



**Gitonga (Suing Through her lawful Attorneys James Chege Macharia,  
Alfornse Kisilu and Urbanus Kioko) v Njoki & another (Environment & Land  
Case 705 of 2016) [2022] KEELC 3936 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3936 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 705 OF 2016**

**LN MBUGUA, J  
JULY 28, 2022**

**BETWEEN**

**CYNTHIA WANJIRU GITONGA ..... PLAINTIFF  
SUING THROUGH HER LAWFUL ATTORNEYS JAMES CHEGE MACHARIA,  
ALFORNSE KISILU AND URBANUS KIOKO**

**AND**

**CHRISTINE NJOKI ..... 1<sup>ST</sup> DEFENDANT  
COUNTY GOVERNMENT OF NAIROBI ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. Through the Amended Plaint dated June 13, 2018, the Plaintiff claims to be the proprietor of plot number B55 Umoja Innercore Sector III in Nairobi having been allocated the said plot by the City Council of Nairobi (the predecessor of the 2<sup>nd</sup> Defendant) vide the allotment letter dated November 26, 2008. That she paid a consideration of Kshs 60,000 and a further Kshs 15,000 as survey fees for the said plot and thereafter she put up temporary structures.
2. She later came to learn that the 1<sup>st</sup> Defendant had encroached on her property, demolished the temporary structures and put up semi-permanent structures without approval. This act which was illegal and unlawful caused her loss and damage as she could not use her property any more. She pointed out that during the pendency of this suit, she learnt that the 1<sup>st</sup> Defendant had obtained title to the property in form of a Certificate of Lease for LR Nairobi/Block 83/1584 formerly B55 Umoja Innercore Sector III.
3. She stated that the 2<sup>nd</sup> Defendant had abetted the 1<sup>st</sup> Defendant's illegal actions since it failed to exercise its authority to demolish the said illegal structures. She added that the said title issued to the 1<sup>st</sup> Defendant was illegal and fraudulently acquired and should be revoked and cancelled.



4. She thus prayed for for the following orders:
  - i. A permanent injunction restraining the defendants by themselves, servants agents, employees and any person claiming under them from interfering in any way, developing, constructing, allocating, alienating, transferring, charging or in any other way dealing with the parcel of land known as plot number B55 Umoja Innercore Sector III now LR Nairobi/Block 83/1584.
  - ii. Vacant possession of plot number B55 Umoja Innercore Sector III now LR Nairobi/Block 83/1584.
  - iii. Eviction of the 1<sup>st</sup> Defendant from plot number B55 Umoja Innercore Sector III now LR Nairobi/Block 83/1584.
  - iv. Damages for trespass.
  - v. Mesne profits.
  - vi. Costs of the suit and interest.
  - vii. A declaration that the lease and the certificate of lease for LR Nairobi/Block 83/1584 formerly B55 Umoja Innercore Sector III were obtained and/or acquired illegally, unprocedurally, are rooted in fraud and therefore the 1<sup>st</sup> Defendant has no legitimate proprietary rights over the same.
  - viii. A declaration that the Plaintiff is the lawful allottee and / or owner of plot number B55 Umoja Innercore Sector III.
  - ix. An order revoking title No LR Nairobi/Block 83/1584.
5. The 1<sup>st</sup> Defendant opposed the suit vide her amended Defence dated June 25, 2018 and filed in court on June 27, 2018. She avers that she is the owner of the suit property having purchased the same in year 2015 for valuable consideration from one Lilian Wanjiru Muiruri who was the registered leasee. She denies having acquired the said title illegally and fraudulently, adding that she did not collude with the 2<sup>nd</sup> Defendant to acquire the said property. She also stated that the structures said to have been demolished by her were illegal structures.
6. The 2<sup>nd</sup> Defendant filed their statement of defence dated January 26, 2021 where they recognize the plaintiff as the owner of the suit property as her name appears in their records. They however still sought the dismissal of the suit with costs.

