



**Kamanga (Suing as the Administrator of the Estate of Jacinta Wanjiru Mukonyoro) v Embakasi Ranching Company Ltd & 4 others (Environment & Land Case E394 of 2022) [2024] KEELC 6717 (KLR) (12 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 6717 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E394 OF 2022**

**MD MWANGI, J  
JULY 12, 2024**

**BETWEEN**

**FRANCIS MUKONYORO KAMANGA (SUING AS THE ADMINISTRATOR OF THE ESTATE OF JACINTA WANJIRU MUKONYORO) ..... APPLICANT**

**AND**

**EMBAKASI RANCHING COMPANY LTD ..... 1<sup>ST</sup> DEFENDANT  
LUCY NYOKABI ..... 2<sup>ND</sup> DEFENDANT  
WALTER KIGERA ..... 3<sup>RD</sup> DEFENDANT  
MARY GATHONI WAINAINA ..... 4<sup>TH</sup> DEFENDANT  
CHIEF LAND REGISTRAR, NAIROBI ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. Before me for determination is the Plaintiff’s application dated 24th June, 2024 expressed to be brought under the provisions of Section 3, & 3A of the *Civil Procedure Act*, Section 4 and 19 of the *Environment and Land Court Act*, 2011 as well as Article 40 (2) and 50 (1) of *the Constitution*. The Plaintiff/Applicant prays for orders that;
  - a. The 1st Defendant, its surveyors, servants and/or agents, the 2nd and 3rd Defendants/ Respondents be summoned to appear before Court to point out, to both the Plaintiff and their Advocates simultaneously where Plot No. P7830 designated as Plot No. Nairobi/ Block /105/7708; Plot No. P3486 and Plot No. P3486 and Plot No. P3486B are situated, before 30th July, 2024 and while in the company/assistance of the OCS Ruai and pending the hearing and determination of this suit.



- b. Before 30th July, 2024, the 1st Defendant, its surveyors, servants and/or agents, the 2nd and 3rd Defendants/Respondents produce a register showing the respective title allocation of the Plots; Plot No. P7830, Plot No. P3486, Plot No. P3486B and a confirmation that the identified plots are not allocated to any other party not in this suit pending the hearing and determination of this suit.
  - c. Costs of this application.
2. The application is premised on the grounds on the face of it. The Applicant asserts that the 1st Defendant as a registered land buying company and the 2nd and 3rd Defendant being its chairperson and vice- chair respectively, allocated a total of 3 properties to the Plaintiff and 4th Defendant.
  3. The Plaintiff avers that the allocation of the said plots is not in dispute as the parties herein paid the requisite fees for issuance of the respective titles. Both the Plaintiff and the 4th Defendant have Share Certificate Numbers and Letters of Clearance confirming allocation of their respective plots. It is contended that the Bonus Plot No. P3486B was allocated Title Number Nairobi/Block 136/1361 and Plot No. P3486 was given the same Title Number Nairobi/Block 105/7708 in 2020 meaning it was a double allocation.
  4. That the double allocation of a Title Number Nairobi/ Block 105/7708 which in now being identified as both Plot P7830 and Plot P3486 makes it imperative for the 1st, 2nd and 3rd Defendants to appear before the Court and be compelled to physically point out the allocated plots for justice to both the Plaintiff and the 4th Defendant. Consequently, the non-participation of the 1st, 2nd and 3rd Defendants in this suit or physical identification of the plots that were bought by the parties before this court will occasion great prejudice and a miscarriage of justice. It is therefore in the interest of justice that the orders sought be granted.
  5. The application is further supported by the affidavit of Francis Mukonyoro Kamanga deponed on the 24th June, 2024 summarizing the assertions contained in the grounds in support of the application stated above.
  6. The Defendants were served with the application. However, none of the Defendants responded to the application.
  7. The application came up for hearing on the 10th July, 2024 and counsel for the Plaintiff/Applicant informed the court that they did not wish to file any submissions.

