



**Okongo & another v Katoke & 2 others (Environment & Land Miscellaneous  
Case E131 of 2021) [2024] KEELC 3705 (KLR) (8 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 3705 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND MISCELLANEOUS CASE E131 OF 2021**

**JA MOGENI, J**

**MAY 8, 2024**

**BETWEEN**

**RONALD ONYAMBU OKONGO ..... 1<sup>ST</sup> PLAINTIFF**

**PETER KANE GICHUKI ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**DAVID KIKI KATOKE ..... 1<sup>ST</sup> DEFENDANT**

**EMBAKASI RANCHING COMPANY LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**THE CHIEF LAND REGISTRAR ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The 1<sup>st</sup> plaintiff who had the authority of the 2<sup>nd</sup> plaintiff herein filed through a plaint dated 9/07/2021 a suit against the defendants herein. He is claiming that he is the registered owner of the suit plot No. V 8593 hereinafter referred to as suit property Title Number: Nairobi Block 136/12257. He wanted orders that would inter alia have a mandatory injunction against the said defendants.
2. The specific prayers that the 1<sup>st</sup> plaintiff sought from the court are:
  - i. A mandatory injunction does issue restraining the defendants jointly and severally from trespassing, transferring, charging or in any other way or interfering with the suit parcel of land being Title Number Block 12257 and/or evicting the plaintiff from the said property
  - ii. A declaration that the plaintiff is the legal owner of her portion of Title Number: Nairobi Block 136/12257 and a cancellation of any title in the names of the 1<sup>st</sup> defendant thereof.
  - iii. Costs and interest of the suit
3. The said suit was contemporaneously filed with an application of even date where that plaintiff was seeking injunctive orders against the defendants of which prayers 2 and 3 of the application were



granted on the 01/03/2022 when the plaintiff's application to serve the defendants by substituted service was also granted since the defendants had not entered appearance despite being served.

4. On 12.07.2023, the court was informed by plaintiff's counsel that they needed to serve the 1<sup>st</sup> defendant by substituted service and the court extended the earlier orders issued and directed that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants be served physically. From the affidavit of service sworn on 17/11/2023 the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were served physically and the 1<sup>st</sup> defendant was served via the Daily Nation Newspaper dated 5/04/2024.
5. When the matter came up for hearing on 24/04/2024, none of the defendants had filed in court any response relating to the instant suit. The court therefore proceeded to have a formal proof for the plaintiff's suit.

### **Pleading**

6. *Vide* the plaint dated 09.07.2021, the plaintiffs have pleaded that they are the registered owners of the property currently known as Plot V 8593 (Certificate Number 019210) which has been earmarked as Title Number: Nairobi Block 136/12257. That when they applied for the issuance of the title deed the 1<sup>st</sup> plaintiff was shocked to learn that it has been earmarked for allocation to the 1<sup>st</sup> defendant who is a stranger to the plaintiffs and has never been an owner of the suit property.
7. The plaintiff pleaded that they had paid Kesh 32,000 on 27/10/2008 and had been issue with non-member certificate of ownership number 0191210 and he annexed copied of the receipt and certificate marked as ROO2. That they had settled on the suit property and by 2010 having built a residential house and a pit latrine. Further that he was asked and he paid Kesh 10,000 for beacon certificate on 11/08/2010 and he annexed copies of the cheque, certificate and a picture of the constructed house marked as ROO3
8. That upon making the said payments the 2<sup>nd</sup> defendant allowed him to settled on the suit property. That in 2017 he lost his son and he interred his remains on the suit property as evidenced by the burial permit annexed as ROO4. That when the government announced that the 2<sup>nd</sup> defendant would to the owners of the parcels of land he confirmed that their names were well entered in the register at the office of the 2<sup>nd</sup> defendant and also he confirmed the register at the Land Office on 9/12/2018 as evidenced by the computer printout showing their names as owners of parcel number 12257 marked as ROO5
9. He however learnt later in September 2018 that their names had been replaced with the names of the 1<sup>st</sup> defendant and he lodged complaints at the offices of the 2<sup>nd</sup> defendant and at the Land Offices to which he was assigned numbers 87 and 730 respectively.
10. That before he appeared before the board for his complaint to be heard, he learned that the title to the suit property had been issued on 8/09/2020 despite the pending complaints filed against the issuance of title both at Embakasi Ranching Offices and at the Land's offices.
11. The plaintiff avers that the title of the 1<sup>st</sup> defendant was obtained through fraud and illegality and blames the 2<sup>nd</sup> and 3<sup>rd</sup> defendants too for forgery of the title over the suit property since the 3<sup>rd</sup> defendant are the custodians of land records throughout the Republic of Kenya.
12. The Plaintiffs plead the following particulars of fraud, irregularity, and illegality against the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> defendants
  - a. Conspiring to acquire Title No. Nairobi Block 136/12257 by fraudulently removing the plaintiffs' name from the register