### **The Evidence**

7. The Plaintiff's case was advanced by one witness, James Chege Macharia (PW1) an accountant who stated that he had a Power of Attorney in regards to Plot B55 Umoja Innercore (the suit property). He adopted his witness statements dated June 24, 2016 and March 13, 2018 as his evidence. He also produced 13 documents as Plaintiff Exhibit 1-13, the said documents are in two lists, the one dated June 24, 2016 with 11 items and the one dated March 13, 2018 containing two items, all of which are to be found in plaintiff's paginated Trial Bundle dated March 19, 2018.
8. In the said witness statements PW1 re-stated the contents of the Plaintiff adding that after perusing the 1<sup>st</sup> Defendants pleadings they discovered that the title alleged to be LR Nairobi/Block/83/1584 was acquired fraudulently as the Plaintiff had never transferred her rights to the property to anyone, hence the title should be revoked and cancelled.



9. On cross examination by counsel for the 1<sup>st</sup> Defendant, PW1 stated that the Power of Attorney was granted to him by the Plaintiff out of trust. He was competent to testify on matters that occurred before he got the Power of Attorney because he was duly briefed. He contends that the Plaintiff complied with the allotment conditions and only learnt of a Lilian Wanjiru from the 1<sup>st</sup> Defendants pleadings.
10. On cross-examination by counsel for the 2<sup>nd</sup> defendant, PW1 re-affirmed that the property known as B55 Umoja Inner Core belongs to the plaintiff.
11. On re-examination, PW1 stated that the letter of allotment was released to the Plaintiff on April 1, 2009 and the first payment was made on April 14, 2009 and another was made on May 21, 2009.
12. The case for the 1<sup>st</sup> Defendant Christine Njoki Ngaruhia was advanced by herself as DW1. She adopted her witness statement dated April 11, 2018 as her evidence. She also produced the eight documents in her list also dated April 11, 2018 as Defence Exhibit 1-8. The said documents can be traced in her paginated Trial bundle bearing the same date.
13. DW1 contends that she purchased the suit property from one Lilian Wanjiru Muiruri for a consideration of Kshs 4,000,000 vide a sale agreement dated May 12, 2015. The transfer was effected on May 28, 2015 and a subsequent certificate of lease was issued to her on June 23, 2015.
14. On cross examination by counsel for the Plaintiff, DW1 affirmed that she purchased the suit property from Lilian Wanjiru for Kshs 4,000,000 using a banker's cheque which she did not produce in court. On the transfer document, she stated that on the second page thereof, there was a consent endorsed by the Nairobi Town Clerk. She also confirmed that the lease document in her bundle dated April 23, 2013 was signed by the Mayor and Town Clerk while the transfer of the land to her is dated May 28, 2015.
15. On cross examination by counsel for the 2<sup>nd</sup> Defendant, DW1 stated that she could not call Lilian Wanjiru (the person who sold her the property) as a witness because she no longer had her contact details. She stated that prior to the purchase, they conducted a search which showed that Lilian was the owner of the property. However, the said search certificate was not produced in court. She also stated that they went to the suit premises where they were shown the plot beacons and she was issued with a beacon certificate which was also not produced in court. She stated that she had been paying land rates including rates for January 2022 and she was even issued with a clearance certificate by the 2<sup>nd</sup> Defendant.
16. In re-examination, DW1 re-affirmed that all the completion documents were availed to her to facilitate the sale. Thus she had no reason to doubt the authenticity nor void the transaction.
17. The case for the 2<sup>nd</sup> Defendant was advanced by one Geoffrey Cheruyot, a County Surveyor, (DW2). He adopted his witness statement dated March 30, 2021 as his evidence. In the said statement he indicated that according to records from Director of Survey and Department of Land, Urban Planning, Urban Renewal and Project Management, the suit property known as Nairobi/Block 83/1584 belonged to the Plaintiff. That this was the same information in the County Government of Nairobi.
18. On cross examination by Counsel for the Plaintiff he confirmed that plot Nairobi/Block 83/1584 was the same as B55 Umoja Inner core Sector III which was owned by the Plaintiff as per their records. He confirmed that the letter of allotment on the Plaintiff's document on page 13, search certificate on page 24 were from the 2<sup>nd</sup> Defendant which showed that the Plaintiff was the owner of the said property. He however stated that he could not confirm whether a lease was prepared in favour of the Plaintiff.



