

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC APPEAL NO.E021 OF 2024

JOSEPH MBARIA MUCHINA.....
APPELLANT

VERSUS

FRANCIS MURERWA MBUURI.....1ST
RESPONDENT

ANN KAROKI MURERWA.....2ND
RESPONDENT

SUSAN NJERI KIBIRU.....3RD
RESPONDENT

***(Being an appeal from the judgement of Hon E.H. KEAGO
(CM) delivered in Nyahururu CMCC NO.236 OF 2013 on
9/10/2024)***

JUDGMENT

The case before the trial court

1. The suit before the trial court was instituted by the appellant herein vide a plaint dated 2.12.2013 and amended on 25.2.2015. The plaintiff contends that he is the legal owner of the suit plot no. Nyahururu Municipality

Block 8/314, having acquired the same from one Mary Nyambura Mbugua on 19.8.1988 and he is in actual occupation of the said plot. That vide the letter dated 22.9.2005, the Commissioner of lands forwarded the lease documents to the suit land duly signed and stamped ready for registration in plaintiff's favour. However, the registration could not take place as the defendants had fraudulently acquired the lease on 7.4.2005.

2. The plaintiff therefore sought judgment in the following terms;

a) A declaration that the plaintiff is the sole absolute legal owner and allottee of plot No. NYAHURURU MUNICIPLAITY BLOCK 8/314 and the Certificate of lease issued to the 1st and 2nd defendants on the 7/4/2005 and entry No. 1 and 2 in the register dated 4/10/04 be nullified.

b) That the District Land Registrar - Nyandarua be ordered to register the plaintiff as the registered proprietor of PLOT NO: NYAHURURU MUNICIPALITY BLOCK 8/314 and to issue him with a Certificate of Lease.

c) Costs of the suit plus interest.

d) Any other or further reliefs that this honourable court may deem fit and just to grant.

- 3.** The 1st and 2nd defendants filed a joint statement of defence dated 13.1.2014, which was later amended. However, the document presented at page 120 as the amended defence is incomplete. The two defendants deny the allegations levelled against them, asserting that they are the current registered owners of the suit property.
- 4.** The amendment of the plaint brought on board a 3rd defendant, one Susan Njeri Kibiru who was apparently served through the Newspaper advertisement, but she did not enter appearance.
- 5.** At the trial, the plaintiff, JOSEPH MBARIA MUCHINA called 3 witnesses, himself testifying as PW1. His evidence was that he bought the suit plot from Mary Wambui Mbugua in 1988 as per the agreement at a price of Ksh.60 000 and the transfer was effected at Ardhi house in Nairobi. That the seller had a letter of allotment dated 19.7.1986. He thereafter went to pick up the lease but he learnt that

someone else had been issued with a title. He applied for the green card so as to know the persons who had the title. He avers that the issuance of the title to the defendants was done fraudulently. He produced the documents in his list as exhibits.

6. In cross examination, Pw1 stated that he has no title though he was in the process of getting the same, and he is sure that the suit plot belongs to him. He avers that he was paying the land rates before the name of Susan was entered in the register.

7. PW2 is one NATHAN GIOCE GATHERE a land Registrar in Nyandarua and Samburu counties. He avers that once payment for the allotment letter is made, and the documents are processed, the allottee comes to the Registrar for registration. That as per exhibit 4, this was a letter from the Commissioner of lands forwarding the lease certificate for execution and it was copied to the plaintiff. However, their office could not register the same because there were records indicating that the parcel was in the name of a different person. That the Registrar informed the Commissioner of lands of this situation

through a letter dated 7.5.2010 requesting the commissioner of lands to confirm the genuine allottee, of which the latter wrote requesting that the lease to the 3rd defendant be forwarded, but the Land Registrar could not trace the same. According to PW2, he could not confirm how the 3rd defendant came to be registered as the owner of the suit land.

8. On cross examination, PW2 stated that a Land Registrar cannot work without documents. He however confirms that the green card indicates that Susan Njeri was the lessee for 99 years as from 1.7.1986 from the Government of Kenya. He cannot tell how the 3rd defendant acquired the suit land. He avers that plaintiffs documents are unregistered due to the anomaly. They do not have documents relating to records of allocation and informal transfers as some documents are in Nairobi. He confirms that the current registered owners of the suit land are the 1st and 2nd defendants.

