



**Mbugua v Embakasi Ranching Company Limited (Environment and Land Case Civil Suit 148 of 2019) [2022] KEELC 3495 (KLR) (14 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3495 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 148 OF 2019**

**JO MBOYA, J**

**JULY 14, 2022**

**BETWEEN**

**DAVID MICHAEL MBURU MBUGUA ..... PLAINTIFF**

**AND**

**EMBAKASI RANCHING COMPANY LIMITED ..... DEFENDANT**

**JUDGMENT**

1. Vide the plaint dated the May 3, 2019, the plaintiff herein has approached the court seeking for the following reliefs;
  - i. A declaration that the plaintiff is entitled to exclusive and unimpeded right of possession and occupation of the property being Plot number P1217 contained in Map Nine (9) (now LR. No. Nairobi/Block 105/4541).
  - ii. A declaration that the defendant allocated plot number P1217 contained in Map Nine (9) (now LR. No. Nairobi/Block 105/4541) illegally to Polly G. Wanjiru.
  - iii. An order compelling the defendant to deliver to the plaintiff at its expense vacant possession of Plot Number P1217 contained in Map nine (9) (now LR. no. Nairobi/Block 105/4541).
  - iv. An order compelling the defendant to allocate, point out and/or show the plaintiff the physical location of the bonus plot.
  - v. An order compelling the defendant to release to the plaintiff title documents in respect of Plot number P1217 contained in map nine (9) (now LR. No. Nairobi/Block 105/4541) and the Bonus Plot.
  - vi. General Damages for loss and suffering.



- vii. Costs of this suit together with interests thereon at such rate and for such period of time as this honourable court may deem fit to grant.
- viii. Any such other or further reliefs as this court may deem appropriate.
2. Upon being served with the plaint and summons to enter appearance, the defendant herein duly entered appearance on the May 20, 2019 and thereafter filed a statement of defense on the June 27, 2019.
3. However, the Defendant neither filed a list of witnesses nor list and bundle of documents, whatsoever and howsoever.

### **Evidence By The Parties:**

#### Plaintiff's Case

4. The plaintiff herein testified as PW1 and same stated that on or about the November 13, 1975, same registered as a shareholder with the defendant company and thereafter paid the requisite registration fees.
5. On the other hand, the plaintiff further testified that same made several payments towards the acquisition of one (1) share of the defendant company and that upon completion of the payments towards and in respect of acquisition of the one (1) share, same was issued with a share certificate number 10290. For clarity, the witness pointed out that the share certificate was issued on the June 8, 1998.
6. Further, the witness testified that in the year 1991, same was allocated Plot Number P1217 contained in map nine (9) (now LR. no. Nairobi/Block 105/4541). Besides, the witness stated that Plot number P1217 was thereafter registered as L.R Nairobi/Block 105/4541.
7. Other than the foregoing, the witness further testified that after completing the payment to and on account of the subject property, same was advised to wait for the issuance of title documents in respect of the suit property.
8. Notwithstanding the foregoing, the witness testified that in the year 2005 same notified the defendant that he had qualified for a bonus plot and that pursuant to the said notification, the defendant herein advised same to pay the requisite bonus fee, so as to be entitled and be issued with a plot to that effect.
9. The witness has further stated that pursuant to the foregoing, same indeed proceeded to and paid the bonus fees, as well as the incidental charges, inter-alia, engineering fees, survey fees and Site visiting fees.
10. Further, the witness testified that in March 2011, same was advised by the defendant to pay additional site visiting fees, to facilitate the visitation to the site and identification of the Plot belonging to the witness herein.
11. The witness further testified that same made additional payment as requested by the defendant and thereafter the defendant herein commissioned a surveyor, who proceeded to and indeed identified the plot which was allocated to the plaintiff.
12. Following the identification of the plot in question, the plaintiff stated that same entered upon and took possession thereof and proceeded to and constructed a semi-permanent house thereon.
13. Be that as it may, the witness has stated that in the year 2015, same visited the suit property and discovered his house, which had been constructed on the suit property had indeed been demolished



and that someone had even commenced construction of a permanent structure on the property, which had been identified and shown to the witness.

