



**Mugechi v County Government of Nairobi & 2 others (Environment & Land
Case 65 of 2010) [2022] KEELC 3902 (KLR) (18 August 2022) (Judgment)**

Neutral citation: [2022] KEELC 3902 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 65 OF 2010**

**BM EBOSO, J
AUGUST 18, 2022**

BETWEEN

MARY MUGECHI PLAINTIFF

AND

COUNTY GOVERNMENT OF NAIROBI 1ST DEFENDANT

ROSE N KINYANJUI 2ND DEFENDANT

BENSON N. MUCHIRI 3RD DEFENDANT

JUDGMENT

1. The dispute in this suit revolves around the question as to whether, in the year 2008, the plaintiff, Mary Mugechi, ceased to be the lawful proprietor of an unsurveyed and untitled piece of land designated by the City Council of Nairobi as Umoja Innercore Plot Number B 59 Sector 3 [hereinafter referred to as “the suit property”]. The City Council first allocated the suit property to one Joyce Wanjiru Wanjohi in 1978. It subsequently issued to her a lease dated 19/11/1990. Joyce Wanjiru subsequently sold the suit property to one Mary T Muthoni who in 1993 sold and transferred the suit property to the plaintiff. The three successive proprietors executed deeds of assignment with the City Council. It is contended that the City Council repossessed the suit property from Mary Mugechi in 2008 and reallocated it to one Nicholas Mbevu who immediately sold it to the 2nd and 3rd defendants. The 2nd and 3rd defendants’ entry into the suit property is what triggered this suit.
2. Through a plaint dated 19/2/2010, the plaintiff sought the following reliefs against the defendants:
 - a. A declaration order that the plaintiff has proprietary rights and is the lawful owner of the plot pursuant to the assignment of 29/10/1993.
 - b. A mandatory injunction directed at the 1st defendant to reaffirm and register the plaintiff’s interest in the land comprised in Umoja Innercore Plot Number



B59 Sector 3 and to process the issuance of a title deed in her name within such period as shall be determined by this honourable court.

- c. A mandatory injunction directed at the 2nd and 3rd defendants compelling them, their agents, servants and employees to cease construction upon and occupation of the land comprised in Umoja Innercore Plot Number B59 Sector 3, and vacate the same forthwith.
- d. A permanent injunction restraining the defendants or any of them, by themselves, their agents, servants or employees from disposing, dealing in, entering upon, digging on, excavating, fencing and erecting any structure upon the land comprised in Umoja Innercore Plot Number B59 Sector 3 and in any way whatsoever interfering with and disrupting the plaintiff, her agents or servants from enjoying quiet possession of the plot.
- e. A mandatory injunction compelling the 1st defendant to ensure and supervise the demolition of any structure that has been erected upon the land comprised in Umoja Innercore Plot Number B59 Sector 3 by the 2nd and 3rd defendants, their agents, servants, employees, such demolition to be carried on as directed by and within the period set by this honorable court.
- f. A mandatory injunction compelling the 2nd and 3rd defendants jointly and severally to ensure and supervise the demolition of any structure that has been erected upon the land comprised in Umoja Innercore Plot Number B59 Sector 3 by themselves, their agents, servants or employees, such demolition to be carried on as directed by and within the period set by this honorable court.
- g. An order of eviction permitting the plaintiff to evict the 2nd and 3rd defendants their agents, servants or employees from the land comprised in Umoja Innercore Plot Number B59 Sector 3 and comprised (sic) to demolish any structure that may have been erected thereupon without her consent.
- h. An order directing the Commissioner of Police or the Officer Commanding the Police Station under whose jurisdiction the land comprised in Umoja Innercore Plot Number B59 Sector 3 falls, to assist in the compliance of the orders of this court to ensure that there shall be no breach of the peace.
 - i. The costs of this suit shall be awarded to the plaintiff against the defendants jointly and severally.
- j. Any other orders it deems mete and just [sic].

