



**Mwangi & 2 others (Suing as Legal Representatives of the Estate of the late Marion Wairimu Mwangi) v Kagema & another (Environment & Land Case 3 of 2023) [2023] KEELC 22070 (KLR) (7 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22070 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA  
ENVIRONMENT & LAND CASE 3 OF 2023  
YM ANGIMA, J  
DECEMBER 7, 2023**

**BETWEEN**

**MESHACK MACHARIA MWANGI ..... 1<sup>ST</sup> PLAINTIFF  
ESTHER WAMUYU MWANGI ..... 2<sup>ND</sup> PLAINTIFF  
LOISE NYAMBURA MOSES ..... 3<sup>RD</sup> PLAINTIFF  
SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE  
MARION WAIRIMU MWANGI**

**AND**

**AGNES WANGUI KAGEMA ..... 1<sup>ST</sup> DEFENDANT  
SETTLEMENT FUND TRUSTEES ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**A. Plaintiffs' Claim**

1. By a plaint dated 15.12.2020 the Plaintiffs sued the Defendants seeking the following reliefs:
  - a. An order for excision of a portion of four (4) acres out of the land parcel occupied by the 1<sup>st</sup> Defendant for the benefit of the deceased's estate and consequential amendment of the relevant Registry Index Map to reflect the respective ground occupation of Titles No. Nyandarua/Kaimbaga/127 and 128 in terms of the mutual agreement dated 6<sup>th</sup> September, 2018.
  - b. An order for costs of the survey exercise to be borne equally by the Plaintiffs and the 1<sup>st</sup> Defendant.
  - c. Costs of the suit plus interest thereon at court's rate.



- d. Any other or better relief deemed fit by the honourable court.
2. The Plaintiffs pleaded that they were the administrators of the estate of the late Marion Wairimu Mwangi (the deceased) who was at all material times the allottee of Plot No. 128 Kaimbaga Settlement Scheme measuring about 4.8 ha whereas the 1<sup>st</sup> Defendant was the allottee of an adjacent Plot No. 127 – Kiambaga Settlement Scheme, measuring 3.2 ha.
  3. It was pleaded that upon allocation of the said plots by the Settlement Fund Trustees (SFT) the deceased was inadvertently shown Plot 127 where her family settled whereas the 1<sup>st</sup> Defendant settled on Plot 127 instead of her rightful Parcel No. 128. It was pleaded that the deceased fully settled her loan for Plot No. 128 and she was issued with a title deed before the said mistake was discovered.
  4. The Plaintiffs pleaded that upon discovery of the mistake the matter was reported to the SFT which invited the parties for resolution of the dispute as a result of which an agreement dated 06.09.2018 was reached. It was pleaded that by the said agreement the 1<sup>st</sup> Defendant agreed to excise a portion of 4 acres out of Plot No. 128 occupied by her to compensate the family of the deceased and to clear her outstanding loan with SFT.
  5. It was pleaded that the 1<sup>st</sup> Defendant had since refused to comply with the terms of the said agreement by failing to make the excision of 4 acres and also failing to settle her loan with SFT. It was contended that both the Plaintiffs' family and the 1<sup>st</sup> Defendant's family had undertaken various developments of a permanent nature on the parcels they occupied hence it would be impracticable and inequitable to ask them to relocate to their rightful parcels. The Plaintiffs further contended that despite service of a demand and notice of intention to sue, the 1<sup>st</sup> Defendant had failed to make good the claim hence the suit.

#### **B. 1<sup>st</sup> Defendant's Response**

6. There is no indication on record of the 1<sup>st</sup> Defendant having filed a defence to the action even though she made sporadic appearances in court and even filed written submissions.

#### **C. 2<sup>nd</sup> Defendant's Response**

7. The Attorney General entered appearance for the 2<sup>nd</sup> Defendant and filed a defence dated 05.10.2022 on behalf of the 2<sup>nd</sup> Defendant. The 2<sup>nd</sup> Defendant denied all the Plaintiffs' allegations contained in the plaint and put them to strict proof thereof. The 2<sup>nd</sup> Defendant pleaded that it was not privy to the agreement of 06.09.2018. The 2<sup>nd</sup> Defendant, however, conceded that it was a necessary party to the proceedings since it was the allocating authority but contended that any mistake or inadvertence in showing the disputing parties their respective plots was not in bad faith.

