**M'Mugwika (Suing as the Administrator of the Estate of the Late M'Mugwika M'Ruguongo - Deceased) v Settlement Fund Trustee & another (Environment and Land Appeal 42 of 2019) [2022] KEELC 902 (KLR) (9 March 2022) (Judgment)**

*M'Mugwika M'Rugongo v Settlement Fund Trustee & another [2022] eKLR*

Neutral citation: [2022] KEELC 902 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ENVIRONMENT AND LAND APPEAL 42 OF 2019**

**CK NZILI, J**

**MARCH 9, 2022**

**BETWEEN**

**MISHECK K M'MUGWIKA ..... APPELLANT**

**SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE M'MUGWIKA M'RUGUONGO - DECEASED**

**AND**

**THE SETTLEMENT FUND TRUSTEE ..... 1ST RESPONDENT**

**PETER N KIRIGUA ..... 2ND RESPONDENT**

## JUDGMENT

### A. Peladings

1. The appellant as the plaintiff sued the respondents as the defendants in the lower court for fraudulently transferring and registering L.N. No. Meru/Ngushishi/384 in favour of the 2nd respondent despite his allotment in 1982, creation of a charge, possession and user rights. He prayed for the reversal of the registration and registration in place of the 2nd respondent.

2. The 2nd respondent filed a defence and a counterclaim dated 28.6.2018 denying the contents of the plaint. He maintained that he was the legal, legitimate and registered owner of L.R Ngushishi Settlement Scheme/384 and was issued with a title deed in 1998. He sought for the nullification of the transfer of the land from the appellant following orders obtained exparte as well as cancellation of any registration documents issued in the plaintiff's name as a result of the aforesaid order.

3. His prayers were the suit be dismissed, declaration that he was an absolute owner of the suit land and that his title was indefeasible, the appellant's title be cancelled and a permanent injunction do issue restraining the appellant from interfering with his land.

4. The 1st respondent did not enter appearance and on 10.9.2015, interlocutory judgment was entered against it. On 29.5.2019 the default judgment was set aside and an inhibition issued stopping any transactions over the suit land pending the hearing of the suit.

**B. Testimony**

5. The appellant testified that he was allocated the suit land in March 1983 and paid Kshs. 6,100/= after which he was given a charge which he produce as P exh 1. After paying the other amounts, the appellant was issued with a discharge of charge which he produced as P exh 2. Further, he lodged an application to the land office which he produced as P exh 3 only to be told the land had been re-allocated to the 2nd respondent. He produced the payment receipts as P exh 4 and a letter dated 21.10.2004 by the director of land adjudication and settlement as P exh 5.

6. Further, the appellant produced a copy of green card showing that a title deed was issued to the 2nd respondent as P exh 6. In his view, the discharge of charge by the 2nd respondent was fake.

7. In cross examination, the appellant stated he stopped using the suit land in 1978 though he had fenced it whereas the 2nd respondent started using his land in 1998 after he obtained a title deed.

8. As to clearance of the amount, the appellant testified he was paying the loan in instalments but cleared in 1998 after which he was given a discharge of charge and that between 1998 and 2004 he could not pick his title deed for he was still clearing the loan. In his view, the 2nd respondent fraudulently obtained the title deed.

9. Eventually, after 2016, the appellant told the court he removed 2nd respondent from the land following a court order and took vacant possession. In his view, the appellant stated initially the land was 2/2 acres in 1982 but was increased to 5 acres for the same amount as per the allotment letter.

10. PW2 testified the land was allowed to belong to PW1 vide a charge dated 1.1.1982. Thereafter, he paid Kshs. 2,100/= on 22.1.1990, Kshs, 1,000/=, Kshs. 2,990/= on 12.5.1997 and was eventually issued with a discharge of charge on 31.10.2003 with remarks RR meaning that the property had already changed hands.

11. As regards the director's letter dated 21.10.2004, PW2 testified it stated that there was another discharge of charge which in his view appeared fake. He produced the same as P exh 7. He also confirmed the land office file for the parcel had no receipts in favour of the 2nd respondent. He explained there were two types of settlement schemes namely:- where squatters are settled and conventional one where the government acquires land and settles people through a letter of offer in which case one had to respond by making payments. In his view, the letter of offer was a charge and once payment was made, a discharge of charge would be issued to the allottee.

12. In his view, PW2 testified his office file showed the appellant as the one who had fully completed whereas the records for the 2nd respondent were missing and that in the event he had a title deed, it was for the court to decide.