Plaintiff's Case

3. The plaintiff's case was that she obtained proprietary interest in the suit property in October 1993 vide a deed of assignment dated 29/10/1993 between the Nairobi City Commission; Mary J Muthoni Muchoki [the assignor]; and herself. She contended that Mary Muthoni Muchoki had obtained proprietary interest in the suit property from one Joyce Wanjiru Muthoni vide a deed of assignment dated 19/11/1990 between the Nairobi City Commission on one part; Joyce Wanjiru Wanjohi [as the assignor] and Mary J Muthoni Muchoki [as the assignee]. It was her case that Joyce Wanjiru Wanjohi was the initial allottee and lessee of the suit property, through a lease dated 19/11/1990 between the Nairobi City Commission and herself.



4. The plaintiff contended that at the time of assignment of the suit property to her, she conducted due diligence and established that all relevant costs, outlays and outgoings relating to the suit property had been paid in full. She took possession of the suit property on 29/10/1993 and submitted development plans for approval. Vide a letter dated 10/1/1994 from the 1st defendant's advocates, M/s Musyoka – Annan Company Advocates, she was notified to pay Kshs 8,180 to enable the 1st defendant process a title in her name and she duly paid the money to the 1st defendant's advocates. She was surprised when she learnt on 11/2/2010 that the 2nd and 3rd defendants had trespassed onto the suit property and were in the process of erecting a fence around the suit property, purporting to have acquired it. Her visits to the 1st defendant's Dandora Office to establish the truth about the 2nd and 3rd defendants' claim were futile. She reported the matter to the local chief.
5. The plaintiff averred that the 1st defendant was in breach of its public duty to her, contending that it had failed to affirm her interest in the suit property and that it had failed to prevent trespass upon the suit property. She added that the 1st defendant had failed to process her title.
6. The plaintiff further averred that between 12/2/2010 and 17/2/2010, the 2nd and 3rd defendants, acting in concert, illegally demolished her structures and carted them away and commenced construction on the suit property.

1st Defendant's Case

7. The 1st defendant filed a statement of defence dated 10/9/2014. It denied the plaintiff's contention that she was the proprietor of the suit property. It averred that on or about 25/8/1978, it allocated the suit property to one Joyce Wanjiru. The said Joyce Wanjiru subsequently transferred the suit property to one Mary T Muthoni who in turn transferred the suit property to the plaintiff. The 1st defendant added that the suit property "remained in arrears" and vide a notice published in the Daily Nation on 15/8/2006, the 1st defendant notified all members of the public who had been allocated land by the 1st defendant and were in arrears to clear the arrears failure to which the said allocations would be revoked. It added that the plaintiff did not clear her areas and upon expiry of the 30 days' notice, the Housing and Development Committee of the 1st defendant met on 8/10/2008, repossessed the suit property and re-allocated it to one Nicholas Mbevu. The 1st defendant, contended that it was the plaintiff's omission and indolence that led to the plot being repossessed by the 1st defendant, hence her proprietary interest in the suit property had been legally extinguished. It urged the court to dismiss the plaintiff's claim.

Case of the 2nd and 3rd Defendants

8. The 2nd and 3rd defendants filed a joint statement of defence dated 18/6/2019. Their case was that the plaintiff had never been in possession of the suit property. They contended that vide a defaulter's repossession notice dated 8/10/2008 [sic] issued by the 1st defendant, the plaintiff's allotment was cancelled and rescinded for failure to pay the dues owed to the 1st defendant. It was their case that the plaintiff's rights in the suit property were extinguished and ceased. They added that the suit property was lawfully allocated to one Nicholas K Mbevu through an allotment letter dated 26/11/2008. The 2nd and 3rd defendants added that they lawfully purchased the suit property from the said Nicholas K Mbevu in January 2010 at a consideration of Kshs 1,400,000. They contended that they cleared all the outstanding arrears relating to the suit property, aggregating Kshs 178,900, after which they applied for and obtained development approvals. They thereafter initiated construction works on the suit property. They added that they were innocent purchasers for value. They urged the court to dismiss the plaintiff's claim.