14. Pursuant to the demolition of the semi-permanent structure, which was constructed on the suit property, the witness testified that same was obligated to and indeed undertook a search to ascertain whether his Plot had been allocated to someone else.
15. It was the witness' further statement that during and in the course of the investigations/search, same discovered that the defendant had indeed allocated the suit property to a third party who had proceeded to and caused the suit property to be registered in her name.
16. Further, the witness testified that the third-party, in whose name the property was registered in, was One, namely, Polly G. Wanjiru.
17. Nevertheless, the witness further testified that having been allocated the suit property, which was lawfully shown and/or identified by the defendant's own surveyor, it was not open for the defendant herein to allocate the same plot to someone else.
18. In the premises, the witness testified that the purported allocation or better still, re-allocation of the suit plot to one namely, Polly G. Wanjiru, was therefore irregular, illegal and unlawful.
19. In the circumstances, the witness herein beseeched the court to nullify and/or cancel the allocation of the suit property to the third party and to revert the suit property to and in his favor.
20. Other than the foregoing, the witness referred to the written statement dated the May 3, 2019 and same sought to adopt and rely on the statement. In this regard, the witness statement was duly admitted and adopted as part of the Evidence- in -chief.
21. On the other hand, the witness also referred to the List and the Bundle of Documents which was filed on the 6<sup>th</sup> May 2019 and sought Leave to have same produced and admitted as Exhibits. For clarity, the said Documents were thereafter admitted and marked as Exhibits P1 to P12, respectively.

#### **Defendant's Case:**

22. Though the Defendant herein filed a Statement of Defense, same however, did not file any List of witnesses, Witness statement and Bundle of Documents.
23. Consequently and based on the non-filing of the foregoing documents, the Defendant herein was legally barred and/or prohibited from calling any witnesses and/or from producing any documents whatsoever.
24. Notwithstanding the foregoing, it is imperative to take cognizance of two salient Paragraphs that were contained in the Statement of Defense. For clarity, paragraphs 6 and 9 are pertinent. For convenience, same are reproduced as hereunder;
  - 6 The Defendant admits the content of paragraph 7 of the Plaintiff and further avers that the site visit on or about the 8<sup>th</sup> March 2011 was done in a bid to assist the Plaintiff confirm that he had indeed been allocated Plot number P1217 contained in map nine (9) (now Nairobi/Block 105/4541), which fact he indeed confirmed.
  - 9 Further, the Defendant avers that it only issued original ownership documents to the Plaintiff and same is not aware of any other person claiming ownership to the said allotted property.



### **Submission By The Parties:**

#### Plaintiff's Submissions:

25. The Plaintiff herein filed written submissions dated the 7<sup>th</sup> June 2022 and in respect of which the Plaintiff addressed three pertinent issues.
26. First and foremost, the Plaintiff's counsel submitted that the Plaintiff had fully paid for one share of the Defendant company and in confirmation that the Plaintiff had indeed completed the payment, the Defendant proceeded to and issued the Plaintiff with share certificate number 10290.
27. On the other hand, the plaintiff's counsel further submitted that thereafter, the defendant proceeded and allocated to and in favor of the plaintiff Plot number P1217, which was later re-named as LR. No.Nairobi/Block 105/4541.
28. Based on the foregoing, the plaintiff's counsel submitted that the plaintiff was therefore entitled to exclusive occupation, possession and use of the suit property, to the exclusion of all and sundry, the defendant, not excepted.
29. Secondly, the plaintiff's counsel has further submitted that vide the statement of defense, the defendant herein has conceded, acknowledged and indeed confirmed that the plaintiff is the lawful and legitimate owner of the suit property.
30. Pursuant to the foregoing, it has been submitted that the defendant therefore ought to take the necessary and appropriate mechanism to facilitate the revocation of the registration of the suit property in the name of one polly g. wanjiru and effect the transfer and registration thereof in favor of the plaintiff.
31. Thirdly, the plaintiff's counsel has submitted that by virtue of having been allocated the suit property, same therefore became unavailable and could not have been allocated and/or alienated to and in favor of Polly G. Wanjiru or any other person, whatsoever.
32. It was the plaintiff's further submissions that having been allocated the suit property, the said allocation could only be reversed, albeit with notice to himself and not otherwise.
33. Further, it was submitted that to the extent that the suit property stood allocated and/or alienated, the defendant herein was legally incapacitated to deal with and/or re-alienate same, to the purported second allottee or otherwise.
34. Based on the foregoing, the plaintiff's counsel has therefore submitted that the plaintiff was/is entitled to the reliefs sought at the foot of the plaint.

#### **Defendant's Submissions:**

35. Though the defendant herein was granted liberty to file written submissions, same failed and/or neglected to do so.
36. Nevertheless, it is worthy and/or appropriate to recall that the Defendant herein had essentially admitted the plaintiff's rights to and/or in respect of the suit property vide paragraphs 6 and 9 of the statement of defense.



