shown the four beacons. She asserted that the documents she had produced in her case were all that she had in support of her claim.
17. She disagreed with the letter by the 3rd Defendant Company as well as the averment in their statement of Defence confirming the 1st Defendant as the owner of the land. She was aware that the 1st Defendant had a title to the land but he had gotten it during the subsistence of this case.
18. Responding to questions from the Advocate for the 3rd Defendant, the Plaintiff confirmed that her letter of provisional allocation dated 21st March 2022 had no endorsement at the back nor a Company stamp confirming issuance of a plot. She was aware that that was the procedure followed by the Company. The letter would be stamped with the words, "allocated" at the back.
19. The Plaintiff confirmed that her mother died in 1979 and that was the reason why the receipt of 16th February 1982 was issued to Mohammed Mambo Waititu, her brother who had made the payments. She agreed that she had not produced documents confirming allocation of the plot alleging that they got lost when her house was broken into.
20. In the year 2021, while the case was still pending in court, the Plaintiff confirmed going with the officials of the 3rd Defendant Company to the plot. She showed them the space where she was laying a claim over but they ground did not correspond with the map.
21. The Plaintiff affirmed that she had not been issued with any clearance letter by the 3rd Defendant to allow her process a title of the plot she was claiming. She agreed that the map she had exhibited in support of her claim was not certified by the Director of Surveys. It showed the parcel number as 5622.
22. Finally, the Plaintiff stated that the land she was claiming was I her mother's name and that was the reason why the documents were all in her mother's name. She had not transferred them to her name. She had a certificate of confirmation of grant confirming 1 share certificate No. 5622 plot F56.
23. PW2 claimed to be a neighbor of the Plaintiff at Ruai where the suit property is situated. His plot is V3276. He had been there since 2017 though he brought no document in court to support his allegations. He did not know the Plaintiff's plot number. He further stated that the Plaintiff does not live on the plot adjacent to his.
24. PW2 confirmed undergoing through the process of allocation through the 3rd Defendant's Company. After he was taken to the land by a surveyor, the surveyor had endorsed his receipt.
25. PW3 was a son of the plaintiff. He could not remember the area where his mother's plot is. He stated that it was near a mosque.

Evidence adduced on behalf of the Defendants

26. DW1 was a surveyor from Embakasi Ranching Company, the 3rd Defendant in this case. He adopted his witness statement of 13th March 2023. He affirmed the 3rd Defendant's position that the 1st Defendant was the lawful owner of the disputed property. The Company had issued the 1st defendant with a clearance letter requesting the Ministry of Lands to issue him with a certificate of title which they had done.



27. The witness elaborated on the processes for land allocation by the 3rd Defendant Company. He asserted that the Plaintiff through her mother, Njoki Watitu, had not been allocated land and what she was claiming belonged to the 1st Defendant. He confirmed a site visit which demonstrated that what the Plaintiff was claiming did not correspond to the map. The Board of the 3rd Defendant had considered the dispute between the Plaintiff and the Defendant and all the evidence was in favour of the 1st Defendant. That informed the issuance of the 3rd Defendant's clearance letter to the Ministry of Lands.
28. The 1st and 2nd Defendant's testimonies affirmed their pleadings. They adopted their witness statements which form part of the record of this court. The 1st Defendant confirmed that he bought the plot from a shareholder of the 3rd Defendant Company after he got confirmation of ownership from the Company itself. The Company gave the go-ahead for the transaction having confirmed that the seller was the owner of the subject property. The same Company subsequently cleared him to process a title which he had done.

Court's Directions

29. Upon the close of the hearing, the court directed parties to file written submissions. All the parties complied and the court has had the opportunity to read the submissions.

Issues for determination

30. The core issue for determination in this matter is the ownership of the suit property. Flowing from the determination of that core issue is whether the court should issue the orders sought by either the Plaintiff or the 1st Defendant, the principal disputants in this matter. Off course at the end of it, the court will make a determination on the issue of the costs of the suit and the counter-claim by the 1st Defendant against the Plaintiff.

Analysis and Determination

31. At this juncture, I must point out that both the Plaintiff and the 1st Defendant claim to have acquired the suit property from the 3rd Defendant, Embakasi Ranching Company Ltd. The position of Embakasi Company Ltd in this dispute is therefore critical to the final determination of the dispute between the parties.
32. The averments by the 3rd Defendant in its statement of Defence and the fact that the 1st Defendant already had a certificate of title in his name should have sent a cue to the Plaintiff. In spite of that, the Plaintiff stuck to her single prayer for a permanent injunction against the Defendants.
33. A certificate of title issued by the Registrar upon registration shall, under Section 26 of the [Land Registration Act](#), be taken by all Courts as prima facie evidence that the person named as the proprietor of the Land is the absolute and indefeasible owner. The title may only be challenged on the grounds set out under the Section, namely:
 - 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.



34. In the case of *Republic v Chief Land Registrar & 4 others; Ex parte Shishirkumar Kantilal Shah & 3 others* [2021] eKLR, the court affirmed the position and held that:

“It is trite law that a certificate of title, issued by the Registrar upon registration is prima facie evidence before all courts that the person named as proprietor of the land is the absolute and indefeasible owner and the title of that proprietor... Without a Certificate of title, the Applicants are unable to effectively assert their right to property to the 4th and 5th Respondents and in any court of law, should they be charged with trespass. The Respondents have not brought any evidence challenging the veracity of the Applicants’ title under Section 26 of the Land Registration Act. Issuance of the certificate of title to any third party would thus be an infringement of the Applicants’ right to property.”

35. The Plaintiff herein in her amended plaint, does not challenge the title of the 1st Defendant. She has not pleaded any of the grounds enumerated above, neither has she prayed for the revocation/annulment of the title.