Evidence

9. Hearing of the case commenced before Gacheru J on 25/7/2016. The plaintiff testified as PW1. She tendered her evidence-in-chief and was cross-examined before Gacheru J. Upon transfer of Gacheru J from Milimani Environment and Land Court to Thika Environment and Land Court, the File was assigned to me. The plaintiff [PW1] tendered her evidence in re-examination before me on 12/2/2020.
10. The plaintiff adopted her written statements dated 9/12/2011. She reiterated her case as summarized above. She produced the following nine exhibits:
 1. Assignment dated 29/10/1993 between Mary Mugechi and Mary J. Muthoni Muchoki.
 2. Receipts and memo dated 20/3/1992 showing relevant costs in relation to the plot had been paid.
 3. Correspondence on the matter of construction approvals by acting Director of Housing.
 4. Letter dated 10/1/1994 from the firm of Musyoka – Annan & Company Advocates.
 5. Receipt dated 4/3/1994 from Musyoka Annan & Company Advocates acknowledging receipt of Kshs. 8,180/= for purposes of processing the Title Deed to the plot.
 6. Receipts evidencing payment of rates to the City Council of Nairobi.
 7. Notice issued by the firm of Mutitu, Thiongo and Company Advocates.
 8. Letter dated 12/2/2010 addressed to the Town Clerk.
 9. Bundle of photographs of building and person at the premises on 11/2/2011.
11. During cross examination, she testified that upon acquisition of the suit property, she paid land rates to the City Council and the payments were reflected in the documents produced in court. In re-examination, she testified that she did not owe the 1st defendant any mortgage areas because her predecessors had paid the full consideration for the lease.
12. The 1st and 2nd defendants led evidence by Peter Kinyanjui Njeri who testified as DW1. His evidence was that the 2nd defendant was his maternal aunt and the 3rd defendant was the husband to the 2nd defendant. The 2nd and 3rd defendants lived in Massachusetts, in the United States of America. He adopted his witness statement dated 23/5/2012. He produced the 14 documents contained in the 2nd and 3rd defendants' bundle.
13. DW1 testified that he organized the purchase of the suit property by the 2nd and 3rd defendants. He was the one who identified the seller. He conducted due diligence and established that the suit property had been repossessed by the City Council of Nairobi from the plaintiff. He made payment to Mr Nicholas Mbevu on behalf of the 2nd and 3rd defendants. He also made payments to the City Council. The City Council accepted the payments and issued receipts relating to the payments. The payments related to stand premium, legal fees, survey fees and rates. He subsequently applied for development approval and the same was granted. They embarked on construction but the constructed was halted through a court order.



14. The 2nd defendant testified as DW2. She stated that the 3rd defendant was her husband and that she lived in Boston in the United States of America. She adopted her written statements dated 17/5/2012. She reiterated their case as summarized above. She added that upon paying the purchase price of Kshs 1,400,000 to Mr Nicholas K Mbevu, the seller executed and gave them a power of attorney authorizing them to take possession of the suit property. They cleared all the outstanding rates and other outgoings, aggregating Kshs 179,900. They made all the payments but the receipts were issued in the name of Nicholas Mbevu. They subsequently submitted their drawings for approval. It was her evidence that all transactions relating to the suit property were done by DW1. She contended that the plaintiff failed to make payments to the City Council of Nairobi and her default led to the repossession of the suit property on 8/10/2008.
15. The 1st defendant did not lead evidence during trial.

