



Nyabera & another v Machakos County & 2 others (Environment & Land Case 224 of 2014) [2022] KEELC 3440 (KLR) (6 July 2022) (Judgment)

Neutral citation: [2022] KEELC 3440 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 224 OF 2014**

**A NYUKURI, J
JULY 6, 2022**

BETWEEN

CAROLINE KIGADI NYABERA 1ST PLAINTIFF

MARX GAD KAHENDA 2ND PLAINTIFF

AND

MACHAKOS COUNTY 1ST DEFENDANT

MAVOKO SUB COUNTY 2ND DEFENDANT

MID TUSKS AGENCIES LTD 3RD DEFENDANT

JUDGMENT

Introduction

1. By a plaint dated November 25, 2014, the two plaintiffs in this matter averred that in the year 2005, each of them purchased a parcel of land from the 3rd defendant. They stated further that the 1st plaintiff purchased plot No 6 which was LR No 12715/65/2 at a cost of Kshs 200,000/-, while the 2nd plaintiff purchased plot No 7 which was LR No 12715/65/3 at a cost of Kshs 200,000/-. The Plaintiffs averred that they paid the entire purchase price for their respective parcels.
2. It was the plaintiffs' case that in the years 2008 and 2009, the defendants declared the two properties purchased by them as having been surrendered, without consulting the plaintiffs who were merely innocent purchasers for value. They stated that the defendants had no legal capacity to unilaterally decide on the surrender of private property, and therefore that the defendants' actions were illegal, unconstitutional and without any justifications. The plaintiffs further complained that the defendants illegal declaration of surrender in respect of their parcels of land occasioned them loss and damage.
3. Therefore, they sought for the following orders;



- a. A declaration that the defendants unilateral declaration of surrender of LR No 12715/65/2 and LR No 12715/65/3 is illegal, null and void abinitio and that the plaintiffs are the absolute owners of the aforesaid plots and the defendants be compelled to give and surrender the plots to the plaintiffs and the Registrar Mavoko Sub County do rectify the Land Register to indicate that the plaintiffs are the true owners.
 - b. A permanent injunction restraining the defendants, their agents, workers, servants or assignees from interfering, wasting, alienating or transferring LR No 12715/65/2 and LR No 12715/65/3.
 - c. Alternatively, payment of the said plots at commercial rates.
 - d. Costs of the suit.
 - e. Any other relief this honourable court may deem fit and just to grant.
4. The 1st and 2nd defendant filed their statement of defence on March 4, 2015. They denied the plaintiffs claim and stated that the sale of land transaction between the plaintiffs and the 3rd defendant was based on a private contract between the plaintiffs and the 3rd defendant and that the 1st and 2nd defendants were neither parties to that contract nor were they privy to the terms thereof.
 5. It was the 1st and 2nd defendants' case that the 3rd defendant submitted an application for approval to the defunct Municipal Council of Mavoko for parcel of land LR No 12715/65 upon a subdivision scheme which the 3rd defendant proposed the suit properties for surrender as plots for public utilities. They further stated that the subdivision was approved on condition of surrendering the two properties claimed by the plaintiffs; for public utilities and subsequently that the approval was forwarded to the 3rd Defendant who was the registered owner of those properties.
 6. Further, the 1st and 2nd defendant asserted that they followed the laid down procedures provided in law in the approval of the subdivision of parcel of land LR No 12715/65 and therefore the two properties were duly surrendered as plots for public utilities to the government and hence the plaintiffs have no claim over public land surrendered for public utilities.
 7. It was the 1st and 2nd defendants' position that the plaintiffs' suit was defective and an abuse of the court process at it failed to disclose any reasonable cause of action against them. They therefore sought for the dismissal of the plaintiffs' suit with costs.
 8. In a rejoinder, the plaintiff filed a reply to the 1st and 2nd defendants' defence, wherein they stated that they were innocent purchasers for value and absolute owners of plots LR No 12715/65/2 and LR No 12715/65/3 respectively. They maintained that the declared surrender of their properties was illegal, unconstitutional and without justification.
 9. By application dated April 5, 2016, the plaintiffs sought for leave of court to serve pleadings on the 3rd defendant by registered post. In its ruling of February 25, 2017, this court allowed the said application. Despite service, the 3rd defendant failed to enter appearance or file defence.

The 1st Plaintiff's Case

10. On February 14, 2022, the 1st plaintiff, Carolyn Kigadi Nyabera, who was PW1, gave her testimony. She relied on her witness statement dated December 16, 2019 and filed in court on January 7, 2020, which she adopted as her evidence in chief. Having realized that her list of documents did not have the documents she intended to rely upon, the plaintiff's counsel stood the plaintiff down and sought for time to file the documents. The court allowed the plaintiff to file documents she intended to rely



upon, which she filed on February 16, 2022. Therefore, on March 8, 2020, the plaintiff returned to the witness stand and proceeded with her testimony.