### Issues For Determination:

37. Having reviewed and/or considered the pleadings filed by the parties, the witness statements; and having similarly taken into account the written submissions filed by the plaintiff, the following Issues do arise and are thus germane for determination;
- i. Whether the plaintiff is the lawful and legitimate proprietor of the suit property.
  - ii. Whether the suit property could still be available for allocation, subsequent to same having been allocated to the plaintiff.
  - iii. Whether the plaintiff is entitled to the reliefs sought.

### Analysis and Determination:

Issue Number1:

Whether the plaintiff is the lawful and legitimate proprietor of the suit property.

38. The plaintiff tendered and or adduced evidence, which showed that same was duly allocated the suit property and that post the allocation of the suit property, same was requested to pay inter-alia site visitation fees, which the plaintiff duly paid.
39. Further, the plaintiff also stated that after the payment of the visitation fees, in the manner demanded by the defendants, the defendant organized and facilitated the site visit and thereafter the suit plot was duly identified and mapped by the defendant's surveyor.
40. It is also imperative to recall that the defendant thereafter allowed the plaintiff to enter upon, take possession and/or occupation of the duly identified plot, which comprised the suit property.
41. Based on the totality of the documents which were produced by the plaintiff and taking into account that the contents of the said documents were not challenged, impeached and/or controverted, it is safe to find and hold that the plaintiff was lawfully and legally allocated the suit property.
42. Besides, it is similarly sufficient to hold, that upon being issued with the Title documents pending issuance of the certificate of Title and having duly made the requisite payments, it was deemed that the Plaintiff had indeed become the lawful and legitimate proprietor of the suit property.
43. Consequently and in the premises, it was neither open nor available for the defendant to rescind, alter and/or interfere with the plaintiff's rights over the suit property, without notice to and/or involvement of the plaintiff.
44. Suffice it to hold, that the documents which were issued to and in favor of the plaintiff, coupled with the payments of the requisite fees, which was duly acknowledged by the defendant, constituted and conferred a legitimate interest to and in favor of the plaintiff.
45. To this end, it is appropriate to adopt and endorse the holding of the court in the case of *Ocean View Plaza Ltd v Attorney General* [2002] eKLR, where the Honourable Court observed as hereunder;

“Allotment of land to a citizen or others protected under the Constitution, which action is symbolized by Title Deeds, invests in the allottee inviolable and indefeasible rights that can only be defeated by a lawful procedure under the Land Acquisition Act.”



## Issue Number 2:

Whether the Suit property could still be available for allocation, subsequent to same having been allocated to the plaintiff.

46. Having duly and lawfully allocated and/or alienated the suit property to and in favor of the plaintiff herein, it is appropriate to observe and underscore that the suit property thereafter became private property belonging to the plaintiff.
47. It may well be that the title documents had not been generated and/or issued, but the interest in respect of the said property, had passed to and/or been conferred on the plaintiff.
48. To this end, it is therefore appropriate to note that the plaintiff had become the owner of the suit property and therefore the defendant herein could not seek to re-alienate and/or re-allocate the suit property to any other Party, Polly G. Wanjiru, not excepted.
49. In the premises, the defendant's purported attempt to disposes the plaintiff of the property and to transfer same in favor of a third-party, was therefore illegal and unlawful. clearly, the rights over and in respect of the suit property, which are rights in rem, had passed to and in favour of the plaintiff.
50. Nevertheless, it is imperative to underscore that the property rights over and in respect of the suit property had vested in the plaintiff and hence the defendant had no legal rights, if any, capable of being passed over to any other third-party.
51. In the circumstances, the purported actions by and/or on behalf of the defendant, which are the subject of challenge vide the suit herein, were therefore illegal, unlawful and invalid.
52. To underscore the fact that the title in respect of the suit property had already passed to and in favor of the Plaintiff and that the Plaintiff could not be divested of same, without the allotment being canceled, it is imperative to take cognizance of the decision in the case *Kenya Ihenya Company Ltd & another versus Njeri Kiribi* (2019)eKLR, where the court held as hereunder;

Thirdly, it was clear that the 1<sup>st</sup> appellant had allotted the suit land to both the respondent and the 2<sup>nd</sup> appellant hence the learned Judge's conclusion that there was a double allocation.

That being the case, since the respondent was first in time, as the evidence is clear that she completed making payments in the year 1983 whilst the 2<sup>nd</sup> appellant claimed to have purchased the same on June 24, 1997, she was the bonafide proprietor. In that regard, the law is succinctly spelt out in *M'Ikiara M'Rinkanya and another vs. Gilbert Kabeere M'Mbijiwe* [1982 – 1988] 1 KAR 196 wherein this court held that:-

“Where a similar situation as in this case arose, there was a double allocation to a plot issued by the Council of the area. The court had noted that the said first allotted letter to the original plaintiff had never been cancelled. That the council had no power to allocate the same property again without following the laid down procedure of re-allocating the property.”

