



Ngalyuka & 3 others (Suing as Administrator of the Estate of the Late Timothy Mutua Moni) v Movies Four You Limited (Environment & Land Case 77 of 2017) [2024] KEELC 5330 (KLR) (10 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5330 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 77 OF 2017**

**A NYUKURI, J
JULY 10, 2024**

BETWEEN

**HENRY NGALYUKA 1ST PLAINTIFF
GEORGINA APONDI ODUORI 2ND PLAINTIFF
RUTH WACEKE WANGOMBE 3RD PLAINTIFF
MARGARET WANGARI MUTUA 4TH PLAINTIFF
SUING AS ADMINISTRATOR OF THE ESTATE OF THE LATE TIMOTHY
MUTUA MONI**

AND

MOVIES FOUR YOU LIMITED DEFENDANT

JUDGMENT

Introduction

1. The plaintiffs instituted this suit against the defendant vide a Plaint dated 7th July 2015, seeking the following reliefs;
 - a. A declaration that un-surveyed residential Plot No 286 situated at Mulinge Scheme in Athi River belong to the plaintiffs.
 - b. A permanent injunction restraining the defendant by itself, its servants or agents from entering, excavating, digging, building, wasting or in any other manner howsoever interfering with all that piece of land known as un-surveyed residential Plot No 286 situated at Mulinge Scheme in Athi River.
 - c. Damages for trespass and waste.



- d. Interest and costs.
2. The plaintiffs averred that they were owners of all that piece of land known as un-surveyed residential Plot No 286 situated at Mulinge Scheme in Athi River, having purchased it from one Immaculate Mueni Ngonzo and George Manga David Nziu, the original allottees on 23rd November 2011 at a consideration of Kshs 2,400,000/=. They alleged that in April 2015, the defendant trespassed on the suit property, put up a boundary wall and built a temporary illegal structure thereon. They also alleged that their advocate had on 4th April 2015 written a demand letter to the defendant demanding them to stop the trespass and encroachment but that the defendant remains adamant.
3. The suit was opposed. The defendant filed a statement of defence dated 25th March 2021. It denied the allegations by the plaintiffs and claimed to be the rightful owner of the suit property, claiming to have been in open and continuous possession of the same from the year 2010. They acknowledged receipt of the demand notice but that the same did not disclose any cause of action against the defendant.
4. The matter proceeded by way of viva voce evidence. The plaintiffs presented two witnesses while the defendant presented one witness.

Evidence by the plaintiffs

5. PW1 was George Manga Nzilu. He adopted his witness statement dated 5th March 2021 as his evidence in chief. In the said statement, he averred that he was one of the previous co-proprietors of the un-surveyed Plot No 286, situated at Athi River, Mulinge Scheme. He testified that on 2nd March 1995, Dr. Mueni Ngonzo and himself applied for and received a letter of allotment from the department of lands over the un-surveyed residential Plot No 286 Athi River, accepted the offer on 7th July 1995 and made all the requisite payments.
6. He further stated that they then took possession of the suit property and that during their tenure, no one ever challenged their ownership nor did they receive any complaint of double allocation or being in another person's piece of land. Further that on 23rd November 2011, they entered into an agreement with the plaintiffs in this suit for sale of the suit property at an agreed purchase price of Kshs 2,400,000/=.
7. It was further his testimony that Dr. Mueni Ngonzo and himself surrendered the original letter of allotment to the plaintiffs together with all the receipts evidencing the payment, showed the plaintiffs the beacons on the ground and the physical location of the suit property. He stated that neither he nor Dr. Mueni Ngonzo had sold the suit property to any other persons apart from the plaintiffs. He also stated that they had all along been in occupation of the suit property up until they sold it to the plaintiffs. He stated that he was a stranger to the defendant and denied selling the suit property to the defendant. He stated that the defendant's alleged allotment letter had no documents to show that the same was accepted and that the defendant could not be allocated the suit property as the same had already been allocated to him. He produced the documents attached to the list of documents dated 18th September 2017. He produced a letter of allotment dated 2nd March 1995; letter of acceptance dated 7th July 1995; banker's cheque No 239406 for Kshs 22,887/=; receipt No 240000; sale agreement dated 23rd November 2011; banker's cheques to Dr. Immaculate Mueni Ngonzo; demand letters from S.M. Muhia Advocates; and a letter dated 29th May 2015 from Wangalwa Oundo Advocates.
8. Upon cross examination, he confirmed that he had sold the property and that he had no claim over it. He also stated that he complied with the conditions issued in the allotment and paid for the land within the requisite period, on 7th July 1995. He stated that at page 2 of the allotment letter there was a condition that he was not to sell the land.



