Mburugu & 6 others v County Government of Meru (Environment and Land Appeal E069 of 2022) [2023] KEELC 22399 (KLR) (13 December 2023) (Judgment)

Neutral citation: [2023] KEELC 22399 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT AND LAND APPEAL E069 OF 2022

CK NZILI, J

DECEMBER 13, 2023

BETWEEN

DANIEL KINOTI MBURUGU .... 1ST APPELLANT

KARANGA SELF HELF GROUP (SUING THROUGH GEORGE MANENE RITARA) .... 2ND APPELLANT

CHWAA UKAEWA SELF HELP GROUP (SUING THROUGH DICKSON GITONGA) .... 3RD APPELLANT

ROBERT KIRIMI EDWARD .... 4TH APPELLANT

DAVID KIAMBI .... 5TH APPELLANT

GILBERT KINYUA MURIIRA .... 6TH APPELLANT

DAVID GITONGA GIKUNDA .... 7TH APPELLANT

AND

THE COUNTY GOVERNMENT OF MERU .... RESPONDENT

(Being an appeal from the judgment of Hon. E. Ayuka SRM in Nkubu ELC case No. 23 of 2019 delivered on 10th November 2022)

JUDGMENT

1. The appellants, as the lower court plaintiffs, had, through an amended plaint dated 6.12.2019, sued the respondent for a declaration that they were the bonafide owners of LR No. Nkuene/Mitunguu/198, allocated to them as subdivisions No's 6695, 695, 663, 668, 658, 652 & 670, respectively.

2. The appellants asserted that despite the allotment letters, the respondent had threatened to repossess and reverse the suit plots to it. They also prayed for general damages for the breach. The plaint was accompanied by witness statements and documents dated 5.4.2019, 9.8.2019 and 20.10.2019.

3. The respondent opposed the claim through a statement of defense dated 14.5.2019. It denied that the appellants were bona fide owners of LR No. Nkuene/Mitunguu/198 or any of its subdivisions. Further, the respondent averred that the appellants had neither exhibited valid ownership documents for the alleged plots nor suffered any loss or damage as alleged or at all. Additionally, the respondent averred that the suit offended the mandatory provisions of the *Physical Planning Land Use Act*. The statement of defense was accompanied by a list of witness statements dated 2.9.2019 7.6.2022.

4. Daniel Kinoti Mburugu, the 1st plaintiff, testified as PW 1. He told the court in 2004 that he was allocated two plots No. 695 and 669 by the respondent through the process of balloting. PW 1 testified that he paid a processing fee, after which the respondent issued him a letter of allotment.PW1 said he continued paying annual rates as they fell due, per the respondent's acknowledgment receipts. He said that he wrote a letter to the respondent, who confirmed the status of his land, only for the respondent to turn around and demand that he vacates the land.

5. The 1st appellant said he had supplied all the relevant receipts and approved plans to the county government to prove ownership of the plots. He produced P. Exh No. 1-31 as per the list of documents dated 9.8.2019 and the ballot papers No. 646, 525, 658, 570 & 695 as P. Exh No's. 32 (a) – (f). In cross-examination, PW 1 told the court that the respondent announced the allocation of the plots, took the processing fee, and eventually issued allotment letters.

6. Robert Kirimi testified as PW 2 and adopted the witness statement dated 24.10.2019, as his evidence in chief. He said he was allocated Plot No. 658 in 2004, according to a ballot paper dated 2005 and an allotment letter dated 12.10.2004. He said he was yet to develop the plot.

7. David Kinoti Arithi testified as D.W. 1. As the acting director of physical planning and urban development, he adopted the witness statement dated 7.6.2022, and that of his predecessor Jefferson Musyoka dated 2.9.2019 as his evidence in chief. D.W. 1 said the suit plots were situated within the Mitunguu Market area. Further, D.W. 1 said the respondent issued an enforcement notice on 19.2.2019 to all the persons who had encroached onto its parcel LR No. Nkuene/Mitunguu/198, among them the appellants.DW1 said the suit land was among the assets registered with the defunct County Council of Meru since 13.5.1966.