9. PW3 is one OJWANG OMOLO PATROBA, an assistant Director at Land Administration. He had the correspondence file no 117443 containing the history of

the suit plot. There in was the letter of allotment to Mary Wambui Mbugua which was an allocation of an unsurveyed plot in Nyahururu Municipality “k” of 1986. That the allottee accepted the letter of allotment vide her letter of 17.7.1988 and she agreed to pay the fees of sh.6 480 of which a receipt was issued on 30.8.1989 where there was an underpayment of sh 200. The amounts were then paid on 3.8.1999. That Mary wrote a demand letter of 4.8.1999 requesting to transfer the plot, which request was allowed by the Commissioner of Lands on 19.8.1999. That the Commissioner wrote to the Director of survey to confirm that the parcel had been paid for, thus the parcel was given the number Nyahururu Municipality Block8/314 as per the authentication document dated 7.8.1999.

- 10.** The consent for transfer indicated that Mary Wambui was transferring the suit land to Pw1 for sh.30 000 which the latter paid. The Director of Survey then forwarded the RIM to the Commissioner of Land for the processing of the lease. Thus on 15.7.2005, the Commissioner of Lands forwarded the stamped lease to the Land Registrar Nyandarua.

11. However, the Registrar wrote to the Commissioner of lands vide the letter of 4.7.2011 indicating that there was a lease in favour of the 3rd defendant and the land had been transferred to the 1st and 2nd defendants. The Commissioner of lands requested for the said lease and the letter forwarding the lease. Then a letter dated 1.8.2013 was done by the Chief Land Registrar which was addressing a complaint by the plaintiff. The Registrar did not provide the letter and the lease as requested and there was no further communication.

12. PW3 stated that there was no other lease prepared except the one for the plaintiff

13. On cross examination, PW1 stated that once the letter of allotment is issued, it is accepted within 30 days, but this is not followed strictly. That the first receipt was made on 30.8.1998 and the second on 18.10.1999. The letter of allotment has to be verified by the Commissioner of lands, but this was not done. He avers that they have the informal transfer which was issued with a lease to the plaintiff. However, the 3rd defendant was registered as a first lessee on 1.10.2004 which was not cancelled. and the

current registered owners are the 1st and 2nd defendants. He avers that some registrars issue certificate of leases without proper documents.

14. The case for the 1st and 2nd defendants was advanced by FRANCIS MURERWA M'BUURI, DW1. He is the 1st defendant and he identifies the 2nd defendant as his wife. He adopted his witness statement dated 13.1.2014 as his evidence. He also produced their documents as exhibits. He avers that they did a search and confirmed that the proposed seller cum lesee was the registered owner of the suit land, thus they entered into a binding agreement for the sale of the said land at a cost of sh 150 000. They then paid stamp duty and they were issued with a lease certificate.

15. That they fenced the land, but they suspect the plaintiff destroyed the same. They reported the matter to the police, and the plot was not re-fenced. He avers that they are the ones who have been paying rates to the former municipal council.

16. On cross examination, Dw1 stated that leaseholds were usually given by the Commissioner of lands based at Nairobi, who was also issuing the letters of allotments.

That the 3rd defendant did not show him any letter of allotment or payments for the stand premium. He avers that the lease is not being used by anybody.

17. In the judgment delivered on 9.10.2024, the trial court found that the titles of the 1st and 2nd defendants could only be impeached by Mary Wambui Mbugua who did not testify, thus the plaintiff had no good title. It was also found that the burden of proving fraud on the part of the 1st and 2nd defendants fell on the plaintiff as the 3rd defendant was the 1st lessee of the suit land from the Government of Kenya and the latter had not complained of being defrauded by Susan. Thus the absence of documents at the land registrar's office did not amount to fraud. The trial court therefore dismissed plaintiff's claim with costs to the 1st and 2nd defendants.

The Appeal

18. Aggrieved by the aforesaid decision, the appellant filed his memorandum of appeal raising ten (10) grounds of appeal summarized as follows; That the learned magistrate erred in law and fact in finding that the appellant did not prove

his case, ignoring the evidence of Pw3, finding that the certificate of lease held by the 1st and 2nd defendants could only be impeached by Mary Wambui Nganga and invoking the Limitation of Actions Act.