19. He was not aware of any lease issued to Lilian Wanjiru and he could not confirm whether the signatures on page 15 of 1<sup>st</sup> defendant's bundle (in the lease dated April 23, 2013) belonged to the Mayor and the Town Clerk as indicated. He however pointed out that on April 23, 2013 there was no Mayor and Town Clerk at the 2<sup>nd</sup> Defendant's offices. He also questioned the veracity of the consent endorsement by the Town Clerk dated June 23, 2015 on page 18 of the 1<sup>st</sup> Defendant's documents stating that as at that date, there was no Town Clerk for City Council of Nairobi. Thus the lease and consent could not have emanated from the 2<sup>nd</sup> Defendant. He elaborated that before the 2<sup>nd</sup> Defendant issues a lease, there needs to be a letter of allotment first. And no letter of allotment was given to the 1<sup>st</sup> Defendant.
20. On cross examination by counsel for the 1<sup>st</sup> Defendant, DW2 stated that from the lease on page 13 of the 1<sup>st</sup> Defendant's documents, he could not confirm whether there was another lease, he could also not confirm whether the Plaintiff had documents similar to the ones on page 16 and 17 of the 1<sup>st</sup> Defendant's documents which were registration of a lease and clearance certificate respectively. He also stated that he could neither confirm nor disprove whether the documents of 1<sup>st</sup> defendant originated from the 2<sup>nd</sup> Defendant or not.
21. He confirmed that on page 24, 25 and 26 of the 1<sup>st</sup> Defendant's bundle, there were rates demand notes from the 2<sup>nd</sup> Defendant stating that he was not aware whether the system could issue rates to different people.
22. He confirmed that the Plaintiff's allocation document read B55 Umoja Inner Core and that payment was to be made within 30 days. On looking at the search document on page 24 of the Plaintiff's document dated March 23, 2016 and the certificate of lease dated June 23, 2015 on page 20 as well as the demand notes dated January 11, 2016 on page 24/25 of the 1<sup>st</sup> Defendant's documents he stated that it was possible to have such discrepancies in documents belonging to the same property since they were different documents.
23. On re-examination he clarified that the hand written search document reflected the records of allocation at the County Government while the printed demand notes were for rate payments only and were not a source of record allocation and they had evidence of payments from the Plaintiff in their records at the Dandora office.
24. He elaborated that every allottee had a ledger where all the payments were made and recorded. In the case of the Plaintiff, he stated that he was familiar with the documents on 14, 15 and 19 to 21 which were receipts of payment for property B55 Umoja Innercore Sector III. He also stated that payments made in Dandora were for plots that had not been issued with titles.
25. He confirmed that the document on page 22 of the Plaintiff's document showed that all payments had been cleared by May 21, 2009 before the said property was issued to the 1<sup>st</sup> Defendant.
26. He concluded by stating that he was not aware of any cancellation of the allotment to the Plaintiff.

