



REPUBLIC OF KENYA



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**Yusuf & another v Ngacha & another (Enviromental and Land Originating
Summons 263 of 2015) [2024] KEELC 6804 (KLR) (17 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6804 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 263 OF 2015**

JO OLOLA, J

OCTOBER 17, 2024

IN THE MATTER OF PROPERTY KNOWN AS LR. NO.

NYERI /MUNICIPALITY BLOCK11/89

**IN THE MATTER OF THE ESTATE OF MOHAMED SHEIKH
AND HALIMA YUSUF MOHAMED (BOTH DECEASED)**

AND

IN THE MATTER OF THE ESTATE OF NGACHA NDEIYA (DCD)

AND

IN THE MATTER OF DECLARATION AND DETERMINATION OF A TRUST

AND

**IN THE MATTER OF RECOVERY OF THE
PROPERTY LR. NO. NYERI/MUNICIPALITY 11/89**

BETWEEN

MARIAM YUSUF 1ST APPLICANT

FATUMA YUSUF 2ND APPLICANT

AND

MARGARET WANJIRU NGACHA 1ST RESPONDENT

**NYERI MUSLIM HOUSING CO-OPERATIVE SOCIETY LTD 2ND
RESPONDENT**



JUDGMENT

Background

1. By an Originating Summons dated 29th October 2015 as amended on 18th February 2022, Mariam Yusufu and Fatuma Yusuf (hereinafter “the Applicants”) pray for the following:-
 - a). A declaration that the property known as L.R. No. Nyeri Municipality Block 11/89 (originally known as Plot 11 Line 1” and hereinafter referred to as “the suit property” was held and managed by the 2nd Respondent in trust for the Applicants and other beneficiaries of the Estate of Mohammed Sheikh (deceased) and Halima Yusuf Mohamed (deceased);
 - b). That the registration of Fatuma Ali Abdulahi (deceased) as the proprietor of the suit property purportedly on 30th September 1992 and subsequently in the name of Ngacha Ndeiya (deceased) on the 7th August, 1997 were in fraudulent breach of the pleaded trust, hence null and void;
 - c). A declaration that the 2nd Respondent’s Annual General Meeting held on 30/03/1997 and the Minute No. 44/97 of the same meeting, that purportedly approved the transfer of the suit property to the 2nd Defendant’s official one Fatuma Ali Abdulahi (deceased) and subsequent sale of the suit property was illegal, null and void;
 - d). A declaration that the sale of the suit property to the 1st Respondent’s late husband Ngacha Ndeiya was illegal and unprocedural;
 - e). That the registration of the suit property on 19th May 1997 in the name of the 2nd Respondent was in trust for the Applicants and the other beneficiaries of the Estate of Mohamed Sheikh (deceased) and Halima Yusufu (deceased);
 - f). That the Certificate of Lease over the suit property issued in the name of the 1st Respondent’s late husband Ngacha Ndeiya was acquired illegally and unprocedurally;
 - g). Cancellation of the Certificate of Lease registered in the name of Ngacha Ndeiya (deceased) and in the event that the Estate of Ngacha Ndeiya has been administered, cancellation of all subsequent Certificate of Leases issued over the suit property, upon the administration of the Estate of Ngacha Ndeiya;
 - h). That the Applicants and other beneficiaries of the Estate of Mohamed Sheikh and Halima Yusuf Mohammed be registered as the absolute proprietors of the suit property;
 - i). That the Honourable Court do make such other orders it deems just and expedient to meet the ends of Justice therein; and
 - j). That the costs of this suit be borne by the 1st and 2nd Respondents.
2. The Originating Summons is supported by an affidavit jointly sworn by the Applicants wherein they aver that their grandfather Mohammed Sheikh was issued with a Temporary Occupation Licence over Plot 11 Line 1” by the British Colonial Administration in the year 1930s. It is their case that later on, their grandfather and other people who had been allotted similar properties incorporated the 2nd Respondent in the 1960s and that their grandfather thereafter placed the suit property under the 2nd Respondent’s trusteeship.



