



Kigano v County Government of Mombasa & 2 others (Environment and Land Case 302 of 2018) [2025] KEELC 5298 (KLR) (16 July 2025) (Judgment)

Neutral citation: [2025] KEELC 5298 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND CASE 302 OF 2018**

**SM KIBUNJA, J
JULY 16, 2025**

BETWEEN

CLEMENT MUTURI KIGANO PLAINTIFF

AND

COUNTY GOVERNMENT OF MOMBASA 1ST DEFENDANT

GRACE WANGUI MAHUTHU 2ND DEFENDANT

NATIONAL LAND COMMISSION 3RD DEFENDANT

JUDGMENT

- Through the plaint dated 19th December 2018, the plaintiff sued the defendants and averred inter alia that Mombasa/MN/Block 1/713 (original 392/VI/MN), the suit property, was allocated to one Mwakandi Ngao Mwakandi, sometime in 1987 by the defunct Municipal Council of Mombasa, who then sold it to him. That Mr. Mwakandi donated an irrevocable power of attorney to him, which was registered on 29th September 1992 with the Mombasa Titles Registry as C.R. PA 7065. That the said power of attorney was executed on 26th September 1992 and on the same date, Mr. Mwakandi wrote a letter to the Director of Housing Development Department, of the defunct Mombasa Municipal Council informing the said office that he had assigned his rights to the plaintiff. That the plaintiff thereafter fenced the suit property using barbed wires and cedar posts, but sometime in 2015, he visited the suit property and found temporary structures erected thereon. He made enquiries from Mr. Mwakandi who told him that he knew nothing about it. The plaintiff later conducted a search at the 1st defendant and discovered that the 2nd defendant had been registered as the new owner. That the said registration was done without notice to himself or Mr. Mwakandi, the original allottee, and he therefore filed Mombasa High Court Miscellaneous Application 16 of 2015 (J.R) seeking to quash the registration of the 2nd defendant as the owner of the suit property, but the court dismissed it on 23rd October 2018, indicating that this court would be best placed to handle the matter. That during the proceeding of the above case, he found out that Mr. Mwakandi was allocated the suit property in 1987



by the defunct Municipal Council of Mombasa, and that the defunct Municipal Council had sent a notice of repossession of the suit property for alleged non-payment of land rates and a loan advanced to Mr. Mwakandi. That the suit property was thereafter reallocated to the 2nd defendant on 18th October 1995, and that she was not aware that Mr. Mwakandi was the original allottee. That the 2nd defendant was registered as the owner of the suit property and issued with a certificate of lease on 17th March 2009. He therefore sought for the following prayers:

- a. “A declaration that the property known as title No. Mombasa/MN/Block 1/713 (Originally Plot No. 392/VI/MN) belongs to the plaintiff.
 - b. A declaration that the purported repossession of plot 392/VI/MN from Mwakandi Ngao Mwakandi and the purported re-allocation of the same to the 2nd defendant by the defunct Municipal Council of Mombasa on 18th October 1995 was wrongful, null and void.
 - c. A declaration that the registration of the 2nd defendant as owner of title No. Mombasa/MN/Block 1/713 (Originally Plot No. 392/VI/MN) on 17th March 2009 is null and void.
 - d. An order for the cancellation of registration and the Certificate of lease issued to the 2nd defendant on 17th March 2009 in respect of the suit property.
 - e. An order for vacant possession/eviction of the 2nd defendant from the suit property.
 - f. A permanent injunction restraining the 2nd defendant from developing, remaining on, selling, transferring, alienating, charging, mortgaging, pledging or in any other manner howsoever interfering with the land comprised in title No. Mombasa/MN/Block 1/713, originally plot No. 392/VI/MN, situate in Mikindani Site and service Scheme.
 - g. In the alternative and without prejudice to the above prayers, an order for payment of the sum equivalent to the market value of the suit property as at the date of judgement.
 - h. Costs of the suit and interest in (g) above.”
2. The plaintiff’s claim is opposed by the 1st Defendant through their undated Statement of Defence in which it denied all the allegations of the plaintiff and inter alia averred that he fraudulently attempted to obtain the suit property without following the due procedure; that according to their records, the plaintiff was not the beneficial owner of the suit property; that the suit property was never allotted to the plaintiff and that it has never consented to any transfer of the said plot to the plaintiff; that the plaintiff had not paid any rates or any other liabilities in respect to the suit property.
 3. The 2nd defendant filed her Defence on 20th February 2019 and denied the allegations in the plaint and reiterated that she was not aware that the suit property had been allocated originally to Mr. Mwakandi Ngao. She also disputed the alleged letter sent to the defunct council stating that it did not bear an official stamp and that by 1992, the defunct council had sent three notices demanding arrears issued on 5th July 1988, 26th February 1990 and another one on 31st December 1991. She alleged that the defunct council could not have given consent for Mr. Mwakandi to transfer his interest to the plaintiff, and that the sale was only meant to defraud the plaintiff. She blamed the plaintiff for not investigating whether Mr. Mwakandi owed any rent arrears. She also alleged that when she visited the suit property sometime in 1995, there was no indication of occupation or a fence or cedar posts, and that if she had seen such structure, she would not have applied for allotment. She averred that she took possession of the suit property immediately after allocation in 1995. That her lease runs from 1st March 1981 and she has immensely developed the suit property, with underneath water storage tanks and parks the water tankers there. She further averred that she learned from the High Court judicial review suit that the plaintiff claimed ownership of the suit property by virtue of a power of attorney



