

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 68 OF 2021

JOMODA INVESTMENT LIMITED PLAINTIFF

VERSUS

ZAM ZAM SWALEH

DEFENDANT

JUDGMENT

Background

1. By a Complaint dated 7th April 2021, Jomoda Investment Limited (the Plaintiff) prays for judgment against the Defendant for:
 - a) **A declaration that it is the owner of Plot No. 5330/I/MN;**
 - b) **An order to issue against the Defendant for eviction and vacant possession from Plot No. 5330/I/MN;**
 - c) **An order removing the Defendants' name from the County Government of Mombasa rating records;**
 - d) **General damages for illegal occupation;**

- e) Any other relief this Court deems fit to grant in the circumstances; and**
- f) Costs and interest of this suit.**

2. Those prayers arise from the Plaintiff's contention that at all times material to this suit, it was the registered owner of the suit property. The Plaintiff accuses the Defendant of entering and taking possession of the said property without its permission or authority and thereafter causing its name to be registered at the Mombasa County Offices for the purpose of rates payment.
3. Zam Zam Swaleh (the Defendant) is opposed to the Plaintiff's claim. In her Statement of Defence dated 21st June 2021, the Defendant denied that the Plaintiff is the registered owner of the property known as Plot No. Mainland North/ Section I/5330. The Defendant avers that her title was the first registration with an earlier CR No. 58959 and states that the registration of the Plaintiff's title under CR No. 75462 is fraudulent and illegal as the property was then no longer available for allocation.

4. The Defendant further asserts that the suit property was allocated to herself by the Commissioner of Lands on 2nd July 1998 and she accepted and complied with all the conditions and was subsequently issued with a title therefor in the year 2012.
5. At the trial herein, the Plaintiff called four (4) witnesses while the Defendant testified as the sole witness in her case.
6. I have carefully perused and considered the pleadings herein, the testimonies of the witnesses as well as the evidence adduced at the trial. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates representing the parties.

Analysis and Determination

7. By this suit the Plaintiff urges the Court to declare that it is the owner of the parcel of land known as Plot No. 5330/I/MN and to issue an order for the eviction of the Defendant therefrom. It is the Plaintiff's case that at all times material, it was the registered proprietor of the suit property and that sometime in the year 2020, it came to realize that, the

Defendant had without its permission taken possession thereof.

8. The Defendant does not deny being in possession of the suit property. According to the Defendant she has since the year 1998 been in occupation of the suit property as a matter of right after the parcel of land was allocated to her by the Commissioner of Lands. The Defendant asserts that she was duly issued with a title deed for the suit property after she accepted and complied with all conditions pertaining to the allotment of the land to herself.
9. According to the Plaintiff, it had through one of its directors applied for the Plot from the issuing authority sometime in 1987 and it had all along been pursuing it but it was only issued with title documents and lease in the year 2020. Testifying through its director Daniel Nzau (PW1) the Plaintiff told the Court that it came to know that the Defendant is the one in occupation of the said property when it discovered that the Defendant had registered herself with the County Government as the one who is rateable. PW1 further told the Court he had come to know upon visiting the site

sometime in the year 2020 that it is the Defendant and her people who are in occupation of the property.

10. The Plaintiff did not produce a copy of the application they claim to have made to the issuing authority in 1987. Nor did they explain what had been happening on the land between 1987 and the year 2020 when they obtained the Lease. Instead at the trial herein, PW1 appeared to make a complete departure from their pleadings as filed herein.
11. Testifying at the trial herein, PW1 told the Court that they had on 8th May 1991 acquired the suit property from one Jackson Karitu Kimuri who was the first allottee of the suit property. In support of that position, the Plaintiff produced a Letter of Allotment dated 5th May, 1987 issued to the said Jackson Karitu Kimuri.
12. At Paragraph 6 and 7 of their Plaint dated 7th April 2021, the Plaintiff pleads as follows:

“6. The Plaintiff avers that it applied for this Plot from the issuing authority sometime in 1987 through one of its Directors and has all along been pursuing it and was only issued with title documents and lease in 2020 and the said Directors agreed and consented

that the title to be issued (sic) in the name of the Plaintiff.

7. The Plaintiff avers that sometime in the year (2020), it confirmed that indeed the Defendant was in its plot and issued a demand letter to the Defendant to vacate and hand over vacant possession but the Defendant has refused to co-operate and has remained in such illegal occupation and she is still there todate.”

13. While the Plaintiff submitted that their evidence before the Court did not substantially deviate from the pleadings, I was not persuaded that that was the case. As the Court of Appeal held in ***Dakianga Distributors (K) Ltd -vs- Kenya Seed Company Limited (2015) eKLR:***

“The system of pleadings operate to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the Court will be called upon to adjudicate between them. It thus serves the two-fold purposes of informing each party what is the case of the opposite party which he

will have to meet before and at the trial, and at the same time informing the Court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the Court will have to determine at trial.”

14. In the ***Independent Electoral & Boundaries Commission & Another -vs- Stephen Mutinda Mule & 3 Others (2014) eKLR***, the Court of Appeal quoted with approval the Supreme Court of Malawi in ***Malawi Railways Limited -vs- Nyasulu (1998) MWSC 3*** where it was stated thus:

“As parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings for the sake of certainty and finality each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he had to meet and cannot be taken by surprise at trial.”

15. In the matter herein, whereas the Plaintiff stated at Paragraph 6 of the Plaint that it did apply for the suit property through one of its Directors in the year 1987, the evidence on record adduced by the Plaintiff’s main witness is

that the Plaintiff acquired the property from one Jackson Karitu Kimuri on 8th May 1991. Even where one were to take it that the Plaintiff acquired the property in 1991 as stated by PW1, that version does not add up as the certificate of incorporation produced in Court Shows that the Plaintiff was not incorporated as a company until some six (6) years later on 20th February 1997.