### **Issues for determination**

8. Having carefully considered the application and the affidavit in support, I am of the view that the only issue for determination is whether the application is merited to warrant the issuance of the Orders sought.

### **Analysis and Determination**

9. It is trite law that he who alleges must prove. Section 107(1) of the *Evidence Act* is categorical that:-  

“Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”
10. Therefore, although the application was not opposed the Applicant is bound to prosecute it and establish its merits.



11. It is important to highlight the Plaintiff's case as stated in his Complaint dated 23rd November, 2022 for a better analysis of the instant application. The Plaintiff's case is that the deceased purchased Plot No. P7830 now known as Nairobi Block 105/7708 from the 1st Defendant. That upon payment of the purchase price, the deceased was issued with a Plot ownership certificate and a beacon certificate by a Surveyor. The deceased thereafter took possession of the suit property. The 1st Defendant then issued the deceased with the clearance and registration documents for purposes of processing a title. Unfortunately, she died before obtaining a title.
12. The Plaintiff avers that upon obtaining Letters of Administration, he lodged the documents with the ministry of lands for processing of the title and paid the requisite fees. However, he later learnt that the 1st, 2nd and 3rd had deleted the deceased's name from the register and replaced it with that of the 4th Defendant herein. He states that the 3rd Defendant, being in charge of land allocation within the 1st Defendant, confirmed that the deceased owned the suit property.
13. The 1<sup>st</sup> Defendant, through the 3rd Defendant however wrote to the 5th Defendant requesting to have the title deed issued in the name of the 1st Defendant. He accuses the 4th Defendant of colluding with the 1st, 2nd and 3rd Defendants to reallocate the land that rightfully belongs to his deceased wife to the 4th Defendant. He avers that, the title if any, issued in favour of the 4th Defendant should be cancelled forthwith.
14. The Plaintiff therefore seeks among other orders for;
  - a. A declaration that the deceased Jacinta Wanjiru Mukonyoro is the legal and beneficial owner of Plot No. P 7830 measuring 0.1692 Hectares now also known as Nairobi Block/105/7708.
  - b. A mandatory injunction order do issue cancelling the certificate of title or any other title issued to the 1st Defendant or any other person other than the Plaintiff or Jacinta Wanjiru Mukonyoro in respect of the property known as Nairobi Block 105/7708.
  - c. A permanent injunction restraining the Defendants from selling, allocating, interfering, entering, subdividing, transferring or in any other way interfering with the Plaintiff's ownership, possession and or control of the proprietary interest in the property known as Nairobi Block 105/7708.
  - d. An order compelling the 5th Defendant to forthwith issue a Certificate of Title for property known as Nairobi Block 105/7708 in the name of the Plaintiff or Jacinta Wanjiru Mukonyoro.
15. Having laid the above background, I will address each of the orders sought herein separately and distinctively.
16. First, the Applicant seeks summons against the 1st Defendant's surveyor or agents, the 2nd and 3rd Defendants to appear in court and point out where the respective plots are situated in the presence of the OCS Ruai Police Station before the hearing of the suit.
17. It is indeed a well settled principle of law that parties are bound by their pleadings and that unless amended the evidence adduced shall not deviate from the pleadings. This legal position was reaffirmed by the Court of Appeal in the case of David Sironga Ole Tukai -vs- Francis Arap Muge & 2 Others Civil Appeal No. 76 of 2014 [2014] eKLR thus;

“In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded



without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other's case as is pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense.”

