



Nafuu Holdings Limited v Mwangi (Environment and Land Case Civil Suit 652 of 2012) [2022] KEELC 3012 (KLR) (16 June 2022) (Judgment)

Neutral citation: [2022] KEELC 3012 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 652 OF 2012**

LC KOMINGOI, J

JUNE 16, 2022

BETWEEN

NAFUU HOLDINGS LIMITED PLAINTIFF

AND

NICHOLAS G MWANGI DEFENDANT

JUDGMENT

1. By a plaint dated October 1, 2012, the Plaintiff prays for judgement against the Defendant for:-
 - a. A permanent injunction to restrain the Defendant whether by himself, or by his servants or agents or any of them or otherwise dealing with the property known as LR 209/4401/708 situated at Hamza, Makadara; Nairobi in any manner whatsoever by trespassing, constructing, occupying, selling, alienating, disposing, charging, mortgaging or creating or placing a lien, charge, caveat or any other illegal encumbrance on the said property.
 - b. An order for the eviction of the Defendant from the suit premises.
 - c. Such other or further relief that this Honourable Court may deem just to grant.
 - d. Costs of this suit.
2. It is the Plaintiff's case that it is and was at all material times the owner and entitled to the possession of the land known as LR No 209/44401/708 situated at Hamza, Makadara in Nairobi. It further contends that in September 2012, the Defendant wrongfully entered upon the suit land and placed thereon a construction notice indicating that he had a project on plots LR 440/805,806 and 807 for the construction of flats and simultaneously proceeded with construction.
3. The Plaintiff stated that it has verified from the Government records held at the ministry of lands and Survey of Kenya that plots LR 440/805,806 and 807 do not exist and the Defendant is actually carrying out his activities on the plaintiff's land known as LR No 209/44401/708 situated at Hamza, Makadara



in Nairobi. It further stated that the Defendant by virtue of not having title to the property cannot be in possession of valid building approvals thus his construction is illegal. It is its case that it has been deprived of the use and enjoyment of the suit property and has suffered loss and damages.

The Defendant's Case

4. The Defendant filed an amended defence and counterclaim dated January 14, 2015. It is his case that he is the bona fide owner of the property known as LR 209/4401/708 and has had possession since 2008. He admitted to placing a notice on property known as LR No 4401/709 (plot No.805), LR No 209/4401/708 (plot No 806) and LR No 209/4401/707 (plot No 807) for construction of flats and further admitted proceeding with construction and being in possession of valid building approvals from the City Council of Nairobi.
5. The Defendant also contended that he purchased LR 209/4401/708 (Plot No 806) from Beth Wambui Machira who in turn was allotted by the City Council of Nairobi on September 22, 1992. It was his case that the Plaintiff fraudulently obtained a title deed in respect of the property known as LR 209/4401/708 and particularized the fraud allegations against the Plaintiff.
6. In his counterclaim, he contended that he is owner of 2 adjacent plots to the suit property being plot No 805 (LR 209/4401/709) and plot No 807 (LR No 209/4401/707) and that the 3 plots have been amalgamated with the consent and approval of the City Council of Nairobi.
7. He sought orders;
 - a. That the Plaintiff's suit against the Defendant be dismissed with costs.
 - b. A declaration that the property known as LR 209/4401/708 (plot No 806) belongs to Nicholas George Mwai.
 - c. A declaration that the Plaintiff's registration of a lease in respect of LR 209/4401/7089 (plot No 806) in its favour was unlawful, unprocedurally and fraudulently procured.
 - d. A permanent injunction restraining the Plaintiff either by itself, its servants, agents, employees, assigns, personal representatives or otherwise from encroaching upon, trespassing onto, alienating or disposing of or in any other way whatsoever dealing with and or interfering with the Defendant's property known as Land Reference No 209/4401/708 (plot No 806).
 - e. An order directing the land registrar to cancel and deregister the lease in favour of Nafuu Housing Limited in respect of LR 209/4401/708(plot No 806).
 - f. An order for compensation for violation of the Defendant's constitutional rights.
 - g. Costs of the suit
 - h. Interest in (f) and (g).
 - i. Any other remedy this Honourable Court may deem fit to grant.

