



Kanan Dairy Limited v Kyatha (Sued as the personal legal representative of the Estate of the late Beatrice Nzakwa Makau) & another (Environment & Land Case 132 B of 2019) [2022] KEELC 158 (KLR) (5 May 2022) (Judgment)

Neutral citation: [2022] KEELC 158 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 132 B OF 2019**

CA OCHIENG, J

MAY 5, 2022

BETWEEN

KANAN DAIRY LIMITED PLAINTIFF

AND

MARTINISHI WAMBUA KYATHA (SUED AS THE PERSONAL LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE BEATRICE NZAKWA MAKAU) 1ST DEFENDANT

KATELEMBO ATHIANI MUPUTI & RANCHING COOPERATIVE SOCIETY LTD 2ND DEFENDANT

JUDGMENT

1. By a Plaint dated the 3rd December, 2019, the Plaintiff prays for judgement against the Defendants jointly and severally for:
 - a) An order that the Letters of Allotment held by the 1st Defendant (if any) cannot override the title deed held by the Plaintiff.
 - b) A permanent injunction restraining the Defendants by themselves or through their directors, employees, servants, agents or otherwise howsoever from entering, trespassing, interfering or otherwise threatening the Plaintiff's ownership and quiet possession of property known as LR Athi River/ Athi River Block 1/1139.
 - c) Costs of the suit.
2. The 1st Defendant filed her Defence and Counterclaim dated the 6th October, 2020 wherein she denied the averments in the Plaint except the descriptive and jurisdiction of the court. In the counterclaim, she sought for the Plaintiff's suit to be dismissed with costs and judgement entered therein for:



- a) A permanent injunction do issue against the Plaintiff by himself, his agents or servants from transferring or in any manner interfering or dealing with the land title No. Athi River/ Athi River Block 1/1139.
 - b) A declaration that the 1st Defendant is the entitled legal owner of plot No. 519 now registered as land title No. Athi River/ Athi River Block 1/1139.
 - c) Cancellation of the title to the Plaintiff and directing Machakos County Land Registrar to rectify the register to reflect the name of Beatrice Nzakwa Makau as the registered owner of the land title No. Athi River/ Athi River Block 1/1139.
 - d) Costs of the suit and interests.
3. The Plaintiff filed a reply to Defence and Defence to Counterclaim where it denied the allegations in the Plaint and reiterated its averments as per the Plaint. It insisted it is an innocent purchaser for value without notice. It contended that it purchased the suit land for Kshs. 3,400,000/= and took vacant possession. Further, that it only became aware of the 1st Defendant's interest in 2019. It explained how it acquired the suit land and insisted that its title was procured in a legal manner. It sought for the counterclaim to be dismissed.

The matter proceeded for hearing where each party called one witness.

Evidence of the Plaintiff

4. PW1 Daniel Zuriel Mbithi testified that he is a Director of the Plaintiff that owned land parcel number LR Athi River/ Athi River Block 1/1139, hereinafter referred to as the 'suit land'. It was his testimony that the Plaintiff purchased the said land in 2014 at a consideration of Kshs. 3,400,000/= and immediately took possession by developing it into a dairy farm. He explained that prior to the purchase he undertook due diligence and confirmed the Certificate of Title was registered in the vendor's name. He explained that in 2016, he was informed of the claim over the suit land by a third party and he was invited to appear before the Taskforce on Katelembo Athiani Muputi Farming and Ranching Cooperative Society Limited hereinafter referred to as the 'taskforce'. Further, he proceeded to highlight the role of the said taskforce. He testified that when he appeared at the taskforce, he learnt that one Beatrice Nzakwa Makau, the 1st Defendant herein, alleged widow to one John Makau (deceased) claimed the suit land was allocated to her late husband, by the 2nd Defendant, prior to his death in 1999. He states that he explained to the aforementioned task force the process he adhered to, to acquire the suit land from one Joseph Muthama who had purchased it from Agnes Mutindi Makau (a widow and personal representative to the estate of one John Makau – deceased) who also died in 1999. Further, that the said vendor Joseph Muthama had previously served as a director of the 2nd Defendant. He further testified that from the evidence presented at the Taskforce hearings by the 2nd Defendant, it revealed that there were two (2) John Makau's in the 2nd Defendant's register, who were both allotted parcels of land and both died in 1999. Further, the said Taskforce failed to take the testimony of Agnes Mutindi Makau and treated the property as belonging to the 2nd Defendant. He confirmed in evidence that the said Taskforce proceeded to revoke the Plaintiff's title over the suit land and directed it to vacate it and ordered the 1st Defendant to take possession. Further, the said Taskforce proceedings were challenged in a judicial review.
5. In cross examination, PW1 confirmed being a director to the Plaintiff, although he did not have a Board resolution. He insisted the Plaintiff bought the suit land from Joseph Muthama vide a Sale Agreement executed in April, 2014, and had a Certificate of Title that indicated KANAN DAIRY but not KANAN DAIRY LIMITED. The Plaintiff produced the following documents as its exhibits:



Certificate of Title in the name of KANAN DAIRY; Sale Agreement dated the 15th April, 2014 for Athi River/ Athi River Block 1/1139 between KANAN DAIRY LIMITED and JOSEPH MUTHAMA; Certificate of Official Search dated 4th April, 2014 for Athi River/ Athi River Block 1/1139 in the name of JOSEPH MUTHAMA; Certificate of Title in the name of JOSEPH MUTHAMA; Gazette Notice No. 1949 dated 3rd March, 2017 and Task force Report dated 22nd August, 2019 in respect to the dispute herein and Judgement dated 30th July, 2020 in Machakos ELC Judicial Review Application No. 69 of 2020.

Evidence of the Defendant

6. DW1 Martinishi Wambua Kyatha testified that he is the legal representative to the estate of Beatrice Nzakwa Makau – deceased, who was the widow of John Makau, a shareholder of the 2nd Defendant. It was his testimony that John Makau was allotted Plot No. 519 which is currently Athi River/ Athi River Block 1/1139 and an allocation slip was issued to him to that effect. He confirmed that John Makau died in 1999 and upon his demise, his membership No. 2384 and Plot No. 519 now registered as the suit land was transferred to Beatrice Nzakwa Makau as the next of kin. Further, that Beatrice Nzakwa Makau took possession of the suit land and started cattle farming. He avers that sometime in the year 2014, the Plaintiff entered the suit land claiming to have purchased it from Joseph Muthama and upon conducting a search at the Land Registry, it showed the land was registered in the name of KANAN DAIRY. Further, Beatrice Nzakwa Makau reported to the society Task force and at the appearance before the said Taskforce, it was discovered that one Joseph Muthama had illegally sold the suit land to the Plaintiff. Further, Joseph Muthama bought the said land from Agnes Matindi Makau who had relied on succession cause No. 94 of 2001 for John Makau Kisilu, yet the said proceedings had been filed by the Public Trustee. He further testified that the Task force found that John Makau Kisilu was neither a shareholder nor a member of the society but the records show there was a member No. 2384 by the name of John Makau who was the husband of Beatrice Nzakwa Makau. Further, the Taskforce resolved that she could be registered and issued with title to the suit land as the same was unlawfully issued to the Plaintiff without her consent. During cross examination, he confirmed Beatrice Nzakwa Makau was his auntie but had no documents to prove the said Beatrice Nzakwa Makau was the wife of John Makau and claimed they got married traditionally. He further confirmed that Beatrice Nzakwa Makau did not take out Letters of Administration Intestate in respect to the estate of John Makau but the 2nd Defendant transferred his shares to her. He insisted the Plaintiff obtained title to the suit land fraudulently. He further confirmed that he never sued Joseph Muthama as he believed the suit land belonged to Beatrice Nzakwa Makau. The 1st Defendant produced the following documents as exhibits: Limited Grant Ad litem; Letter dated the 3rd September, 2020 issued by Katelembo Athiani Muputi Farming & Ranching Cooperative Society Ltd; Membership Card; Plot allocation slip for member No. 2384; Forewarding register for T/DEEDS by the society for plot 519; Chief's letter; Notice of Summons to appear before the Taskforce; Proceedings before the Taskforce and Confirmation Letter for plot No. 519.