19. The appeal was heard by way of written submissions. The submissions of the appellant are dated 13.11.2025. He frames the key issue for determination as ; Who as between Mary Wambui Mbugua and Susan Njeri Kibiru was the bonafide owner of the suit property. He avers that allocation of leasehold plots starts with Commissioner of lands and not the Land registrar, thus the certificate of lease held by Susan Njeri had to be traced to the Commissioner of Lands, but there was no iota of evidence to that effect. Thus the 3rd defendant did not have a clean title. To this end, the appellant regurgitated the evidence tendered for his case, particularly the one given by Pw3 giving a step by step account of how his interest could be traced in the land administration records. To support this argument, the appellant relied on the cases of Alice Chemutai Too v Nickson Kipkurui Korir & 2 Others (2015) KEELC 151 (KLR), Munyu Maina v Hiram Gathinja Maina

(2013) ECLR, Esther Ndege Njiru & Another v Leonard Gatei (2014) eCLR and Arthi Highway Developers Ltd vs Westend Butchery Ltd & Others Civil Appeal No. 246 of 2013.

20. The appellant further argues that it was only after a green card dated 5.11.2013 was supplied to him that he learnt that the suit land had been transferred to 3rd parties. Thus, it was erroneous for the trial court to hold that his claim was time barred.

21. The submissions of the 1st and 2nd respondents are dated 14.1.2026. They argue that indeed the claim of the appellant was time barred as he waited for 25 years before coming to court, adding that the pleadings of the appellant were not even served upon the 3rd respondent.

22. On ownership of the suit plot, it was submitted that the said land was never allocated to the appellant, thus he could never claim to be the owner. To this end, it was submitted that a letter of allotment per se is nothing but an invitation to treat. It does not constitute a contract between the offerer and the offeree and does not confer an interest in land at all. This far, the respondents relied

on the cases of **Torino Enterprise Limited v Attorney General (Petition 5 (E006) OF 2022 (2023) KASC 79 (KLR).**

- 23.** The respondents further argued that the appellant did not discharge the burden of proof on the issue of fraud, unlawfulness and illegality of their title and relied on the case of **Vijay Morjoria V Madhusingh Dabar & Another (2000) KLR and Kinyanjui Kamau vs George Kamau (2015) eKLR** to buttress their arguments.
- 24.** The respondents contend that the suit property was registered in the name of the government as the lessor which entity was not sued in these proceedings. That no evidence was adduced regarding corrupt schemes on the part of the respondents, thus the trial court was right in dismissing the claim of the appellant. _
- 25.** The court has considered the record of the trial court as well as the rival submissions. This being a first appeal, the court reminds itself of its primary role namely, to re-evaluate, re-assess and re-analyse the evidence and then determine whether the conclusions reached by the learned magistrate are to stand and give reasons either

way. That was the pronouncement of the court in the case of **Abok James Odera t/a A.J Odera & Associates Vs John Patrick Machira t/a Machira & Co. Advocates (2013) eKLR, Selle and Another Versus Associated Motor Boat Company Ltd & Others [1968] EA 123.**

- 26.** The issues falling for determination turns on the question of service of pleadings upon the 3rd respondent, limitation of the appellants claim as well as the ownership of the suit plot.
- 27.** On the issue of service upon the 3rd respondent, it is noted that the said issue was only raised by the respondents in their submissions before the trial court. The said issue was not made a subject of contest at the trial. However, submissions cannot be used to introduce new facts, nor can they be used as evidence and they hold their place as persuasive arguments;
- 28.** On limitation, I find that the trial court took up the issue when it was dealing with the question as to whether the plaintiff should be registered as the owner of the suit land. The court stated that;

“The plaintiff didn’t acquire good Title as the validity of the contract was 6 years and the claim for land is restricted to a period of 12 years. There are no good reasons why the plaintiff waited for that period before moving the Court. The claim suffers the legal defects and the prayers sought are affected by effluxion of time element”

29. In the case of **Galaxy Paints Company Ltd V Falcon Guards Ltd [2000] eKLR** the court held that;

“The issues for determination in a suit generally flowed from the pleadings, and a trial court could only pronounce judgment on the issues arising from the pleadings or such issues as the parties framed for the courts determination”.

30. While in **Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR**, cited in **Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR**, it was held that;

“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 its consideration. The issues arise only when a material proposition of fact or 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.....”Empasize added.

31. Nowhere in the pleadings of the parties was the issue of limitation raised, thus it was erroneous for the trial court to make a determination that the claim of the appellant was time barred. Therefore, it was neither desirable nor permissible for the trial court to frame the issue of limitation which did not arise from the pleadings.

32. Needless to state that the appellant availed tangible evidence of how the progressive realization of his interests in the suit land was taking shape over the years. Such that by 19.1.2010, the Land Registrar Nyandarua was giving reasons unto the Commissioner of Lands as to why the suit land could not be registered in the name of the appellant. Further, at paragraph 4 of his witness statement, the appellant stated that;

“The current District Land Registrar - Nyandarua informed me in November 2013 that he could not issue the lease as my plot is in the names of the defendants herein and he supplied me with a copy of the green card to prove the same.”