The Plaintiff's Evidence

8. PW1, Paul Wangai Murigi a director of the Plaintiff, testified on 9th May 2019. His witness statement filed on October 2, 2012 was adopted as part of his evidence. The Plaintiff's list of documents filed on the same date and a further list of documents filed on 25th October 2012 produced as exhibits in this case.



9. He told the court that the Plaintiff's claim is that it requested to be allocated land by Nairobi city Council to develop housing units and in 2010, it was allocated LR No 209/4401/708, paid all the necessary fees and it was given a lease registered on February 14, 2012 which he produced. He added that the lease was drawn by the City Council of Nairobi and witnessed by Winfred W Gitao and that signatories are the Plaintiff's directors. He stated that as they wanted to commence construction, they found that the Defendant had encroached on the suit land and started construction. He produced photographs of the construction and stated that the Defendant went on with the construction up to completion.
10. He produced the survey plan for the area and stated that the Plaintiff filed a complaint to the authorities. It was his testimony that he has seen the Defendant's defence and counterclaim and denies allegations therein in totality. He stated that the Plaintiff did not obtain any documents/registration fraudulently/illegally as all the documents pertaining to the suit land were given to them by City Council of Nairobi and they all referred to the suit land. He added that LR No 209/4401/708 is different from LR No 440/805-7 which is the plot the Defendant claims. He stated that the Defendant has encroached on the Plaintiff's property and prayed that the defence and counterclaim be dismissed.
11. When cross-examined, he stated that plot 806 is the same as LR 209/4401/708. He told the court that he made an application for allocation of land which goes before a committee who make the allocation. He added that he applied for a specific area being Makadara but not a specific plot and that the lease was given in 2010. He stated that he did not have the application to the council.
12. He testified that the lease was registered on February 14, 2012 thus the Plaintiff became owner on that date. He added that he visited the suit property and there was nothing in the said land. He stated that before the lease, they were not given a letter of allotment. He further stated that he was in the process of applying for approval of building plan when he found that the suit land had been encroached.
13. It was his testimony that he paid land rates but receipts are not in his bundle of documents. He testified that there is no consideration, he would need to consult the other directors on the issue of consideration. It was his testimony that they paid several monies but there are no receipts in his bundle.
14. When put to task on the Defendant's documents, he stated that he has seen the letter of Allotment issued to Beth Wambui Machira and seen that she transferred to Nicholas G Mwai. He added that he has seen the letter from City Council confirming that the plot belongs to Nicholas G Mwai but he has not seen results of investigations conducted over the suit land by the Director of Criminal Investigations. Referred to the letter from Ag Chief Land Surveyor dated September 21, 2012 and copied to the director, City planning and legal affairs with the conclusion that 'later registration should be revoked and title cancelled to avoid unnecessary litigation, he stated that he did not register his title clandestinely.
15. PW1 also stated that Nairobi City Council was supposed to give him vacant possession but he has not sued it for vacant possession. He told the court that he does not know the relationship between Tomajok limited and the Plaintiff as he does not know the directors of the said Tomajok Limited. He stated that the Plaintiff's Advocate's offices; Winfred Gitao were near Arboretum but does not recall whether the mayor or the Town clerk signed the lease as his lawyers were handling the matter and they must be having correspondence between them and City Hall forwarding documents.
16. When he was re-examined, he stated that that he gathers investigations over this matter are ongoing from the letter dated November 19, 2011 addressed by the DCI but his title has not been revoked and none of the Plaintiff's directors has been charged in a criminal court in respect of the suit land stated



that there must have been payments made to city hall in respect of acquisition of title and that he does not understand why city Hall has not given him possession yet they gave him all the documents.

