



REPUBLIC OF KENYA



Kimani v Omar & another (Environment & Land Miscellaneous Case E002 of 2023) [2024] KEMC 58 (KLR) (10 October 2024) (Judgment)

Neutral citation: [2024] KEMC 58 (KLR)

**REPUBLIC OF KENYA
IN THE MPEKETONI LAW COURTS
ENVIRONMENT & LAND MISCELLANEOUS CASE E002 OF 2023
EP NABWANA, SRM
OCTOBER 10, 2024**

BETWEEN

ANNA NDATA KIMANI PLAINTIFF

AND

MOHAMED OMAR 1ST DEFENDANT

SWALEH ALI OMAR 2ND DEFENDANT

JUDGMENT

I. Summary of the Case:

1. Anna Ndata Kimani was registered as the proprietor of the plot of land known as Lamu/Mpeketoni Town/410 (“suit property”) on May 20, 2022 measuring approximately 0.0519 Hectares. It was an inheritance from her husband, the late Kimani Mugi Magenyi who was the original allottee of the suit property which was then known as Plot No. 346 IND. The deceased died intestate on February 20, 2005 and the Plaintiff obtained a grant of letters administration intestate from Malindi High Court Succession Cause No. 68 of 2011 on October 10, 2011.
2. The said grant was confirmed on July 31, 2012 listing the suit property as one of the deceased’s properties. That on 23rd September, 2005 the suit property then known as Plot No. 346 IND was recognized by the Mpeketoni Physical Development Plan as belonging to the late Kimani Mugi Magenyi. Prior to this and on May 9, 1984 the deceased received an approval from the Town Clerk of the now defunct County Council of Lamu to erect a slaughterhouse. He erected the slaughterhouse which is operational to date.
3. Not to stop there, the Plaintiff averred that the Defendants and their agents and/or servants wrongfully entered and took possession of the suit property sometimes in the year 2019 including the Private slaughterhouse and have thus trespassed and continue to trespass thereon. This has led to the deprivation of the Plaintiff from the use and enjoyment of the property.



4. The Defendants on their part averred that the allegations by the Plaintiff are falsehoods. That the suit property was owned by one Simon Ngige Kimani by virtue of a letter of allotment dated 28th October, 1998. It is from the said Simon that the Defendants first leased the suit property and paid rent before deciding to purchase the property and continue with the abattoir business. On September 28, 2009 they bought the suit property from the said Simon Ngige Kimani and enjoyed peaceful possession of the property. They continued with the slaughterhouse business, made improvements thereon and in the year 2017 they were issued with a certificate of title being Lamu/mpeketoni Township/251.
5. The Defendant were certain that the land they occupied was theirs lawfully only to shockingly learn in the year 2022 that the Plaintiff was laying claim to the suit property with a certificate of title reading Lamu/mpeketoni Town/410. The Defendants averred that it was shocking since neither the Plaintiff nor her late husband have ever resided and carried on business thereon since it was previously in the custody of Simon Ngige and later in their custody.
6. It is for the foregoing reasons that the Defendants filed a defence and counter-claim seeking a declaration that they were the lawful owners and that the title issued to the Plaintiff be quashed. They premised their counter-claim on fraud perpetrated by the Plaintiff in obtaining a letter of allotment in favour of the deceased after he had already passed on. Acted as the deceased and transferred the rights to her name when he had already passed away and could not sign any transfer.

II. Issues for Determination

7. In the case of *Odd Jobs v Mubea* [1970] EA 476, the court established that the issues to be decided by a court originate from the pleadings submitted by the parties. Alternatively, if an issue is not explicitly pleaded, it may arise from the proceedings during the trial, leaving it to the court for a final decision. To properly resolve this case, the court identifies the following points falling for determination: -
 - a) Who, between the Plaintiff and Defendants are the lawful owners of the suit property?
 - c) What orders commend themselves herein?

III. Analysis

a. Who is the lawful owner of the Suit Property?

8. The Plaintiff produced as P. Exh.1 a copy of title deed in respect of the suit property registered in her name. According to Section 26 (1) (b) of the *Land Registration Act*, title is considered valid and is seldom challenged unless as provided hereunder:

“The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer ... 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 ... 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.”
9. According to paragraph 25 of the Defence and Counter-Claim the Defendants have listed 8 particulars of fraud as committed by the Plaintiff in obtaining the title registered in her name ostensibly of the



suit property. When ownership of property is challenged, it is well-established that the proprietor must demonstrate the basis of their ownership. The Court of Appeal in the case of *Munyu Maina vs. Hiram Gathiha Maina* (2013) eKLR pronounced itself thus:

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is challenged and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances.”