13. In cross examination, PW2 stated a charge imposed some terms and conditions to be met in order to acquire the land failure of which the land could be re-allocated to someone else, though before that

could happen, there was supported to be an opportunity given to the initial allottee to be heard over the breach.

14. PW2 testified the letter of offer indicated the land was for agricultural purposes and he could not confirm if the appellant had met all the conditions. The conditions in his view included payment of 10% premium within 90 days. According to him, if the letter of offer had been made in 1982, by the time the payment was done in 1990, the appellant had not met the condition and the land could have been re-allocated to someone else.

15. PW2 confirmed however, there was no signature on the letter dated 21.10.2004 and the one dated 29.1.2004. He could not however confirm if any investigations were carried out to determine if the 2nd respondent's discharge of charge was fake or not. In his view, once the land adjudication office issued the discharge of charge, the documents would be forwarded to the land registrar for the issuance of a title deed. In his view, the letter of offer for the 2nd respondent was not indicated and it appeared his discharge of charge had been issued six years after a title deed was processed to him in 1998.

16. DW1 told the court he applied for the suit land in 1997 for the re-possessed parcels of land in Meru and got a letter of offer for Parcel No. 384. He stated he had met all the conditions by paying for the premiums and discharge of charge. He produced the letter and a title deed of charge and a title deed as P exh 1, 2 and 3. He thereafter took up the land, fenced it off and put workers on the land as per conditions in the letter of offer.

17. DW1confirmed he had planted wheat on the land, built houses and toilets. While on the suit land, DW1 stated CID officers from Meru came to allege the land belonged to someone else, investigations were commenced after he gave out his title documents and the outcome of the investigations was that his documents were genuine.

18. DW1 denied ever colluding with anybody to defraud the appellant of his land. He sought for the suit to be dismissed and his counterclaim to be allowed.

19. In cross examination, DW1 stated he had made an application to the Director of Settlement though he did not possess a copy in court. He stated he was aware the suit land had been repossessed after the initial allottees defaulted in meeting the terms and conditions in the offer letter, hence was available for re-allocation.

20. Even though some receipts had been issued after payments, DW1 claimed he did not have them before court. In his view, his discharge of charge was not fake for he had appeared before an officer by name Mr. Omari and signed his documents before a Mr. Kaittany. He stated once the title deed was issued, he moved into the suit land which was vacant, took a survey there and put up a fence, structures and employed people to work for him.

21. He clarified after the title deed was issued he did not see the need to keep in safe custody the letter of offer and receipts. In his view, he had been occupying the suit land for 20 years.

22. Corporal Benson Wekesa Sindani, a CID investigator as PW6 told the court he received a letter dated 9.4.2014 from the Office of the Director of Public Prosecution to investigate a complaint by the appellant over land allotment. According to him, there was a transfer of land dated 2.4.1998, a discharge of charge dated11.2.1998 and a copy of a title deed. In his view, the land had been allocated twice, first to the appellant and secondly to the 2nd respondent. He stated from his investigations, it disclosed no criminal offence against the 2nd respondent. He produced the investigation file as an exhibit.

23. In cross examination, PW6 clarified both documents by the parties emanated from the head office and that the greed card was at the land office; that the 2nd respondent's documents had been issued by the chief land registrar office Nairobi; that from his investigations, Mr. Kaittany and Mr. Omari were duly authorized officers who issued the documents possessed by the 2nd respondent though he former had retired while the latter was deceased.

**C. Grounds of Appeal**

24. The appellant's ground of appeal are the trial court: failed to appreciate his evidence; failed to consider his documentary evidence, failed to find he was the only one in possession of a letter of allotment; the court failed to consider he was in occupation; failed to determine that the respondents" allotment and title deed was obtained unprocedurally since his allotment letter was not cancelled; failed to order for compensation by the 1st respondent; failed to appreciate that the first registration of the title did not extinguish the appellant's right to property.

**D. Written Submissions**

25. With leave of court, the parties put in written submissions dated 24.11.2021 and 8.5.2021 respectively.

26. The appellant submitted the trial court failed to totally consider his evidence especially his documents of allotment and the evidence by PW2 that confirmed he was the original allottee and that the office file did not contain any documents in favour of the 2nd respondent and whatever the 2nd defendant had in his view appeared fake hence fraudulently obtained.

27. Secondly, it was submitted that the 2nd respondent never tendered any evidence over the existence of the land allegedly repossessed by the 1st respondent especially Parcel No. 384 and that there was no time the aforesaid property was advertised as re-possessed so as to be available for re-allocation to the 2nd respondent.

