



REPUBLIC OF KENYA



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**Ruria v Kivungi & 2 others (Environment & Land Case 241 of 2021)  
[2024] KEELC 463 (KLR) (7 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 463 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 241 OF 2021**

**SM KIBUNJA, J  
FEBRUARY 7, 2024**

**BETWEEN**

**JASPER GITONGA RURIA ..... PLAINTIFF**

**AND**

**JULIUS MUSYOKA KIVUNGI ..... 1<sup>ST</sup> DEFENDANT**

**SETTLEMENT FUND TRUSTEES ..... 2<sup>ND</sup> DEFENDANT**

**DISTRICT LAND REGISTRAR, MOMBASA ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The suit herein was instituted vide a plaint dated 9<sup>th</sup> November 2021. It is the plaintiff's case that he is the beneficial owner of Land Parcel Mombasa/Bububu Extension /3 (Original No. 1174) within the Bububu Extension Settlement Scheme. He maintained that he was allocated the suit property on 31<sup>st</sup> January 2002 by the 2<sup>nd</sup> defendant through a letter of offer and that he proceeded to pay Kshs 7,575.00 that was required. On 27<sup>th</sup> July 2004 he was issued with a Certificate of Outright Purchase having met the prerequisite requirements set out in the acquisition of a parcel of land within the settlement scheme. He averred that later on 29<sup>th</sup> July 2009, the 2<sup>nd</sup> defendant issued him with a discharge of charge. However, when he presented the said discharge with the transfer documents, the 3<sup>rd</sup> defendant refused to process the same on the ground that the suit property was allocated to the 1<sup>st</sup> defendant on 27<sup>th</sup> July 2007. The plaintiff maintained that the 2<sup>nd</sup> and 3<sup>rd</sup> defendant fraudulently allocated the suit property to the 1<sup>st</sup> defendant while being aware that he was in the process of pursuing the same title. He urged the court to enter judgment in his favour for:
  - a. "A declaration that the issuance of the title deed to Title No. Mombasa/Bububu Extension/3 (Original No. 1174) to the 1<sup>st</sup> defendant was fraudulent, illegal and unlawful and the same be revoked/cancelled.



- b. An order directing the 3<sup>rd</sup> defendant to rectify the register and issue Title No. Mombasa/Bububu Extension/3 (Original No. 1174) in favour of the plaintiff.
  - c. In the alternative to prayers a and b an order that the 2<sup>nd</sup> and 3<sup>rd</sup> defendant do allocate and issue an alternative property to the plaintiff.
  - d. In the alternative to prayers a, b and c the 2<sup>nd</sup> defendant does refund Kshs 7,572/= paid in 2002 together with interest at the prevailing market interest rate from the date of payment until payment in full.
  - e. Costs of the suit.
  - f. Any other relief that this honourable court may deem just to grant.”
2. Vide an application dated 13<sup>th</sup> March 2022 the plaintiff sought leave of court to serve Summons to enter appearance to the 1<sup>st</sup> defendant by substituted service by means of advertisement in a national newspaper. On 27<sup>th</sup> June 2022, this court allowed the application. The plaintiff was granted leave to serve the Summons to enter appearance to the 1<sup>st</sup> defendant by substituted service through advertisement in the Daily Nation or the Standard. The plaintiff filed an affidavit of service sworn by Jane Nyambura deponing that on 14<sup>th</sup> July 2022, the plaintiff served the 1<sup>st</sup> defendant by way of substituted service.
  3. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants filed a statement of defence dated the 22<sup>nd</sup> February 2022, on the 28<sup>th</sup> February 2022. They denied being privy to the averments made by the plaintiff and put him on strict proof of the same. They urged court to dismiss the suit against them with costs.
  4. On 15<sup>th</sup> March 2023, the plaintiff testified before court as PW1 and called Salim Mohamed Salim who testified as PW2. He stated that he applied for a parcel of land on 6<sup>th</sup> April 2002 and on 31<sup>st</sup> January 2002 he received a letter of offer from the Director of Settlement and Adjudication. He was required to pay Kshs 7,572/= which he paid on 4<sup>th</sup> December 2003 and was later given a Certificate of Outright purchase on 27<sup>th</sup> July 2004. He further testified that on 29<sup>th</sup> July 2009, he was issued with a discharge of charge and forwarded the same to the Land Registrar, and later paid the stamp duty. However, on 18<sup>th</sup> May 2011 the Land Registrar informed him that he could not proceed with registration since he had discovered that the suit property had already been transferred and registered in the name of the 1<sup>st</sup> defendant. The plaintiff claimed that the 1<sup>st</sup> defendant acquired title to the suit property without following the laid down procedure. The plaintiff stated that he took possession of the suit property in 2010 by constructing a house, planting trees and even hiring a caretaker who lives on the suit property. He added that the 1<sup>st</sup> defendant has never objected to his occupation of the land until recently when the said house was destroyed and the caretaker took off. During cross-examination, he stated that though he was not a squatter in the area, he applied or allocation of land to the Settlement and Adjudication office. He confirmed that the verification process of 2007 was to confirm that the people on the ground, who had been allocated land, were indeed squatters. He refuted claims that he was using his connections to get the suit property allocated to him. PW2 confirmed knowing the suit land belonged to the plaintiff as he had assisted him to clear it in 2009, in digging a borehole and building a temporary structure. He also engaged one Charles Tsuma as a caretaker. That on completing the works, they had slaughtered two goats that they ate with the neighbours. That he had visited the land on 14<sup>th</sup> March 2023 and did not find anybody else on it.
  5. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants called Benjo Kibet Daniel, the Land Adjudication and Settlement officer, Mombasa, who testified as DW1. He testified that the suit property is registered in the name of the 1<sup>st</sup> defendant though it was first allocated to the plaintiff. He maintained that the 1<sup>st</sup> defendant paid the