53. In view of the foregoing, I therefore find and hold that the attempted and/or purported allocation of the suit property to one, namely, Polly G. Wanjiru was not only illegal and unlawful, but incapable of conferring any legal Interest over and in respect of the suit property.

## Issue Number 3:

Whether the plaintiff is entitled to the reliefs sought.



54. The plaintiff herein was obliged and/or obligated to tender and/or avail sufficient and credible evidence to establish and/or prove that same is indeed the legitimate owner of the suit property.
55. To this end, I wish to point out that the plaintiff indeed brought forth and laid before the court uncontroverted evidence, which have established and authenticated the plaintiff's rights to and entitlement over the suit property.
56. In the premises, it is appropriate to observe that the plaintiff has therefore discharged the burden of proof that laid on his shoulders, as required and/or stipulated vide sections 107 and 108 of the Evidence Act chapter 80 Laws of Kenya.
57. As pertains to the burden and standard of proof, which laid at the doorstep of the plaintiff, it is worthy to restate the holding in the case of Agnes Nyambura Munga (suing as the Executrix of the Estate of the late William Earl Nelson) v Lita Violet Shepard (sued in her capacity as the Executrix of the Estate of the Late Bryan Walter Shepard) [2018] eKLR, the Court expounded on section 107 and 109 of the Evidence Act as;

“The standard of proof is on a balance of probabilities which Lord Denning in the case of Miller vs Minister of Pensions (1947) explained as follows:-“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 the tribunal can say: „We think it more probable than not?, the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof 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? explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”

58. To my mind, the evidence put forth by the plaintiff, is sufficient to warrant a finding to and in favor of the Plaintiff.
59. Nevertheless, there is one outstanding issue that needs to be pointed out. For clarity, the issue herein relates to the Plaintiff's claim touching on and/or concerning entitlement to a Bonus plot.
60. However, I beg to point out that despite the claim of entitlement to a Bonus Plot, no evidence was laid before the court, to show and/or establish the pre-requisite conditions that were to be met before a shareholder, in this case, the Plaintiff, would become entitled to a bonus Plot.
61. On the other hand, the Plaintiff also did not avail evidence to prove and/or authenticate his Entitlement to same.
62. Perhaps, being alive to the fact that no evidence was tendered to vindicate the claim for an award of a Bonus Plot, the Plaintiff chose to give the issue a wide berth, in his submissions. Simply put, the issue of the Bonus Plot was neither touched on nor addressed in the Plaintiff's written submissions.

### **Final Disposition:**

63. Based on the totality of the evidence adduced by and/or on behalf of the plaintiff herein, it is clear and/or established that indeed the Plaintiff has met and/or satisfied the requisite threshold to warrant the grant of the orders sought.
64. In the premises, I find and hold that the Plaintiff has proved his case and same is thus entitled to the following orders;



- i. A declaration be and is hereby issued that the plaintiff is entitled to exclusive and unimpeded right of possession and occupation of the property being plot number P1217 contained in map nine (9) (now Nairobi/Block 105/4541).
- ii. A declaration be and is hereby issued that the defendant allocated plot number P1217 contained in map nine (9) (now Nairobi/Block 105/4541) illegally to Polly G. Wanjiru.
- iii. The Title documents over and in respect of L.R No Nairobi/Block 105/4541 bearing the name of one Polly G. Wanjiru, be and are hereby revoked, canceled and/or nullified.
- iv. An order be and is hereby issued compelling the defendant to deliver to the plaintiff at its expense vacant possession of plot number P1217 contained in map nine (9) (now Nairobi/Block 105/4541).
- v. An order be and is hereby issued compelling the defendant to release to the plaintiff the transfer instruments and title documents in respect of Plot Number P1217 contained in Map nine (9) (now Nairobi/Block 105/4541).
- vi. An order of permanent injunction be and is hereby granted to restrain the defendants, either by herself, agents, servants and/or anyone acting on her instructions from further alienating, disposing of and/or otherwise interfering with the plaintiffs rights and/or entitlement to and in respect of the suit property, namely plot number P1217 contained in map nine (9) (now Nairobi/Block 105/4541).
- vii. Costs of this suit be and are hereby awarded to the plaintiff.

It so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF JULY 2022.**

**HON OGUTTU MBOYA,**

**JUDGE**

**In the Presence of;**

**Kevin Court Assistant**

Mr. Ayieko for the Plaintiff.

N/A for the Defendant.