Submissions

Plaintiff's Submissions

7. The Plaintiff in its submissions reiterated its averments and relied on its witness testimony. It contended that it tendered evidence to prove it is validly registered as owner of the suit land. Further, it is a bona fide purchaser for value as at the time it purchased the suit land, it carried out a search which revealed Joseph Muthama was its registered owner. It further submitted that the omission of the word 'limited' in the title deed can be corrected as it is a minor error which can be rectified by the



Land Registrar. Further, it is the one that purchased the suit land, is in occupation thereon and this does not affect its interest on the said land. It insisted the questioning on lack of resolution from the Plaintiff's Director has come too late in the day. It disputed the 1st Defendant's claim that its Certificate of Title was obtained fraudulently and referred to the evidence where it was confirmed that there were two John Makau's in the 2nd Defendant's register who both died in 1999. Further, that Beatrice Nzakwa Makau did not furnish court with a Marriage Certificate or demonstrate she met the legal requirements of being the administratrix of the deceased estate. It reiterated that there was competing interests between the Letter of Allotment and Certificate of Title over the suit land. Further, that the holder of a Certificate of Title is superior to a holder of a Letter of Allotment. It averred that the 1st Defendant did not have locus to make a claim in respect to the suit land. To buttress its averments, it relied on the following decisions: *David Peterson Kiengo & 2 Others v Kariuki Thuo* (2012) eKLR; *Boniface Awuor & Another Vs Victor Otieno Nyadimo & 2 Others* (2017) eKLR; *Dr. Joseph N. K Arap Ngok Vs Justice Moijo Ole Keiwua & 5 Others* CA No. 60 of 1997; *Don Woods Company Limited V Eric Mumo Mutisya & 3 Others* (2021) eKLR; *Mavuno Industries Limited & 2 Others Vs Keroche Industries Limited* (2012) eKLR; *Zacharia Wambugu Gathimu & Another V John Ndungu Maina* (2019) eKLR and *Njuwangu Holdings Ltd V Langata KPA Nairobi & 5 Others* (2014) eKLR.

1st Defendant's Submissions

8. The 1st Defendant in his submissions relied on his testimony including exhibits and contended that the Plaintiff's suit is incompetent as there was no evidence that the Plaintiff's witness was a director of the company. Further, that there was no authority to plead presented by the said witness hence this rendered this suit fatally defective. He further submitted that the Plaintiff had not proved its case that it is entitled to the relief sought in the Plaint and made reference to the Taskforce Report. Further, that the Plaintiff never tendered evidence on how it acquired the suit land, nor proof of how it paid the full purchase price. It averred that the company seal was not affixed to the Sale Agreement. It reiterated that it had proved allocation of the suit land and is entitled to the reliefs sought in the counterclaim. Further, that transaction that led to the Plaintiff acquiring the title to the suit land was fraudulent. He reaffirmed that from the register held by the 2nd Defendant, the title to the suit land ought to have been issued to Beatrice Nzakwa Makau and laid strong emphasis on the proceedings before the Taskforce. To support his averments, he relied on the following decisions: *Falcon Global Logistics Co. Limited V Management Committee of Eldama Ravine Boarding Primary School* (2018) eKLR; *David Peterson Kiengo & 2 Others v Kariuki Thuo* (2012) eKLR; *Alice Chemutai Too V Nickson Kipkurui Korir & 2 Others* (2015) eKLR; *Propwa Company Limited V Justus Nyamo Gatondo & Another* (2020) eKLR and *Benson Wandera Okuku V Israel Were Wakho* (2020) eKLR.

Analysis and Determination

9. Upon consideration of the Plaint, Defence including Counterclaim, Testimonies of the Witnesses, Exhibits and Submissions, the following are the issues for determination: Whether this suit is fatally defective. Who is the registered proprietor of the suit land Athi River/ Athi River Block 1/1139. Whether the Plaintiff is entitled to the Orders sought in the Plaint. Whether the 1st Defendant are entitled to the Orders sought in the Counterclaim. Who should bear the costs

As to whether this suit is fatally defective.