3. The Applicants further aver that in the year 1962, their grandfather requested and was allotted the suit property by the then Urban Council of Nyeri. They assert that their grandfather thereafter entered into a Tenant Purchase Loan Agreement in the sum of Kshs. 19,000/= to purchase a home constructed by the Council on the suit property. It is their case that following the death of their grandfather in the year 1963, their grandmother serviced the loan until her death in the year 1986.
4. It is further the Applicant's case that sometime in the year 2010, they came to realise that the suit property had been fraudulently transferred to the 2nd Respondent's official one Fatuma Ali Abdullahi and thereafter to the 1st Respondent's husband Ngacha Ndeiya. They assert that the suit property belonged to the family and that their father Yusuf Mohammed had no capacity to enter into any agreement to alienate the same.
5. Margaret Wanjiku Ngacha (the 1st Respondent) is opposed to the grant of the orders sought. In her Replying Affidavit sworn on 23rd March 2023, the 1st Respondent avers that her husband Ngacha Ndeiya purchased LR. No. Nyeri Municipality/Block 11/89 from one Fatuma Ali Abdullahi who was then the absolute owner in the year 1997. It is the 1st Respondent's case that the Applicants thereafter trespassed on part of the said property measuring 15 feet by 50 feet.
6. The 1st Respondent avers that as a result of the trespass, the Applicant's father committed himself in writing on the 25th May 2000 to vacate the suit premises by 30th October 2000 but failed to do so. Consequently, the 1st Respondent's now deceased husband instituted Nyeri ELC Case No. 641 of 2014 seeking to have the Applicant's father removed therefrom. It is the 1st Respondent's case that the Applicants admitted in the said case that their predecessor had filed a claim over the suit property and that the same was dismissed.

Analysis and Determination

7. The Originating Summons was canvassed by way of written submissions between the Applicants and the 1st Respondent. The 2nd Respondent did not file any pleadings in respect of the suit.
8. I have carefully perused and considered the pleadings filed herein by the parties. I have similarly perused and considered the vival submissions and authorities as filed herein by the Learned Advocates representing the parties herein.
9. By their Originating Summons filed herein, the two Applicants pray for a declaration that the property known as LR. No. Nyeri/Municipality Block 11/89 was held and managed by the 2nd Respondent in trust of the two Applicants and the other beneficiaries of the Estate of Mohamed Sheikh and Halima Yusuf Mohamed. The Applicants further urge the court to declare that the registration of one Fatuma Ali Abdullahi (now deceased) as the proprietor of the suit property on 30th September 1992 and the subsequent transfer to the name of Ngacha Ndeiya (also deceased) on the 7th August 1997 were in fraudulent breach of the said trust and that the same were hence null and void.
10. In addition, the Applicants urge the court to declare that the 2nd Respondent's Annual General Meeting held on 30/3/97 and the Minute No. 44/97 of the same meeting that purportedly approved the transfer of the suit property to the 2nd Respondent's official one Fatuma Ali Abdullahi as well as the subsequent sale were illegal, null and void.
11. Further the Applicants urge the court to cancel the Certificate of Lease issued in the name of the 1st Respondent's husband and to have the Applicants and other beneficiaries of the Estate of Mohamed Sheikh and Halima Yusuf Mohamed registered as the absolute proprietors thereof.



12. In support of their case, the Applicants aver that the two of them together with seven (7) others are grandchildren and heirs of the Estate of Mohamed Sheikh and Halima Yusuf Mohamed. The Applicants assert that the other beneficiaries are aware of this suit and that they have given the Applicants their consent to prosecute the case.
13. It was the Applicant's case that the suit property was originally known as Plot 11 Line 1 before it became known as Plot No. 1108/129 and eventually became registered as LR. NO. Nyeri/ Municipality Block 11/89. The Applicants aver that sometime in the 1930s, the British Colonial Administration issued their grandfather the said Mohamed Sheikh with a Temporary Occupation Licence over Plot 11 Line 1.
14. The Applicants told the court that having taken and occupied the said Plot 11 Line 1, their grandfather and other people who had been allotted similar properties decided to incorporate the 2nd Respondent as an investment entity for various purposes. Among other things, the founding members are said to have resolved to place their properties under the trusteeship of the 2nd Respondent to manage and handle all issues in respect thereof.
15. The Applicants assert that sometime in the year 2010, they were shocked to learn that sometime in the year 1992, the 2nd Respondent had purported to sell the suit property to one of its officials by the name Fatuma Ali Abdullahi who later on, in the year 1997 purported to sell same to the 1st Respondent's husband. It is the Applicant's case that the transfer of the property to the said Fatuma Ali Abdullahi was fraudulent and in breach of the 2nd Respondent's duty as a trustee and hence the prayer for the cancellation of the resulting title in the name of the 1st Respondent's husband.
16. The 1st Respondent however disputes the Applicant's claim. While admitting that LR. No. Nyeri Municipality/Block 11/89 is registered in the name of Ngacha Ndeiya, her now deceased husband, it is her case that her husband did lawfully purchase the suit land from the said Fatuma Ali Abdullahi who was the then registered owner thereof in the year 1997. It is the 1st Respondent's case that contrary to their assertions, it is the Applicants herein, who had trespassed into a portion of the suit property measuring some 15 feet by 50 feet.
17. The 1st Respondent told the court that as a result of the trespass, the Applicants' father committed himself in writing on 25th May 2000 to vacate the suit property and that when the Applicant's father subsequently failed to honour his commitment, the 1st Respondent's husband sued the Applicants' father in Nyeri ELC No. 641 of 2014.
18. The crux of the applicant's claim herein is the submission that the suit property comprises of what was previously known as Plot 11 Line 1 and that the same was subsequently registered in the name of the 2nd Respondent to hold in trust for the Applicants and 7 other beneficiaries of the Estates of Mohamed Sheikh's and Halima Yusuf Mohamed. On that basis, they urge the court to find that the transfer of the said property to one Fatuma Ali Abdullahi and any other person thereafter was illegal, null and void ab initio.
19. As it were, a trust is one of the overriding interests in land that under Section 28 of [Land Registration Act](#) No. 3 of 2012, subsist and affect land without necessarily being noted in the register. However, as was stated in [Juletabi African Adventure Limited & Another –vs- Christopher Michael Lockley 92017](#)) eKLR:

“The law never implies, the court never presumes, a trust, but in case of absolute necessity. The courts will not imply a trust save in order to give effect to the intentions of the parties.



The intention of the parties to create a trust must be clearly determined before a trust will be implied.”

20. In support of their case, the Applicants pleaded that sometime in the 1930s the British Colonial Administration issued their grandfather, the said Mohamed Sheikh with a Temporary Occupation Licence over Plot 11 Line 1 and that their grandfather occupied the suit property and paid the required licence fees. It is further their case that sometime in the 1960s, their grandfather and other people who had been allotted similar properties decided to incorporate the 2nd Respondent to inter alia, manage the said properties. In that respect, the Applicants told the court that their grandfather vested the suit property in the hands of the 2nd Respondent in order to manage as their trustee.
21. From the material placed before the court, it was apparent that the Applicants grandfather had not only been issued with a Temporary Occupation Licence but he had also made some remittances in the early 1960s in respect of the said Plot No. 11 Line 1. What was not clear was how the 2nd Respondent was created and how the said plot No. 11 Line 1 came to be vested thereon as asserted by the Applicants.
22. As it turned out, the 2nd Respondent did not enter appearance nor did it file any documents herein. From the very faint and scanty documents annexed to the Applicant’s Supporting Affidavit, I was unable to find any evidence from which one could get to the conclusion that the 2nd Respondent herein was incorporated by the Applicants’ grandfather and other beneficiaries and more particularly, that it was created for the purpose inter alia of holding the said properties and managing them in trust for the members. More so, I was unable to find any link between the said Plot No. 11 Line 1 with the 2nd Respondent.
23. What was apparent from the bundle of documents was that on 19th January 1964, the Applicants grandmother Halima Yusuf became a member of the 2nd Respondent upon payment of an Entrance Fee of Kshs. 5/-. From the Applicants’ depositions herein, it would appear that their grandmother paid for the said Entrance Fee in order to join the 2nd Respondent and to take up the shares of their grandfather who had passed away the previous year in 1963.
24. Again from the material placed before the court, it was clear that at some point in time, the 2nd Respondent had entered into some Tenant Purchase Scheme arrangement with what was then known as the Nyeri Urban Council to enable the members of the 2nd Respondent to purchase certain homes that the council had constructed. One such house to which the Applicants lay claim was situated in what was then LR. NO. 1108/129. While the Applicants contended that this property was the same as the one they described as Plot No. 11 Line 1, it was difficult to tell as no evidence was placed before the court in that respect.
25. It was also evident that at some point in time, the Tenant Purchase Scheme ran into trouble after the 2nd Respondent fell behind in making remittances to the council. From annexure “MY8” attached to the Applicants’ own Supporting Affidavit, it was evident the said LR. No. 1108/129 was one of the properties that fell in arrears. As a result, the Nyeri Town Council wrote to the 2nd Respondent on an unclear date in the said annexure “MY8” as follows:-

“Repossession of T.P. House No....

Owing to lack of response of our notice served to the Landlord on 26th January 1981 to clear the Tenant Purchase Loan repayment arrears in respect of the above mentioned house, which was indicated in the said notice, it has now become necessary to repossess the premises with immediate effect.



If you are a tenant occupying the above mentioned T.P house, you are hereby instructed to be paying the agreed monthly rent by your Landlord to the council by the end of this month of May 1981, without failure. Should you fail to honour the instruction given in this letter, the Council without any notice will evict you from the house and the house will be allocated to somebody else.

You are also required to come to the office of the Nyeri Municipal Council to sign an agreement.

If the T.P house is occupied by the owner he will also be immediately evicted and the contents contained in the notice served to him/her on 26th January 1981 will be effected immediately.”