issued to him in 1992, and that Mr. Mwakandi had allegedly informed the defunct council that he transferred his proprietary interest. She however averred that the said letter does not bear an official stamp of the council confirming it was received. That the allocation of the plot to Mr. Mwakandi Ngao was cancelled on January 1995 for non –payment of the rates amount demanded by the defunct council. That the council had issued a demand notice on 20th February 1990 for Kshs. 5,672.40 arrears of land rates, and another on 31st December 1991 for a demand of Kshs. 11,344.80 and a further notice on 10th April 1993 for Kshs. 14,890.05. That on 31st January 1995 the defunct council issued a notice of cancellation of allocation to Mr. Mwakandi and repossessed the suit property, which resulted thereafter in advertisement for fresh application and it was allocated to her. She applied for the suit to be dismissed.

4. The 3rd defendant did not enter appearance and or file any defence or participate in the hearing.
5. The plaintiff testified as PW1, and adopted as his evidence in chief his witness statement dated 18th December 2018 and list of documents of 19th December 2018. He testified that he has a power of attorney from Mr. Mwakandi, but he could not transfer the suit property to his name because it was registered with the 2nd defendant. He admitted he had not been paying rates to the 1st defendant, and added that he could not tell whether it was being paid before he got the power of attorney. He stated that he did not check whether the fees required under the allotment letter had been paid by Mr. Mwakandi. He added that even if fees under the letter of allotment had not been paid, there is a procedure to be followed before revocation of the allocation, which was not complied with. He stated that other than what the 2nd defendant has disclosed to the court through her pleadings, he does not know how she acquired the title to the suit property. He was adamant that even though the 2nd defendant had made the necessary payments under the allotment letter, it could not cure the illegality of the 2nd defendant in obtaining the said title. He also testified that the 2nd defendant knew that the suit property had been allocated to another person before her because he had fenced the suit property. PW1 denied being involved in any acts of fraud in relation to the suit property.
6. The 2nd defendant testified as DW1 and adopted her witness statement dated 2nd June 2021 as her evidence in chief and relied on the list of documents of even date. She testified that she went to the defunct council offices in 1995 and saw an advertisement for people to apply for allocation of the suit property. She presented her application for allotment of the plot and she emerged successful. She was given an allotment letter for the suit property and she paid the requisite fees, and thereafter was allowed to take possession. She told the court that the land was vacant and bushy and that after taking possession, she and her husband built water tanks, and used the rest of the suit property to park their vehicles for their business of selling water. That sometimes in 2003 she went to the defunct council offices and collected her lease and left the letter of allotment there. During cross-examination, she stated that she has never seen the plaintiff on the suit property and she has never been asked to vacate. That she has been paying rates. She admitted that the allotment letter dated 9th January 1987 produced by the plaintiff was signed by the same person who signed her letter of allotment dated 18th October 1995, and that they are both of parcel 392. She denied ever using the suit property to take a loan and denied that the receipt at page 18 of her list of documents was for a plot loan from January 1988 to 1995, which was in arrears. She added that she was not aware that the suit property had a loan when she was applying for it. That she paid the loan indicated so that she could start developing the suit property. She was categorical that she was not involved in the repossession of the suit property and did not collude with an individual named Dziro, who worked in the defunct council, to obtain the suit property illegally.
7. The learned counsel for the plaintiff and the 2nd defendant filed their submissions dated 22nd April 2025 and 16th June 2025 respectively, which the court has considered.



8. The issues for determinations by the court are as follows:
- a. Whether the plaintiff had a legal or equitable interest over the suit property that overrides the 2nd defendant's title.
 - b. Whether the suit property was free for allocation when it was allocated to the 2nd defendant.
 - c. Whether the plaintiff has establish fraud in the acquisition of the 2nd defendant's title to the suit property that the defendants were party to.
 - d. Who bears the cost?