28. Thirdly, it was submitted the evidence of PW2 and PW6 - the investigating officers showed there was double allocation and that the 2nd respondent lacked original documents.

29. Fourthly, it was submitted the trial court merely relied on the oral testimony of the 2nd respondent over allocation without valid documents on re-possession yet the appellant was not notified over the intended re-possession if there was any and or re-allocation of this land in favour of the 2nd respondent.

30. Fifthly, the appellant submitted the court failed to detect fraud on the manner the 2nd respondent was issued with the title deed by the 1st respondent.

31. Sixthly, it was submitted the trial court failed to provide the appellant with a remedy despite no error in his part under Section 26 (a) of the *Land Registration Act*. Reliance was placed on Daudi Kiptugen –vs- Commissioner of Lands and Others [2015] eKLR, Martha Chelal & Another –vs- Elijah Kipkemoi Boiywo & 2 Others [2019] eKLR.

32. On the other hand, the 2nd respondent submitted there were three issues for determination:

    i. If the trial court erred in fact and law in arriving at its findings.

    ii. What is the legal position of an allotment letter?

    iii. Whether the 2nd respondent is entitled to costs.

33. On the 1st issue, it was submitted there was no evidence to prove fraud given the appellant had failed to meet the terms and conditions of the charge unlike the 2nd respondent who was prompt and complied

with the terms and conditions subsequent to which he got a title deed. Under Sections 27 and 28 of the *Land Registration Act* he possessed absolute ownership rights under Section 26 (1) which can only be impeached on account of mistake, fraud or misrepresentation.

34. As regards the letter of allotment and charge, the 2nd respondent submitted a letter of allotment was not a proof of ownership as it was only a step in the process of allocation of land. Reliance was placed on Evans Kafusi Mcharo –vs- permanent Secretary Ministry of Roads, Public Works & Housing & Another [2013] eKLR, *John Mukora Wachihi & Others –vs- Ministry for Lands & Others High Court Petition 82 of 2010*, Wreck Motors Enterprises –vs- The Commissioner of Lands & 3 Other's Nairobi Civil Appeal No. 71 of 1997, Joseph Arap Ngo'k –vs- Justice Moijo Ole Keiwua.

35. The 2nd respondent submitted the appeal had been overtaken by events for the property had been disposed of by 2nd respondent to a third party. The 2nd respondent prayed the appeal be dismissed with costs.

36. This being a first appeal, the mandate of this court is to rehear, reappraise and rehearse the lower court file and come up with independent findings and conclusions while aware the trial court had benefit of hearing of the witnesses first hand. See Peters –vs- Sunday Post [1958] E.A. 424.

**E. Issues for Determination**

37. I have gone through the pleadings, evidence, the appeal and written submissions. The issues I need to determine are:-

    i. If the appellant upon allocation of the parcel of land, complied as required with the terms and conditions.

    ii. What were the implications of not complying with the terms and conditions.

    iii. If the 1st respondent was entitled to recall the letter of offer and or charge.

    iv. If the 2nd respondent had a better title.

38. The appellant's claim was that the 1st respondent had fraudulently caused his allocated Parcel No. 384 to be cancelled and re-allocated to the 2nd respondent subsequent to which he was issued with a title deed.

39. The 1st respondent did not enter appearance whereas the 2nd respondent denied the claim and he insisted he was lawfully allocated the land, obtained a title deed which was indefeasible in law. He sought for the cancellation of the same in his favour, declaration he was the legal owner and his title to the land was absolute and indefeasible and a permanent injunction.

40. There is no dispute that the appellant was issued with a charge under Registed *Land Act* Cap 300 on 17.12.1982 by the 1st respondent with conditions that the principle sum of Kshs. 6,100/= and interest from 1st January 1982 and at the rate of 1 12 per annum to be paid in 56 consecutive half yearly instalments of Kshs. 234. The first instalment was to be paid on 31.3.1984 and the borrower was to pay the first instalment in addition pay interest on the principle from 1.1.1982 to 31.3.1982.

41. The other conditions were to farm and manage the land; pay all rates and taxes; pay premises and the principle sum and interest; reside on the land personally and if there was default, the entire money was to become due and payable once. The charge was subject to the Agriculture Act and Registered *Land Act* and the letter of allotment.