Plaintiff's Submissions

16. The plaintiff filed written submissions dated 17/1/2022, through the firm of Njoroge Regeru & company Advocates. Counsel for the plaintiff identified the following as the five issues that fall for determination in this suit: (i) Whether the plaintiff has a legitimate claim over the suit property; (ii) Whether the allotment/reallocation of the suit property by the 1st defendant in favour of Nicholas Mbevu and subsequently the 2nd and 3rd defendants were procedural and legal; (iii) Whether the default on the rates and notice issued offered sufficient grounds for repossession of the suit property; (iv) Whether the plaintiff is entitled to the prayers sought; (v) Who should bear the costs of this suit?
17. On whether the plaintiff has a legitimate claim over the suit property, counsel submitted that the plaintiff having acquired the suit property lawfully, she could only be divested of her title to the suit property in accordance with the law. Counsel added that the 1st defendant having elected not to lead evidence, the plaintiff's evidence remained unchallenged.
18. On whether the repossession and reallocation of the suit property by the 1st defendant was procedural, counsel for the plaintiff submitted that the purported repossession and reallocation was unprocedural, unlawful and amounted to fraud. Counsel added that the notice which the 2nd and 3rd defendants had relied on related to alleged mortgage arrears and not rates. Counsel faulted the 1st defendant for purporting to repossess the suit property without according her the right to be heard. Counsel urged the court to award the plaintiff the reliefs sought in the suit.

1st Defendant's Submissions

19. The 1st defendant filed written submission dated 15/1/2022, through the firm of Kithi & Company Advocates. Counsel for the 1st defendant identified the following as the two issues that fall for determination in the suit: (i) Whether the plaintiff has a justifiable claim over the suit property; and (ii) Whether the plaintiff is entitled to the reliefs prayed for. On the first identified issue, counsel for the 1st defendant submitted that the plaintiff had failed to pay land rates for a period of 7 years and failed to remedy the default when a general notice was published in the newspaper. Counsel submitted that the plaintiff was in breach of the terms spelt out in the relevant allotment letter.
20. Counsel added that the process of repossession was procedural, contending that a notice was published in the newspaper and, for two years, the plaintiff did not remedy the default. Counsel further submitted that the equitable remedies sought by the plaintiff were not available to her because she was "guilty of delay." It was the position of counsel for the 1st defendant that the plaintiff had failed to discharge her burden of proof in the suit.



21. On whether the plaintiff is entitled to the reliefs prayed for, counsel submitted that the plaintiff had failed to demonstrate that she was not in breach of the terms of the letter of allotment, hence the court should not grant her the reliefs sought in the plaint.

2nd and 3rd Defendants' Submissions

22. The 2nd and 3rd defendants filed written submissions dated 17/1/2022 through M/s Z N Gathara & Company Advocates. Counsel for the 2nd and 3rd defendants identified the following as the two issues that fall for determination in the suit: (i) Who, as between the plaintiff on one part and the 2nd and 3rd defendants on the other part, are the lawful owners of the suit property?; and (ii) Whether the plaintiff is entitled to the reliefs sought in the suit.
23. On the first identified issue, counsel submitted that there were some conditions which the plaintiff was required to meet within the stipulated time for the allocation letter to be effective. Counsel contended that the plaintiff failed to comply with those conditions, prompting the 1st defendant to repossess the suit property and allocate it to someone else. Counsel contended that the repossession of the suit property by the 1st defendant “renounced the plaintiff’s right to the suit property.”
24. Counsel contend that the “cancellation of the allotment” was done lawfully, adding that the plaintiff failed to meet the conditions for allotment by failing to clear arrears owed to the 1st defendant. Counsel submitted that the repossession by the Council followed due process, contending that through a notice dated 15/8/2006, the Council notified all the allottees who were in arrears to clear the arrears within 30 days failure to which the allocations were to be revoked. Counsel added that upon repossession of the suit property by the Council, it was properly allocated to Nicholas Mbevu who in turn sold it to the 2nd and 3rd defendants for valuable consideration. Counsel further submitted that the 2nd and 3rd defendants cleared all outstanding City Council rates and charges aggregating Kshs 178,900.
25. On whether the plaintiffs were entitled to the reliefs sought, counsel submitted that the plaintiff had failed to demonstrate that she was the lawful owner of the suit property, hence she was not entitled to the reliefs sought in the suit.