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

##### **(a.) Plaintiffs' Evidence**

8. At the trial hereof, the Plaintiffs called 2 witnesses before they closed their case. The 1<sup>st</sup> Plaintiff adopted the contents of his witness statement dated 15.12.2020 as his evidence in-chief. He also produced the 11 documents in the Plaintiffs' list of documents dated 15.12.2020 as exhibits P1 – P11. The Plaintiffs' evidence simply mirrored the averments made in the plaint. It was their case that the 1<sup>st</sup> Defendant had unreasonably refused to compensate them for the 4 acres of land their family lost as a result of the mistake alluded to in the plaint in spite of the agreement dated 06.09.2018.



9. The Plaintiffs also called an officer from the SFT who testified on their behalf as PW2. He testified that he was aware of the nature of the dispute between the parties in that the allottee of Plot 127 had mistakenly settled on Plot 128 whereas the allottee of Plot 128 had settled on Plot 127. He conceded that the agreement dated 06.09.2018 was reached as a result of a meeting held at the SFT offices. He further stated that SFT was ready to comply with any orders made by the court towards resolution of the dispute.

### **Defendants' Evidence**

10. The record shows that although the 1<sup>st</sup> Defendant made sporadic appearances during the hearing, she was absent on the date scheduled for defence hearing hence she did not tender any evidence at the trial.
11. The record further shows that the 2<sup>nd</sup> Defendant did not tender any evidence at the trial even though they sent a representative to testify on behalf of the Plaintiffs.

### **E. Directions on Submissions**

12. Upon conclusion of the trial, the parties were given timelines within which to file and exchange their respective submissions. The record shows that the Plaintiffs' submissions were filed on 21.08.2028 whereas the 1<sup>st</sup> Defendant's submissions were filed on 29.09.2023. However, the 2<sup>nd</sup> Defendant's submissions were not on record by the time of preparation of the judgment.

### **F. Issues for Determination**

13. The court has noted that the parties did not file an agreed statement of issues for determination. The record shows that whereas the Plaintiffs filed their version of 3 issues for determination, the Defendants did not file any statement of issues. As a result, the court shall frame the issues for determination as stipulated under the Civil Procedure Rules, 2010. Under Order 15 rule 2 of the said Rules, a court may frame issues from any of the following:
  - a. The allegations contained in the pleadings.
  - b. The contents of the documents produced by the parties.
  - c. The allegations made on oath by or on behalf of the parties.
14. The court has considered the pleadings, evidence and documents on record and is of the opinion that the following issues arise for determination herein:
  - a. Whether the Plaintiffs have proved their claim against the Defendants to the required standard.
  - b. Whether the Plaintiffs are entitled to the reliefs sought in the suit.
  - c. Who shall bear costs of the suit.

### **Analysis and Determination**

#### **Whether the Plaintiffs have proved their claim against the Defendants to the required standard**

15. The court has considered the pleadings, the evidence and submissions on record. It is evident from the pleadings and the evidence that Plaintiffs' claim is essentially directed at the 1<sup>st</sup> Defendant and not so much the SFT. The latter was joined as necessary party and as the allocating authority which showed the disputing parties the wrong parcels on the ground.