### **Submissions**

25. The Plaintiff's submissions are dated March 28, 2022 containing five issues for consideration as summarised hereunder.
27. The first issue is whether the suit property was allotted to the plaintiff. It was submitted that the Plaintiff was the allottee of the suit land as per the letter dated 26<sup>th</sup> November 2008 stating that the 2<sup>nd</sup> Defendant has made it clear that the records from that office showed that the Plaintiff was the owner and confirmed that the allotment had never been revoked. Reference was made to Section 7 of the [Land Act](#) which



- provides allotment as a method of land acquisition. The case of [\*Ali Gadaffi & Another vs Francis Mubia Mutungu & 2 Others\*](#) (2017) eKLR was proffered to buttress this point.
28. The second is whether the lease and certificate of lease for LR Nairobi/Block 83/1584 were obtained or acquired illegally, unprocedurally and fraudulently, and whether the same should be revoked. It was submitted that as at April 2013, the office of the Mayor and Town Clerk were no longer in existence. Therefore it was not possible for a non-existent office to sign documents dated April 2013 and May 2015. It was pointed out that the 2<sup>nd</sup> Defendant made an unequivocal statement that they never issued any lease to a Lilian Wanjiru. On this point reference was made to Section 26(1) of the [\*Land Registration Act\*](#) and the cases of [\*Dr Joseph N K Arap Ngok vs Moiwo Ole Keiwua & 4 Others\*](#) Civil Appeal No 60 of 1997, [\*Charles Adavachi Malenya vs Stephen G Kiari & 4 Others\*](#) (2021) eKLR, [\*Daudi Kiptugen vs Commissioner of Lands & 4 Others\*](#) (2015) eKLR, and [\*Munyu Maina vs Hiram Gathiba Maina\*](#), Civil Appeal No 239 of 2009. As such, there is no way Lilian Wanjiru had a valid title that could be passed to a third party and asked that the register be rectified as per Section 80 of the [\*Land Registration Act\*](#).
  29. The 3<sup>rd</sup> issue is on whether the 1<sup>st</sup> Defendant was an innocent purchaser. It was submitted that the documents produced were fraudulent since no search certificate was adduced and the signed documents had signatures of non-existent persons. Further, there was no proof of the purported purchase of Kshs 4,000,000. Reference was made to the case of [\*Lawrence P Mukiri Mungai, Attorney of Francis Muroki Mwaura vs Attorney General & 4 Others\*](#) [2017] eKLR on the description of a *bona fide* purchaser. It was submitted that Article 40(6) of the [\*constitution\*](#) could not protect property acquired fraudulently as stated in [\*Alice Chemutai Too vs Nickson Kipkirui Korir & 20 Others\*](#) (2015) eKLR.
  30. In conclusion, it was submitted that the Plaintiff was entitled to the prayers sought with costs.
  31. The submissions of the 1<sup>st</sup> Defendant are dated June 7, 2022. It was submitted that the 1<sup>st</sup> Defendant had tendered uncontroverted evidence that she had a lease from the city Council of Nairobi registered on April 23, 2013 and *vide* a sale agreement dated May 12, 2015, she had purchased the property for a consideration of Kshs 4,000,000, she was issued with a certificate of lease on June 23, 2015. Noting that she had no knowledge of the Plaintiff's claim to the suit property. As such she was a *bona fide* purchaser for value. Reference was made to the cases of [\*Neal v Holt\*](#) 69 SW 2d 603 (Civil Appeals of Texas), [\*Weston Gitonga & 10 others v Peter Rugu Gikanga & Another\*](#) [2017] eKLR and [\*Dr Joseph Arap Ngok \(supra\)\*](#).
  32. It was submitted that the 2<sup>nd</sup> Defendant did not produce allotment letters for verification on who the listed proprietor was. It was also pointed out that the 2<sup>nd</sup> Defendant's witness statement made reference to Nairobi/Block 85/1584 which was not the suit property. Reference was made to the cases of [\*Philma Farm Produce & Supplies & 4 Others vs The Attorney General & 6 Others\*](#) (2012) and [\*Kaseve Welfare Society v Harp Housing Ltd\*](#) (2020).
  33. It was further submitted that the evidence presented by the Plaintiff showed that she made payments for the land after the 30 days had expired which was a condition on the allotment letter. And the payment was not even equivalent to the Kshs 18,000 required. The court was urged to note that even if the plaintiff is found to have complied with the conditions of allotment, an allotment letter could not defeat title of a registered proprietor. On this point reference was made to the case of [\*Lilian Waitbera Gachubi v David Shikuku Mzee\*](#) [2005] eKLR.
  34. On the issue of fraud, it was stated that there was no evidence of fraud, and as such the Defendants indefeasible property rights enshrined in Section 25(1) and Section 26(1) of the [\*Land Registration Act\*](#) could not be defeated. The following cases were proffered to buttress the aforementioned point;