The Defendant's Evidence

17. DW1, Nicholas George Mwai the Defendant, testified on 9th May 2019. His witness statement dated November 2, 2012 was adopted as part of his evidence in chief. The Defendant's list of documents of the same date, a list of documents dated January 20, 2015 and a supplementary list of documents dated May 2015 were marked as exhibits in this case.
18. He urged the court to cancel the Plaintiff's Title as it is forged. He added that he has seen the Plaintiff's documents and they are not genuine. He stated that he has developed the plot and has a total of 72 flats. He further stated that he has the original allotment letter issued to Beth Wambui Machira in September 1992 and he did a search which informed him that the suit plot was hers.
19. It was his testimony that in 2009, he learnt that somebody was claiming the property and the Chief land surveyor wrote a letter to the Director of Planning to investigate deed plans in respect to the suit plot. He stated that registration of the Plaintiff's lease be stopped until further advise but the Plaintiff proceeded to have it registered unprocedurally. He stated that the Plaintiff's lease was witnessed by Winfred Gitau who was not in Nairobi City council's panel.
20. He testified that the letter dated October 4, 2012 from the town clerk confirms that plot 806 was allocated to Beth Wambui Machira then transferred to him and that he also owns plots 805 and 807 and that the 3 were approved for amalgamation and approvals for development obtained. He further testified that the minutes availed by the Plaintiff do not exist and that his flats cover the 3 plots. He stated that he has invested over Kshs.65 Million and that he has tenants and gets an income of kshs.1 million per month.
21. When cross-examined on the signage placed on the suit property indicating that the proposed flats would be constructed on LR .440/805, 806 and 807, he stated that his contractor put the signage and that he does not have title in respect of the amalgamated plots since the Plaintiff forged documents in respect of plot 806.
22. When he was referred to the conditions on the letter of allotment with respect to the suit property issued on September 22, 1992, he stated that there is a receipt for Kshs. 12, 140/= issued on May 14, 1994 and that conditions in the letter of allotment were to be met within 30 days and the allotment letter is still valid. Referred to the lease, he stated that it is drawn by John Ombongi. He stated that he does not work at City Hall, the memos in his list of documents were given to him after making requests through his Advocates. He stated that the Plaintiff has not been charged with any criminal offence and its title has not been revoked.
23. When he was re-examined, he stated that Beth Wambui Machira was issued with the allotment letter dated September 22, 2019 and she has receipts of payment of rates and a beacon certificate dated 1st August 2008. He stated that he bought the suit land for Kshs.1,050,000/=. He further stated that he has attached the amalgamation plans for plots 805-7 which is now 209/4401/708 where he has constructed and that the amalgamation letter has not been objected to.
24. At the close of oral testimonies parcels tendered final written submissions.

The Plaintiff's Submissions

25. They are dated March 4, 2022. Counsel for the Plaintiff submitted on the following issues:-



- a. Is the Plaintiff the lawful owner of land parcel known as LR No 209/4401/709?
 - b. Whether the Plaintiff acquired LR No 209/4401/709 illegally?
 - c. Whether the Plaintiff is entitled to possession of LR No 209/4401/709?
 - d. Whether there exist plots known as LR No 440/805,806 and 807?
 - e. Whether the Defendant is in lawful occupation of LR No 209/4401/709?
 - f. Whether the Defendant's letters of allotment are valid?
 - g. Whether parties are entitled to reliefs sought in their respective prayers?
 - h. Who should pay costs?
26. The Plaintiff's counsel submitted that the Plaintiff entered into a lease agreement with the City Council of Nairobi on April 5, 2010 over title Number IR 12431/806 also known as Land Reference No 209/4401/806 being a portion of grant registered as No 1243/1 and the same was registered as No 137568/1 on 9th May 2012, thus the Plaintiff holds a duly registered lease.
27. It was his submission that the Defendant's claim is pegged on the Letter of Allotment issued to Beth Wambui Machira yet a letter of allotment does not confer any proprietary rights to anyone as the same is an offer. He added that there is no evidence any written acceptance of the Letter of Allotment issued to Beth Nyambura and no evidence of payment of rent and stand premium as contained in the Letter of Allotment within 30 days. He further submitted that the suit property described in the Letter of Allotment is not the same as the suit property as it does not exist. He relied on the case of *Dickson Ngigi Ngugi v Commissioner of Lands* [2019] eKLR.
28. Counsel submitted that the Plaintiff paid conveyance fees of Kshs.15,000/= to the City Council of Nairobi for the purchase of the suit property and also paid a stamp duty of Kshs.1220/= on April 26, 2012 therefore the Plaintiff procedurally bought and acquired title over the suit property and is entitled to possession. It was also his submission that government records at the Ministry of lands and the Department of survey show no records of the property known as LR No.440/805, 806 and 807.

