



**Nairobi City County v Kenya Airports Authority (Environment and Land Case Civil Suit 918 of 2012) [2022] KEELC 2720 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 2720 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 918 OF 2012**

**OA ANGOTE, J  
JULY 28, 2022**

**BETWEEN**

**NAIROBI CITY COUNTY ..... PLAINTIFF**

**AND**

**KENYA AIRPORTS AUTHORITY ..... DEFENDANT**

**JUDGMENT**

**Background**

1. Vide an Amended Plaintiff dated 31<sup>st</sup> August, 2021, the Plaintiff seeks as against the Defendant the following reliefs;
  - i. A Permanent Injunction to restrain the Defendant whether by itself or via its servants, agents or any other person(s) claiming under it from dealing with or continuing to deal with, use, dispose of, part with, charge, alienate, lease or otherwise in any manner whatsoever interfering with the Plaintiffs ownership, control and proprietorship over Plots No 9042/32, 9042/35, 9042/36, 9042/R situate within Embakasi in Nairobi.
  - ii. An order directed at the Chief Land Registrar, Nairobi (and/or any other concerned officer of government) to recall, cancel and nullify Grant No I.R No 77020/I, L.R No 9042/667 situate in Embakasi within Nairobi.
  - iii. A declaration that the Plaintiff is the lawful proprietor of Plots No's 9042/34, 9042/35, 9042/36, 9042/R situate within Embakasi in Nairobi.
  - iv. Costs of the suit and Interest
2. It is the Plaintiff's case that it has at all material times been the registered proprietor and/or beneficial owner of all those parcels of land known as L. R.9042/34-1.337Acres, L.R.9042/35-1.257 Acres, L.R. 9042/36-1.684 Acres and L. R. 9042/R situate within Embakasi Area in Nairobi (hereinafter the suit



- property); that the Plaintiff has not disposed its proprietary interest or ownership in any of the aforesaid parcels of land to the Defendant or any other person and that no decisions and/or resolutions have been passed by the Plaintiff sanctioning the sale, letting or transfer of the suit property.
3. The Plaintiff averred in the Plaint that on diverse dates in 2007, the Defendant approached the Plaintiff seeking to acquire some of the Plaintiff's plots aforesaid but the Plaintiff declined the Defendant's request because it had, among other reasons, not obtained consent from the concerned Ministry to dispose off the properties and that the above notwithstanding, the Defendant on the strength of Grant I.R No 77020/I, L.R 9042/667 allegedly acquired in 1998 claimed ownership of all the Plaintiff's aforesaid plots.
  4. According to the Plaintiff, although the Defendant alleges to have acquired its grant over the property L.R 9042/667 in 1998, in the year 2007, it exerted pressure on the Plaintiff to sell the suit plots to itself which request was denied; that the Defendant's alleged title to the suit plot is irregular and void and is vitiated by illegality, mistake, error or fraud to which the Defendant is a party to and that the Defendant's fraudulent activities include laying claim to the Plaintiff's plots, applying and causing itself to be registered as the owner of the suit premises knowing that the suit property was not available for alienation.
  5. The Defendant filed a Defence and denied all the averments in the Plaint. The Defendant averred that it is the registered owner of all that property comprised in Grant I.R No 77020/1, L.R No 9042/667 as confirmed in the Grant of Title issued on 23<sup>rd</sup> July, 1998; that the Defendant has not laid claim to ownership of any of the parcels of land pleaded or at all and that the dimensions of the property comprised in the Grant I.R No 77020/1, L.R No 9042/667 are particularly delineated in Deed Plan No 218610 dated 13<sup>th</sup> July, 1998 and the said property is distinct and does not include the properties cited by the Plaintiff.