Arthi Highway Developers Ltd vs West End Butchery & Others; Insurance Company of East Africa vs The Attorney General & 3 others HCC No 135 OF 1998 and Falcon Properties Ltd v Tom Chore Odiara & 2 others (2018) eKLR.

35. The submissions of the 2<sup>nd</sup> defendant are dated May 6, 2022. It was submitted that the Plaintiff had adduced receipts of payments demanded in the allotment letter as well as search certificates showing the land was in her name. That the allotment letter issued to the Plaintiff was the one appearing in the 2<sup>nd</sup> Defendant's records and that the records did not bear any information relating to the 1<sup>st</sup> Defendant.
36. It was stated that the documents held by the 1<sup>st</sup> Defendant were fraudulently acquired since there was neither a Mayor nor a Town Clerk on the dates they were apparently signed.
37. It was further submitted that once land had been allocated, then a subsequent allocation could not be possible without cancellation or revocation of the previous allotment noting that DW2 had categorically said that the allotment to the Plaintiff had never been cancelled nor revoked. Further, the 1<sup>st</sup> defendant had not availed any letter of allotment to Lilian Wanjiru and did not call the latter as a witness. The case of Republic vs The City Council of Nairobi [2014] eKLR was cited to support this position.

### **Analysis and Determination**

38. This court finds that the issues for determination are:
  - i. Who is the lawful owner of plot no B55 or Nairobi/Block 83/1584 Umoja Innercore Sector III?
  - ii. What orders should be issued?

### **Ownership**

39. It is clear that the suit property is contested between the Plaintiff and the 1<sup>st</sup> Defendant with both parties adducing different documents before this court. The claim of the plaintiff is anchored on the letter of allotment dated November 26, 2008, while the 1<sup>st</sup> defendant claims to have purchased the land from one Lillian Wanjiru who already had a lease to the land in question. From the out set, I find that the lease which was apparently possessed by Lillian Wanjiru issued on April 23, 2013, indicates that the suit property was "Nairobi Title Number ; Nairobi/ Umoja Block 83/1584 Formerly;B55- Umoja Inner Core Section 111". I have no doubts that the land being claimed by the plaintiff via an allotment letter is the same land being claimed by the 1<sup>st</sup> defendant through her title.
40. It has been said that in civil cases, courts decide cases on a balance of probability. In the Court of Appeal case of Samuel Ndegwa Waitbaka v Agnes Wangui Mathenge & 2 others [2017] eKLR the court had this to say on this issue:

"In Civil cases such as this case, the standard of proof is on the balance of probabilities. This standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not."
41. In the current case, the plaintiff possesses a letter of allotment dated November 26, 2008. The letter on plaintiff's bundle page 22 emanates from the 2<sup>nd</sup> defendant who were confirming that plaintiff had paid all outstanding rates. There is no evidence that the allotment of the land plot no B55 Umoja Inner Core was ever revoked. There is also no evidence adduced to indicate that the plaintiff was notified of any short-coming regarding her allotment. If anything, the 2<sup>nd</sup> defendant avers that their records



indicate that the plaintiff is the owner of the suit land. In any event, there is no evidence of an allotment issued to Lillian Wanjiru to gauge when the said Lillian could have possibly acquired an interest in the suit land. I find that the plot of land was not available for allocation by the time Lillian Wanjiru was being issued with a lease in year 2013. see *Ali Gadafi & Another vs Francis Mubia Mutungu & 2 Others* (2017) eKLR cited by the plaintiff.