8. After obtaining the enforcement notice, D.W. 1 said the appellants wrote the respondent a letter dated 27.2.2019, claiming they were valid allotees of the land. In response, D.W. 1 said the respondent wrote a letter dated 5.3.2019 demanding proof of ownership of the plots, receipts for rates payments, approved building plots and building designs, approved subdivision scheme, and approved change of user as provided under the *Physical and Land Use Planning Act*. D.W. 1 reiterated that the suit land exclusively belonged to the respondent, who had never allocated the same to the appellants as alleged. He termed the appellants as trespassers to the land whose developments, if any, were illegal and subject to demolition at their owner's cost.

9. D.W. 1 produced a copy of the enforcement notice dated 19.2.2019 as D. Exh No. 1 letter dated 5.3.2019 as D. Exh and a copy of the green card as D. Exh No. (3). He termed the P. Exh No. 9-14, the alleged allotment letters issued between 2004 and 2005 together with ballot papers, (P. Exh No. 32 (a) – f), as irregularly issued. He said the legal procedure was that the first step was balloting, followed by minutes allocating the plots and then issuance of the allotment letter. D.W. 1 said the allotment and ballot papers were invalid without minutes from the respondent, which the appellants could not produce before it, as requested in the letter. Regarding P. Exh No's. 1-8, D.W. 1 told the court it was evident that some irregularities and illegal acts had occurred during the defunct county council's purported issuance of the allotment letters. He said the technical department on land ownership or allocation was the physical planning department instead of the finance department.

10. Asked about the payment of land rates, D.W. 1 said the subject land was registered in the respondent's name, which had never been lawfully allocated to the appellants, hence the enforcement notice.

11. The appellant by grounds of appeal dated 21.11.2022 faults the trial court on 11 grounds namely; being partisan, selective and prejudicial in evaluating the over- conflicting, incoherent and inconsistent documents and records prepared, generated and issued by the respondent; for failing to observe and find the respondent's had defrauded the appellants by either tampering, interfering with and doctoring its records; for making contradictory and inconsistent findings; for pegging its decision on a mistaken and misconceived finding that the appellants had not adduced evidence of subdivision of the mother title; for ignoring the allotment letters; for ignoring the appellants' exclusive possession of the suit plots for many years; for omitting or failing to record crucial proceedings among them the directives on 12.5.2022 that the 1st & 4th appellant to testify on behalf of the rest of the appellants; for only relying on the respondent evidence and lastly; making inconsistent findings and reaching a decision against the weight of the evidence tendered.

12. The appellants relied on written submissions dated 7.11.2023. It was submitted that a court of law was a court of evidence and that the appellants had backed the plaint dated 5.4.2019, with evidence as per the list of documents accompanying it, which the respondent did not object to on account of fraud, forgery, or lack of authenticity.

13. The appellants submitted that the appellate court's role is to re-evaluate such evidence and reach a conclusion, as stated in *Anne Wambui Nderitu v Joseph Kiprono Kipropkoi and another* C.A. No. 345 of 2000.

14. Further, the appellants submitted that the respondent caused subdivisions of the mother title into the itemized plots, after which allocations were made to them as per the allotment letters and receipts for payments of annual rates.

15. Further, the appellants submitted that the respondent was privy to the subdivisions and their occupation of the allocated plots until they received enforcement notices. The appellants submitted that they filed seven witness statements, but only two witnesses testified as all of them were narrating the same story, and in the spirit of saving precious judicial time, parties were all in agreement only to be surprised at the judgment for being faulted for not testifying yet directions were given to that effect on 12.5.2022, though which surprisingly was not captured in the proceedings. The appellants urged the court to find that failure to call all the witnesses should not have been one of the grounds for dismissing the suit. The appellants submitted that the evidence they had tendered was entirely ignored by the trial court, and had it been considered, the court would have reached a favorable judgment.

16. The respondent relied on written submissions dated 15.11.2023. It was submitted that the burden of proof lay with the appellants under Sections 107 – 109 of the *Evidence Act* to establish all the pleaded facts through material evidence. Reliance was placed on *Stephen Wasike Wakhu and another v Security Express Ltd* (2006) eKLR.