18. The Plaintiff has all along maintained that the deceased purchased the suit property and was issued with Certificate of Ownership and Beacon Certificates by the 1st Defendant's Surveyor. She was later issued with clearance documents which the Plaintiff lodged at the Ministry of Lands to process a title. He maintains that he has indeed been in possession of suit property for over 27 years. Why then does the Plaintiff require the Court to compel the Defendants to point out the respective plots?
19. Furthermore, the plots have since been registered with the Ministry of Lands which is represented by the 5th Defendant herein. The effect of such registration is that the said parcels of land now have defined measurements and delineated boundaries in accordance with the Maps held by the Director of Surveys of Kenya. The Plaintiff/Applicant has a burden of proving his allegations on a balance of probabilities in an adversarial system like ours. Therefore, since the parcels of land are duly registered, nothing stops the Plaintiff/Applicant from procuring the services of a Licensed Surveyor to locate the said parcels.
20. This Court is bound by the pleadings of the parties. The duty of the court is to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. In the case of *Beatrice Nyongo Ndungu & Others –vs- Samuel K. Kangoro, The Attorney General & The County Government of Nakuru ELC 70 of 2008*, the court observed stated that  

‘..all decisions of the court are based on an interpretation of facts and the law. Facts are to be presented before the court as evidence whether oral or written. Evidence is the key route through which parties introduce their version of facts before the court. In an adversarial system the burden of proof is always on he who alleges and the court never goes to seek facts on its own. It is always incumbent upon parties to adduce evidence to prove the facts which they assert...’
21. Regarding the second prayer on the production of the 1st Defendant's register showing the respective title allocation of the plots, the Plaintiff has pleaded the issue of double allocation in the Plaintiff. He asserts that the 3rd Defendant confirmed that the deceased owned the suit property.
22. The Plaintiff has all along maintained that the deceased purchased the suit property and was issued with Certificate of Ownership and Beacon Certificates by the 1st Defendant's Surveyor. She was later issued with clearance documents which the Plaintiff lodged at the Ministry of Lands to process a title. These are issues that the Plaintiff is to prove at trial. The Plaintiff is expected to prove the root of the title he claims to be his or the deceased's through documentary and oral evidence.
23. *J.L. Onguto, J in the case of Caroline Awinja Ochieng & another v Jane Anne Mbithe Gitau & 2 others [2015] eKLR*, what the court ought to consider in determining the issue of ownership of a plot as follows: -

“In determining the above issue it would perhaps be appropriate to first state that tracing ownership of unregistered land is dependent on tracing the root of title. Unlike registered land where ownership is domiciled and founded in the register of titles, ownership of unregistered land and the ascertainment or confirmation thereof involves the intricate journey of wading through documentary history.....

It is the delivery of deeds or documents which assist in proving not only dominion of unregistered land but also ownership. The deeds must establish an unbroken chain that



leads to a good root of title or title paramount. A good compilation of the documents or deeds relating to the property and concerning the claimant as well as any previous owners leading to the title certainly proves ownership. It is such documents which are basically ‘the essential indicia of title to unregistered land’’: per Nourse LJ in *Sen v Headley* [1991] Ch 425 at 437.

The documents in my view are limitless. It could be one, they could be several. They must however establish the claimant’s beneficial interest in the property. Examples of the deed or documents include, at least in the Kenyan context: sale agreements, Plot cards, Lease agreements, allotment letters, payment receipts for outgoings, confirmations by the title paramount, notices, et al.”

24. Therefore, considering that the ownership of the suit property, that is Nairobi Block 105/7708 is contested between the Plaintiff and the 4th Defendant, each party has to prove their respective cases. Granting the prayers sought is tantamount to summarily determining the dispute herein before hearing evidence from the parties. The analysis and the determination of this suit will only be made upon examination of facts presented before the court and the evidence adduced in support of each party’s claim.
25. In conclusion, I find that the Plaintiff’s application dated 24th June, 2024 is not merited and is therefore dismissed with no orders as to costs.

It is so ordered.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 12<sup>TH</sup> DAY OF JULY, 2024.**

**M.D. MWANGI**

**JUDGE**

In the virtual presence of:

Ms. Muema holding brief for Ms. Mutungi for the Plaintiff/Applicant

No appearance by the Defendants/Respondents

Court Assistant - Yvette