- b. Allowing his name to be used in the conspiracy of defrauding the plaintiff subject property.
  - c. Conspiring with the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to evict the plaintiffs from the subject property where he has lived for over 10 years
  - d. Conspiring and colluding to transfer
  - e. Conspiring with the 1<sup>st</sup> defendant to remove the plaintiffs' names from the property
  - f. Conspiring with the 1<sup>st</sup> defendant to purchase the suit property with no knowledge of the plaintiffs
  - g. Conspiring with the 1<sup>st</sup> and 3<sup>rd</sup> defendants to transfer the property into the 1<sup>st</sup> defendant's names
  - h. Conspiring with the 1<sup>st</sup> and 3<sup>rd</sup> defendant to defraud the plaintiff of the subject property
  - i. Conspiring with the 1<sup>st</sup> and 3<sup>rd</sup> defendants to evict the plaintiff from the suit premises without a valid court order.
  - j. Conspiring with relevant government officials to transfer property into the name of the 1<sup>st</sup> defendant without following due process.
  - k. Conspiring with the 1<sup>st</sup> and 2<sup>nd</sup> defendants to defraud the plaintiff off the subject property.
  - l. Conspiring with 1<sup>st</sup> and 2<sup>nd</sup> defendants to evict the plaintiff without following due process of eviction as required by law,
13. In support of their case, the Plaintiffs filed the following evidence. a. Witness statement by the second Plaintiff dated 8/5/2020. b. Copies of title deed for the suit land in the names of the Plaintiffs' father, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. c. Copies of grant and certificate of confirmed grant. d. Copy of Gazette Notice No. 1932 of 15/2/2013. e. Copies of charge to Family and Equity Banks. f. Copy of discharge of charge on Equity Bank. g. Copies of the application for transfer, registration, documents and title deed. h. Copies of the extract of the register. i. Copy of transfer from the 1<sup>st</sup> to the 2<sup>nd</sup> Defendant. j. Copy of charge to NIC Bank Ltd, now CBA. k. Copy of extract of the title.
14. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants did not enter appearance or file a defence despite having been served. In essence none of the defendants filed any pleadings, thus on 27.04.2024, the court gave directions that the matter would proceed as a formal proof.
15. That notwithstanding, the defendants were duly served with the mention dates, pre-trial conference date and hearing date as per the affidavits of services filed in the portal.

### **The evidence**

16. The Plaintiff is the lone witness in this case. He gave his testimony in open court and stated that he is a small business man and that he resides in Ruai. He stated that he knows the 2<sup>nd</sup> plaintiff and the they bought the suit property together. He stated that he had sued the defendants and he adopted his witness statement dated 9/07/2021 which he adopted as his evidence in chief and also produced a list of documents as his exhibits numbered 1 to 7 dated 9/07/2021 which were adopted as his Pw1-Exhibits.
17. Hi witness statement and evidence in court mirrors the content of his pleadings. I will therefore not belabour reproducing the said evidence.



## Submissions

18. The submissions of the plaintiff are dated 14.2.2024 where he avers that he is the legal owner of the suit property, the averments and evidence remain uncontroverted, but nevertheless, the plaintiff has discharged the burden of proof.

## Determination

19. The Court has carefully read and considered the pleadings filed and the evidence adduced and the written submissions and renders itself as follows;
20. Though the defendants were served they never filed any pleadings, the Plaintiffs' evidence remained uncontroverted. See the case of *Shaneebal Limited v County Government of Machakos* (2018)eKLR, where the Court cited the case of *Janet Kaphiphe Ouma & ano v Marie Stopes International (Kenya)*, Kisumu HCC No.68 of 2007, where the Court held that:-

“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 1<sup>st</sup> 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.”
21. However, it is trite that ‘he who alleges must proof’ and uncontroverted evidence, is not automatic evidence, as the law places on the Plaintiff the obligation of proving his case.
22. Having considered the pleadings herein and the available evidence, the Court finds the issues for determinations are;
  - i. Whether, the Plaintiffs are entitled to the orders sought.
  - ii. Who should bear the costs of the suit
23. By failing to file any pleadings in court even after being served the court perceives the defendants to be not interested in defending the suit. The 1<sup>st</sup> defendant has outrightly failed to defend how he came into ownership of the said title. The 2<sup>nd</sup> defendant has failed to explain how a parcel that had been allocated to the plaintiffs turned out to be in the name of the 1<sup>st</sup> defendant. The 3<sup>rd</sup> defendant also did not bother to explain the process that led to their issuing a title document in the name of the 1<sup>st</sup> defendant despite there being a formal complaint filed.
24. The Plaintiff has sought for Mandatory Injunction, a Declaration that it is the absolute and indefeasible owner and further for General Damages for trespass. For the Court to find in favour of the Plaintiff, it is not in doubt that the Plaintiff ought to prove that it is deserving of the orders sought.
25. It is evident herein that both the plaintiffs are in possession of a grant over the suit Property suit plot No. V 8593 hereinafter referred to as suit property Title Number: Nairobi Block 136/12257. However, the 1<sup>st</sup> defendant has been allotted the said parcel of land as was averred by the plaintiffs. The plaintiffs did not attach any copy of the Title document but attached copies of the show that the plaintiff paid for Plot No. V 8593 and the ownership documents issued by the 2<sup>nd</sup> defendant including the beacon certificates.