required fees and the discharge of charge was issued in his name. He testified that before 2007 there was agitation among the locals who complained that land within the settlement scheme was being allocated to outsiders. A fresh verification process was carried out and the suit property was reallocated to the 1<sup>st</sup> defendant. He asked the court to order for refund of the cash paid by the plaintiff for the suit property or order that he be allocated an alternative parcel of land.

6. The learned counsel for the Plaintiff filed their submissions dated the 21<sup>st</sup> November 2023 that the court has given due consideration.
7. The issues before the court for determination are as follows:
  - a. Whether the allotment of Land Parcel No. Bububu Extension Settlement Scheme/3, suit property, to the plaintiff was lawful.
  - b. Whether the allotment and registration of the 1<sup>st</sup> defendant with the suit property was lawfully, legally and procedurally done.
  - c. Who is the lawful and legal owner of the suit property.
  - d. Whether the plaintiff is entitled to any of the reliefs sought.
  - e. Who pays the costs?
8. The court has carefully considered the pleadings filed by the plaintiff, 2<sup>nd</sup> and 3<sup>rd</sup> defendants, evidence tendered by PW1, PW2 and DW1, submissions by the learned counsel, superior courts decisions cited thereon and come to the following determinations:
  - a. It was the plaintiff's evidence that on 31<sup>st</sup> January 2002, the then Director of Land Adjudication and Settlement Officer offered him Plot No. 1174 at Bububu Squatter Settlement Scheme. He accepted the same and on 4<sup>th</sup> December 2003, and made the payment required of Kshs 7,572/= to the Settlement Fund Trustee. He was issued with a Certificate of Outright Purchase on 27<sup>th</sup> July 2004. He was subsequently issued with a Discharge of Charge and a Transfer of Land in Settlement Scheme both dated 29<sup>th</sup> July 2009, and proceeded to pay Kshs 260 on 21<sup>st</sup> July 2010 as stamp duty for the said discharge of the suit property. However, when he proceeded for registration of the discharge, he was informed by the Director of Land Adjudication and Settlement, vide a letter dated 22<sup>nd</sup> June 2011, that the same could not be registered as a title to the land had already been issued to the 1<sup>st</sup> defendant. It is not disputed that the plaintiff made further follow-ups, during which he discovered that the District Land Registrar had earlier on 18<sup>th</sup> May 2011 informed the Director of Land Adjudication and Settlement that the discharge of charge and transfer documents in favour of the plaintiff could not be registered as the suit property had been registered in the names of the 1<sup>st</sup> defendant and a title issued to him on 27<sup>th</sup> July 2007. There is no evidence tendered by the defendants to suggest that the allocation of the said plot to the plaintiff had been illegally or irregularly made or obtained.
  - b. The 1<sup>st</sup> defendant on the other hand did not enter appearance or defend this suit despite being served through substituted service. The plaintiff's averment and evidence against the 1<sup>st</sup> defendant remains unrebutted or unchallenged.
  - c. DW1, the Land Adjudication and Settlement officer, Mombasa, testified that the suit property was registered in the name of the 1<sup>st</sup> defendant, though it was first allocated to the plaintiff. DW1 stated that the cancellation of the plaintiff's allocation was due to agitation among the settlers of the scheme that land parcels in the scheme had been allocated to outsiders as