9. He also stated that he received the letter of allotment after March 1995 and that his acceptance was received and stamped. He stated that the sale was not illegal since he had accepted the offer. He also confirmed to have given possession of the suit land to the plaintiffs.
10. PW2 was Ruth Waceke Wangombe, one of the plaintiffs herein. She adopted her witness statement dated 16th June 2021 as her evidence in chief. She stated that on 23rd November 2011, she entered into an agreement for sale with Dr. Immaculate Mueni Ngonzo and George Manga David Nziu (the vendors) to purchase their plot known as un-surveyed residential Plot No 286 situated at Mulinge Scheme in Athi River. She averred that they purchased the plot with her partners Timothy Mutua Moni (now deceased), Henry Ngalyuka Musaki and Georgina Apondi Aduori.
11. PW2 further testified that the purchase price for the plot was two million and four hundred thousand shillings, (Kshs 2,400,000.00/=) which was duly paid to the vendors on 23rd November 2011. She also stated that the sale of the plot was by way assignment by the vendors, comprised in a letter of allotment dated 2nd March 1995 issued by the Commissioner of Lands.
12. She confirmed that in addition to the letter of allotment, the vendors also shared the following documents as evidence of ownership including;
 - a. Letter of acceptance dated 7th July 1995.
 - b. Bankers cheque No 239406 for Kshs 22,887/= dated 10th July 1995.
 - c. Receipt No 240000 for Kshs 22,887= issued by the Commissioner of Lands in settlement of stand premium conveyancing fees, stamp duty and other charges set out in the letter of allotment.
13. The witness further stated that sometime in April 2015, she received information that the defendant had trespassed and encroached on their plot, dug a boundary wall and built a temporary illegal structure thereon. She averred that they then instructed S. M Muhia & Co. Advocates to write to the defendant with instructions that they should stop trespassing and encroaching on their plot but that despite the demand letter, the defendant has refused to desist from its illegal acts and instead on 29th May 2015, its advocates wrote to her advocates and alleged that the plot belongs to them.
14. She produced the following documents in support of the plaintiff's case;
 - a. Letter of allotment dated 2nd March 1995
 - b. Letter of acceptance dated 7th July 1995
 - c. Banker's cheque no.239406 for Ksh.22, 887 dated 10th July 1995 issued by Trust Bank Ltd
 - d. Receipt No.240000 dated 17th July 1995 issued by the Commissioner for Lands of Kshs 22,887.00
 - e. Agreement for sale dated 23rd November 2007
 - f. Copies of banker's cheque paid to Dr. Immaculate Mueni Ngozo
 - g. Demand letters by S.M. Muia & Company Advocates dated 4th April 2015 and 10th June 2015
 - h. A letter from Ngalwa Oundo & Company Advocates dated 29th May 2015.
15. Upon cross-examination, she stated that the 1st plaintiff is a civil servant working in South Sudan whereas Georgina Apondi is in India working with the High commission. She also averred that as per



her understanding, the letter of allotment does not prohibit her from transferring the property before she acquired the title. She also confirmed that the allotment letter under clause 9 means the lessee should not sell or transfer the land, and that the same can be sold by consent but that she did not have any consent.

16. The witness further averred to have complied with clause 2 of the allotment letter, evidenced by the receipts. Upon re-examination, she averred that the 30 days are calculated from the date of postmark from when the letter was dispatched, and that she did not know when the letter was dispatched. That marked the close of the plaintiffs' case.

