



Ndundu & 2 others v Embakasi Ranching Company & 5 others (Environment & Land Case 281 of 2012) [2023] KEELC 18163 (KLR) (8 June 2023) (Judgment)

Neutral citation: [2023] KEELC 18163 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 281 OF 2012**

LN MBUGUA, J

JUNE 8, 2023

BETWEEN

**STEPHEN KIMANI NDUNDU 1ST PLAINTIFF
SAMUEL NDUNDU KIMANI 2ND PLAINTIFF
MARY NYAMBURA NDUNDU 3RD PLAINTIFF**

AND

**EMBAKASI RANCHING COMPANY 1ST DEFENDANT
TERESIAH WAMBUI NJOROGE 2ND DEFENDANT
MAINA NDEGWA 3RD DEFENDANT
WANGURURO MBUGUA 4TH DEFENDANT
GERALD KARIMI 5TH DEFENDANT
LAND REGISTRAR NAIROBI 6TH DEFENDANT**

JUDGMENT

1. By a plaint dated May 22, 2012 and amended on June 21, 2021, the Plaintiffs claim to have been the bonafide shareholders of the 1st Defendant and as such, were allocated plot numbers C20, C21, C22, C23 and C24 by the 1st Defendant back in the year 1990. They accuse the 2nd - 4th Defendants of illegally trespassing onto the said plots and the 6th Defendant of illegally issuing titles to the 2nd -5th Defendants.
2. They pray that judgement be entered in their favour in the following terms;
 - a) A declaration that the plaintiffs are the bonafide shareholders of the 1st Defendant and rightful owners of Plot Numbers C20, C21, C22, C23 and C24.



- b) A declaration that the 2nd to 5th Defendants, whether by themselves or their servants or agents or otherwise howsoever, are wrongfully in occupation of the suit property and are accordingly trespassers on Plots Number C20, C21, C22, C23 and C24.
- c) A permanent injunction restraining the Defendants jointly and severally whether acting by themselves, their agents, employees, servants, directors or whosoever from entering, trespassing, encroaching, selling, offering for sale, transferring, alienating or otherwise dealing with the suit premises being Plot Numbers C20, C21, C22, C23 and C24.
- d) An order of eviction from Plot Numbers C20, C21, C22, C23 and C24 be issued against the 2nd to 5th Defendant herein.
- e) An order of destruction and removal of any structures that the 2nd to 5th Defendants may have erected on the suit premises.
- f) An order from this Honourable for the cancellation of the titles issued to the 2nd to 5th Defendants issued by the 6th Defendant.
- g) That the 6th Defendant be compelled to issue the titles of Plot Numbers C20, C21, C22, C23 and C24 under their respective parcel numbers to the Plaintiffs herein.
- h) Costs of this suit.
- i) Any such order or further relief as this Honourable Court may deem appropriate.”

3. The 1st and 6th Defendants neither entered appearance nor filed a defence.
4. The record indicates that on July 18, 2018, the case against the 2nd Defendant (now deceased) was withdrawn by the Plaintiffs.
5. The suit is opposed by the 3rd -5th Defendants. They filed a statement of defence dated November 21, 2012. On November 9, 2021, the 3rd -5th Defendants were granted leave to file an amended defence by February 2, 2021 but they didn't, hence their defence on record is the one dated November 21, 2012. They denied allegations against them contained in the plaint and aver that they are rightful owners of the suit plots thus they cannot be trespassers to their own plots.
6. PW1, Stephen Kimani Ndundu, the 1st Plaintiff testified for and on behalf of the other plaintiffs. He adopted his witness statement dated November 8, 2016 as his evidence. He also produced the 9 items in their bundle of documents as P Exhibit 1-9, while those in their list at page 56 of the same bundle were produced as P Exhibit 10-20.
7. In his statement, Pw1 stated that he joined Embakasi Ranching Company in 1975 and was issued with a certificate in 1978. He joined with a registration fees of ksh 100/= and was issued with receipts which he surrendered at the PCs offices in Nairobi and was issued with allocation letters.
8. He further stated that he paid for 5 plots which were allocated to him being C-20, C-21, C-22, C23 and C24 which he allocated to his wife the 3rd Plaintiff and his son who is the 2nd Plaintiff herein. He was shown the beacons and the surveyor confirmed the same to be true and accurate.



9. Since the plots were unused, he embarked on clearing them and planted trees and started tilling. He also built a small house for his own use and engaged a care taker known as Justin Muturi to watch over the plots, till and cultivate.
10. He states that on June 13, 2003, he came across a fence erected around Plot No C23 & C24 and discovered that the plots had been newly cultivated. He reported the incident to Ruai Police station on June 21, 2003.
11. He avers that on July 8, 2003, he went to the 1st Defendant's offices at Mugo Kibiru to follow up and to inquire on the plots, and he was assured by one Mr Kariuki Mwangano, the 1st Defendant's chairman and his committee that he was the bonafide owner. The same position was confirmed at the 1st Defendant's Ruai office and by the 1st Defendant's surveyor Mr Nyika who had the deed plan.
12. On October 25, 2003, PW1 visited the 1st Defendant's offices and was shown a different list indicating that the 4th Defendant was allocated plot C23 & the 2nd Defendant was allocated C24. However, on December 2, 2003, the Chairman and surveyor of the 1st Defendant confirmed that the 1st Respondent's record indicates at page 819 and 827 and computer No 260900 that the disputed plots belong to him.
13. On October 13, 2004, PW1 visited plots C23 & C24 and found the 5th Defendant tilling. They raised alarm and reported to the police who asked him for documents to the land and he gave documents pertaining to plot C333. On November 18, 2004, Pw1 and Mr Karimi (5th defendant) went to the chief and property manager where clarification on errors in plot allocations were made.
14. The advocates for the 3rd - 5th defendants were served but did not attend the hearing of the case. Parties did not file written submissions as directed by the court.