26. When a party's title to land is called into question, the Party has an obligation to show the root of its title. See the case of *Munyu Maina v Hiram Gathiba Maina*, Civil Appeal No.239 of 2009, where the Court of Appeal held that: -

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

27. As already noted above, since 1<sup>st</sup> Defendant did not file any pleadings, the plaintiffs' evidence remain uncontroverted.

28. The Plaintiff on the other hand testified that he was allocated the suit property as a non-member of the 2<sup>nd</sup> defendant where he paid the requisite fees including payment for the beacon certificate. Further when he made effort to ensure that the issuance of title documents reflected the correct entries showing his name. When he noted anomalies he raised the said concerns with the 2<sup>nd</sup> and 3<sup>rd</sup> defendants herein. The Plaintiff has produced in evidence among others a copy of proof of payment of Plot No. V 8593 and certificate of ownership, copies of cheque for payment of beacon and copies of beacon certificate, copy of print out from Embakasi Ranching Company showing proof of ownership of land, indicating the transaction between it and the 2<sup>nd</sup> defendant.

29. The court in the case of *Rukaya Ali Mohamed v David Gikonyo Nambacha & another* (Kisumu HCCA No. 9 of 2009):-

“Once (an) allotment letter is issued and the allottee meets the conditions therein, the land in question is no longer available for allotment, since a letter of allotment confers (an) absolute right of ownership or proprietorship unless it is challenged by the allotting authority or is acquired through fraud, mistake or misrepresentation, or that the allotment was out rightly illegal or it was against the public interest.”

30. In other words, where land has been allocated, the same land cannot be reallocated unless the first allocation is validly and lawfully cancelled.

31. Thus the Plaintiff having been able to show the root of its title, the Court finds and holds that it has then proved that it is the absolute and indefeasible owner of the suit property. See the case of *Hubert L. Martin & 2 Others v Margaret J. Kamar & 5 Others*[2016] eKLR, where the Court held that;

‘A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.’



32. Even assuming the 1<sup>st</sup> defendant was able to show the root of their title, it has been decided in many cases that where there is a double allocation, there is no doubt that the first in time will prevail. The court finds that the Plaintiffs' title was first in time and the Court will rely on the Maximum of Equity which states that, "when two equities are equal, the first in time shall prevail". See the case of [Gitwany Investment Ltd v Tajmal Ltd & 3 Others](#) (2006)eKLR.
33. Having found that plaintiffs are the absolute and indefeasible owner of the suit property, then the Court finds that the Plaintiff is entitled to enjoy the rights of an absolute owner of the property as is provided by Sections 24 and 25 of the [Land Registration Act](#). Section 24(a) of the said Act provides as follows: -
- Subject to this Act: -
- "The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto:"
34. Further as an absolute proprietor, such right attaching to it can only be defeated by operation of the law as provided by Section 25(1) of the [Land Registration Act](#) which provides as follows: -
25. (1) The rights of a Proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject:-
- a. to the leased, charges and other encumbrances and to the conditions and restrictions if any, shown in the register; and
  - b. to such liabilities, rights and interests as affect the same and are declared by Section 28 and to require noting on the register, unless the contrary is expressed in the register.
35. As the Court finds that the plaintiffs acquired their allocation and registration regularly, then it is evident that the Plaintiff is entitled to protection of its property as provided by Article 40 of the [Constitution](#) and therefore entitled to the mandatory injunction orders sought.
36. The plaintiffs have proved on the required standard that the suit land known as plot No. V 8593 hereinafter referred to as suit property Title Number: Nairobi Block 136/12257 to the plaintiffs. This therefore concludes that the registration of the suit land in respect of 1<sup>st</sup> Defendant was tainted with irregularity and was null and void, and the Court finds that it has no option but to cancel the 1<sup>st</sup> Defendant's proprietorship of the suit property as per the provisions of Section 80 of the [Land Registration Act](#), having failed to give evidence of the process through which it was allocated the suit land.
37. Consequently, after careful analysis of the available evidence, the Court finds that the Plaintiffs have proved their case on the required balance of probabilities and therefore are entitled to the prayers sought in their plaint. For the above reasons, the Court enters Judgment for the Plaintiffs against the Defendants jointly and severally in the following terms:
- i. A mandatory injunction is hereby issued restraining the defendants jointly and severally from trespassing, transferring, charging or in any other way or interfering with the suit parcel of land being Title Number Block 12257 and/or evicting the plaintiff from the said property



- ii. A declaration is hereby issued that the plaintiff is the legal owner of his portion of Title Number: Nairobi Block 136/12257 and a cancellation of any title in the names of the 1<sup>st</sup> defendant is thus issued.
- iii. The plaintiff is awarded costs of the suit as against all the defendants jointly and severally

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI VIRTUALLY ON THIS 8<sup>TH</sup> DAY OF MAY, 2024.**

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**MOGENI J**

Judgement read in virtual court in the presence of:

Mr. Chege for the 1<sup>st</sup> Plaintiff

No appearance for Respondent

Ms. C. Sagina - Court Assistant.

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**MOGENI J**

**JUDGE**