26. Arising from the foregoing, it was clear that the account for the said LR. No.1108/129 was in arrears and that as early as May 1981, the Council had made a decision to repossess the same. While the Applicants purport that their grandmother Halima Yusuf had completed the payment of the purchase price and was only waiting for the Council to transfer the property to her name as at the time of her death 5 years later on 29th September 1986, the only evidence of payment in her name annexed to the Supporting Affidavit was the Kshs. 5/= Entrance Fee that was paid on 19th January 1964.
27. The property having been repossessed from the Applicants’ family in 1981 for failure to pay for the same, there was nothing to stop the 2nd Respondent from disposing of the said property to any other of its compliant members as it did when it transferred the property to Fatuma Ali Abdullahi on 30th June 1992. A copy of the Green Card for the suit property indicates that it was transferred from the name of the Nyeri Urban Council on 19th May 1991 to the 2nd Respondent’s name. A year later, the 2nd Respondent disposed of the same to the said Fatuma Ali Abdullahi at a consideration indicated thereon of Kshs. 650,000/=.
28. It was further evident that as at the time the 1st Respondent’s husband Ngacha Ndeiya (deceased) acquired the property on 7th July 1997, the same was duly registered in the name of the said Fatuma Ali Abdullahi and he was hence an innocent purchaser for value without notice of any defects on the title.
29. Even where it could be presumed that the Applicants were right and that the parcel of land known as Plot No. 11 Line 1 is what became LR. No. 1108/129, which is now Nyeri Municipality Block 11/89, there was no basis upon which the Applicants would be entitled thereto. As per their own concession, the said plot No. 11 Line 1 had been issued to their grandfather in the 1930s under a Temporary Occupation Licence. Under Section 2 of the *Land Act*, such a licence is defined thus:-

“A permission by the Commissioner in respect of public land or proprietor in respect of private or community land or a lease which allows the licensee to do some act in relation to the land comprised in the lease which would otherwise be a trespass, but does not include an easement or profit.”
30. Considering the nature of such a licence in *Runda Coffee Estates Ltd –vs- Ujagar Singh* [1966] EA 564 at P. 568, the Court of Appeal held as follows:-

“It is the essence of a license of this nature that it is personal to the licensee and creates no interest which can be disposed of by the licensee. As has been stated well over 100 years ago, it creates nothing which is assignable.”



31. That was the same position taken in Faraj Maharus –vs- J.B. Martin Glass Industries & 3 others [2005] EKLK where the Court of Appeal opined as follows:

“The Temporary Occupation Licence issued in 1926 could not oust the Certificate of Title granted under the Registration of Titles Act... The Appellant does not possess title under the Act.

We would agree therefore with the Learned Judge that the license to occupy the suit property came to an end upon the death of Eyendi Maharus and his widow as the appellant has nothing for the continued occupation of the suit land, his occupation amounted to trespass against the registered proprietor”

32. Applying the said principle, it was clear to me that the temporary occupation licence issued to the Applicant’s grandfather in regard to Plot No. 11 Line 1 came to an end upon the death of Mohamed Sheikh and his widow Halima Yusuf if she continued to occupy the same house. That property did not form part of their respective estates upon their death and could therefore not be inherited by the Applicants in the manner they have sought to do herein.

33. Ultimately, it was also clear to me that this suit was filed for an ulterior purpose and in utter abuse of the court process. It was not in dispute that on the basis of the same issues raised herein, the Applicants had trespassed into a portion of the suit property around the year 2000. When the 1st Respondent’s husband confronted their father Yusuf Mohamed Sheikh, the father committed himself in writing in an agreement dated 25th May 2000 to vacate the land by 30th October 2000.

34. When the Applicants’ father reneged on their agreement to vacate, the 1st Respondent’s husband Ngacha Ndeiya filed Nyeri ELC Case No. 20 of 2010 against the Applicants’ herein seeking an order of their eviction. On 17th March 2010, the two Applicants filed a joint Statement of Defence claiming that the suit property was fraudulently transferred and sold to the Plaintiff.

35. That suit was alive and on-going for some five (5) years before the Applicants filed the Originating Summons herein on 29th October 2015 purporting that the property was held by the 1st Respondent in trust for themselves.

36. Their defence then and the claim herein are clearly without basis. The Originating Summons dated 9th October 2022 is accordingly dismissed with costs to the 1st Respondent.

DATED, SIGNED AND DELIVERED AT NYERI THIS THURSDAY 17TH DAY OF OCTOBER, 2024.

In the presence of:

Ms. Gakii for the applicants.

Ms. Lucy Mwai for the Respondent.

Court Assistant: Kendi

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J. O. OLOLA

JUDGE