### **Hearing & Evidence**

6. The matter proceeded for hearing on 23<sup>rd</sup> February, 2022. PW1 informed the court that he is the Principal Valuer of the Plaintiff and that the Plaintiff is the beneficial owner of the properties known as Plot No's 9042/34, 9042/35, 9042/36 and 9042/R located in Embakasi Nairobi County having been granted the same by the Department of Lands, which allocation was perfected between 1958 & 1973.
7. According to PW1, residential houses have been erected on L.R No's 9042/34, 9042/35 and 9042/36 by the Plaintiff in respect of which the Social Services and Housing Department of the Plaintiff levies rent to tenants whereas the property known as LR 9042/R was at the time of allocation unsurveyed land allocated to the Plaintiff for the purposes of erecting shops, a charcoal depot & a public market.
8. It was the testimony of PW1 that the Plaintiff has never disposed of the suit properties in any manner whatsoever to any person or entity; that it is apparent from the Deed Plan adduced by the Defendant that the suit properties form part of the Defendant's alleged property L.R No 9042/667 and have been subsumed therein and that there have been several cases with respect to the suit plots and restraining orders issued barring the Defendant from evicting the Plaintiff's tenants from the rental houses erected on the suit property, specifically HCCC No 718 of 2011 and High Court Petition 113 of 2012.
9. According to PW1, the Defendant has in the course of the proceedings admitted that the suit properties belong to the Plaintiff and that it is unlawful for the Defendant to threaten the Plaintiff's tenants with eviction from the rental houses situate on the suit properties.
10. During cross-examination, PW1 admitted that the title to L.R No 9042/667 was in the Defendant's name; that the letter of allotment is for plot number 34; that parcel number 9042 is for the entire



- Embakasi Village; that there were certain conditions to be met by the Plaintiff as per the letter of allotment including payment of stand premium and that he is unaware whether the same was done.
11. PW1 informed the court that they have records of the plots including the valuation book which shows information of ownership and site value; that he does not have the original valuation book; that they are still processing titles for many public institutions and he does not know why titles have not been issued in respect of the suit plots and that there are minutes of the meeting between themselves and the Defendant after the eviction of their tenants.
  12. On re-examination, PW1 stated that the Plaintiff sued the Defendant because the Defendant wanted to evict its tenants; that the Defendant even tried to purchase the suit properties and that the Plaintiff's claim is that plots 9042/34, 35, 36 & R are not part of the land belonging to the Defendant.
  13. DW1 informed the court that vide Grant No I.R 77020 issued on 23<sup>rd</sup> July, 1998 by the Registrar of Titles, the Defendant became the registered owner of all that parcel of land known as L.R No 9042/667; that the dimensions of the property comprised in Grant I.R NO 77020/1 L.R NO 77020/1 are particularly delineated in Deed Plan Number 208610 dated 13<sup>th</sup> July, 1998 and that as such, it is not true that the property forms part of the suit plots.
  14. DW1 stated that the Defendant has never laid claim to any other property other than the property aforesaid, nor does it dispute the Plaintiff's ownership aforesaid; that the Defendant had expressed interest to buy the suit properties and that the process leading up to the acquisition of the property comprised in grant I.R NO 77020/1 L.R No 9042/667 registered in favour of the corporation was entirely above board.
  15. On cross-examination, DW1 stated that she was employed by KAA in 2004; that she has been on the ground where KAA is located; that the Defendant does not deny the Plaintiff's ownership of the parcels of land stated in the Plaintiff and that investigations are ongoing and she cannot conclusively state that the suit properties belong to the Plaintiff.

### Submissions

16. The Plaintiff counsel submitted that the documentary evidence adduced in court confirms the Plaintiff's proprietorship of the suit properties; that the Defendant has admitted that it does not lay claim on any of the Plaintiff's properties; that it is evident from the Deed Plan adduced by the Defendant that the suit properties are distinct from L.R No 9042/667 which belongs to the Defendant and that having demonstrated its ownership of the suit property, the Plaintiff is entitled to the orders sought.
17. The Defendant's counsel submitted that the Defendant's title to L.R No 9042/667 issued vide Grant No I.R 77020 has not been challenged by the Plaintiff and neither has it been demonstrated that the title was illegally procured. Reliance in this regard was placed on the case of *Susan Wairimu Mathai vs Peter Waitara Wathoko* [2014]eKLR which affirmed that a registered owners title is protected by Section 25 of the *Land Registration Act* and can only be impeached as per the provisions of Section 26 of the Act.
18. Counsel submitted that the Plaintiff's proprietorship of the suit property has not been proved there having been no evidence showing that they complied with all the requirements set out in the letter of allotment; that further, titles to the aforesaid properties have for unknown reasons not yet been issued and that the Plaintiff has failed to establish any proprietary interest in the suit property and as such, it is not entitled to the permanent injunctive orders sought. Reliance in this regard was placed on the case of *Nguruman Limited vs Jan Bonde Nielsen & 2 Others*[2014]eKLR.