Evidence by the defendant

17. DW1 was Phelisia Mzenge Mburu, the defendant's general manager. She adopted her witness statement dated 25th March 2021 as her evidence in chief. She stated that on 21st June 2010, the defendant received a letter of allotment for the parcel of land known plot No 286 situated at Athi River, Mulinge Scheme, within Machakos County. She further averred that by letter dated 13th July 2010 the company signified to the commissioner of lands its acceptance of the offer, and also remitted a banker's cheque in the sum of Kshs 22,887/= as demanded in the letter of offer.
18. DW1 also stated that the survey for the plot was duly approved by the director of survey and that the company has been in possession and actual occupation of the suit property from the year 2010 until then and that the company has developed the suit parcel of land extensively.
19. The witness produced documents attached to the defendant's list of documents dated 25th March 2021. She produced sketch maps; the defendant's letter dated 13th July 2010; certificate of incorporation; a letter allegedly written by Director of Surveys to the Commissioner of Lands dated 14th may 2010; and allotment letter dated 24th February 1998.
20. Upon cross-examination, she stated that she was the general manager of the defendant company, having joined in 2012 and that the letter of acceptance was dated 13th July 2010, 12 years after the date of allotment. She stated that that she had no evidence of bankers' cheque showing the defendant's payment in respect of the allotment or a receipt from the Ministry of Lands.
21. She stated that when they began pursuing the matter to get a title deed, it is when they were sued and that they had begun activities on the land. On being shown the plaintiffs' allotment letter, she confirmed that it was issued earlier.
22. Upon re-examination she stated that both the allotment letters to the plaintiffs and the defendant were signed and she could not know which was signed first. She also stated that their letter of acceptance dated 13th July 2010 referred to payment, and survey and that the matters ought to be considered together. That marked the close of the defence case.
23. Parties filed submissions in support of their respective cases. On record are the plaintiffs' submissions dated 19th June 2023 and filed on 22nd June, 2023 and the defendant's submissions dated 23rd November 2023 and filed on 19th December 2023.

Submissions by the plaintiffs

24. Counsel for the plaintiffs submitted that the plaintiffs' allotment letter was dated 2nd March 1995 and that it was initially issued to Dr. Mueni Ngonzo and George Manga Nziu, who had accepted it by payment of Kshs 22,887/= made via a cheque dated 10th July 1995.



25. It was submitted that the difference in the dates was attributed to slight delays by the Commissioner of Lands in dispatching the allotment letters, and that had the commissioner been desirous of rejecting the same, the office would not have received any monies or issued receipts in favor of the payments, and that they would have cancelled the allotment. It was further submitted that the parties sealed the transaction vide an agreement for sale dated 23rd November 2011.
26. It was their submission that the defendant's letter of allotment was dated 24th February 1998 and as per the defendant's testimony, they had accepted the same on or about 13th July 2010, over 12 years after the plaintiff's allotment. The said acceptance letter was challenged for not bearing a stamp from the commissioner of lands, as well as the failure to produce any evidence of an alleged payment of Kshs 22,887/= for the land.
27. It was further submitted that the defendant's allotment letter related to a different piece of land as per the wording of the allotment letter, being 'UNS.RESIDENTIAL PLOT No 286-ATHI RIVER T-SHIP.' It was also their submission that the deed plan number on the defendant's exhibit was with regard to I.R. 28444 whereas the number at the bottom of the page is 58410 while the F.R No is 498/64. It was further argued that the LR number in the letter dated 3rd March 2014 does not correspond to the deed plan attached to the defendant's pleadings, as well as the letter from the commissioner of lands. It was contended that the defendant's documents do not marry and the only logical explanation was that the defendant was trying to lay stake on a property that was not allotted to it as theirs is an entirely different parcel of land.
28. Counsel further submitted on a without prejudice basis that should the parties have been allotted the same parcel, the defendant's claim ought to fail since the land was not available for allotment after the same was allocated to the plaintiffs, citing the case of [*Philemon L. Wambia v Gaitano Lusitsa Mukofu & 2 others*](#) [2019] eKLR. It was also submitted that there was no evidence substantiating the defendant's claims of payment, placing reliance on Section 109 of the [*Evidence Act*](#).
29. As to whether the plaintiffs were entitled to orders sought, it was submitted that the plaintiffs had met the threshold for the grant of a permanent injunction and damages for trespass and waste. It was also argued that by their actions, the defendants had kept the plaintiffs away from their property and proposed a sum of Kshs 3,000,000/= for trespass. As to who should bear the costs of the suit, reliance was placed on Section 27 of the [*Civil Procedure Act*](#) to argue that costs follow the event.

Submissions by the defendant

30. Counsel for the defendant based their submissions on special condition 9 of the letter of allotment issued to the original allottee, that the interest held by the lessee was not to be sold, transferred or charged, except with prior consent, until special condition no.2 has been performed. It was argued that the said consent had not been obtained, placing reliance on the case of [*Wambui v Mwangi & 3 others*](#) (Civil Appeal 465 of 2019) [2021] KECA 144 (KLR). It was also their submission that the documents adduced by the plaintiffs for proof of ownership were a nullity, due to the breach of special condition 9 of the offer letter of allotment. They concluded by placing reliance on the case of [*Standard Chartered Bank Kenya Limited v Intercon Services Ltd & 4 others*](#) eKLR, in arguing that an illegal transaction could not lead to a valid title to land.

