



Karanja v Njihia & 3 others (Environment and Land Case Civil Suit 584 of 2015) [2023] KEELC 918 (KLR) (9 February 2023) (Judgment)

Neutral citation: [2023] KEELC 918 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 584 OF 2015
OA ANGOTE, J
FEBRUARY 9, 2023**

BETWEEN

MAINA KARANJA PLAINTIFF

AND

ABRAHAM MWANGI NJIHIA 1ST DEFENDANT

NAIROBI CITY COUNTY 2ND DEFENDANT

TERCY INVESTMENTS LIMITED 3RD DEFENDANT

THE CHIEF LAND REGISTRAR 4TH DEFENDANT

JUDGMENT

Background

1. This suit was instituted vide a plaint dated June 22, 2015 wherein the plaintiff sought the following reliefs:
 - a. A declaration that the property known as plot No 471 Jamhuri phase II Nairobi (title No Nairobi/ block 63/759) belongs to Maina Karanja, the plaintiff.
 - b. A declaration that the issuance of a lease on October 19, 2001 in respect of title No Nairobi/ block 63/759 in favour of the 1st defendant herein was unlawful, unprocedural and fraudulently procured.
 - c. A declaration that the issuance of a lease on December 10, 2004 in respect of title No Nairobi/ block 63/759 in favour of the 3rd defendant herein was unlawful, unprocedural and fraudulently procured.
 - d. A permanent injunction restraining the 3rd defendant either by itself, its servants, agents, employees, assigns, successors, or otherwise from encroaching upon, trespassing onto,



alienating or disposing of or in any other way whatsoever dealing with or interfering with the plaintiff's property known as plot No 471 Jamhuri Phase II Nairobi (title No Nairobi/ block 63/759).

- e. An order directing the chief land registrar, the 4th defendant herein to cancel entries in favour of Abraham Mwangi Njihia and Tercy Investments Limited in respect of plot No 471 Jamhuri Phase II Nairobi (title No Nairobi/ block 63/759) and the register be rectified to reflect Maina Karanja as the owner thereof.
 - f. An order directing the 3rd defendant, its servants and agents or other person claiming through it do forthwith give the plaintiff vacant possession of the property known as plot No 471 Jamhuri Phase II Nairobi (title No Nairobi/ block 63/759).
 - g. An order for compensation to be issued against the defendants jointly and severally for violation of the plaintiff's constitutional rights to own and enjoy his property.
 - h. Costs of the suit.
 - i. Interests in (f) and (g) above.
 - j. Any other remedy this court may deem fit.
2. The plaintiff has averred in the plaint that he purchased the suit property, plot No 471 Jamhuri Phase II Nairobi (commercial), from Peter Kimani Kairu *vide* a sale agreement dated July 21, 1997; that Peter Kimani Kairu informed the city council through a letter dated August 21, 1997 that he had sold the plot to him and that the original letter of allotment dated March 3, 1992 was endorsed that the property had been transferred to him whereafter the city council issued to him a lease dated January 31, 2001.
 3. According to the plaintiff, he was informed by the city council that his property was registered as title No Nairobi block 63/759; that in May 2007, he was informed that a title had been issued in favor of the 1st defendant and that in December 2014, he discovered that the property had been illegally occupied and the trespasser was illegally constructing a structure on the suit land.
 4. The plaintiff further averred that he discovered that the certificate of lease was re-issued on October 25, 2004 and later issued to the 3rd defendant on December 10, 2004; that he is the absolute owner of the suit property, having been issued with the lease certificate dated January 31, 2001 and that the subsequent transactions on the register were carried out without his consent and were thus fraudulent, unlawful, illegal and through corrupt means.
 5. According to the particulars of illegality and fraud, the 1st defendant obtained a certificate of lease without a valid letter of allotment from the Nairobi city council and obtained a certificate of title No Nairobi/ block 63/759 without regard to the laid down procedure and presented forged documents to the 4th defendant.
 6. The plaintiff further alleged that the 2nd defendant illegally issued ownership documents for the suit property to the 1st defendant while the property was not available for allotment; that the 3rd defendant relied on forged documents uttered by the 1st defendant to have the certificate of lease transferred to it and that the 3rd defendant failed to conduct due diligence on the suit property to verify its ownership status, presented forged documents to the 4th defendant and invaded the plaintiff's property.
 7. The 2nd defendant responded to the suit by filing a statement of defence dated August 3, 2016, and denied the plaintiff's claims. The 2nd defendant asserted that it had no knowledge of the dealings of the



plaintiff and Peter Kimani Kairu regarding the suit property and denied the particulars of corruption, fraud and illegality enumerated by the plaintiff in the plaint.