Further, in the case of *In the case of Hubert L. Martin & 2 Others Vs. Margaret J. Kamar & 5 Others* [2016] eKLR, it was held that: -

‘A Court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one’s case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.’

This is a case where both parties have title to land they purport to be theirs. The court must exhaustively interrogate how the process of the titles was undertaken so as to arrive at proper findings.

10. The Plaintiff produced a total of 16 exhibits which this court must interrogate. To prove that the deceased was the first owner of the Plot after allocation, the Plaintiff produced as P. Exh. 16 a copy of the allotment letter in respect of Plot No. Industrial 346 dated October 4, 2012. Firstly, it does not provide an approximate size or acreage of the Plot in question which is quite unusual since one would not tell the size of the Plot allotted to the deceased.
11. Secondly, the letter of allotment was issued to the deceased seven (7) years after his demise on February 20, 2005. When no one had succeeded his estate or acted in representative capacity of his estate. To clearly bring out this point further, the letter of allotment was issued 2 months after the Plaintiff received her certificate of confirmation of grant from the High Court at Malindi.
12. Thirdly, the Certificate of Confirmation of Grant dated at Malindi on August 8, 2012 does not list the suit property as among the description of properties owned by the deceased, Kimani Mugi Magenyi. How then did the Plaintiff receive a transfer from her deceased husband of the rights to the Plot marked as Plot No. 346 IND in Mpeketoni Town?
13. Fourthly, and most surprisingly as this might be the only recorded case of a deceased resurrect for purposes of effecting a transfer to his wife’s name 5 years after his death, the Plaintiff produced as P. Exh. 13 a letter where a clerk to the County Council of Lamu, Moses O. Semera effected a transfer of the deceased’s interest in Plot No. 346 IND to the Plaintiff. Suffice to state, if only but for the record that the County Council of Lamu had been dissolved by the year 2013 and the County Government of Lamu had taken over. There is also no way, as indicated in the letter produced as P. Exh. 13 that the deceased would have made the application for transfer on February 3, 2011 when he had died on



February 20, 2005. The court shall not belabour this point any further lest experts in extra-terrestrial activities challenge this assertion strenuously.

14. The Plaintiff also called witnesses in support of her case. PW 2, Francis Kamau Kinyanjui claimed to know the deceased well. He stated that the deceased owned an abattoir and that he worked for the deceased in a butcher. He would also transport meat for the deceased. However on cross-examination he contradicted his adopted testimony from his own statement that he used to sell soup at a butchery belonging to the deceased. This contradiction raises doubt in the mind of the court as to the veracity of his testimony. He could also not remember the year he left working for the deceased. At one point he said he worked for the slaughter house and later affirmed that he worked at the butchery and not the slaughterhouse. He was a witness whose testimony should not be relied on as factual.
15. As for the Defendants' case, they produced as D. Exh. 2 a letter of allotment dated October 28, 1984 in favour of Simon Ngige Kimani for Residential Plot No. 346 – Mpeketoni Township. It's approximate size was for 0.10 Hectares. It is clear that the land was initially allotted to him way back before the deceased was ever allotted a plot posthumously. They had earlier leased the property from the said Simon before later purchasing the parcel of land by the 2nd Defendant vide an Agreement for sale dated 28th September, 2009. From the foregoing, it is clear that the Defendants were in occupation of the suit property sometimes before 2009 and as from 2009 to date.
16. The question then begs, why didn't the Plaintiff demand or make claim to the land either prior to the sale or at the very least since the year 2009? It will not be farfetched to find that the suit property was either not her husbands nor was she aware of its existence since it was not even mentioned as part of the properties of the deceased.
17. The Defendants were able to call Simon Ngige Kimani as DW 2 and was candid enough to admit that the deceased was a fellow businessman who was into the trade of hides from slaughtered animals. This information was corroborated by DW 3, Peter Ndirangu Kariuki who worked as a slaughterer at the abattoir in 2005. He stated that he worked at the facility for well over 20 years. He was certain that the deceased was not the owner of the abattoir as claimed.
18. In view thereof, two things emerge. First that the Defendants have enjoyed an open and uninterrupted possession of the suit property until the filing of this suit. And, secondly, that neither the Plaintiff nor his witnesses have ever taken possession of the suit property since they were issued with the titles or letters of offer. For arguments sake, had the court found that the Plaintiff's title was genuine, then by operation of the law the Defendants would still have adversely possessed the suit property.
19. Notably, the Plaintiff in her pleadings did not challenge the Defendant's letter of offer as having been obtained fraudulently nor led evidence towards that effect. There is no reply to defence and counter-claim challenging this issue. Contrary to learned counsel Mr. Oduol's assertion, a letter of allotment is an instrument conferring ownership rights over an unregistered property. Justice Warsame as he then was in *Rukaya Ali Mohamed -vs- David Gikonyo Nambacha & Another* (Kisumu HCCA NO. 9 OF 2009 in this regard held that:

“Once (an) allotment letter is issued and the allottee meets the conditions therein, the land in question is no longer available for allotment since a letter of allotment confers (an) absolute right of ownership or proprietorship unless it is challenged by the allotting authority or is acquired through fraud, mistake or misrepresentation, or that the allotment was out rightly illegal or it was against the public interest.”



20. Simply put, the deceased could not have been allotted land already allotted to DW 2 unless it was challenged as having been unlawfully or fraudulently obtained. What concerns this court is that even when regularization was done by the County Government of Lamu no dispute was reported on the said parcel of land. How was the regularization done? It must have been done either without the benefit of going to the ground and ascertaining the status of the land in question or the ugly arm of bribery and name fixing was done by the committee of elders responsible for adjudication of the Plots at the ground level.
21. Either way, it is quite unfortunate that committee members and government officials would turn a blind eye to the ills brought about by underhand dealings in terms of land adjudication. The Minister for Lands, Lamu County should look into this issue. There are many genuine complaints of people who have lost or may lose their properties because of a few crafty individuals who took part in the adjudication process.
22. Matters were made worse when the Lamu County Surveyor refused to come to court to present a report he was tasked to prepare by this court on the issues at play. The Defendants were given a title for an area that they do not possess. It was for the Surveyor to conduct an extensive report and advise the court appropriately while being subjected to cross-examination over his findings. He failed to answer to court summons over four (4) times. I shudder to think what citizens go through at his office if he can ignore lawful summons by a court of law.
23. In view of the foregoing, this court finds that the Plaintiff's case in the main suit fails whilst the Defendants case in the Counter-Claim succeeds to the extent of the orders issued herein below.

B. What Orders Commend Themselves?

24. In the end this court makes the following orders: -
 1. A declaration is hereby made declaring Swaleh Ali Omar Shaabal as the lawful, legitimate and absolute owner of all that plot of land earlier registered as Uns. Residential Plot No. 346 – Mpeketoni Township on the approved Part Development Plan Ref. No. LMU/230/98/17 measuring about 0.10Ha;
 2. Consequently, an order is hereby issued compelling the Plaintiff Anna Nduta Kimani to surrender the certificate of title registered as Lamu/mpeketoni Town/410 to the Land Registrar, Lamu for cancellation and rectification of the Lands Register within the next 45 days;
 3. Further, an order is hereby issued compelling the 2nd Defendant Swaleh Ali Omar Shaabal to surrender the certificate of title registered as Lamu/mpeketoni Township/251 for cancellation and rectification of the Lands Register within the next 45 days;
 4. Further, the Land Registrar, The Surveyor And Physical Planner, Lamu County to forthwith move to the suit property, map out its area, survey and place beacons on the property and later adjust the Registry Index Map and all other relevant registers include the Land Register and issue a title to the 2nd Defendant with its own peculiar number in accordance with this order within 60 days of today's date;
 5. In view of the fact that the process of regularization was mishandled by the County Government of Lamu, they shall bear the costs of the exercise ordered in order 2, 3 and 4 herein;
 6. Costs follow the event, since the Defendant was successful in the main suit as well as in his Counter-Claim, he is hereby awarded costs of the suit as against the Plaintiff in the main suit;



7. In view of the far reaching orders herein, a stay of execution of the orders above is hereby issued for a period of 45 days from today's date.
8. Right of appeal is 30 days;

DATED THIS 10TH DAY OF OCTOBER, 2024 AT MPEKETONI LAW COURTS.

P.E. NABWANA

SENIOR RESIDENT MAGISTRATE

In the presence of:

Plaintiff: Oduol Adv.

Defendants: Abdul Munim Adv.

Court Assistant: Abbas Shongolo

