



REPUBLIC OF KENYA



**Maina v Attorney General (Environment & Land Case 104 of 2017)
[2022] KEELC 14901 (KLR) (17 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14901 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT & LAND CASE 104 OF 2017
YM ANGIMA, J
NOVEMBER 17, 2022**

BETWEEN

GEORGE THEURI MAINA PLAINTIFF

AND

ATTORNEY GENERAL DEFENDANT

JUDGMENT

A. The Plaintiff's Claim

1. By a plaint dated August 10, 2010 the Plaintiff sought the following reliefs against the Defendant:
 - a. A declaration that the Plaintiff is entitled as against the Government of Kenya to L.R. Nyandarua/Ol Joro Orok Salient/11582 and to its exclusive possession.
 - b. General damages for infringing on the Plaintiff's property rights over L.R. Nyandarua/Ol Joro Orok Salient/11582.
 - c. Costs of this suit.
2. The Plaintiff pleaded that at all material times he was the registered proprietor of Title No. Nyandarua/Ol Joro Orok Salient/11582 (Parcel 11582). He further pleaded that sometime in October, 2009 prisons officers from Thomson Falls G.K. Prison Nyahururu wrongfully and without his consent took possession of parcel 11582 on the pretext that it belonged to the government of Kenya. He further contended that he was the absolute owner of the said parcel and that the action of dispossessing him of the land was unlawful and an infringement of his proprietary rights. He further contended that despite issuing a statutory notice before filing suit the government had failed to give him vacant possession of the said land hence the suit.



B. The Defendant's Defence and Counterclaim

3. The Attorney General filed a statement of defence dated October 22, 2010, amended on May 31, 2011 and further amended on March 3, 2021 to include a counterclaim. The Defendant denied that the Plaintiff was the proprietor of parcel 11582 and put him to strict proof thereof. It was contended that the said parcel was, and has always been, part and parcel of the land belonging to G.K. Thomson Falls Prison.
4. The Defendant further pleaded that if the Plaintiff held any title to parcel 11582 then the same was illegally acquired since the said land belonged to G.K. Prison - Thomson Falls and had never been sold or reallocated to any other party.
5. By his counter-claim the Defendant reiterated the contents of the defence and prayed for the following reliefs against the Plaintiff:
 - a. A declaration that parcel No.Nyandarua/Ol Joro-orok Salient/11582 is public land which belongs to the Republic of Kenya.
 - b. An order for surrender of the Plaintiff's title deed for Nyandarua/Ol Joro-Orok Salient/11582 to the District Land Registrar for cancellation.
 - c. Any other relief the honourable court may deem fit to grant.
 - d. Costs of the suit.

C. The Plaintiff's Response to Counterclaim

6. There is no indication on record of the Plaintiff having filed a defence to counterclaim despite having been granted 14 days to do so with effect from May 12, 2021.

D. Directions on Submissions

7. Upon conclusion of the trial the parties were granted timelines within which to file and exchange their respective submissions. The Plaintiff was granted 21 days to file and serve his submissions whereas the Defendant was granted 21 days upon the lapse of the Plaintiff's period to do likewise. The record shows that the Plaintiff's submissions were filed on August 11, 2022 whereas the Defendant's submissions were not on record by the time of preparation of the judgment.

E. The Issues for Determination

8. The court has noted that the parties did not file an agreed statement of issues in the matter. Whereas the Plaintiff filed a statement containing 6 issues dated July 18, 2013 the Defendant did not file any issues. Accordingly, the court shall frame the issues for determination as provided for in law. Under order 15 rule 2 of the *Civil Procedure Rules*, 2010 the court may frame issues from any of the following:
 - (a) The allegations contained in the pleadings.
 - (b) The contents of documents produced by the parties.
 - (c) The statements made on oath by or on behalf of the parties.
9. The court has perused the pleadings, the documents and the evidence on record in this suit. The court is of the opinion that the following issues arise for determination herein:
 - (a) Whether the Plaintiff was the registered proprietor of the suit property.