Hearing And Evidence

8. The plaintiff, PW1, adopted his witness statement dated April 25, 2017 in which he laid out the facts of the case as set out in his plaint and supporting documents. He adduced as evidence the letter of allotment to Peter Kimani Kairu dated March 3, 1992; a letter from Nairobi city council dated March 5, 1997, and an undated letter from Nairobi city council to all plot owners.
9. The plaintiff also produced in evidence several receipts for stand premium, ground rent and survey fees paid between 1992 and 1997, in the name of Peter Kimani Kairu; a survey plan of the area; a sale agreement dated July 21, 1997 and a banker's cheque No 00xxx paid to Mr Kimani dated July 19, 1997 for Kshs 500,000.
10. The plaintiff also produced in evidence letters from Mr Kimani to the director city planning dated August 21, 1997 and September 23, 1997, informing him that he had sold the suit land to the plaintiff; a letter of allotment dated September 29, 1997, issued to him; a letter to Mr Kimani dated September 30, 1997 confirming the transfer of allotment; an agreement for lease in the plaintiff's favour by the Nairobi city council on January 31, 2001; a certified copy of the register, amongst other documents.
11. In cross-examination, PW1 testified that the letter of allotment was conditional upon payment of the requisite amount. Although the heading on the letter of allotment states that it is a commercial plot, he stated that the plot could only be used for residential purposes.
12. PW1 stated that the acreage of the land indicated in the map attached to the supplementary list is 0.0196 hectares while the allotment letter indicated the acreage as 0.03 hectares and that the lease agreement indicated that he was purchasing a portion of plot 471. The 2nd and 4th defendants closed their case without calling any witness.

Submissions

13. The plaintiff's counsel submitted that the process through which the 1st defendant acquired the lease had not been explained to the required standard of proof; that the documents that preceded the issuance of title in favor of the defendant have not been exhibited and must thus have been forged; that the plaintiff has been paying rates and that the 1st and 3rd defendants have not demonstrated that they paid any rates.
14. The plaintiff's counsel relied on the Court of Appeal case of *Kenya National Highway Authority v Shalien Masood Mughal & 5 others* [2017] eKLR, amongst others, where it held that courts should nullify fraudulent titles.
15. It was counsel's submission that the plaintiff has discharged his burden of proof as required by section 112 of the *Evidence Act* and proved that he is the owner of the suit property. Counsel sought to rely on *John Kirui v Richard Rono* (2017) eKLR where the court held that in certain circumstances, a letter of allotment can be used as evidence to demonstrate that title ought to have been issued to a person holding such a letter.

Analysis and Determination

16. Having considered the plaint, defence, evidence and submissions thereto, the issues for determination are:



- a. Whether the plaintiff acquired absolute and lawful title to the suit land.
 - b. Whether the 1st and 3rd defendants was unlawfully issued lease to the suit land.
 - c. Whether this court should grant the orders as prayed.
17. The plaintiff's case is that it acquired the property plot No 471 Jamhuri Phase II, Nairobi from Peter Kimani Kairu who had a letter of allotment; that the city council of Nairobi issued him with a lease dated January 31, 2001 and that he later on discovered that the plot was issued title No Nairobi block 63/759 in favor of the 1st defendant.
 18. In this suit, only the 2nd and 4th defendants entered appearance, with the 2nd defendant filing a statement of defence. The 2nd defendant did not however adduce any evidence in support of its case, rendering the plaintiff's case uncontroverted and unchallenged.
 19. All the same, the plaintiff has a duty to formally prove his case on a balance of probabilities as is required by section 107 of the *Evidence Act*, which provides as follows:
 - (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."
 20. As stated by the Court of Appeal in *Kirugi and another v Kabiya & 3 others* (1987) KLR 347 as quoted in *Phyllis Wangui Ktavi & another v Stephen Parasho Kaito* [2021] eKLR:

"The burden was always on the plaintiff to prove his case on a balance of probabilities even if the case was heard as formal proof. Likewise, failure by the defendant to contest the case does not absolve a plaintiff of the duty to prove the case to the required standard."
 21. Section 26(1) of the *Land Registration Act* provides that a certificate of title is to be taken as *prima facie* evidence that the person to whom the title is registered is the absolute and indefeasible owner.
 22. It is trite that a letter of allotment is not a title to property as it merely constitutes a step in the process to acquire title. This position was aptly stated by the Court of Appeal in *Joseph Arap Ng'ok v Justice Moiwo Ole Keiwua & 4 others* [1997] eKLR where it stated as follows:

"It is trite that such a title to landed property can only come into existence after issuance of the letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of the title document pursuant to the provision of the Act under which the property is held."
 23. The process of obtaining title through allocation was well-laid out by this court in the case of *Nelson Kazungu Chai & 9 others v Pwani University* [2014] eKLR:

"It is trite law that under the repealed Government Lands Act, a part development plan must be drawn and approved by the commissioner of lands or the minister for lands before any unalienated government land could be allocated. After a Part Development Plan (PDP) has been drawn, a letter of allotment based on the approved PDP is then issued to the allottees.