The Defendant's Submissions

29. They are dated March 9, 2022. Counsel for the Defendant submitted that *the Constitution* at Article 40(6) does not extend protection of a right to own property to any property that has been found to have been unlawfully acquired. It was his submission that the Defendant was able to prove the particulars of fraud /illegality on the part of the Plaintiff. He pointed out that the Plaintiff relied on minutes from City Council and list of approved buildings from city Hall contained in the further list of documents dated October 25, 2012 to demonstrate that it was allocated the suit property by Nairobi City Council. He added that the Defendant objected to their production and the Plaintiff failed to call their maker to produce them thus there is no documentary evidence to support the purported lease. He also pointed out that PW1 did not have the letter of application to the council to be given the suit property and had no letter of allotment.
30. It was also his submission that that City Council of Nairobi has categorically denied the Plaintiff's claim of ownership of the suit property and confirmed that the Defendant is lawful owner in their memos and letters produced by DW1; which were produced without contestation from the Plaintiff.



31. Counsel also relied on the case of *Kenya National Highway Authority v Shalieu Masood Mughal & 5 others* [2017] eKLR and the case of *Alberta Mae Gacii v Attorney General & 4 others* [2006] eKLR to submit that mere possession of a title document does not imply that the same cannot be challenged.
32. In support of the Defendant's counterclaim, Counsel submitted that the Plaintiff's dismissal of the letter of allotment as not being title is unfounded since the Defendant's allotment has never been cancelled and was 1st in time and on the other hand, the Plaintiff has no letter of allotment.
33. He also submitted that the Defendant pleaded that he is also the bonafide owner of two adjacent plots being plot No 805 (LR No 209/4401/709) and plot No 807 (LR No 209/4401/707). He added that there was a dispute in respect of one of the said properties being plot No 805 (LR No 209/4401/709) filed against the Defendant and which is reported as *Tomajok Limited v Nicholas George Mwai Mwangi* [2019] eKLR which was heard and determined in favour of the Defendant and urged the court to be persuaded by that holding.
34. I have considered the pleadings and the evidence on record. I have also considered the written submissions filed on behalf of the parties and the authorities cited. the issues for determination are:-
 - i. Who is the lawful owner of the suit property?
 - ii. Is the Plaintiff entitled to the reliefs sought?
 - iii. Is the Defendant entitled to the reliefs sought in the counterclaim?
 - iv. Who should bear costs of this suit?
35. PW1, the Plaintiff's director told the court that they requested to be allocated land to develop housing units. He told the court in 2010 they succeeded after following due process. He told the court that they were allocated LR No 209/4401/708. He produced the lease in respect of the said plot as exhibit P1.
36. It was his case when they sought to commence construction they found someone else had started construction on the same plot. The person constructing was the Defendant. It appears the Defendant has constructed to completion.
37. When he was cross examined by the Defendant's counsel, he admitted that he did not have a copy of the application in their bundle. He also stated that the Plaintiff was not given a letter of allotment. He further stated that he paid several monies but the receipts were not in the Plaintiff's bundle of documents.
38. He could not state what the consideration was but it was issued with a lease on July 9, 2010 and registered on February 14, 2012. He did not produce any receipts for payment of rates.
39. He also admitted that he had not sued the Nairobi City County for vacant possession.
40. The tussle over the suit land involves the alleged registered proprietor who is the Plaintiff and the Defendant whose claim is pegged on the Letter of Allotment issued to Beth Nyambura Machira on September 22, 1992. In *Munyu Maina v Hiram Gathiba Maina* [2013] eKLR, the Court of Appeal stated; "Under Section 112 of the *Evidence Act*, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him." The Plaintiff's Title is under challenge; he is required to go beyond the instrument of title and prove the legality of how it acquired the title.
41. PW1 told the court that he made an application to be allocated land to the Nairobi City Council. There was no evidence of such application. He stated that the Plaintiff was then allotted the suit