## Analysis & Determination

19. Having carefully considered the pleadings, the testimonies and submissions herein, the issues that arises for determination are;
  - i. Whether the Plaintiff has proved its case on a balance of probabilities and if so;
  - ii. Whether the Plaintiff is entitled to the orders sought?
20. The Plaintiff is primarily seeking for a declaration that it is the proprietor of the suit plots and for a permanent injunctive order restraining the Defendant from interfering with its ownership thereof as well as an order for cancellation of L.R No 9042/667 belonging to the Defendant.
21. According to the Plaintiff, it is the lawful proprietor and or beneficial owner of the suit plots known as Plots 9042/34, 9042/35, 9042/36 and 9042/R having been granted the same by the Government between 1958 and 1973; that the Plaintiff has never parted with ownership of the suit properties in any way whatsoever and that the Deed Plan No 218610 produced by the Defendant shows that the suit plots form part of L.R No 9042/667 owned by the Defendant.
22. It is the Plaintiff's case that whereas the Defendant asserts that its claim is in respect of L.R No 9042/667, it has laid claim on the suit plots and has sought to evict the Plaintiff's tenants thereon; that there are several cases with respect to the suit properties being Hcc 1683 of 1998, Hcc 718 of 2011 and High Court Petition 113 of 2012 and that there are restraining orders barring the Defendant from evicting the Plaintiff from the suit properties.
23. The Plaintiff produced into evidence correspondence between itself and the Defendant dated 8<sup>th</sup> October, 2007, 15<sup>th</sup> November, 2007, 20<sup>th</sup> November, 2007, 17<sup>th</sup> April, 2008, 14<sup>th</sup> December, 2010, 21<sup>st</sup> April, 2011, 21<sup>st</sup> April, 2011 all with respect to the suit properties. PW1 also produced in evidence the Minutes of 10<sup>th</sup> June, 2009, the Letter of Allotment Refs-64405/2, 62019/90, 51776/IV/155, the Valuation rolls for 9042/R.34, 9042/R.35, 9042/R.36 and an internal memo dated 17<sup>th</sup> May, 2007.
24. In response, the Defendant asserts that it is the registered owner of all that property known as Grant I.R No 77020/1, L.R No 9042/667 and that it has not laid claim to any of the suit plots as alleged by the Plaintiff or at all; that the dimensions in the property comprised in Grant Number I.R 77020/1 L.R 9042/667 particularly delineated in Deed Plan No 218610 are distinct and do not form part of the suit plots and that there is no basis upon which the Plaintiff can impugn the Defendant's title.
25. The Defendant adduced into evidence a copy of the Grant No I.R 77020 dated 23<sup>rd</sup> July, 1998 and a copy of the Deed Plan No 218610 dated 13<sup>th</sup> July, 1998.
26. It is trite law that he who alleges must prove. This is set out under Section 107(1)(2) of the Evidence Act, which provides as follows:
  - (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
  - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."



27. Sections 109 and 112 of the same Act state;

“109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

“112. In civil proceedings, 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.”

28. In discussing the standard of proof in civil liability claims in this jurisdiction, the Court of Appeal in *Mumbi M'Nabea vs David M. Wachira* [2016] eKLR stated as follows:

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not.

...The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M'mairanyi & Others v. Blue Shield Insurance Company Limited* -Civil Appeal No. 101 of 2000 [2005] 1 EA 280 where it was held that:

“Whereas under section 107 of the *Evidence Act*, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”

29. With respect to the burden of proof, the learned Judges of Appeal in the case of *Palace Investments Limited vs Geoffrey Kariuki Mwenda & another* [2015] eKLR, posited thus:

“Denning J, in *Miller –vs- Minister of Pensions* [1947] 2 All ER 372 discussing the burden of proof had this to say;-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.

This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will loose because the requisite standard will not have been attained.”

30. The court will be guided by the foregoing. In the present case the Plaintiff's proprietorship of the suit plot is not disputed by the Defendant. Indeed, according to the Defendant's witness, they have never laid any claim over the suit properties as alleged by the Plaintiff.

31. The Plaintiff's claim to ownership of the suit property is primarily founded on the letters of allotment as well as the Valuation Roll. It is now accepted that an allotment letter is not a title but a right or invitation which if accepted by an Applicant can translate to a right capable of being protected by law.



This was persuasively stated by the court in *Stephen Mburu & 4 Others vs Comat Merchants Ltd & Another* (2012) eKLR where he stated as follows:

“...from a legal stand point a letter of allotment is not a title to property. It is a transient and [is] often a right or offer to take property.”