opposed to the locals. That agitation had led to a verification process being conducted in 2007, after which the suit property was allocated to the 1<sup>st</sup> defendant and title issued him. He denied any collusion between the Land Adjudication and Settlement office and the 1<sup>st</sup> defendant in reallocating the plaintiff's parcel, and maintained that it was the verification process that resulted into the plot being allocated to the 1<sup>st</sup> defendant. It is however noted that the defendants did not produce before the court documentary evidence confirming that the 1<sup>st</sup> defendant had accepted the offer of the plot, or made payments thereof, or the discharge of charge issued in his favour and, stamp duty payment made before registration of the title in his name. There was no documentary evidence placed before court to support the 1<sup>st</sup> defendant's claim of title to the suit property. It is no wonder the 1<sup>st</sup> defendant did not find it worthwhile to come to court and defend his title, but left it to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.

- d. The court has no difficulty in finding that the plaintiff has established he was allocated the suit property by the Director of Land Adjudication and Settlement on 31<sup>st</sup> January 2002 and paid the prerequisite payment of Kshs 7,572/= on 4<sup>th</sup> December 2003. The re-allocation of the suit property to Julius Musyoka Kivungi, the 1<sup>st</sup> defendant, by the same office of Director of Land Adjudication and Settlement on 2<sup>nd</sup> November 2007 was therefore irregular and not procedurally done, and amounted to double allocation. DW1 sought to explain to the court that the re-allocation happened in 2007 after there were complaints from the locals that the people who were allocated land in the settlement scheme were not locals. He claimed that a verification process was carried out, which resulted in locals getting plots in the scheme, hence the suit property being freshly allocated to the 1<sup>st</sup> defendant. If that was so, the least the defendants could have done is to avail the reports generated during the alleged verification exercise with the recommendations thereof, especially in respect of the suit property.
- e. No evidence was presented before the court to show that the plaintiff acquired the allotment letter illegally, unprocedurally or through a corrupt scheme. Having analyzed the evidence tendered by both the plaintiff and defendants, it is clear that the plaintiff is the initial or original allottee of the suit property. He accepted the allotment and made all the payments demanded. The discharge of charge and transfer documents were then issued to him and he paid the stamp duty demanded. His transfer was surprisingly not registered on presentation allegedly because the suit property had been registered with the 1<sup>st</sup> defendant. With the dates on the steps the plaintiff had taken in mind, it becomes clear that if the 1<sup>st</sup> defendant ever made an application for a settlement plot, the suit the suit property was not available for allocation by then as it was already alienated to the plaintiff.
- f. It is strange that the letter of offer to the 1<sup>st</sup> defendant from the Director of Land Adjudication and Settlement was dated 2<sup>nd</sup> November 2007 while his title was dated 27<sup>th</sup> July 2007. How was the title issued months before the allotment letter? What precedes the other between the two? Did the 1<sup>st</sup> defendant pay the requisite payments to the Settlement Fund Trustee and stamp duty before he got registered as proprietor of the suit property? That obviously, the allocation of the suit land to the 1<sup>st</sup> defendant, long after it had already been allocated to the plaintiff, created a double allocation of the suit property. In the case of Cecilia Nyambura Ndungu v Ol'kalou Farmers Co-operative Society [2018] eKLR, the court held that,

“In essence therefore I find that there was double allotment of the suit land and the blame therefore lay squarely on the Settlement Fund Trustee. This notwithstanding, in the case of M'Ikiara M'Rinkanya & Another v Gilbert Kabeere M'Mbijiwe, [1982-1988] 1KAR 196, the court held that where there was a double allocation of



land, the first allotment would prevail. That therefore there was no power to allot the same property again. (See also *Kariuki v Kariuki* [1982-88] KAR 26/79 and *Otieno and Matsanga*, [2003] KLR 210).”

When the suit property was allocated to the plaintiff by the Director of Land Adjudication and Settlement and the plaintiff paid all related charges, he was then considered to have acquired rights over it, making the suit property unavailable for allocation to other persons, the 1<sup>st</sup> defendant included. It was therefore not possible for a second allotment to be validly made where an earlier allotment had been made, without first lawfully revoking the first allocation. This was the position held by the Court of Appeal in *Waterfront Holdings Limited v Kandie & 2 others* (Civil Appeal 88 of 2019) [2023] KECA 1223 (KLR) (6 October 2023) (Judgment) where it was held that,

“In that case what was in issue was whether a second allotment can validly be made in circumstances where an earlier allotment had been made. That Court found that that was not possible. That was the position this Court adopted in the case of *Kenya Ihenya Company Limited & Another v Njeri Kiribi* [2019] eKLR where it was again stated;

“... it was clear that the 1st appellant had allotted the suit land to both the respondent and the 2nd 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 2nd appellant claimed to have purchased the same on 24th June, 1997, she was the bonafide proprietor.”

