Mohammed & another (Suing as personal representatives of Ahamed Mohammed Khalid - Deceased) v Wafula & 4 others (Environment and Land Appeal 24 of 2022) [2025] KEELC 529 (KLR) (11 February 2025) (Judgment)

Neutral citation: [2025] KEELC 529 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ENVIRONMENT AND LAND APPEAL 24 OF 2022

EC CHERONO, J

FEBRUARY 11, 2025

BETWEEN

AHAMED MOHAMMED & JAMAL AHAMED (SUING AS PERSONAL REPRESENTATIVES OF AHAMED MOHAMMED KHALID - DECEASED) ..... APPELLANT

AND

CAROLYNE AKINYI WAFULA ..... 1ST RESPONDENT

COUNTY GOVERNMENT OF BUNGOMA ..... 2ND RESPONDENT

COLLINS MUNYASIA WAFULA ..... 3RD RESPONDENT

DERRICK MUGANDA WAFULA ..... 4TH RESPONDENT

VALTARE ANDATI WAFULA ..... 5TH RESPONDENT

(Being an appeal from the judgment of HON. E.N MWENDA, Principal Magistrate in BUNGOMA CM-ELC case NO. 78 of 2020 (formerly HCCC NO.128 of 2012 as consolidated with HCCC NO. 17 of 2012 delivered on 6th September, 2022)

JUDGMENT

Background

1. The Appellant was the plaintiffs while the Respondents were Defendants in the former suit being Bungom CM-ELC NO. 78 of 2020 (formerly 128 of 2012. In a Further Amended plaint dated 27th July 2018, the Plaintiffs/Appellants had sought the following orders;

    i. That the plaintiff claim against the 1st Defendant for an order that the caution lodged on parcel No. Bungoma Township/291 as entry No.7 be removed

ii. Further, the Plaintiff claims against the 2nd Defendant for an order that since the 2nd Defendant has refused to surrender the Certificate of lease, the Bungoma Land Registrar to dispense with the production of lease Certificate and the Bungoma Deputy Registrar to sign all the relevant documents on behalf of the 2nd Defendant to effect transfer of the said plot to the Plaintiff.

iii. Alternatively, a declaration order to the effect that the Plaintiff is entitled to compensation, refund of costs incurred to uplift the house, material costs, renovation costs, repair costs, labour, fixtures, rates paid to the tune of three million and interest at court rates.

iv. Costs of the suit.

v. Interest.

vi. Any other relief.

2. The 2nd Defendant filed a statement denying the plaintiff's claim and pleaded that she is the registered owner of the suit property and counterclaimed against the plaintiff for the following orders;

a. An order dismissing the Plaintiff's suit with costs.

b. An order declaring the purported process of sale of the property known as Bungoma Township/291 (BGM/290) to the 1st Defendant as irregular, unprocedurally, illegal and thus null and void.

c. An order compelling the plaintiff to immediately pay the amount owed to the 2nd Defendant amounting to Kshs. 504,000/

d. General damages for breach of rental agreement.

e. Interest in (c) and (d) above.

f. Eviction to issue if the 1st Defendant fails to pay the amounts in (c) above within 14 days.

g. Orders to issue directing the Officer Commanding Station Bungoma Police Station to assist with ensuring compliance with the eviction orders.

h. Costs of the suit and the Counterclaim together with interest thereon at court rates.

i. Any further or alternative relief which this Honourable Court deem fit to grant.

3. The 3rd Defendant filed a statement of Defence denying the 2nd Defendant's counterclaim and sought to have the same dismissed with costs. The 3rd Defendant deny the fact of sale by public auction of the suit premises to the plaintiff and admitted that the plaintiff has paid the outstanding rates to the suit property and issued a receipt in the name of Bartholomew Wafula Lule.