17. In this instance, the respondent submitted records relating to the claimed Plot. Nos 646, 652, 658, 663, 668, 669, 670, and 695 were not substantiated, and evidence was not produced to show that there were subdivisions of the mother title. Whether the respondent tampered with or doctored the record, it was submitted that the appellant made assumptions about it but never proved such wild allegations. For instance, the respondent submitted that the appellants failed to produce any subdivision plan, mutation, or consent for the alleged subdivision, resulting in the claimed plots.

18. Additionally, the respondent submitted it produced a copy of the green card for LR No. Nkuene/Mitunguu/198 registered under the name of its predecessors in an intact title since registration in 1966, showing no entries of the alleged subdivision.

19. The respondent submitted that the procedure governing the alienation of public land was set out in *Mohammed Dagame v Hakar Abshir & 3 others* (2021) eKLR *Nelson Kazungu Chai & 9 others v Pwani University College* (2014) eKLR, *Stephen Mburu & 4 others v Comat Merchants Ltd & another* (2012) eKLR, *African Line Transport Co. Ltd v The Hon. Attorney General* Mombasa HCC No. 276 of 2013, *Joseph Gitau & 2 others v Ukay Estate Ltd* Nrb HCC No. 813 of 2005 and *Moses Okatch Owuor & another v Attorney General & anothe*r (2017) eKLR.

20. In this instance, the respondent submitted that the appellants were unable to provide evidence that:

    i. There was a site visit and a fact-finding mission by the defunct county council that the land was government land that could not be disposed of, followed by a notification or advice to the Commissioner of Lands.

    ii. Preparation of part development plan for approval by the Commissioner of Lands.

    iii. Determination of the setting price at which the lease of the plot would be sold, conditions of special covenants, period, and annual rent payable.

    iv. Gazettment of the plots to be sold by way of public auction, number of plots to be sold, upset price term of the lease, rent payable building conditions, and any special covenants.

    v. Sale of the plots by public auction to the highest bidder.

    vi. Issuance of allotment letter to the allottees.

21. The respondent submitted that none of the above procedures were followed in the instant case since the appellants never produced evidence of compliance with the six steps above.

22. The role of the first appellate court is to look at the lower court record with an open mind and a fresh perspective to come up with independent findings as to facts and the law, giving credit to the trial court who heard and saw the witnesses firsthand. See *Ann Wambui Nderitu v Joseph Kiprono Ropkoi and another* (*supra*)—*Peters v Sunday Post Ltd* (1958) EA 424, *Gitobu Imanyara and 2 others v Attorney General* (2016) eKLR.

23. The following issues call for my determination:

    a. Did the appellants plead and prove ownership of the claimed plots?

    b. Did the respondent substantiate their statement of defense that there was never any subdivision and allocation of the alleged plots from the mother title and

    c. Was there justification to enforce ownership rights?

    d. Was the suit contrary to the *Physical Land Use and Planning Act*?

24. The amended plaint dated 6.12.2019 captured the appellants' claim. In paragraph 3, the appellants averred they were bona fide owners of plots allotted to and registered in their names by the respondent as subdivisions of LR No. Nkuene/Mitunguu/198 into Plots No's. 669 and 695, 663, 668, 658, 652, 670 & 646 respectively. It was averred that the respondent had demanded they vacate the land, claiming it belonged to it. Therefore, they sought a declaration that they were the legal owners and for general damages. In support thereof, only two appellants testified and produced P. Exh No. 1-32 (a) – (f),

respectively. A party wishing the court to believe the existence of pleaded facts must prove those facts through tangible and cogent evidence.

25. The plaintiffs' exhibit makers were not called to testify and produce them. None of the exhibits were certified or authenticated by the makers. The originals of the documents were not available to the trial court. After D. Exh No. 1 & 2 were served upon the appellants, none produced evidence that they surrendered whatever documents for ownership in their possession for authentication and confirmation by the respondent. Such authentication would have established that the appellants were genuine allottees of the plots by the defunct County Council of Meru.