16. The court has noted from the record that the 1<sup>st</sup> Defendant did not file any defence to the suit disputing the Plaintiffs' factual foundation. The court has also noted that the defence which was filed on behalf of SFT was a mere denial and perhaps the only useful thing in the defence is the plea that any inadvertence in showing the parties the wrong plots was not done in bad faith. As things stand on record, neither the 1<sup>st</sup> Defendant nor the 2<sup>nd</sup> Defendant tendered any evidence at the trial to dispute the Plaintiffs' claim. The court takes the Plaintiffs' evidence as uncontroverted and accepts the same as true.
17. The court has noted that in her submissions the 1<sup>st</sup> Defendant disputed the agreement dated 06.09.2018 on the basis that it was fraudulently procured. It was alleged that she was misled into signing the agreement believing it was, in fact, a transfer form for her property. This submission by the 1<sup>st</sup> Defendant is for summary rejection without further consideration. <sup>st</sup> Defendant genuinely believed that the agreement was fraudulently obtained, then she would have filed a defence to plead the alleged fraud. She would also have tendered evidence at the trial to demonstrate the alleged fraud. The court takes the belated allegation of fraud as a mere afterthought by a Defendant who has no reasonable defence to the action.
18. Even if the agreement dated 06.09.2018 were to be excluded, there is adequate evidence on record, both oral and documentary, to prove the Plaintiffs' claim against the 1<sup>st</sup> Defendant on a balance of probabilities. It is clear from the material on record that the 1<sup>st</sup> Defendant was entitled to a plot measuring 3.2 ha and not the 4.8 ha which she occupies on the ground. There is absolutely no justification for the 1<sup>st</sup> Defendant to retain an additional 4 acres which was not allocated to her by the SFT.

#### **Whether the Plaintiffs are entitled to the reliefs sought in the suit**

19. The court has already found and held that the Plaintiffs have proved their claim against the 1<sup>st</sup> Defendant on a balance of probabilities. The court has found that the 1<sup>st</sup> Defendant is not entitled to hold and keep a bigger acreage than was allocated to her by the SFT. The court has noted from her written submissions that the 1<sup>st</sup> Defendant is not willing to be moved from her current location where she claimed to have resided for 40 years. She, however, wanted to retain the extra acreage belonging to the Plaintiffs' family.
20. The court has noted that both families have undertaken substantial developments on the parcels of land they erroneously occupied several decades ago. It may not be practicable and economically sensible to direct them to swap the plots so that each family occupies its rightful parcel. The court is of the opinion that the prudent thing to do is to adjust the acreage by ordering excision of the extra acreage from Plot 128 to compensate the Plaintiffs' family. The court is consequently of the view that the Plaintiffs are entitled to the reliefs sought in the plaint.

#### **Who shall bear costs of the suit**

21. 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 –vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason why the successful litigants should be deprived of the costs of the action. Consequently, the Plaintiffs shall be awarded costs of the suit to be borne by the 1<sup>st</sup> Defendant only. The evidence on record shows that the dispute herein was resolved by the agreement dated 06.09.2018 and had the 1<sup>st</sup> Defendant been faithful to the terms thereof the matter would not have ended in court for resolution.



## **H. Conclusion and Disposal Order**

22. The upshot of the foregoing is that the court finds and holds that the Plaintiffs have proved their claim against the Defendants on a balance of probabilities. As a result, the court makes the following orders for disposal of the suit:
- a. An order be and is hereby made for the excision of a portion 4 acres out of Plot No. 128 Kiambaga Settlement Scheme currently occupied by the 1<sup>st</sup> Defendant for the benefit of the estate of the late Marion Wairimu Mwangi.
  - b. The 2<sup>nd</sup> Defendant together with the County Surveyor Nyandarua shall effect consequential amendments of the Registry Index Map (RIM) to reflect the ground occupation of Title Nos. Nyandarua/Kaimbaga/127 & 128 in terms of the agreement dated 06.09.2018 which was produced as exhibit P-10 in the proceedings.
  - c. The costs of the survey and excision shall be borne equally by the Plaintiffs and the 1<sup>st</sup> Defendant. In the event of the 1<sup>st</sup> Defendant's failure to pay the Plaintiffs shall pay the same and recover the amount as part of the costs of the suit.
  - d. The Plaintiffs are hereby awarded costs of the suit to be borne solely by the 1<sup>st</sup> Defendant.

It is so decided.

**JUDGMENT DATED AND SIGNED AT NYANDARUA THIS 7<sup>TH</sup> DAY OF DECEMBER, 2023  
AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.**

**Y. M. ANGIMA**

**JUDGE**

In the presence of:

Ms. Muigai for the Plaintiffs

1<sup>st</sup> Defendant - present in person

Mr. Rotich holding brief for Ms. Chepkirui for the 2<sup>nd</sup> Defendant