Determination

15. The contested plots herein are plots C20, C21, C22, C23 and C24. The Defendants failed to call any witnesses during the trial. Even so, the Plaintiffs still had a burden to prove their case. In [*Gichinga Kibutha v Caroline Nduku*](#) [2018] eKLR the Court held that;

“It is not automatic that in instances where the evidence is not controverted the claimant shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”
16. The plaintiffs claim that titles to the suit plots were issued to the 2nd - 5th Defendants in the course of these proceedings. While the said titles were not produced in evidence, the burden still lies on the Plaintiff to establish that the said titles were unlawfully issued. Further, the plaintiffs have to prove that indeed they are entitled to the suit plots even though they do not have titles.
17. In the case of [*Beatrice Wambui Maina v Embakasi Ranching Company Ltd & another*](#) [2022] eKLR, the court stated that;

“The court is alive to the fact that there are circumstances where a property in dispute has no title. This does not however mean that no rights can accrue therefrom. In such circumstances the court will set out to establish whether the documentary evidence establishes an unbroken chain leading to the root of the title.”
18. The court will therefore interrogate the documents availed by the plaintiffs to establish the plaintiffs process of acquisition of the rights and interests in the suit plots.



19. At this juncture, I must point out that the documents availed by the plaintiffs in their supplementary list are haphazardly filed, with some documents like the deed plan and photographs being illegible.
20. The evidence of pw1 is that he was a share holder of the 1st defendant way back in 1975 of which they were issued with share certificates in 1978. The various share certificates of the plaintiffs have been exhibited as follows; No 6338 and 4479 for 1st plaintiff are at page 28 and 21 of plaintiffs bundle, No 5368 for 3rd plaintiff is at page 40, while No 5333 for 2nd plaintiff is at page 48 of plaintiffs bundle of documents. All these documents bear the date of August 1, 1978.
21. The evidence of Pw1 as set out at paragraph 5 of his recorded statement is that the plots were allocated in 1990. That being the case, the plaintiff was duty bound to explain the circumstances as to how the insertion of plot numbers was made in the share certificates issued 12 years earlier in 1978. That nexus has not been established.
22. The next port of call is the interrogation of other documents relating to allocation or acquisition of the suit plots. The provisional letters of allocation of the suit plots are to be found at pages 22, 30, 44 and 50 of the plaintiff's bundle of documents. All of them bear two dates that is November 28, 1982 and October 26, 1990. That discrepancy on the dates has not been explained. Further, for the provisional letter of allocation to 1st plaintiff at page 22 of their bundle, the plot numbers are indicated as 2741 and 2742, the insertion of plot 21, 22 is at the top of the document with no explanation as to when the insertion was made. This discrepancy runs through the rest of the allocation documents. On a balance of probability, I find that the aforementioned documents at page 22, 30, 44 and 50 cannot be termed as the ones which gave the plaintiffs their rights and or interests over the suit plots.
23. For the document at page 61 of plaintiffs' bundle, it appears like a sketch map, however, the contents thereof are not discernible.
24. Finally, the court has perused the documents of clarification of ownership emanating from 1st defendant. The document at page 73 apparently signed by some one from Embakasi Ranching on 12/11/12 indicates that the family of Stephen Kimani owns plot C20 and C24. Another document at page 75 of plaintiffs' bundle dated 7/9/2012 bears the letter heads of the 1st defendant and it was clarifying ownership of plots C20-24. It indicates that Stephen Kimani (1st plaintiff) owns plot C20, Njambi Kamiti owns plot C21, Wangaruro Mbugua owns plot C22, Gerald Mutua owns plot C23, while Samuel Ndungu Kimani (3rd plaintiff) owns plot C24. It is pertinent to note that the 1st defendant was the allocating authority. The aforementioned documents don't seem to have been varied or cancelled by the allocating authority. I find that the said documents are the only ones which tend to ascertain the rights and interests of the claimants in the suit plots.
25. In the circumstances, I conclude that the plaintiffs have partially proved their case to the extent that the 1st plaintiff owns plot C20 while the 3rd Plaintiff owns plot C24. I therefore proceed to give the final orders as follows;
 - 1) An order is hereby issued declaring that Stephen Kimani Ndungu 1st plaintiff is the owner of plot C20, while Samuel Ndungu Kimani is the owner of plot C24.
 - 2) An order is hereby issued for cancellation of titles issued in relation to plot C20 and C24 and fresh titles be issued to Stephen Kimani Ndungu 1st plaintiff in respect of plot C20, and Samuel Ndungu Kimani in respect of plot C24.
 - 3) The defendants are hereby directed to give vacant possession of the plots C20 to Stephen Kimani Ndungu and C24 to Samuel Ndungu Kimani within 30 days, failure to which the defendants to be evicted from the aforementioned plots.



- 4) On costs, the 1st defendant appears to have been the author of the confusion. In the circumstances, I direct that each party bears their own costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF JUNE, 2023 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Ongwen for plaintiffs