26. It is trite law that he who alleges must prove. In the statement of defense, the respondent denied the alleged subdivisions, allocations, and registration of the plots in favor of the appellants. The appellants were put on notice from an enforcement notice dated 19.2.2019 and a letter dated 5.3.2019. Specifically, the appellants were called upon to prove ownership by way of title deeds, official searches, letters of allotment, rates, payment receipts, approved building plans/approved subdivision schemes, and approved change of user.

27. When the appellants came to court, they knew the main issue was the paper trail toward acquiring the alleged plots. The appellants had to prove every step of converting public land into private land.

28. The respondent produced a copy of the records for LR No. Nkuene/Mitunguu/198, certified as of 23.8.2019. It shows that the land belongs to the defunct County Council of Meru. The burden was upon the appellants to prove that their plots were subdivisions of the mother title. The appellants produced no minutes of allocation or register to show that the defunct County Council of Meru lawfully and procedurally did the alleged subdivisions, allocations, balloting, and issuance of allotment letters.

29. The clerk to the defunct Council who signed the allotment letters was not called to testify. The minutes for the allocation were not produced. None of the appellants produced an application letter for the plots. The exhibits appearing on pages 37 43 of the record of appeal were not certified or authenticated by the relevant physical planning department officers as indicated by D.W. 1. See *Okiya Okoiti and others v Attorney General* (2020) eKLR.

30. It was upon the appellants to prove every chain of allocation and acquisition of the plots. The appellants had to go to the allocating authority to authenticate their documents. See *Habiba Jattani Guyo v Hassan Galgalo & another* (2021) eKLR. It did not matter that the respondent was the assumed custodian of the alleged documents. Section 80 of the *Evidence Act* had to be complied with. No notice to produce was applied for, sought, obtained, or served upon the respondent to produce the documents.

31. Further, it was upon the appellants to prove that the plot numbers in their possession were connected to the mother title. Subdivision of a title is a legal process that requires consent, approval, and minutes. Evidence of the alleged subdivisions, dates of the subdivisions, the parties involved, and the sizes of the plots were not produced.

32. The appellants had alleged that the respondent had threatened to reverse the allocations. From the copy of the records, the land was an alienated public land belonging to the respondent. It was upon the appellants to prove that a letter of request for the conversion of public land to private use was approved by the Commissioner of Lands, a PDP, and a deed plan was prepared and approved by the relevant authorities. Further, it was upon the appellants to prove that a request for subdivisions and change of user was undertaken and approved by the Commissioner of Lands, the County Clerk, the District Physical Planner, and the Land Registrar. Additionally, it was upon each appellant to testify

and ascertain if they applied for the plots and if beacons were placed on the ground for each. Minutes of the Town Planning Committee and the entire County Council should also have been produced, showing all the names of the allottees and the date of the approval of the allocation.

33. In *Rinya Hospital Ltd v Awendo Town Council and 21 others* (2010) eKLR, the court said under section 53 of the *Trust Land Act*, the Commissioner of Lands used to administer the trust land of each county council as an agent of the council and could only alienate such land with the express authorization of the concerned county council.

34. From the copy of records produced by the respondent, the LR No. Nkuene/Mitunguu/198 remains a freehold title owned by the respondent. To produce letters of allocation and claim ownership, the appellants must show that the acquisition process was valid, lawful, and procedural. In *Dandi Kiptugen v Commissioner of Land and others* (2015) eKLR, the court observed the acquisition of title and was not a result since the acquisition process is equally material. Only a title obtained procedurally can adequately trace its route without breaking the chain the court can uphold. In *Hubert L. Martin & 2 others v Margaret J. Kamar & 5 other* (2016) eKLR, the court observed that no party should take it for granted that simply because they have a title or certificate of lease, they have a right over the property; otherwise, every party must show that their title has a good foundation and passed adequately to the current title holder.

35. In *Munyu Maina v Hiram Gathiha Maina* C.A No. 239 of 2009, the court observed that when an instrument of title is under challenge, the registered owner must go beyond the instrument to prove the legality of how he acquired the title, to show that the acquisition was legal, formal, and free from any encumbrances including overriding interests.

36. The copy of records shows the suit land is a freehold title. The appellants averred it was converted into plots and allocation made to them. The letters of allotment held by the appellants do not indicate the nature of tenure and who the head lessor is.