42. It appears the appellant paid Kshs. 6,025/= on 30.3.1982 and did not pay any other amount until 12.5.1997 when Kshs. 11,899/= was paid. The 1st respondent failed to produce a copy of the letter of allotment he was issued with.

43. In Arthur Matere otieno –vs- Dorina Matsanza [2003] eKLR, the court held that the right to repossess or forfeit land was the preserve of the Central Land Board. Without the minutes, the notices of repossession, the approval of forfeiture and reallocation by the board thereof.

44. The 1st respondent produced no repossession notice, so did the 2nd respondent. The respondents did not also produce cancellation notice. There was nothing produced to show when the 1st respondent took the decision to repossess the appellant's land. None of such documents were produced and or retrieved from the file at the Director of land adjudication office Nairobi by PW6. PW6 did not visit the Central Land Board which has the mandate to repossess plots. No minutes to that effect were supplied to the court by either the 2nd respondent or PW6.

45. The officers who signed the discharge and charge in favour of the 2nd respondent did not attach such minutes, a notice of repossession and a cancellation duly served upon the appellant. The plot file lacked vital documents particularly a charge in favour of the 2nd respondent, payment details and remarks that the plot had been validly repossessed and or re-allocated to the 2nd respondent with the approval by the 1st respondent. The respondents produced nothing to show the Minister approved the 2nd re-allocation.

46. There is no evidence that Mr. Kaitanny or Omari Momanyi were acting on behalf of the Central Land Board. The appellant had pleaded and proved fraud, mistake and illegalities inline with Arthi Highway Developers Ltd –vs- West End Butcheries Ltd & 6 Others [2015] eKLR, Vijay Morjaria –vs- Nansingh Madhusingh Darbar & another [2000] eKLR, Joel Kipkosgei Sigei –vs- Peter Maina Macharia & Another [2019] eKLR.

47. The appellant gave details that the law was not followed in repossessing his land and re-allocating the same to the 2nd respondent.

48. The appellant insisted he was not given a fair hearing at the time the property was repossessed and or reallocated. The 1st respondent continued to receive money as indicated above as recent as 1997 and subsequently after 1989 when they knew that they had repossessed his land and allocated it to the 2nd respondent. This means the 1st respondent unjustly enriched itself from his monies even when they had issued a title deed to the 2nd respondent before cancelling a charge in his favour.

49. PW2 was clear that the file at their office did not contain the 2nd respondent's documents except a discharge of charge purportedly issued after he had already been issued with a title deed. That by itself was irregular and a purported attempt to cure the irregularities, illegalities and or fraud which had been perpetuated by the respondents to unjustly and unprocedurally repossess and allocate the land twice.

50. The 2nd respondent could not possibly be termed as an innocent allottee and subsequently genuine title holder to the land. In his evidence, he told the court he was aware of re-possessed parcels of land in Meru. How he came to know it remains unclear and a mystery given he produced no notices of repossession and forfeiture.

51. The 2nd respondent did not call anybody from the office which allocated him the land and subsequently issued the title deed to lead credence that he was an innocent allottee and subsequently issued with a clean title deed.

52. It was also unbelievable the 2nd respondent did not possess the original allotment letter or charge and payment receipts. Strangely, he informed the trial court he did not find the documents necessary after he got the title deed.

53. The law is that when a title deed is in question, a party has the duty to show the chain of acquisition including all the steps and procedures of acquisition. It was not enough to waive a title deed and say it was indefeasible and one is an absolute proprietor. A party must demonstrate the manner and the path the documentation has travelled from the issuing authority to the present. See Botwa Farm Co. Ltd –vs- Settlement Fund Trustee & Another [2019] eKLR, Daniel Maina Kibage (Duly Registered Attorney of Gabriel Githiga –vs- Kenya Forest Services [2018] eKLR.

54. The 1st respondent had a duty to clear the air together with the 2nd respondent once the appellant demonstrated the glaring irregularities and fraudulent scheme to unlawfully repossess the land and proceed to re-allocate it when he had already cleared his payments up to 1997 and met the terms and conditions of the allotment letter or charge.

55. In Cecilia Nyambura Ndungu –vs- Ol'Kalou Farmers Co. Society [2018] eKLR, the court held that there was double allocation of the suit land and the blame therefore lay squarely on the Settlement Fund Trustee whereas in M'Ikiara M'Rinkanya & Another –vs- Gilbert Kabeere M'Mbijiwe [1982-1988] 1 KAR 196 the court held where there was double allocation, the first in time would prevail.