16. As it were, while the Plaintiff at the trial produced documents purporting that it had purchased the suit property from a third party in the year 1991, that version was never pleaded at all and could not therefore be considered by this Court. In that respect this Court relies on the decision of the Supreme Court in ***Raila Odinga & Another -vs- IEBC & 2 Others (2017) eKLR*** wherein the apex Court held thus:

“In the absence of pleadings, evidence if any, produced by the parties cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely

to be raised and they may have an opportunity of placing the relevant evidence before the Court for consideration. The issues arise only when a material proposition of fact of law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a Court to frame an issue not arising on the pleadings...”

17. Arising from the foregoing, it was clear to me that the purported evidence adduced by the Plaintiff that it had acquired the suit property from a third party in the year 1991 could not be considered by this Court. It was equally clear from the evidence adduced that the allegation that the Plaintiff had applied for and was allocated the suit property in 1987 was never substantiated.

18. In regard to the burden of proof, Section 107 of the Evidence Act provides as follows:

“107 Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. When a person is bound to prove

the existence of any fact it is said that the burden of proof lies on that person.”

19. Indeed, even where one was to consider the narrative that the Plaintiff had purchased the suit property in 1991 from the original allottee said to be one Jackson Karitu Kimuri, that position was clearly untenable in law. That position was settled by the Supreme Court in ***Torino Enterprises Limited -vs- Attorney General (Petition 5 (E006) of 2022) [2023] KESC 79 (KLR) (22 September 2023) (Judgment)*** where the Court held at Paragraph 60 as follows:

“Suffice it to say that an Allottee, in whose name the allotment letter is issued, must perfect the same by fulfilling the conditions therein. These conditions include but are not limited to, the payment of a stand premium and ground rent within prescribed timelines. But even after the perfection of an allotment letter through the fulfillment of the conditions stipulated therein, an allottee cannot pass valid title to a third party unless and until he acquires title to the land through registration under the applicable law. It is the act of registration that confers a

transferable title to the registered proprietor, and not the possession of an allotment letter.”

20. The Supreme Court went on to state at Paragraph 61 of the said Judgment as follows:

“We must reiterate the fact that an allotment letter in and by itself, is incapable of conferring a transferable title to an allottee. Put differently, the holder of an allotment letter is incapable of transferring or passing valid title to a third party on the basis of the allotment letter unless and until he becomes the registered proprietor of the land consequent upon the perfection of the Allotment Letter. It matters not therefore that the allotment letter has not lapsed.”

21. In the matter herein, it was not in dispute that the Defendant’s title was registered first as CR No. 58959 and that she was registered as the owner of the suit property and issued with her title on 25th January 2013. On the other hand, the Plaintiff’s title was registered as CR No. 75462 and a Certificate of Title was issued in its name on 27th August 2020.

22. Considering the question of double allocation in ***Divalle Limited -vs- ASL Limited & 2 Others (2015) eKLR***, the Court of Appeal held as follows:

“It is trite law that where two competing titles exist, the first in time will prevail. This was the finding in the case of Wreck Motors Enterprises - vs- The Commissioner of Lands and Others, Civil Appeal No. 7 of 1997 where the Court held that “Where there are two registered grants, the earlier grant takes priority.”

23. It was interesting to note that the Plaintiff did not contest the fact that the Defendant had been in occupation and possession of the suit property at all times material to this suit. According to the Defendant, she had been in occupation of the suit property from the year 1998 when she asserts she was allocated the land. It was her case that she had since fenced the land and as confirmed by the Plaintiff, was rearing livestock thereon.

24. The Court of Appeal had the opportunity to deal with the effect of possession of land in ***Henry Muthee Kathurima -***

vs- Commissioner of Lands & Another (2015) KECA

892 KLR where it was held as follows:

“We note that it is not in dispute that the 2nd Respondent has always been in actual and physical occupation of the suit property from 1989 to-date. The appellant must have known of this fact when he applied for the suit property to be allotted to him. In his application for allotment of a commercial plot made by letter dated 21st March 1997, the appellant identified the suit property and marked it red in the attachment. The inference to be drawn is that the appellant identified and knew the specific plot he desired and knew that the 2nd Respondent was in physical possession; it was the appellant’s clear intention not only to dispossess the 2nd appellant of the suit property but to acquire a Public Utility land that was in possession of a public entity. The bona fides of the appellant in applying for the specific suit property knowing that it was in possession and occupation of a public entity is put in issue. In *Mwangi & Another -vs- Mwangi (1986) KLR 328*, it was held that the rights of a person in possession or occupation of land are equitable rights which are binding on the land. It is our view that the 2nd

Respondent having been in possession of the suit property, since 1989 to date, its rights are binding on the suit property and even if the appellant had any claim to the suit property, the 2nd Respondent's possessory rights are overriding."

25. In the matter herein, despite its claim that it acquired the suit property in the year 1991, the Plaintiff has never been in possession or occupation of the suit property. On the other hand, the Defendant has been in possession of the property since the year 1998 and her possessory rights are overriding.
26. It follows that I was not persuaded that there was any merit in the Plaintiff's case. The same is hereby dismissed with costs to the Defendant.

Judgment dated, signed and delivered in open court and virtually at Mombasa this 23rd day of April, 2026.

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J.O. OLOLA
JUDGE

In the presence of:

- a) Ms. Firdaus Court Assistant.
- b) Mr. S. Oddiaga Advocate for the Plaintiff
- c) Mr. A. Wafula Advocate for the Defendant