37. As of the effective date of the *Constitution*, the suit land was public as per Article 62 (1) (n) of the *Constitution*. Allocating the same fell under Section 14 (1) of the *National Land Commission*. It was, therefore, alienated land. There is no evidence that a survey of the plots was conducted and submitted to the survey director for authentication, and a new parcel number was entered in the records. It is the law that a title cannot exist without the number appearing in the registry index map. Once a plot is subdivided, the National Land Commission must be informed, which directs the Chief Land Registrar to effect the amendments and or cancel the original title to be canceled.

38. In *Benja Properties Ltd v Syedna Mohammed Burshannudin Sahed & others* (2015) eKLR, the court observed that once the property is converted from an unalienated government land to alienated government land, it becomes unavailable for subsequent allotment and or alienation by the Commissioner of Lands and the President. In *Gitwany Investment Ltd v Tajmal Ltd & 3 others* (2006) eKLR, the court observed any change in title to land and the acreage, even if done by a private person in a professional capacity, the relevant government officers must always approve and take responsibility for that action. The court cited with approval *Wreck Motors Enterprise v Commissioner of Land* E. A No. 71 of 97 that a grant takes priority. In *Faraj Maharus v J.B. Martin Glass Industries & 3 others* C.A 130 of 2003 the court held that the first in time prevails.

39. In this appeal, no evidence was produced at the trial to sustain the assertion that applications were made to convert the suit land held by the respondent into leaseholders in favor of the appellants. There was no evidence tendered to show any re-planning or surveying activities undertaken before the plot numbers held by the appellants were issued concerning the suit property. There is no evidence that the land was de-gazetted as public land.

40. The respondent had denied the alleged allocation, subdivision, and registration. The suit land was for a public purpose and governed by the doctrine of public trust under section 75 of the retired Constitution. The land remained public and could not have been allocated to private citizens without following the law.

41. In *James Joram Nyaga and another v A.G and another* (2019) eKLR, the court cited with approval *Niaz Mohammed v Commissioner of Lands and another* HCC No. 423 of 1998 and *Re Kisima Farm Ltd* (1978) KLR 36, that land used for purposes other than which it was acquired was illegal. The court said that since the appellant had failed to prove they had acquired the suit legally, a demolition notice was not whimsical or arbitral.

42. In this appeal, I find no justification for why the appellants were on the suit land, yet the ownership documents they held were not validly acquired. As a registered owner of the suit land, the rights of the respondent under Article 40 of the *Constitution*, as read together with Sections 24, 25, 26, and 27 of the *Land Registration Act*, must be safeguarded. The attempts to plead fraud, tampering with and issuing fake documents were not pleaded and proved to the required standards. Under Section 3 (1) of the *Trespass Act*, the appellants remained self-proclaimed trespassers to land. The enforcement notice issued by the respondent was valid.

43. Whether all the appellants should have testified in support of their respective claims was raised. A party need not attend court to testify in support of his case so long as he can use evidence of any other competent witness to bolster his or her case. In *Hagos Birikti Tewoldebren & another v Evans Ihura & another* (2020) eKLR, the court cited with approval *Julianne Ulrike Stamm v Tiwi Beach Ltd* (1998) eKLR, that there is no reference to the plaintiff himself giving evidence first or at all, though a plaintiff was bound to produce evidence in support of the issues he can do so through a competent witness. The court said that as long as the plaintiff can prove his case by evidence of someone else, he does not have to be present at the hearing. The court said that if the means of legal arguments only, he does not have to be physically present at the hearing so long as his advocate is present to prosecute his case.

44. In short, the court said under Order 17 Rule (1) *Civil Procedure Rules*, a plaintiff can prove his case by the evidence of a witness, witnesses other than himself, or by the argument of his counsel going by the caselaw cited, I do not think the failure to call all the appellants prejudiced their case, so long as the two witnesses called produced the exhibits.

45. The upshot is that the appellants failed to prove all the elements of the claims they had filed against the respondent. The appeal is and must be dismissed with costs.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 13TH DAY OF DECEMBER 2023

HON. CK NZILI

....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In presence of

Ashava for respondents