property and a lease was registered between it and Nairobi City Council. He sought to rely on minutes of council allocating the land. While the Defendant objected to production of the said minutes, had they been produced, they do not confer interest until actualized by issuance of Letter of Allotment and by the allottee accepting and meeting conditions contained in the Letter of Allotment. The Plaintiff's contention that it was allotted the suit property was not supported by evidence of a Letter of Allotment. There is no beacon certificate to confirm that the allottee was shown the plot on the ground together with the beacons. There were no receipts to indicate that there was consideration. Apart from waving the Lease registered in 2012, the Plaintiff had no evidence supporting the said lease.

42. The Defendant on the other hand told, the court that he bought the plot from Beth Wambui Machira who was the original allottee of the suit plot. He told the court that as per the records held at the Nairobi County Government he is the owner of the plot. He further stated that he has developed the plots which now have about 72 flats. It is his case that the lease issued to the Plaintiff was done unprocedurally and prays that the same be cancelled.
43. The Defendant led evidence that he purchased the suit plot from Beth Wambui Machira. The allotment letter issued to the said Beth Wambui Machira dated September 22, 1992 has an endorsement on the top right stating, "Transferred from Beth Wambui Machira; letter ref.CPD/ARCH/005583 dated September 22, 1992 to Nicholas George Mwai Mwangi". There is a beacon certificate issued to Beth Wambui Machira dated August 11, 2008. There is evidence that the said Beth Wambui Machira was in possession of the suit land and there are receipts for payment of rates.
44. The Plaintiff argued that the Defendant's claim under the Letter of Allotment could not stand since the initial allottee; Beth Nyambura Machira did not comply with the conditions set in the aforementioned Letter of Allotment within the timelines provided which was 30 days. It argued that receipts of payment of ground rent and stand premium were issued to the said Beth Nyambura Machira in 1994 which was way after the 30 days stipulated in the allotment letter. Once land is allocated, it cannot be re-allocated unless the first allocation is validly and lawfully cancelled. There is no evidence that the allocation to Beth Nyambura Machira was cancelled so that it can be said that the land was available for allocation to the Defendant.
45. There is a letter dated addressed by City Council of Nairobi stating that the suit plot was allotted to Beth Wambui Machira who in turn transferred to the Defendant. The City council of Nairobi is the lessor. It does not recognize the alleged lessee. In a similar case; *Nancy Wanjiru Kunyiba v Samuel Njoroge Kamau* [2018] eKLR the court stated:-

"If the Municipal Council of Nakuru (now the County Government of Nakuru), the holder of the head lease, states that it has never issued a lease in respect of this land, and there is no record of any lease having been so issued, how can this court hold that there was actually a lease granted to Samwel Kamau Mwangi ?The Certificate of Lease held by the Defendant is merely a paper document, not acknowledged by the head lessor and the necessary documentation, and cannot stand. It follows that Godfrey Wadahi never had any title to transfer to the defendant."