It is only after the issuance of the letter of allotment, and the compliance of the terms therein, that a cadastral survey can be conducted for the purpose of issuance of a certificate of lease.



The process was also restated in the case of African Line Transport Co Ltd v The Hon AG, Mombasa HCCC No 276 of 2013 where Njagi J held as follows:

“Secondly, all the defence witnesses were unanimous that in the normal course of events, planning comes first, then surveying follows. A letter of allotment is invariably accompanied by a PDP with a definite number. These are then taken to the department of survey, who undertake the surveying. Once the surveying is complete, it is then referred to the Director of Surveys for authentication and approval. Thereafter, a land reference number is issued in respect of the plot.”

24. It was thus incumbent on the plaintiff to present evidence of a duly issued letter of allotment, a part development plan attached to such letter of allotment and proof of compliance with the conditions set out in the letter of allotment.
25. From the evidence adduced by the plaintiff, it is apparent that one Mr Peter Kimani Kairu was issued with a letter of allotment by the then Nairobi city commission dated March 3, 1992, with respect to plot No 471, Jamhuri estate Phase II (commercial). Vide the sale agreement dated July 21, 1997, Peter Kimani Kairu sold his interest in the subject plot to the plaintiff for a consideration of Kshs 500,000 which was paid by a cheque dated July 19, 1997.
26. Upon being informed of the transaction, the Nairobi city council issued a letter of allotment to the plaintiff dated September 29, 1997. The change of records was confirmed by a letter to Peter Kimani Kairu by the Nairobi city council dated September 30, 1997.
27. The terms of the allotment letter were subject to the payment of Kshs 15,180 as the stand premium and the ground rate. It was also subject to the conditions that the land was only to be used for residential purposes and was to be developed in accordance with approved plans, and that if the land is unsurveyed at the time of commencing building, care must be exercised to ensure that any building or other works is contained within the boundaries of the plot.
28. The evidence by the plaintiff that it was issued with a letter of allotment and a lease by the then Nairobi city council was not controverted. Indeed, although the Nairobi city council was sued, it never tendered evidence to rebut the plaintiff's claim.
29. The 1st defendant neither filed a defence to deny the particulars of fraud enumerated in the plaint against him in respect of how he was issued with a certificate of lease for the suit property in the year 2001. The defendants did not also testify to enable the court disabuse the assertion that the suit property was transferred to the 3rd defendant in 2004 unlawfully.
30. For those reasons, it is the finding of this court that the plaintiff proved its case on a balance of probability and allows the suit as follows:
 - a. A declaration be and is hereby issued that land known as plot No 471 Jamhuri Phase II Nairobi (title No Nairobi/ block 63/759) belongs to Maina Karanja, the plaintiff.
 - b. A declaration be and is hereby issued that the issuance of a lease on October 19, 2001 in respect of title No Nairobi/ block 63/759 in favour of the 1st defendant herein was unlawful, unprocedural and fraudulently procured.
 - c. A declaration be and is hereby issued that the issuance of a lease on December 10, 2004 in respect of title No Nairobi/ block 63/759 in favour of the 3rd defendant herein was unlawful, unprocedural and fraudulently procured.



- d. A permanent injunction be and is hereby issued restraining the 3rd defendant either by itself, its servants, agents, employees, assigns, successors, or otherwise from encroaching upon, trespassing onto, alienating or disposing of or in any other way whatsoever dealing with or interfering with the plaintiff's land known as plot No 471 Jamhuri Phase II Nairobi (title No Nairobi/ block 63/759).
- e. An order be and is hereby issued directing the chief land registrar, the 4th defendant herein, to cancel entries in favour of Abraham Mwangi Njihia and Tercy Investments Limited in respect of plot No 471 Jamhuri Phase II Nairobi (title No Nairobi/ block 63/759) and the register be rectified to reflect Maina Karanja as the owner thereof.
- f. An order be and is hereby issued directing the 3rd defendant, its servants and agents or other person claiming through it do forthwith give the plaintiff vacant possession of the property known as plot No 471 Jamhuri Phase II Nairobi (title No Nairobi/ Block 63/759).
- g. Each party to bear his/its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 9TH DAY OF FEBRUARY, 2023.

O. A. ANGOTE

JUDGE

In the presence of;

No appearance for Plaintiff

No appearance for Defendants

Court Assistant - June