Analysis and Determination

26. I have considered the parties’ pleadings, evidence and submissions.
- I have also considered the relevant legal frameworks and jurisprudence. Parties to this suit did not agree on a common set of issues that are to be determined by the court. Taking into account the parties’ pleadings, evidence and submissions, the following are the three key issues that fall for determination in the suit: (i) Whether the alleged repossession of the suit property from the plaintiff by the City Council of Nairobi in October 2008 was lawful and divested the plaintiff of her proprietary interest in the suit property; (ii) Who, between the plaintiff on one part and the 2nd and 3rd defendants on the other part, are the lawful proprietors of the suit property?; and (iii) Whether the plaintiff is entitled to the reliefs sought in this suit. I will make brief sequential pronouncements on the three issues in the above order.
27. Before I focus on the above specific issues, it is important to observe that despite being accorded the opportunity to lead evidence in support of its statement of defence, the 1st defendant did not lead evidence during trial. The legal ramifications of a party’s failure to lead evidence in support of its pleadings are well settled. In *Edward Muriga Through Stanley Muriga v Nathaniel D. Schulter* Civil Appeal No 23 of 1997, the Court of Appeal outlined the implications as follows:

“In this matter, apart from filing its statement of defence, the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st Plaintiff and that of



the witness remain uncontroverted and the statement in the defence therefore remains mere allegations. Section 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence”.

28. Similarly, in the case of *John Wainaina Kagwe..Vs..Hussein Dairy Ltd*[2013]eKLR, the Court of Appeal held as follows:-

“The Respondent never called any witness(es) with regard to the occurrence of the accident. Even its own driver did not testify meaning that the allegations in its defence with regard to the blame worthiness of the accident on the appellant either wholly or substantially remained just that, mere allegations. The respondent thus never tendered any evidence to prop up its defence. Whatever the respondent gathered in cross-examination of the appellant and his witnesses could not be said to have built up its defence.”

29. The averments made in the statement of defence which the 1st defendant filed are, in the circumstances, mere allegations that have not been proved. I will now turn to the first identified issue.

30. The first issue is whether the alleged repossession of the suit property from the plaintiff by the City Council of Nairobi in October 2008 was lawful and divested the plaintiff of her proprietary interest in the suit property. The plaintiff tendered evidence, and indeed there was common ground, that the suit property was first allocated to one Joyce Wanjiru in August 1978. The plaintiff produced an agreement for lease dated 19/11/1990 showing that the City Commission of Nairobi subsequently formalized the allocation through the lease. The consideration for which the lease was granted to Joyce Wanjiru was Kshs 29,920 and the Commission acknowledged receipt of the said consideration in full at recital clause number (b) of the lease. Clause 3 of the agreement for lease contained a framework on the remedy available to the lessor [the Commission] in the event the lessee defaulted to discharge her obligations under the lease. Clause 3 of the lease provided thus:

“As soon as this agreement has been executed the lessee shall be responsible for and shall pay and discharge all rates, taxes, ground rent (if any) and all other charges assessments duties expenses and outgoings of whatever kind in respect of the premises whether payable by the owner or by the occupier or otherwise howsoever. Upon any default by the lessee in discharging any outgoings the Commission may discharge them and recover the same as debt due from the lessee.”

31. There was also common ground that in 1990, Joyce Wanjiru Wanjohi conveyed her leasehold interest in the suit property to Mary Muthoni Muchoki. Indeed, the plaintiff produced a tripartite deed of assignment dated 19/1/1990, executed by the Commission, Joyce Wanjiru Wanjohi, and Mary J Muthoni Muchoki, conveying Joyce Wanjiru Wanjohi’s leasehold interest in the suit property to Mary Muthoni Muchoki.