46. The Plaintiff is unable to demonstrate the root of its Certificate of Lease. In fact from PW1's testimony there is nothing to show that the Plaintiff applied for the plot and was allocated the same. The minutes sought to be relied upon to show that he was allocated the plot were not produced. As things stand the Plaintiff only has the Certificate of Lease with no supporting documents.
47. The Plaintiff dismissed the Defendant's allotment letter as being a mere letter which does not confer title and stated that it cannot be superior to its lease. In *Miriam Mbeke Nyamasyo & 2 others v Dishon*



Odhiambo & 6 others [2021] eKLR the court while holding that a party is entitled to uphold its interest in a Letter of allotment stated; “I cannot fault the plaintiffs for coming to court seeking the eviction of the 1st – 6th defendants from their land. As I have said, although they only hold allotment letters, they are entitled to protect the interest in the allotment letters. The 1st – 6th defendants have not demonstrated that they have a title that is more superior to that held by the plaintiffs and cannot hinge their defence on the assertion that the plaintiffs only have an allotment letter. The defendants have not demonstrated to me that they should be allowed to continue with possession of the land that has been allotted to the plaintiffs. I therefore find that the plaintiffs are fully entitled to the orders of eviction and permanent injunction against the 1st – 6th defendants. I find no merit in the 1st – 6th defendant’s counterclaim and the same is dismissed.”

48. Section 26(1) (b) of the *Land Registration Act*, 2012 provides that:-

- “(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor 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, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, 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.
- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”

49. The evidence adduced by PW1 confirms that the certificate of lease it holds was issued unprocedurally hence the same can be impeached. In the absence of any Letter of Allotment issued to the Plaintiff, the Plaintiff cannot be said to have been allocated the suit plot. The Plaintiff’s case is that it was allocated the plot by the City Council of Nairobi and there are minutes available. In the case of *County Council of Meru & 2 others v PCEA through the Registered Trustees* [2020] eKLR it was held that:-

“Minutes alone do not confer any proprietary interest in land. This is because minutes are an expression of intention to allocate land. The commitment to actualize the intent to allocate is manifested in the issuance of the Letter of Allotment from the allocating authority. Demarcation of the parcel of land in question is then carried out through the process of survey. Thus the resolution of the council as captured in the minutes must be put into effect in order to give rise to a bundle of rights in land capable of being protected”.

50. In the instant suit the Plaintiff did not produce the minutes which purported to allocate it the suit plot. PW1 did not produce any Letter of Allotment in the name of the Plaintiff. The only conclusion is that the Title held by the Plaintiff was unprocedurally and unlawfully obtained.

51. I find that the Plaintiff has failed to prove its case as against the Defendant on a balance of probabilities. Its case must fail. The same is dismissed.



52. In essence the Defendant's counterclaim succeeds. The Defendant was able to demonstrate how he acquired the suit plot.

53. Accordingly, judgment is entered for the Defendant as against the Plaintiff as follows: -

- a. That a declaration is hereby issued that the property known as LR 209/4401/708 (plot No 806) belongs to Nicholas George Mwai.
- b. That a declaration is hereby issued that the Plaintiff's registration of a lease in respect of LR 209/4401/7089 (plot No 806) in its favour was unlawful, unprocedurally and fraudulently procured.
- c. That a permanent injunction is hereby issued restraining the Plaintiff either by itself, its servants, agents, employees, assigns, personal representatives or otherwise from encroaching upon, trespassing onto, alienating or disposing of or in any other way whatsoever dealing with and or interfering with the Defendant's property known as Land Reference No 209/4401/708 (plot No 806).
- d. That an order is hereby issued directing the Chief Land Registrar to cancel and deregister the lease in favour of Nafuu Housing Limited in respect of LR No 209/4401/708 (Plot No 806).
- e. That the Defendant's shall have costs of the suit.

It is so ordered.

DATED, SIGNED AND DELIVERED NAIROBI THIS 16TH DAY OF JUNE 2022.

L. KOMINGOI

JUDGE

In the presence of:-

Mr. Makori for the Plaintiff

Mr. Kamotho for the Defendant

Steve - Court Assistant