10. The 1st Defendant claims this suit is fatally defective as the Plaintiff failed to adhere to the provisions of Order 4 Rule 1 (4) of the *Civil Procedure Rules*, which fact is disputed by the Plaintiff. PW1 during cross examination explained that the Plaintiff is a company belonging to a man and a wife and he represented the affairs of the said company. I have had a chance to peruse the Defence including



Counterclaim and note the 1st Defendant never raised this issue which is a pure point of law in the said pleadings and is now bringing it in his submissions.

11. The Court of Appeal in the case of *Spire Bank Limited v Land Registrar & 2 others* [2019] eKLR stated thus:

“...It is essential to appreciate that the intention behind order 4 rule 1 (4) was to safeguard the corporate entity by ensuring that only an authorized officer could institute proceedings on its behalf. This was to address the mischief of unauthorized persons instituting proceedings on behalf of corporations, and obtaining fraudulent or unwarranted orders from the court. The company’s seal that is affixed under the hand of the directors ensured that they were aware of, and had authorized such proceedings together with the persons enlisted to conduct them. And where evidence was produced to demonstrate that a person was unauthorized, the burden shifted to such officer to demonstrate that they were authorized under the company seal. With this in mind, we dare say that the provision was not intended to be utilized as a procedural technicality to strike out suits, particularly where no evidence was produced to demonstrate that the officer was unauthorized.”

12. It is trite that points of law cannot be raised at submissions stage. Further, in distinguishing the decision cited by the 1st Defendant while relying on this Court of Appeal decision, I find that failure to file a company resolution with the Plaintiff does not render this suit fatally defective as this is an issue of procedural technicality, as there was no proof that PW1 was unauthorized to represent the Plaintiff.
13. As to who is the registered proprietor of the suit land Athi River/ Athi River Block 1/1139.
14. I note the 2nd Defendant never filed any Defence to controvert the Plaintiff’s averments and I hence find the same unrebutted at its instance.
15. PW1 in his testimony explained that the Plaintiff purchased the suit land in 2014 at a consideration of Kshs. 3,400,000/= and immediately took possession by developing it into a dairy farm. He explained that prior to the purchase he undertook due diligence and confirmed that the Certificate of Title was registered in the name of Joseph Muthama (vendor). The Plaintiff produced the Sale Agreement dated 15th April, 2014 between its Directors and one Joseph Muthama and Certificate of Title in the name of Joseph Muthama (vendor) dated the 11th December, 2013 as well as another in its namedated the 4th July, 2014 as exhibits. DW1 insisted that the suit land was acquired fraudulently and insisted the Plaintiff did not demonstrate how it acquired it except for presenting the Certificate of Title and Sale Agreement. He relied heavily on the proceedings of the 2nd Defendant’s Taskforce conducted in respect to the dispute herein. DW1 in his evidence contended that the suit land which was also known as plot number 519 was allocated to the husband of the late Beatrice Nzakwa Makau, one John Makau, who was a member of the 2nd Defendant. The 1st Defendant produced in evidence a copy of the membership card issued to the late John Makau. I note there was no evidence tendered to prove that Beatrice Nzakwa Makau was the wife of the late John Makau except for letter from the local chief. Further, no Letters of Administration was produced to demonstrate that Beatrice Nzakwa Makau was the one who had been authorized by the court to deal with the Estate of the late John Makau. It further emerged in evidence that there were two John Makau’s who were members of the 2nd Defendant and both died in 1999. In line with the evidence I have analyzed above, I wish to make reference to section 25 and 26(1) of the Land Registration Act which provides that: ‘25 (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other



interests and claims whatsoever, but subject— (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register. (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee. 26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except— (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.’