56. In my view, the 1st respondent had no power to allot the same property twice without following the procedure of repossession and forfeiture. The land was alienated already. The first in time prevails. The 1st charge by the appellant had not been withdrawn or recalled or cancelled.

57. In Benja Properties Limited –vs- Syedna Mohammed Burhannudin Sahed & 4 others [2015] eKLR, the Court of Appeal held an allotment of an interest in land was a transaction in rem attaching to and running with a specified parcel of land.

58. In my view, the second allotment letter/charge to the 2nd respondent did not attach in rem to any land since there was no parcel of land repossessed and or forfeited which the charge could attach.

59. Once the appellant was allocated the land and his payments were received up to 1997, the parcel was unavailable for allotment to the 2nd respondent more so, since the appellant allottee had fulfilled the terms and conditions of the allotment.

60. PW2 testified that their office file lacked original documents belonging to the 2nd respondent. Similarly, the 2nd respondent did not call the officers who issued him with a title deed and authorized the transaction.

61. Further, PW6 did not produce any other documents from the Director of settlement and land adjudication regarding such as a repossession or re-allocation notice and minutes from the Central Land Board which is the body mandated in law to undertake the process.

62. In Solomon Omwega Omache & another –vs- Zachary O Ayieko & 2 others [2016] eKLR, the court stated it had a duty to uphold the sanctity of the records at the lands office. The official records at the lands office in relation to the suit property showed that the first allottee was the appellant.

63. PW2 explained the role of his office as the one which processes all the documents since the suit land was situated within its jurisdiction. The 2nd respondent did not get any clearance of re-possession from the land adjudication and settlement office Meru. His documents were also missing in Meru office.

He bypassed the said office. He who alleges must prove. He did not discharge the burden that his documents were well rooted in law.

64. Once the genuineness and authenticity of his documents was questioned, it was incumbent upon him to call the witnesses from the Nairobi office where he allegedly obtained them. See Philemon L. Wambia –vs- Gaitano Lusitsa Mukofu & 2 others [2019] eKLR

65. The failure to do so and coupled with the fact that the 2nd respondent lacked the original letter of allotment and payment receipts means he was unable to prove his counterclaim on a balance of probabilities.

66. By extension also, the 2nd respondent did not shake the evidence by the appellant that he irregularly, unlawfully and or fraudulently obtained the title deed in 1998 when he did not possess a discharge of charge in the first instance and secondly when the parcel of land had not been repossessed lawfully and or regularly by the Central Land Board.

67. As regards the issue of purported sale and transfer of the property in favour of a third party, the doctrine of lis pendens is applicable in this Country.

68. Commenting on the doctrine of lis pendens, the court in Dhanjal Investment Ltd –vs- Shabaha Investments Ltd Civil Appeal No. 80 of 2019 [2022] KCEA 366 )KLR) 18th February [2022] Judgment held a party who finally succeeds in the litigation can ask the court to ignore any other disposition of property by any party to the proceedings subject to the conditions that the transfer or other disposition was made during the pendency of the lis. By the time this appeal was filed, the suit land was in the name of the 2nd respondent. The 2nd respondent knew this court was handling the appeal relating to the suit land. See Grace Kamene –vs- Joyce Rigiri W/O David Mbogori; Ashford Gerrard Riungu & Another (Interested Parties) [2022] eKLR.

69. The court held the doctrine was based on the expediency of the court and was necessary for final adjudication of matters before court and generally in the interest of public policy and good effective administration of justice and entails that the property which is subject matter of the suit shall not be transferred during the pendency of the suit and it prevents transfer of the title of any disputed property without the court's consent

70. The court further held that the doctrine only applies to prevent the transfer or any other dealing that may take the property out of the reach of the other parties in a suit.

71. The 2nd respondent knew the pendency of this appeal when he allegedly disposed of the property and cannot therefore purport to submit the appeal was overtaken by events.

**F. Final Orders**

72. In the premises, my conclusion is that there was no evidence tendered that the appellant breached the terms and conditions of the charge to the suit land and therefore the 1st respondent had no justification to repossess and reallocate the suit property in favour of the 2nd respondent. The allocation and title deed in favour of the 2nd respondent is hereby invalidated and or reversed as prayed in the lower court.

73. The counterclaim is dismissed with costs.

74. Costs of the appeal to the appellant.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU THIS 9TH DAY OF MARCH, 2022**

**In presence of:**

Mutungi for appellant – present

Orimbo for defendant – present

Court Assistant - Kananu

**HON. C.K. NZILI**

**ELC JUDGE**