4. The Interested parties also filed a statement of defence as well as a counterclaim and averred that in the year 2000, the deceased Bartholomew Wafula Lule transferred the suit premises to the 2nd Defendant to hold in trust for 6 children. They further averred that as beneficiaries to the suit property which is held in trust for them, they were not made aware of the rates arrears nor the public auction. They sought that the rents owed by the estate be paid out. They further averred that if the tenant did incur any expenses, he ought to have off-set the same from the rent. They therefore counterclaimed for the following orders;

a. Bungoma Township/291 be and is hereby registered in the names (sic) of Carolyne Akinyi Wafula (to hold in trust for other 8 children-brothers-sisters) and the auction putting the plaintiff's name be cancelled.

b. The plaintiff continues to pay rent as from 2013 to date.

The Evidence

Plaintiffs Case

5. Jamal Ahmed Mohammed (PW1) identified himself as a resident of Bungoma and the 2nd plaintiff herein while Ahmed Mohammed (1st Plaintiff) was his brother who by then had passed on. He referred to their joint witness statement dated 27/7/2018 which he adopted in his testimony-in-chief. He stated that the late Bartholomeo Wafula Lule was the leasehold of plot No. Bungoma Township/291 having been given to him by the County Government of Bungoma (3rd Respondent) in the year 1980. He stated that the late Bartholomeo Wafula Lule was issued with a notice after he failed to pay rates and thereafter the suit plot was advertised to be sold by public Auction through the Daily Nation newspapers of November, 2011. He stated that he bought the suit property through a public Auction and made payment. Thereafter, the plaintiff was issued with rate clearance Certificate. He stated that the plaintiff was issued with a consent to transfer the plot by the 3rd Respondent but when the documents were presented to the Lands office, it was discovered that the 1st Defendant had placed a caution to the said plot. The plaintiff was also surprised to find that the 2nd Defendant had unlawfully, illegally and unprocedurally registered herself as the owner of the suit property holding in trust of other 6 children. He stated that the plaintiff was legally handed over the plot No. Bungoma Township/291by the 3rd Defendant but the 2nd Defendant has failed and/or refused to surrender the lease Certificate to effect the transfer to the plaintiffs herein. He stated that they were legally handed over the plot No. Bungoma Township/291 by the 3rd Defendant and from the Month of September 2013, they carried out extensive renovation, uplifting and construction on the said plot by purchasing a tank, tank holder, new gate, main door, kitchen windows, patty, tiles, cement, glasses, iron sheet, locks, constructed compound by raising by blocks, modern kitchen, bathroom flooring, interior new drainage system, new electricity line, painted the wall both internal and external, roof, door and windows plus labour. He was referred his list of documents dated 2/7/2021 which he produced as P-Exhibits 1,2,3,4,5,6,7 & 8 respectively. He was also referred to a valuation report dated 11/9/2021 which he produced as P-Exhibit No. 9 and an order issued on 11th August 2012 by the High Court in HCCC NO. 17 of 2012 as P-Exhibit No.10.

6. On cross-examination, the plaintiff stated that the house was declared vacant vide a gazette in the Daily Nation of 21/11/2011 and that he did not know the owner died in 2001. He stated that according to the advertisement in the Nation Newspapers of 21/11/2011, the owner of the house was given as Batholomew Lule. He was referred to a certificate of search and stated that on 12/5/2000, the suit property was registered in the name of Carol Akinyi to hold in trust for other six. He was referred to a letter from the County Government of Bungoma to Batholomew Lule dated 7/8/2018. He stated that from the certificate of official search, the lease was issued in the name of Caroline Akinyi Wafula.

7. He stated that they attended the auction and after making their bid, they were declared the winner and his father paid for the house. He stated that they have been paying rates since 2011 until now under the name of Batholomew Lule because the transfer had not been effected. He produced the receipts as P-Exhibits 3a, 3b and 3c. He stated that they were issued receipts because they were in occupation and had paid for it at the auction.

Interested Parties' Case.

8. Collins Munyasia Wafula (IPW1) referred to his witness statement dated 22nd June 2020 and adopted as his testimony-in-chief. He testified on behalf of the interested parties and beneficiaries of the suit land parcel No. Bungoma Township/291. She stated that from the year 1995 or thereabouts, her deceased father Bartholomew Wafula Lule rented the suit House to Ahmed Mohammed Khalid who continued to pay rent after the demise of her father She produced copies of rent books as exhibits. She stated that there is nowhere the plaintiff or the 3rd Defendant informed them that the suit property was on auction. She stated that the children of Ahmed Mohammed Khalid who are staying in the suit premises have completely refused to pay for the rent of their house and were shocked to learn that the plaintiff had taken over the house in their absence without knowing when it was allegedly sold by way of auction.