32. It is only once a letter of allotment is issued and the terms thereon accepted, that title comes into existence. This was the holding by the Court of Appeal in the case of *Wreck Motor Enterprises vs Commissioner of Lands & 3 others* [1997] eKLR, who held as follows:

“Title to landed property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of a title document pursuant to the provisions held.” (Emphasis added).

33. A similar decision was made in the case of *Joseph Arap Ngok vs Justice Moyo Ole Keiwa*, Nairobi HCCA, APPL. No. 60 of 1997 (Unreported) where it was observed as follows:

“It is trite that such title to landed property can only come into existence after issuance of letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of title document pursuant to provisions in the Act under which the property is held.”

34. The Plaintiff has adduced three letters of allotment. The first one is dated 16<sup>th</sup> April, 1969 for the Nairobi Airport Village-Nairobi Urban district council, measuring approximately 4.5 Acres for staff housing. The second one is dated 13<sup>th</sup> July, 1965 for High Density Housing Site and the third one is dated 4<sup>th</sup> September, 1964.

35. Each of the aforesaid letters of allotment carried a specific time frame within which an acceptance of the offer and conditions for payment of the respective charges were to be made. Consequently, it was incumbent on the Plaintiff to satisfy the court that it in fact accepted the allotment and made the necessary payments within the specified period.

36. Not only was no such evidence adduced, PW1 admitted to being unaware of whether the terms of the letter of allotment were complied with. Further, it is noted that no Part Development Plan (PDP) is attached to the letters of allotment. Indeed, other than the letter of 4<sup>th</sup> September, 1964 in respect of L.R No 9042/R, the court is unable to identify the other parcels of land.

37. In the circumstances, the court finds that the particulars in the Valuation Roll cannot in themselves prove ownership of the suit properties. That being the case, the court is unable to make a finding that the suit properties belong to the Plaintiff.

38. The next issue for determination is whether the Plaintiff has made out a case for the cancellation of the Defendant's title to L.R No 9042/667. The evidence adduced in this case shows that the Defendant is the registered proprietor of the suit property having being so registered on 23<sup>rd</sup> July, 1998.

39. By dint of the provisions of Section 107 of the *Land Registration Act*, 2012, the law applicable to the title held by the Defendant is the Registration of Titles Act (now repealed) which provides as follows:

107. (1) Unless the contrary is specifically provided for in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.



- (2) Unless the contrary is specifically provided for in this Act or the circumstances are such that the contrary must be presumed to be the case, where any step has been taken to create, acquire, assign, transfer, or otherwise execute a disposition, any such transaction shall be continued in accordance with the law applicable to it immediately prior to the commencement of this Act...”
40. The repealed Section 23 (1) of the Registration of Titles Act (RTA) embodied the doctrine of indefeasibility of title as envisaged under the Torrens System of registration. Section 23 (1) of the Registration of Titles Act provides as follows:
- “ 23 (1) The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive of evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.”
41. In *Joseph Arap Ng'ok vs Justice Moiyo Ole Keiwua*, Nairobi Civil Application No. 60 of 1997, (unreported) the Court of Appeal in considering the effect of Section 23 held that;
- “Section 23(1) of the Act [the RTA] gives an absolute and indefeasible title to the owner of the property. The title of such owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya will be placed in jeopardy.”
42. The provision of Section 23(1) aforesaid makes it clear that the title of a registered proprietor shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof subject to encumbrances, easements, restrictions and conditions therein or endorsed thereon, and that the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.
43. No evidence was adduced with respect to the allegations that the Defendant’s property has subsumed the suit properties, which is the foundation of the Plaintiff’s assertions that the Defendant’s title is invalid. That being the case, it is the finding of the court that the Plaintiff has not established its case in this respect.
44. Flowing from the foregoing, it follows that the Plaintiff is not entitled to any declaratory and/or injunctive orders having failed to prove ownership of the suit plots, and having failed to impeach the Defendant’s title.
45. In conclusion, the court finds that the Plaintiff has failed to prove its case on a balance of probabilities as against the Defendant. The Plaintiff’s suit is hereby dismissed with costs.

**DATED, SIGNED AND DELIVERED IN NAIROBI VIRTUALLY THIS 28<sup>TH</sup> DAY OF JULY, 2022.**

**O. A. ANGOTE**

**JUDGE**

**In the presence of;**



Ms Katila for Plaintiff

Ms Akonga for Defendant

Court Assistant - June