- (b) If so, whether such registration was obtained illegally.
- (c) Whether the Plaintiff is entitled to the reliefs sought in the plaint.
- (d) Whether the Defendant is entitled to the reliefs sought in the counterclaim.
- (e) Who shall bear costs of the suit and counterclaim.

F. Analysis and Determination

a. Whether the Plaintiff was the registered proprietor of the suit property

10. The court has considered the pleadings, evidence and submissions on record on this issue. Whereas the Plaintiff pleaded in paragraph 3 of the plaint that he was the registered proprietor of the suit property, the Defendant denied the same in his amended and further amended defence and put him to strict proof thereof. It is evident from the material on record that the Plaintiff was registered as proprietor of the suit property on July 18, 2001 and issued with a title deed on the same date. The title deed was produced as exhibit P.6. The court is thus satisfied that the Plaintiff was the registered proprietor of the suit property.

b. If so, whether such registration was obtained illegally

11. The court has considered the submissions and material on record on this issue. This issue was raised by the Defendant in his amended defence and counterclaim. Whereas the Plaintiff's witnesses testified that the Plaintiff was lawfully allocated the suit property by the Settlement Fund Trustee (SFT) and that he legally obtained registration thereto, the Defendant contended that the suit property was at all material times public land belonging to the G.K. Prisons Department and in particular G.K. Prison - Thomson Falls.
12. The defendant called two witnesses in a bid to demonstrate that the suit land was part and parcel of prisons land and that if any person held title thereto then it must have been illegally obtained. The first witness was Corporal Samuel Mwangi who testified that in 1993 he was assigned the duty of guarding the prisons land at Nyahururu. He testified that the parcel was No.1663 on which the prisons department carried out various agricultural activities such as growing maize, potatoes and vegetables. He further stated that the prisons department harvested crops from the said land on a yearly basis and the same entered in a record or register which he produced as exhibit D-1. His further evidence was that he had never seen any surveyor undertaking any demarcation or erecting beacons on the land.
13. The second defence witness (DW2) was David Ndumu who informed the court that he was an Assistant Commissioner of Prisons and the In-charge of Nyandarua Prison. He stated that parcel No.1663 measuring about 43.5 ha belonged to the prisons department which had been in possession thereof since 1973. He denied knowledge of subdivision of the land and he produced a copy of the Registry Index Map (RIM) for the area which showed that Parcel 1663 was still intact.
14. It was the evidence of DW2 that Parcel 1663 was developed with an administration block, one block of officers' quarters, 3 blocks for junior staff, 2 dams and 4 wells. It was his further evidence that although the land was in the occupation and actual use of the prisons department, it was still registered in the name of SFT as at 1990. It was his further evidence that the land was fully fenced and had a gate manned by prison officers.
15. During cross-examination of the Defendant's witnesses it emerged that Parcel 1663 may have been sub-divided in 2000 or thereabouts to create new Parcel Nos.11573 – 11586 and the register for Parcel 1663 closed. However, the RIM certified by the District Surveyor - Nyandarua North on December



10, 2015 indicated that Parcel 1663 was still intact and the RIM was never amended accordingly. It still reflected that Parcel 1663 was a single large block of land.

16. The question which arises is how did the Plaintiff obtain a title for parcel No.11582 before the RIM was amended? The court is of the opinion that the Plaintiff's title was illegally and irregularly obtained since Parcel 1663 appears to be intact in the RIM. The court also takes into account the evidence of DW1 that Parcel 1663 was never surveyed or subdivided for the period between 1993 and 2018 when he was guarding Parcel 1663. Both DW1 and DW2 further testified that there were no beacons on the ground indicating sub-division of Parcel 1663. If the Plaintiff's parcel was not in existence in the RIM in 2015 then the title deed obtained in 2001 was a fortiori issued irregularly.
17. Although the Plaintiff's witnesses claimed that the Plaintiff had at some point taken possession of Parcel 11582 and constructed a structure thereon, there was no evidence on record to demonstrate the alleged possession and development. DW1 denied that any structures were ever built by the Plaintiff within the prison's land. He also denied that the prison's authority ever demolished any structures thereon. The court is of the opinion that the parcel 1663 has at all material times been in the possession and occupation of the prison's department and there is no evidence on record that it was ever subdivided by a surveyor and beacons fixed on the ground.
18. The court is of the opinion that under section 26(1)(b) of the *Land Registration Act*, 2012 a title may be impeached on the grounds, inter alia, that it was obtained illegally or unprocedurally even though the title holder may not have been privy to any fraud or illegality. In the case of *Elijah Makeri Nyangwara v Stephen Mungai Njuguna & another* [2013] eKLR Sila Munyao J held, inter alia, that:

“Is the title impeachable by virtue of section 26(1) (b)? First, it needs to be appreciated that for section 26 (1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions.”

The court is thus of the opinion that the plaintiff's title to Parcel 11582 was obtained illegally and unprocedurally for the reasons already stated before. Accordingly, the second issue is answered in the affirmative.

c. Whether the Plaintiff is entitled to the reliefs sought in the plaint

19. The court has found and held that the Plaintiff was the registered proprietor of parcel 11582. However, the court has also found that the said registration was obtained illegally and unprocedurally since the mutation for sub-division of Parcel 1663 was never registered and the RIM amended to reflect its creation on the ground. In the premises, the court is of the opinion that the Plaintiff is not entitled to the reliefs sought in the plaint or any one of them.

d. Whether the Defendant is entitled to the reliefs sought in the counterclaim

20. The court has considered the evidence on record on the issue of ownership of parcel 11582. It is evident from the material on record that there was an attempt to subdivide Parcel No.1663 into several parcels including Parcel 11582. The exact location of parcel 11582 within Parcel 1663 is still unknown in view of the fact that none of the parties led evidence thereon and the fact that it was missing from the



RIM. Although it would appear from the evidence on record that Parcel 1663 has been in possession and occupation of the prisons department of the Government of Kenya, there was no evidence on record to demonstrate its allocation to, or reservation for, the prisons department. The court is of the opinion that the issue of allocation of land to government agencies should be left to the concerned allocating authorities. It is upon the prisons department to follow up on the allocation of land it believes was reserved for its use. It is not the function of the court to make such an allocation. In the premises, the court is not inclined to grant a declaration that Parcel 11582 is public land belonging to the Government of Kenya. However, the court is inclined to grant a prayer for cancellation of the plaintiff's title since it was obtained illegally and unprocedurally.

e. Who shall bear costs of the suit

21. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to section 27 of the *Civil Procedure Act* (cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd* [1967] EA 287. Since both the plaintiff and the defendant have failed in their claim and counterclaim, the court is of the opinion that the appropriate order to make on costs is that there shall be no order as to costs.

g. Conclusion and Disposal

22. The upshot of the foregoing is that the court finds and holds that the plaintiff is not entitled to the reliefs sought in the plaint. The court also finds and holds that the Defendant is not entitled to all but one of the reliefs sought in the counterclaim. Accordingly, the court makes the following orders for disposal of the suit and counter-claim:
- (a) The plaintiff's suit be and is hereby dismissed in its entirety.
 - (b) The District Land Registrar – Nyandarua County is hereby directed to cancel the Plaintiff's title for Title No. Nyandarua/OI Joro-Orok Salient/11582 forthwith.
 - (c) Save as stated in paragraph (b) hereof, the rest of the prayers in the defendant's counterclaim are hereby dismissed.
 - (d) There shall be no order as to costs on both the suit and counterclaim.

It is so decided.

JUDGMENT DATED AND SIGNED AT NYAHURURU THIS 17TH DAY OF NOVEMBER, 2022 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of

Mr. Kinyua Njogu holding brief for Mr. Nderitu Komu for the Plaintiff

N/A for the Defendant

C/A - Carol

Y. M. ANGIMA

JUDGE