9. She stated that they were given a letter of waiver of interest and that they were not issued with a notification of sale. He stated that the suit property is registered in the name of Caroline in 2001 to hold in trust for herself and the rest of the siblings. He stated that Ahmed Mohammed Khalid was the tenant since 2012 to 2022. He stated that they were told that the tenant had been sold the land and that is why he stopped paying rent. He stated that the property was and is registered in the name of Carolyne

Defendants Case

10. Maximilla Musonye Melisa (DW1) identified herself as an employee of the County Government of Bungoma as a rates officer. She was referred her witness statement dated 23rd August, 2018 which she adopted as her testimony-in-chief. She was referred to the list of documents dated 8/8/2012 which she produced as D-Exhibit 1 & 2 respectively.

11. On cross-examination, she stated that the plot in question was allocated to Batholomew Wafula Lule and that he was not paying rates She referred to P-Exhibit 3 and confirmed that it was a letter from Municipal Council to Batholomew Wafula Lule and that the last paragraph informed him notice of repossession/auction. She stated that a public notice was issued in the Daily Nation. She was referred to P-Exhibit 2 and stated that it indicates notice for auction and the plot in question was part of the property advertised and that the property belongs to Batholomew Wafula Lule. He stated that they received money from Ahmed Mohammed Khalid in the sum of Kshs. 915, 221 which was for rates. She stated that as per their records, Carolyne Akinyi Wafula is not appearing and that they have not received rates from her. She said that when someone fails to pay rates, they could forward list to auctioneers if they fail to pay, they repossess the plot and reallocate to someone else.

Appellants Submissions

12. The Appellants through the firm of Wattangh & Company Advocates submitted on the following three issues;

    1. Whether the appellant legally and lawfully obtained the certificate of lease over the suit property or not?

    2. Whether the 1st respondent's transfer of the suit property to her name was unprocedural and unlawful or not?

    3. Whether the appellant proved his case on a balance of probabilities and entitled to compensation or not?

13. On the first issue, the learned counsel submitted that according to record of Municipal Council of Bungoma (now County Government of Bungoma) by then, it shows that Bartholomew Wafula Lule

was the person given the lease to the suit property on 10/11/1980 for 99 years. He submitted that upon issuing the lease, the lessee failed to pay rates as per regulation even after a default notice was served upon him by the Municipal Council. He submitted that it was after the default notice that the Municipal Council was left with no other choice than to advertise the same in the Kenya Gazette dated 21/11/2011

14. The learned Counsel submitted that upon the advertisement, the Appellant herein paid the outstanding rates as provided under regulations and was issued with rates clearance certificate and transfer forms to present to the lands office for change of ownership. He further submitted that consent was obtained after the public auction from he Municipal Council by the District Land Registrar and the same was granted before the certificate of lease and the rates clearance was issued and that it is therefore evident that the Appellant purchased the suit property by public auction after the same was gazetted. He submitted that from the transfer documents obtained, the Appellant followed the right procedure in acquiring the suit property

15. On the second issue, the learned counsel submitted that when the Appellant presented the documents to change ownership, it was discovered that the 1st Respondent had unlawfully and unprocedurally. He argued that the rates certificate issued to the 1st Respondent was acquired after the death of the father and no evidence was brought forward that she had cleared all the outstanding rates before being issued the same.

16. As regards the third issue, the Advocate for the Appellant submitted that from the evidence on record, it is clear that the rates clearance certificate was issued to the 1st Respondent after the demise of her father and that no evidence of payment of the outstanding rates her father had defaulted. He submitted that upon default of payment and several notices, the property reverted back to the Municipal Council of Bungoma and the lessee Bartholomew Lule ceased being the owner of the property. He submitted that after the reversion, Municipal Council of Bungoma instructed the Auctioneers to cause the same to be gazetted for public auction. The following cases and authorities were relied;

Interested Parties' Submissions.