11. PW1 testified that in 2005, she purchased a parcel of land known as LR No 12715/65/2 (hereinafter referred to as the suit property) from the 3rd defendant at a consideration of Kshs 200,000/-, which she paid in full. That sometimes later she paid Kshs 20,000/- to her advocates, Ochanda Ongunu & Company Advocates, to facilitate the procurement of her title. She complained that the 3rd defendant had refused to give her the land she purchased. She prayed that the suit property be returned to her. She referred to her documents on record. She produced a copy of her identity card as P-exhibit 1, a copy of a letter of offer as P-exhibit 2, a copy of a cheque deposit slip as P-exhibit 3, a copy of bankers cheque as P-exhibit 4, a land sale agreement as P-exhibit 5, a certificate of ownership as P-exhibit 6, a beacon certificate as P-exhibit 7, a map as P-exhibit 8 and a copy of title as P-exhibit 9. That marked the close of the 1st plaintiff's case.
12. No evidence was tendered by the 2nd plaintiff. At the close of PW1's evidence, the defence case was marked as closed as no defendant nor their advocates attended court despite service. Thereafter counsel for the plaintiff filed their submissions on March 21, 2022.

Submissions

13. Counsel for the 1st plaintiff submitted that the 1st plaintiff's evidence on record remained uncontroverted as the defendants did not give any evidence to challenge the same. It was counsel's position that the 1st and 2nd defendants' pleadings remained mere statements as they were not supported by any evidence. Counsel argued that the 1st plaintiff's evidence was credible and ought to be acted upon by this court. Counsel referred the court to the cases of [*Linus Nganga Kiongo & 3 others v Town Council of Kikuyu*](#) [2012] eKLR, [*Edward Mariga through Stanley Mobisa Mariga v Nathaniel David Schulter & another*](#) [1997] eKLR and [*Kenya Power & Lighting Company Limited v Pamela Awino Ogunyo*](#) [2015] eKLR; all of which have been considered by this court.

Analysis and Determination

14. I have considered the pleadings, evidence, submissions and authorities relied upon in this matter. In my considered view, the issues that arise for determination herein are as follows;
 - a. Whether the 3rd defendant's surrender of the suit property for public utility was unlawful.
 - b. Whether the 1st plaintiff is entitled to the orders sought in the plaint.
15. Article 40 of the [*Constitution of Kenya*](#) protects the right to property as follows;

“(1) Subject to article 65, every person has the right either individually or in association with others to acquire and own property ...

 - a. Of any description; and
 - b. In any part of Kenya.

(2) Parliament shall not enact a law that permits the state or any person;

 - a. to arbitrarily deprive a person of property of any description or of any interest in or right over any property of any description; or



- b. to limit or in any way restrict the enjoyment of any right under this article on the basis of any of the grounds specified or contemplated in article 27(4).
16. Therefore, by dint of the protection granted under article 40 of the *Constitution*, no one should be deprived of their property arbitrarily.
17. The suit property was registered in the name of the 3rd defendant under *Registration of Titles Act*, cap 281 of the laws of Kenya (now repealed) as can be seen from the copy of title produced by the plaintiff as P-exhibit 9. Under section 23 of the said *Act*, the registered proprietor of land, had an indefeasible and absolute title thereto.
18. In the instant suit, the 1st and 2nd defendants conceded in their defence that the subdivision scheme presented to them by the 3rd defendant had included the surrender of the suit property for public utility and that the approval of the subdivision scheme was granted subject to the said surrender. The 1st and 2nd defendants also pleaded that at the time of the approval, the person who was registered as proprietor and who sought the approval was the 3rd defendant and therefore they are not liable in so far as the 1st plaintiff's claim is concerned. It is therefore clear that the issue of surrender of the suit property is not in dispute. The 3rd defendant did not file any document to deny that fact. What is in dispute is whether the surrender was lawful.
19. In her testimony, the 1st plaintiff testified that the defendants herein acting in collusion and without regard to the 1st plaintiff's rights, approved LR No 12715/65/2 as a surrender. However, the Plaintiff did not produce any document to demonstrate the date, nature and import of the surrender. As earlier observed in this judgment, the fact that the surrender that was done is not in dispute. It also appears that the 1st plaintiff tried to seek for amendment of the subdivision scheme in vain as the 1st and 2nd defendants position was that the approval for the subdivision scheme was given, subject to the surrender, upon application by the property owner who was the 3rd defendant.
20. Under section 29 (b) of the *Physical Planning Act*, cap 286 laws of Kenya (now repealed) a local authority had power to control or prohibit the subdivision of land or existing plots into smaller areas. As can be seen from the exhibits produced by the 1st plaintiff, the 1st plaintiff and the 3rd defendant entered into an agreement for sale of the suit property on February 23, 2005, way before the 3rd defendant became the registered proprietor thereof, which was on December 28, 2005. The 3rd defendant ought to have first obtained approval for their proposed subdivision scheme before selling any land to the 1st plaintiff. This is not what happened, as the sale was done before approval for subdivision was obtained. It is at the approval stage when the suit property was surrendered by the 3rd defendant as public utility.
21. In my view therefore, the 3rd defendant sold land which ought not to have been sold in the first place, prejudicing the 1st plaintiff's interests and exposing her to loss and damage. Hence it was unlawful for the 3rd defendant to sell the suit property to the 1st plaintiff before obtaining the necessary statutory approvals from the 1st defendant. In view of the provisions of section 29 (b) of the repealed *Physical Planning Act*, the surrender of the suit property cannot be deemed illegal as the same was done in compliance with the law, as subdivision of land in Kenya is regulated. What was illegal was the 3rd defendant's action of selling the suit property to the 1st plaintiff before ascertaining whether their proposed subdivision would be approved as presented. In the premises therefore, I decline to declare the surrender of the suit property as public utility as being illegal, null and void as proposed by the 1st