33. There was no rebuttal to the above evidence. I am therefore in agreement with the submissions of the appellant that he had no reason to move to court before year 2013 as he only came to know the registration status of the suit land when he was given the green card. To this end, I find that the trial court made an erroneous finding that the claim of the appellant was time barred.

34. On ownership, it is pertinent to note that there are two competing claims to the suit property. On one hand is the claim of the appellant rooted from the allotment issued to one Mary Wambui Mbugua on 19.7.1986. The appellant contends that he bought the suit property from the said Mary Wambui Nganga. On the other hand, the two respondents are the registered owners of the suit property vide the Certificate of lease issued to them on 7.4.2005. They apparently bought the suit property from the 3rd respondent who was the registered owner of the suit land as at 4.10.2004.

35. The provisions of Article 40 (1) of the Constitution do enshrine the right to own property, but there is a rider at Article 40 (6) where it is provided that;

“The rights under this Article do not extend to any property that has been unlawfully acquired”

36. Thus, the post 2010 Constitution has brought about new jurisprudence where the central question is no longer *“who is the registered owner”* but *“How did you become the registered owner”*. In **Daudi Kiptugen v**

Commissioner of Lands & 4 Others [2015] eKLR

the court stated that:

“...the acquisition of title cannot be construed only in the end result; the process of acquisition is material. It follows that if a document of title was not acquired through a proper process, the title itself cannot be a good title.”

37. In **Sehmi & another v Tarabana Company Limited & 5 others (Petition E033 of 2023) [2025] KESC 21 (KLR) (11 April 2025) (Judgment) Neutral citation: [2025] KESC 21 (KLR)**, the Supreme Court of Kenya cited its earlier decision of **Dina Management Limited vs. County Government of Mombasa & 5 Others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR)**, where the court stated that;

“Indeed, the title or lease is an end product of a process. If the process that was

followed prior to issuance of the title did not comply with the law, then such a title cannot be held as indefeasible. The first allocation having been irregularly obtained, HE Daniel Arap Moi had no valid legal interest which he could pass to Bawazir & Co (1993) Ltd, who in turn could pass to the appellant.

Having found that the 1st registered owner did not acquire title regularly, the ownership of the suit property by the appellant thereafter cannot therefore be protected under article 40 of the Constitution. The root of the title having been challenged, as we already noted above, the appellant could not benefit from the doctrine of bona fide purchaser.”

[Emphasis added].

38. What the new jurisprudence portends is that the sanctity of a title is contingent upon the legality of the

process that created it. Consequently, a registered proprietor cannot merely dangle the instrument of title as proof of ownership when the root is challenged.

39. In the case of **Munyu Maina v Hiram Gathiha Maina, Civil Appeal number 239 of 2009**, the Court of Appeal held as follows:

“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 in challenge 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 including any and all interests which would not be noted in the register”.

40. From the above analysis of case law, it is apparent that the title held by the two respondents is challenged by the interests of the appellant.

41. At this juncture, it is pertinent to point out that the process of acquisition of an interests in government land in the pre-2010 Constitution was governed by law and not a free fall exercise. Thus, the claim of the allotment to Mary as well as the lease to Susan must flow from a known legal framework.

42. The applicable law on allocation of public land was mainly the Government Lands Act. Such an allocation of government land would require the applicant to surmount various steps captured in a legion of decisions including; **Dina Management Limited v County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (Constitutional and Human Rights) (21 April 2023) (Judgment) Neutral : [2023] KESC 30 (KLR), Registered Trustees of Sheik Bayed Bin Sultan Al Nahyan v Pelican Engineering & Construction Company Limited & 4 others (Environment & Land Case 639 of 2015) [2024] KEELC 6534 (KLR) (3 October 2024)**

(Judgment) Neutral citation:
[2024] KEELC 6534 (KLR), Ali Mohamed Dagane (Granted Power of Attorney by Abdullahi Muhumed Dagane, suing on behalf of the Estate of Mohamed Haji Dagane) v Hakar Abshir & 3 others [2021] eKLR; Nelson Kazungu Chai & 9 Others v Pwani University (2014)eKLR.

The steps include; having an approved PDP, making an application for the allocation, issuance of the allotment letter, payment of the requisite fees, survey of the plot (where it is given the parcel number), processing of the new grant and then the registration of the parcel by the Land Registrar.