Analysis and determination

31. The court has carefully considered the pleadings, evidence and submissions. The issues that arise are;
 - a. Whether the plaintiffs have proved ownership of the suit property.



- b. Whether the plaintiffs are entitled to the orders sought.
32. It is trite that parties in a suit are bound by their pleadings and evidence given by a party ought to align with the pleadings. The pleadings give a roadmap of the nature of evidence that will be presented.
33. Section 107 of the *Evidence Act* places the burden of proof in a suit on the plaintiff.
34. It is not in doubt that both the plaintiffs and defendant have presented letters of allotment. The plaintiffs' letter of allotment is dated 2nd March 1995 while the defendant's letter of allotment is dated 24th February 1998. No single property can simultaneously exclusively belong to two different individuals. Therefore, this court ought to determine who owns the suit property.
35. Article 40 of the *Constitution* of Kenya protects only the property whose acquisition is lawful and can be explained. The legal protection does not extend to unlawfully or unprocedurally acquired property.
36. In the plaint, the plaintiffs described how they acquired the suit property by purchase from Dr. Immaculate Mueni Ngonzo and George Manga Nziu, as the vendors had earlier been allocated the suit property. On the other hand, in its defence, the defendant stated that it owned the suit property and had been in open and continuous occupation since 2010. The nature of the defendant's acquisition of the suit property is not disclosed in the defence.
37. While the plaintiffs' allotment letter is signed and contains 15 special conditions, the defendant's allotment letter is not signed and does not have the second page and contains conditions 10 to 15 only. In addition, the plaintiffs have demonstrated payment of the sums indicated on the allotment letter by banker's cheque and receipt from the Ministry of Lands when none of such evidence has been shown by the defendant.
38. Having considered the plaintiffs' evidence showing allotment and compliance with the terms of the allotment, I am satisfied that they are the lawful owners of the suit property. The defendant's evidence is not sufficient to demonstrate ownership.
39. The *Black's Law Dictionary* 11th Edition defines "Trespass" as wrongful entry on another's real property. Therefore trespass occurs when a person enters another person's land without the owner's authority.
40. Section 3 of the *Trespass Act* defines trespass as follows;
1. Any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.
 2. Where any person is charged with an offence under subsection (1) of this section the burden of proving that he had reasonable excuse or the consent of the occupier shall lie upon him.
41. In this matter, the plaintiffs having shown ownership of the suit property, and the defendant having entered on that property without the plaintiffs' consent, I find and hold that the defendant's entry on the suit property amounts to trespass.
42. It is trite that trespass is actionable per se, without proof of actual loss. In the case of *Duncan Nderitu Ndegwa v KP& LC Limited & another* (2013) eKLR where P. Nyamweya J held:-
- “...once a trespass to land is established it is actionable per se, and indeed no proof of damage is necessary for the court to award general damages. This court accordingly awards an amount



of Kshs 100,000/= as compensation of the infringement of the Plaintiff's right to use and enjoy the suit property occasioned by the 1st and 2nd Defendants' trespass"

In this matter, the plaintiffs testified that the defendant entered the suit property in 2015. It is now 9 years, since the trespass occurred. Taking into account the value of the land and the duration of the trespass, my view is that a sum of Kshs 500,000/= shall be reasonable compensation, for compensation.

43. In the end I find and hold that the plaintiffs have proved their case on the required standard against the defendant and I enter judgment for them as follows;
- a. A declaration is hereby made that the un-surveyed residential Plot No 286 situated at Mulinge Scheme in Athi River belong to the plaintiffs.
 - b. A permanent injunction is hereby issued restraining the defendant by itself, its servants or agents from entering, excavating, digging, building, wasting or in any manner howsoever interfering with all that piece of land known as un-surveyed residential plot number 286 situated at Mulinge Scheme in Athi River.
 - c. The plaintiffs are awarded Kshs 500,000/= as damages for trespass.
 - d. The costs of the suit are hereby awarded to the plaintiffs.

44. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 10th DAY OF JULY, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Mr. Njoroge for plaintiffs

No appearance for the defendant

Court assistant – Josephine]