42. On the other hand, I find that the documents availed by the 1<sup>st</sup> defendant, particularly the lease issued to Lillian Wanjiru on April 23, 2013, as well as the transfer document on page 18 of 1<sup>st</sup> defendant's documents are flout with issues of fraud. The issue of signature by Mayor and Town Clerk in the lease dated April 23, 2013 was also highlighted by this court through Justice Eboso in the ruling dated November 22, 2017 in the following words:

“...It is a matter of law that all local authorities which existed prior to the General Election held on March 4, 2013 under the Constitution of Kenya 2010 were dissolved and ceased to exist upon conclusion of the elections. The lease which forms the foundation of the 1<sup>st</sup> defendant's title was allegedly presented for registration on April 23, 2013 by the City Council of Nairobi and one Lilian Wanjiru Muriruri. This was at the time when the City Council of Nairobi had ceased to exist...”

43. Further, the transfer document dated May 28, 2015 purportedly transferring the suit property from Lillian Wanjiru to the 1<sup>st</sup> defendant was endorsed and consented to by the Town clerk on behalf of the city council of Nairobi.
44. As rightly submitted by the plaintiff and the 2<sup>nd</sup> defendant, the the offices of the mayor and Town clerk had ceded to exist as at the time of execution of the aforementioned documents. The logical conclusion to make is that such transactions were fraudulent, illegal and unprocedural. The title issued to the 1<sup>st</sup> defendant is therefore anchored on quick sand and cannot be afforded protection under Article 40 (10) of the Constitution as no good title was passed unto her.
45. In the Court of Appeal *Wambui v Mwangi & 3 others* (Civil Appeal 465 of 2019) [2021] KECA 144 (KLR) (Civ) (19 November 2021) (Judgment), it was stated that;

“...No court of law should sanction and pass as valid any title to property founded on: fraud; deceitfulness; a contrived decree; illegality; nullity; irregularity, unprocedurality or otherwise a product of a corrupt scheme...”

## Relief

46. From the foregoing, this court finds that the Plaintiff has proved his case on a balance of probabilities save that the claim of mesne profits though pleaded was not proved. Having come to a conclusion that no good title had been passed onto the 1<sup>st</sup> defendant, the net effect is that the title held by the 1<sup>st</sup> defendant ought to be cancelled.
47. The final orders are as follows;
- i. It is hereby declared that the lease and the certificate of lease for LR Nairobi/Block 83/1584 formerly B55 Umoja Innercore Sector III were obtained illegally and unprocedurally, through fraud and therefore the 1<sup>st</sup> Defendant has no legitimate proprietary rights over the same.
  - ii. An order is hereby issued revoking the Certificate of lease for LR Nairobi/Block 83/1584 issued to Christine Njoki Ngarachu.



- iii. A declaration is hereby issued to the effect that the Plaintiff is the lawful allottee and / or owner of plot number B55 Umoja Innercore Sector III.
- iv. A permanent injunction is hereby issued restraining the defendants by themselves, servants agents, employees and any person claiming under them from interfering in any way, developing, constructing, allocating, alienating, transferring, charging or in any other way dealing with the parcel of land known as plot number B55 Umoja Innercore Sector III now LR Nairobi/Block 83/1584.
- v. An order is hereby issued to the 1<sup>st</sup> defendant to give Vacant possession of plot number B55 Umoja Innercore Sector III now LR Nairobi/Block 83/1584 within a period of 45 days failure to which eviction to issue.
- vi. On costs, the court takes into account that some officers of the 2<sup>nd</sup> defendant must have been involved in the alleged mess of issuance of unlawful documents to the 1<sup>st</sup> defendant. In that regard, I direct that each party bears their own costs of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF JULY 2022 THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**

**In the presence of:-**

M/s Kangethe for the Plaintiff

Githinji for 1st Defendant

M/s Muthee holding brief for R.N Wafula for 2nd Defendant

Court Assistant: Eddel/Benson