17. The interested parties through the Firm of M/S Lucy Nanzushi & Company Advocates submitted that what stands up for determination is whether the Appellant purchased the suit property through public auction. She submitted that in the Notice published in the Daily Nation Newspaper on Monday 21st Nvember 2011, the Municipal Council of Bungoma was putting notice to inform Rate payers that they were to pay rates until 30/11/2011. She submitted that by then, the rate payer in respect of the suit property had died and the property had been transferred to the 1st Respondent to hold in trust for herself and 6 of her siblings. She submitted that Carolyne Akinya who is the registered owner and the 1st Respondent herein was not notified of the purported sale of their property. She argued that the Municipal Council of Bungoma never bothered to check from the lands office the actual registered owner of the property before purporting to sale. She stated that the 2nd Respondent did not follow the law and regulations in purporting to sale the suit property. She submitted that DW1 did not specify where the auction took place and that public auction needs to be published in the dailies and that no prove has been availed by the Appellant.

2Nd Respondent's Submission

The 2nd Respondent did not file submission.

Legal Analysis and Decision

18. I have considered the Memorandum of appeal, the record of appeal which include the pleadings, proceedings and exhibits produced by the parties and their witnesses in the trial court as well as the applicable law. The gist of the plaintiff/Appellants' claim in the lower court was for an order directing Bungoma Land Registrar to dispense with the production of lease certificate and the Deputy Registrar Bungoma to sign all the relevant documents on behalf of the 2nd Defendant to effect transfer of the suit plot to the plaintiff. In the alternative, the Plaintiff/Appellant sought a declaration order that he is entitled to compensation, refund of costs incurred to uplift the house, materials costs, renovation costs, repair costs, labour, fixtures, rates paid to the tune of three million and interest at court rates. The plaintiff/Appellant's claim is hinged on a purported purchase of the suit property through a public auction after the 2nd Defendant/Respondent exercised its statutory power of sale under Sections 17 & 18 of the *Rating Act* Cap. 267 Laws of Kenya through a notice published in the Daily Newspapers on Monday 21st November 2011.I have looked at the record of appeal and find that the plaintiff does not plead a particular date and place the purported auction took place. It was for the plaintiff/Appellant to prove on a balance of probabilities that indeed the auction took place. DW1 in her evidence admitted that they would sent auctioneers and reallocate the property to another person. The trial Magistrate clearly captured this at page 10 of his judgment where he observed as follows';

    > A public auction by its very nature requires publication, that it be held in public at a given date and time and that this notification be publicised. The plaintiff does not present any evidence of this seminal fact.

    The plaintiff has made a prayer in the alternative that he be reimbursed 3,000,000/ shillings that he used to renovate the premises. These are special damages that must specifically pleaded and specifically proved. This threshold was not met in the evidence brought before court."

19. I find the trial Magistrate properly evaluated and analysed the evidence adduced by the parties and applied his mind to the applicable law and find no reason to fault in his findings and Decision. I also note that from the certificate of official search dated 11/7/2001 and also produced in evidence, the 2nd Defendant/Respondent was registered as proprietor of the suit property on 12/3/2001. It therefore follows that if the plaintiff/Appellant did due diligence before purporting to purchase the same in 2011, he would have discovered that the same is owned by Carolyne Akinyi Wafula, the 2nd Defendant, not Bartholomew Lule. I find it reckless for the 3rd Respondent not to confirm from the lands office the actual ownership of the suit property before purporting to exercise their statutory power of sale under the *Rating Act* Cap.267 Laws of Kenya. I also note that the County Council of Bungoma and the predecessor to the County Government of Bungoma acted illegally and unlawfully in purporting to auction a property without due process

20. In light of the afore foregoing, I find this appeal devoid of merit and the same is hereby dismissed with costs.

21. Orders accordingly.

READ, DELIVERED AND SIGNED AT BUNGOMA THIS 11TH FEBRUARY, 2025.

HON.E.C CHERONO

ELC JUDGE

In the presence of;

1. M/S Masengeli for the 2nd Respondent.

2. M/S Nanzushi for the Respondents and the Interested Parties.

3. Bett C/A.