36. The 3rd Defendant further called its surveyor as a witness in this case. He testified as ‘DW1’. He affirmed that his duties include surveying, allocation of plots to parties, beacon re-establishment and site visits.

37. The surveyor confirmed that the plot in dispute in this matter is Nairobi block 136/8909. The allocation number is P5396. The allocation number is temporarily given before the parcel number.

38. DW1 reiterated the averment in the 3rd Defendant’s statement of Defence that the 1st Defendant in this case, Peter Manani Ndubi is the owner of the suit property, according to the records of the 3rd Defendant Company. He too confirmed a site visit with the Plaintiff which confirmed that the plot that the Plaintiff claims on the ground did not correspond with the map. That was the reason why the Plaintiff’s receipt dated 11th January, 2021 for site visit was not signed by the Surveyor at the back. His position was that the Plaintiff’s documents had not gone through the allocation process. Indeed, the site visit report produced by the Plaintiff confirmed that the number in the map issued was P.5396 which had been confirmed to John Kimani Wainaina on 26th January, 2017. This is the person who sold the subject property to the 1st Defendant.

39. DW1 too confirmed that the 3rd Defendant Company had indeed written to the Ministry of Lands and Physical Planning confirming that the Parcel No. NRB Block 136/8909 belonged to the 1st Defendant. He denied any collusion with the 1st Defendant stating that both the Plaintiff and the 1st Defendant were shareholders of the 3rd Defendant Company.

40. Answering questions from the Court, DW1 expressly stated that the Plaintiff is indeed entitled to be allocated a plot by the 3rd Defendant Company. He suggested that the Plaintiff follows him to the Company for allocation of a plot; because the one she claims now on the ground belongs to the 1st Defendant.

41. From the foregoing, and having found that there is no fraud that has been pleaded or proved on the part of the 1st Defendant, this Court holds and finds that he is the lawful proprietor and duly registered owner of the suit property, Nairobi/Block 136/8909.

42. The Plaintiff has not proved a claim of ownership of the suit property. She cannot therefore be entitled to an order of permanent injunction against the Defendants. Her claim fails in its entirety.

43. Although the 3rd Defendant’s witness admitted in his evidence that the Plaintiff is entitled to be allocated a plot by the 3rd Defendant Company, the Plaintiff has not prayed for an order to compel the



3rd Defendant to allocate her a plot. The Court cannot grant her what she has not prayed for. I wish she amended her plaint after the 3rd Defendant filed its statement of Defence or even after the testimony of the 3rd Defendant 's witness. The law on amendment of pleadings allows amendment at any stage. She unfortunately did not take advantage of the law.

44. It is trite law that parties are bound by their pleadings. Even the Court is bound by the 'agenda' set by the parties in their pleadings. In the case of the *Independent Electoral and Boundaries Commission v Stephen Mutinda Mule & 3 others* (2014) eKLR ,the court reiterated the principle that parties in litigation are bound by their pleadings. The court in that case cited with approval the decision of the Malawi Supreme Court of Appeal in *Malawi Railways Ltd v Nyasulu* (1998) MWSC 3 where the court quoted an article by Sir Jacob entitled, "the present importance of pleadings" published in 1960 where the author had stated that:

"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rule of pleadings, for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or Defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves or at any rate one of them might feel aggrieved for a decision given on a claim or Defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice. In an adversarial system of litigation therefore, it is the parties themselves who set the agenda for trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any other business" in the same sense that points other than those specific may be raised without notice."

45. The supreme court of Nigeria on the other hand in the case of *Adetoun Oladeji (NIG) v Nigeria Breweries PLC* SC91/2002 re-emphasized the principle that parties are bound by their pleadings and further stated that:

"In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid surprises by which no opportunity is given to the other party to meet the new situation."

46. In the case of *Raila Odinga & another v IEBC & 2 others* (2017) eKLR, the Supreme Court of Kenya pronounced the essence of pleadings and stated that:

"It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings."



47. The upshot from the above is that the Plaintiff's case fails. It is hereby dismissed against the Defendants. The 1st Defendant's Counter-claim on the other hand succeeds and is accordingly allowed as prayed.
48. The next issue that the Court must determine is on costs. The general rule as provided under Section 27 of the Civil Procedure Act is that costs shall follow the event. However, the Court has the discretion to, as the section provides, otherwise order, but for good reason.
49. In this case, the Plaintiff had a reasonable justification to file suit especially against the 3rd Defendant being a Shareholder of the 3rd Defendant Company. Her reason for filing suit cannot be said to have been frivolous or unreasonable. For that reason, though I have dismissed her case, I will spare her the costs of the suit. I hereby order that each party shall bear its own costs.
50. The final orders therefore are that;
- A. The Plaintiff's suit against the Defendants is dismissed.
 - B. The 1st Defendant's Counter-claim against the Plaintiff is allowed.
 - C. The court declares that the 1st Defendant is the lawful proprietor and duly registered owner of the suit property, Nairobi/Block 136/8909.
 - D. An order of permanent injunction be and is hereby issued in favour of the 1st Defendant against the Plaintiff barring her by herself, servants, agents and or employees or any other person from trespassing, interrupting, or in any other way interfering with the 1st Defendant's ownership of the suit property, Nairobi/Block 136/8909.
 - E. Each party shall bear its own costs.

It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 22ND DAY OF DECEMBER, 2023.

M. D. MWANGI

JUDGE

In the virtual presence of:

Ms. Wangare Ndirangu for the Plaintiff

Mr. Kabaka for the 1st & 2nd Defendants

N/A for the 3rd Defendant

Court Assistant – Yvette

M.D. MWANGI

JUDGE