- plaintiff. I also decline to order rectification of the register to reflect her name as the surrendered land is not available for registration in her name, the same being public land.
22. The plaintiff also sought for a permanent injunction to restrain the defendants from interfering with the suit property. Having found that the suit property is no longer available for registration in the 1st plaintiff's name, I find and hold that there is therefore no basis to issue orders of permanent injunction as prayed because the suit property does not belong to the 1st plaintiff.
 23. The 1st plaintiff sought in the alternative, the payment of the said plot at commercial rates. The fact that the 1st plaintiff paid money towards the purchase of the suit property is not in dispute. The 1st plaintiff testified that the suit property was sold to her at a cost of Kshs 200,000/- which she paid in full. However, the only proof of payment produced in court as an exhibit is the copy of the bankers cheque dated February 23, 2005 drawn in favour of the 3rd defendant for the sum of Kshs 150,000/-. The plaintiff's prayer is for "payment of the said plots at commercial rates."
 24. I must point out that no evidence was led as to what constitutes commercial rates and no submissions were made in that regard. As has been found above, the 1st plaintiff paid a sum of Kshs 150,000/- to the 3rd defendant as purchase price for the suit property. It is therefore only fair and just that the said amount be paid back by the 3rd defendant together with interest thereon.
 25. As the 1st plaintiff's contract with the 3rd defendant was breached by the 3rd defendant, there was no evidence demonstrating liability as against the 1st and 2nd defendants. While the 1st plaintiff alleged collusion between the defendants, the 1st and 2nd defendants pleaded that applications for approval for subdivisions are made by registered proprietors of the parcels of land in issue. And that in this case, it is the 3rd defendant who presented a scheme of subdivision that included surrender of the suit property as public utilities and that the 1st and 2nd defendants were not privy to the agreement between the 1st plaintiff and the 3rd defendant. I agree with the 1st and 2nd defendant's position that approvals for subdivision is between the property owner and the 1st defendant. In the premises, the 1st plaintiff's claim as against the 1st and 2nd defendants has not been proved and the same is dismissed.
 26. On the other hand, apart from the plaint, the 2nd plaintiff did not record any witness statement nor file documents to be relied upon. And most critically, the 2nd plaintiff did not attend court and or testify in this case. As the burden of proof is always on the plaintiff to prove his claim, I find that the 2nd plaintiff did not prove his case as against all the defendants and his case is therefore dismissed.
 27. In the end, I enter judgment for the 1st plaintiff against the 3rd defendant for the sum of Kshs 150,000/- together with interest thereon at court rates from the date of filing this suit till payment in full. The 3rd defendant shall pay costs of the suit. The 1st plaintiff's suit as against the 1st and 2nd defendants is dismissed with no order as to costs. The 2nd plaintiff's suit as against all the defendants is dismissed with no order as to costs.
 28. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 6TH DAY OF JULY 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A NYUKURI

JUDGE

In the presence of;

Mr Jaoko for the Plaintiffs



No appearance for the Defendants

Ms Josephine Misigo – Court Assistant