32. Similarly, there was common ground that subsequently, Mary J Muthoni Muchoki conveyed her leasehold interest in the suit property to the plaintiff. The 1st defendant contended in its defence that it subsequently repossessed the suit property from the plaintiff in 2008 due to arrears. The minutes which the 1st defendant cited in its submissions were produced by DW1. They were unsigned and related to alleged mortgage arrears. Did the plaintiff owe the 1st defendant mortgage arrears relating to the suit property? From the evidence presented to the court, the plaintiff did not owe the 1st defendant any mortgage arrears. First, the 1st defendant acknowledged in recital clause (b) of the agreement for lease that it had received the agreed consideration for the lease in full. That is not all. In a memo dated 20/3/1992, addressed to the Chief Counsel at City Hall, the 1st defendant’s accountant in charge of its



Umoja Office confirmed that the then lessee [Mary M. Muchoki] had paid all costs relating to the suit property in full. Further, in a memo dated 26/10/1993 from the Ag Director of Housing Development Department to the Director of City Planning, the 1st defendant confirmed that purchase price, ground rent, rates and development charges relating to the suit property had been paid in full. All the above documentary evidence was tendered by the plaintiff. The totality of the evidence is that there were no mortgage arrears or unpaid consideration relating to the suit property that were outstanding.

33. In their written submissions, counsel for the defendants contended that there was lawful repossession because the plaintiff was in rates arrears. Clause 3 of the agreement for lease provided a clear framework on how rates were to be recovered by the City Council. Unilateral repossession of the suit property was certainly not a recourse available to the City Council in recovery of rates arrears. The Council was required to recover rates as a debt from the plaintiff. The *Rating Act* provided an alternative procedure for recovery of rates through a suit in the relevant court.
34. Both counsel for the defendants alluded to breach of the terms contained in the “plaintiff’s letter of allotment.” No such letter of allotment was produced by the defendants. Their contention that the plaintiff breached the terms set out in an alleged letter of allotment cannot, in the circumstances, hold.
35. The 1st defendant failed to lead evidence to demonstrate the legality and validity of the alleged repossession. The court cannot, in the circumstances, make a finding that there was a lawful repossession of the suit property by the 1st defendant. Put differently, the totality of the evidence placed before this court demonstrates that the plaintiff has established that there was no lawful repossession of the suit property from the plaintiff by the 1st defendant. Further, the plaintiff has established that her proprietary interest in the suit property was never lawfully divested from her. Those are my findings on the first issue.
36. The second issue is, who between the plaintiff on one part and the 2nd and 3rd defendants on the other part, are the lawful proprietor of the suit property? I have made a finding to the effect that there was no lawful repossession of the suit property from the plaintiff by the City Council of Nairobi. The 2nd and 3rd defendants contended that they were innocent purchasers for value. They relied on an undated sale agreement. DW2 testified that all payments to the City Council were made by the 2nd and 3rd defendants but the receipts were issued in the name of Nicholas Mbevu. All the exhibited receipts bear dates running between June 2009 to July 2009. The purported allotment to Nicholas Mbevu is dated 26/11/2008. It does therefore emerge that at the time DW1 committed the 2nd and 3rd defendants to buy the suit property from Mr Nicholas Mbevu, the said vendor had no crystallized interest in the suit property capable of passing to the two defendants. He had not accepted the purported re-allocation. He had not paid the sum of Kshs 30,000 specified in the letter dated 26/11/2008. Put differently, the 2nd and 3rd defendants purchased an allotment letter whose legality has been successfully challenged. The named allottee had not acquired a legitimate interest in the suit property capable of passing to the 2nd and 3rd defendants. It is therefore my finding that the plaintiff is the lawful proprietor of the suit property.
37. Having come to the above findings, it follows that the plaintiff is entitled to prayers (a), (b), (c), (d), (e), (f) and (g). The Officer Commanding the Police Station in whose jurisdiction the suit property is located shall ensure law and order during enforcement of the above orders.
38. Given that servants/agents of the City Council of Nairobi were the authors of the dispute leading to this suit and the 1st defendant elected not to lead evidence in this suit, the 1st defendant will bear costs of this suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 18TH DAY OF AUGUST 2022



B M EBOSO

JUDGE

In the Presence of: -

Ms Mathangani for the Plaintiff

Mr Gathara for the 2nd and 3rd Defendants

Ms Katana for the 3rd defendant

Court Assistant: Ms Osodo