The 1<sup>st</sup> defendant was issued with a title deed to the suit property on 27<sup>th</sup> July 2007, which is surprisingly before he was issued with a letter of offer on 2<sup>nd</sup> November 2007. The disparity on the dates on the letter of allotment and title, was not explained by the defendants, and the court takes it as a sign that the same was not regularly, procedurally and lawfully done.

- g. It is trite law that where the title of a registered proprietor is being challenged, it is upon the proprietor to prove that the process under which he acquired the said title was proper. In this case, the 1<sup>st</sup> defendant has chosen to keep away from this litigation thereby failing to use the opportunity afforded to demonstrate that he acquired the title to the suit property legally and procedurally. The Court of Appeal stated in *Waterfront Holdings Limited v Kandie & 2 others* (*supra*);

“It is now law that the mere fact of issuance of a title deed does not confer the status of indefeasibility of title. Courts of this country have therefore held that they would not hesitate to nullify titles held by those who stare at the court and wave a title of a grabbed land by merely and pleading loudly the principle of the indefeasibility of title deed. In cases where the very process of acquisition of the land in question is under challenge, it is not enough to simply rely on the title. It was therefore held by this Court in *Munyu Maina v Hiram Gathina Maina* [2013] eKLR that:

“...when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument that is under challenge and the registered proprietor must go beyond the instrument and prove legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need



not be noted on the register. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant's testimony."

The 2<sup>nd</sup> and 3<sup>rd</sup> defendants are only clinging on the title issued to the 1<sup>st</sup> defendant and proposes that the plaintiff be considered for an alternative plot or refunded the money he had paid. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants did not prove to the court that the allotment letter over the suit property that was first issued to the plaintiff was cancelled for failure to meet any of the conditions in the letter of allotment or that the plaintiff was refunded the purchase price of Kshs 7,572/= and other monies paid thereof, before they proceeded to reallocate the same plot to the 1<sup>st</sup> defendant. They therefore had no power to allocate the suit property to the 1<sup>st</sup> defendant without following the laid down procedure before re-allocating the suit property. The fact that the 1<sup>st</sup> defendant's title was issued before his letter of allotment instead of the other way round can only be taken to mean his title was obtained by fraud, irregularly and unlawfully. The 1<sup>st</sup> defendant's title having been successfully impugned and in view of Section 26 (b) of the [Land Registration Act](#) No. 3 of 2012, it should be cancelled.

- h. That as it is because of the acts of the defendants that the plaintiff was compelled to file this suit in pursuit of his rights to property, and as under section 27 of the [Civil Procedure Act](#) chapter 21 of Laws of Kenya, costs follow the events, unless where for good reasons to be recorded the court orders otherwise, and there being no good cause to deviate from that edict, I award the plaintiff costs.
9. In conclusion the court finds that the plaintiff has established his case against the defendants on a balance of probabilities. Judgement is therefore entered in favour of the plaintiff against the defendants jointly and severally and the following orders issued:
  - a. A declaration is hereby issued that the Plaintiff is the proper allottee of Land Parcel No. Bububu Extension Settlement Scheme/3 (Original No. 1174).
  - b. A declaration is hereby issued that the issuance of title deed to Title No. Mombasa/Bububu Extension/3 (Original No. 1174) to the 1<sup>st</sup> defendant was obtained fraudulently, illegally and unlawfully and the same is revoked/cancelled.
  - c. An order be and is hereby issued directing the 3<sup>rd</sup> defendant to rectify the register in respect of Land Parcel No. Mombasa/Bububu Extension/3 (Original No. 1174) by cancelling the name of the 1<sup>st</sup> Defendant as proprietor, and to register the transfer documents presented by the plaintiff as the proprietor of the said property, upon payment of applicable fees, if any is outstanding.
  - d. The plaintiff is awarded costs of the suit.

It is so ordered.

**DATED AND VIRTUALLY DELIVERED ON THIS 7TH DAY OF FEBRUARY 2024.**

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

**In The Presence Of:**

**Plaintiff: M/s Shira For Nyambura.**

**Defendants: Mr. Waga For 2<sup>Nd</sup> And 3<sup>Rd</sup> Defendants.**



**Wilson – Court Assistant**

**S. M. Kibunja, J.**

**ELC MOMBASA.**