16. In the case of *Willy Kipsongok Morogo v Albert K. Morogo* (2017) eKLR the Court held that: ‘ the evidence on record shows that the suit parcel of land is registered in the names of the Plaintiff and therefore is entitled to the protection under sections 24, 25 and 26 of the Land Registration Act.’
17. See also the case of *Christopher Kitur Kipwambok vs Vipulratilal Dodhia & 3 others* (2013) eKLR.
18. Based on my analysis above, while relying on the legal provisions I have cited as well as associating myself with the quoted decisions, I find that since the Plaintiff acquired title from Joseph Muthama who already held title to the suit land; noting that the proceedings of the Taskforce of the 2nd Defendant in respect to the dispute herein were quashed by this Court on 30th July, 2020 vide Machakos ELC Judicial Review Application No. 69 of 2020, I hold that the 1st Defendant is hence estopped from relying on the said proceedings. I further find that the 1st Defendant only holds letters of Allotment while the 2nd Defendant never tendered any evidence to confirm the authenticity of the said Letters of Allotment. It emerged in evidence that Agnes Mutindi Makau (a widow and personal representative to the estate of one John Makau – deceased) who also died in 1999 had indeed sold the suit land to Joseph Muthama who in turn sold it to the Plaintiff. I note the 1st Defendant dwelt on this issue of the fact that the word ‘Limited’ was omitted in the Certificate of Title held by the Plaintiff. However, I opine that the omission of the word ‘Limited’ in the Plaintiff’s Certificate of Title can be rectified by the Land Registrar in accordance with section 79(1) (a) and (e) of the *Land Registration Act* which stipulates that:’ (1) The Registrar may rectify the register or any instrument presented for registration in the following cases—(a) in formal matters and in the case of errors mistakes or omissions not materially affecting the interests of any proprietor; (c) or purposes of correcting the name, address or other particulars of the proprietor upon the written application by the proprietor in a prescribed form.’ It is my considered view that the omission of the word ‘Limited’ from the Certificate of Title does not affect the Plaintiff’s interest in the suit land since it holds title to it has been in occupation of the same since purchase. In the circumstance, I find that the Plaintiff’s Certificate of Title remains conclusive and prima facie evidence that it is indeed the registered and absolute proprietor of land parcel number Athi River/Athi River Block 1/1139, with vested rights and interests therein. I further find that the 1st Defendant’s Letters of Allotment cannot supersede the Plaintiff’s Certificate of Title. It is my considered view that the Plaintiff is indeed entitled to protection of the law in accordance with the provisions of section 24, 25 and 26 of the Land Registration Act.
19. It is against the foregoing that I find the Plaintiff is indeed entitled to the orders sought in the Plaint. The 1st Defendant sought various orders in the Counterclaim which I have enumerated above. However, at this juncture, I find that it failed to tender enough evidence to prove how the Plaintiff fraudulently acquired the title to the suit land. Further, he never called the 2nd Defendant to prove the averments as per the documents it presented. I opine that the burden of proof was upon him to



demonstrate the nexus between the documents he presented and how the Plaintiff's title emanated therefrom but at this juncture, I find that he failed to do so. In the circumstances, I find that he is not entitled to the orders sought in the Counterclaim and will proceed to dismiss it.

Who should bear the costs

20. Since the Plaintiff is the inconvenienced party, I will award it the costs of this suit.
21. It is against the foregoing that I find the Plaintiff has proved its case on a balance of probability and will enter judgement in its favour. I will proceed to make the following final orders: A declaration be and is hereby issued that all that parcel of land known as Athi River/ Athi River Block 1/1139 belongs to KANAN DAIRY LIMITED. An order be and is hereby issued that the Letters of Allotment held by the 1st Defendant (if any) cannot override the title deed held by the Plaintiff. A permanent injunction be and is hereby issued restraining the Defendants by themselves or through their directors, employees, servants, agents or otherwise howsoever from entering, trespassing, interfering or otherwise threatening the Plaintiff's ownership and quiet possession of property known as LR Athi River/ Athi River Block 1/1139. The 1st Defendant's Counterclaim be and is hereby dismissed with costs. Costs of the suit is awarded to the Plaintiff.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 5TH DAY OF MAY, 2022.

CHRISTINE OCHIENG

JUDGE