9. The court has carefully considered the parties' pleadings, oral and documentary evidence presented by PW1 and DW1, submissions by the two learned counsel, superior courts decisions cited thereon and come to the following determinations:

- a. The transactions leading to the dispute in this suit transpired in 1992, and seem to have been registered under the regime of the Registered *Land Act* Chapter 300 of Laws of Kenya, now repealed. The resulting title is a leasehold held under a lease from the 1st defendant's predecessor, the defunct Municipal Council of Mombasa. The only certificate of lease is the one produced by the 2nd defendant that is at page 23-26 of her list of documents. Section 32 (2) of the Registered *Land Act*, (repealed) provided as follows:

“ A title deed or certificate of lease shall be only prima facie evidence of the matters shown therein, and the land or lease shall be subject to all entries in the register.”

The above section is similar to section 26 of the current *Land Registration Act* Chapter 300 of Laws of Kenya. Section 28 of the said repealed Act outlines that a certificate of lease is subject to encumbrances and overriding interests, and Section 143 thereof gave power to the court to cancel any title obtained by fraud or mistake. In the case of Joseph N.K. Arap Ng'ok versus Moiyo Ole Keiwua & 4 others [1997] KECA 1 (KLR) where the Court of Appeal held as follows:

“ Section 23(1) of the Act gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”

- b. The thrust of the plaintiff's case is that the 2nd defendant obtained title to the suit property irregularly, as the title had vested on him through a power of attorney donated to him by the original allottee, Mwakandi Ngao. Section 116 of the *Evidence Act* Chapter 80 of Laws of Kenya provides that:

“ When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.”



From the evidence presented before the court, it is clear that the 2nd defendant is not only the one with title to the suit property, but also the one in possession of the said property. Therefore, the burden is on the plaintiff to prove his claim that the 2nd defendant obtained title irregularly. The plaintiff's claim to the suit property is alleged to have been through purchase from Mwakandi Ngao, and he relied on a letter of allotment issued to Mr. Mwakandi for the suit property and a special power of attorney, PA 7065, donated to him by Mr. Mwakandi to represent him in all matters relating to the suit property. However, no sale agreement between him and Mwakandi Ngao was produced in court as an exhibit, and the said Mwakandi Ngao was not availed as a witness.

- c. It is trite that a power of attorney is neither a means of transferring interest in land as provided in the repealed Registered Lands Act nor is it an overriding interest that was provided in section 30 thereof. The court also holds the considered view that an allotment letter is an offer and cannot confer title capable of being transferred as was held in the case of *Kioko versus Mutunga* [2024] KEELC 5702 (KLR) where the court held as follows:

“ 12. It is trite that an allotment letter is an offer and does not confer title, but the same is merely a transient right and not a good title to the property.

13. In the case of *Stephen Mburu & 4 others v Comat Merchants Limited & Another* [2012] eKLR, the court held as follows;

...from a legal stand point, a letter of allotment is not a title to property. It is a transient and is often a right or offer to take property.”

It is doubtful as to whether the said Mwakandi Ngao had attained any proprietary interest over the suit property that he could transfer to the plaintiff through the alleged sale agreement, by the time he executed the power of attorney that the plaintiff relies on.

- d. It should be noted that the letter of offer to the suit property given to Mwakandi Ngao by the defunct Municipal Council of Mombasa contained certain conditions that he did not comply with. The conditions included payment of specified monies which according to notices for demand of arrears dated 5.7.1988, 26.2.1990 and 31.12.1991 were not fulfilled by Mr. Mwakandi. It was therefore only logical that the defunct Municipal Council of Mombasa initiated the process of demanding payment of the arrears from Mr. Mwakandi, and when that was not complied with, repossessed the suit property and thereafter allocated it to the 2nd defendant. The notices for demand of arrears to Mr. Mwakandi were not challenged by the plaintiff, who only said that he was not aware that Mr. Mwakandi was in arrears. The plaintiff also admitted that he has never paid land rates from the time he acquired the suit property in 1992, and the 1st defendant's predecessor cannot be blamed for issuing the notices for payment of arrears to Mr. Mwakandi, and subsequently repossessing the subject plot and reallocating it to the 2nd defendant after there was no compliance with the said notices.
- e. Though the 1st defendant failed to call any evidence despite being given opportunity to do so, the plaintiff claim against both defendants has not been proved to the standard required and is for dismissal.
- f. Costs under section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya follow the event unless where there is a good reason to order otherwise. The plaintiff has failed in his claim and



the 2nd defendant has defended her title to the suit property and is therefore entitled to costs. The 1st defendant failed to call evidence in support of its defence and though the plaintiff's claim has failed, it shall bear its costs.

10. From the foregoing determinations, the court finds the plaintiff has failed to establish his claim to the standard required of balance of probabilities. The court therefore orders as follows:
- a. That the plaintiff's suit is dismissed in its entirety.
 - b. The plaintiff to bear the costs of the 2nd defendant.

Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 16TH DAY OF JULY 2025.

S. M. KIBUNJA, J.

ELC MOMBASA.

In the presence of:

Plaintiff : Mr. Amuga

Defendants : M/s Ngubau for Ataka for 2nd Defendant

Mr. Nganga for 1st Respondent

Shitemi-court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