43. The appellant has given a consistent account of how he acquired his interest in the suit land. That the said land was allotted to one Mary Wambui vide the allotment letter of 19.7.1986 which is at page 12 of the Record of Appeal. The same was identified as UNSURVEYED PLOT 'K' NYAHURURU MUNICIPALITY. The appellant bought the said parcel vide the sale agreement dated 19.8.1988 and

the consent for the transfer was given by the Commissioner of lands on the same date (see document at page 61 of the Record of Appeal), paving way for the preparation of the lease in favour of the appellant (see document at page 69 of the Record of Appeal).

44. However as per the letter from the Land Registrar dated 19.1.2010 (page 39 of the Record of Appeal), that office informed the Commissioner of Lands that the lease could not be registered as the land was registered in the name of the 3rd respondent vide a lease dated 7.4.2005. The Commissioner of lands through his letter of 4.7.2011 stated as follows;

“In order for this office to investigate the matter conclusively, kindly forward a copy of the letter that forwarded the lease in favour of Susan Njeri Kibiru and a copy of the said lease.”

45. Even the office of the Chief land Registrar did write to their Nyahururu office requesting for the lease of the suit property but nothing was forthcoming.

46. PW3 an assistant Director land administration gave a historical account of the suit property. He had the correspondence file for the said land and he stated that the suit land was Plot 'K' at the time of allocation and was given the block number upon survey. The documents in their records indicate that indeed the suit property was allocated to Mary Wambui and was then transferred to the appellant through the informal transfer.

47. This far, it is apparent that the appellant has met most of the requirements leading to crystallization of his interests in the suit land. The respondents contend that the allotment expired as the fees for the allotments were not paid in time. However, there is no evidence that the said fees were ever rejected, or the allotment cancelled. The document at page 57 of the Record of Appeal indicates that the Commissioner of lands was even requesting for the balance of sh.200 as at 14.11.1988. Thus, there is no evidence to indicate that the allotment issued to Mary Wambui was ever invalidated. This far, it is apparent that the appellant had availed sufficient evidence confirming that he was lawfully entitled to the suit property.

48. In converse, the respondents have no historical account of the suit property. The green card availed by the appellant bears the first entry of 4.10.2004 as registration in favour of Susan Njeri, of which previously the land belonged to the Government of Kenya. That registration is in tandem with the certificate of official search availed by the two respondents at page 87 of the Record of Appeal. However, and as pointed out in the body of this judgment, registration of land comes at the tail end, it's the last step in the acquisition of rights and interests in land. Thus, such registration has to be supported by a lawful process, it could be an allocation which was carried out through the office of the Commissioner of lands of which the custodian of the primary allocation documents fell under the land administration department under the ministry of lands. However, other acquisitions of land rights and interest did emanate from the process of resettlement programmes under the land adjudication and settlement processes or allotment of trust land. The registration of Susan Njeri as the owner of the suit land does not appear to be anchored under any known law. The lease just happened and is

therefore invalid, illegal and unlawful and should be cancelled.

49. The latin maxim "*Nemo dat quod non habet*" which means "no one can give what they don't have" is therefore applicable in the case of the title held by the respondents. They simply hold a paper title. I must however point out that the respondents appear to be innocent purchasers as they simply bought the land from the alleged owner of the suit land. Nevertheless, and as pointed out in the case of **Sehmi & another v Tarabana Company Limited & 5 others (Petition E033 of 2023) [2025] KESC 21 (KLR) (11 April 2025) (Judgment) Neutral citation: [2025] KESC 21 (KLR)**, the jurisprudence of the torrence system no longer holds when the root of the title has been challenged.

50. I come to the conclusion that the trial magistrate erred in dismissing the claim of the appellant. I proceed to render this judgment in the following terms;

1) The Appeal is hereby allowed.

2)The judgment delivered on 9.10.2024 in Nyahururu CMCC NO. 236 OF 2013 is hereby set aside.

3)The appellant's suit in Nyahururu CMCC NO. 236 OF 2013 is hereby allowed.

4)On costs, the court has found that the respondents may have been innocent purchasers albeit of nothing. I desist from burdening them with costs. As such, each party shall bear their own costs of the appeal and before the trial court.

**DATED, SIGNED AND DELIVERED AT NYAHURURU
THIS 6TH DAY OF MAY 2026 THROUGH MICROSOFT
TEAMS.**

LUCY N. MBUGUA

JUDGE

In the presence of:

Bedan - Court Assistant

Waichungo Martin for the Appellant

Joel Sigilai for the 1st and 2nd Respondents

FINAL COPY