



**Mutoko v Hassan & 2 others (Environment & Land Case E065 of 2021)
[2024] KEELC 411 (KLR) (31 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 411 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E065 OF 2021
CA OCHIENG, J
JANUARY 31, 2024**

BETWEEN

ROSE NDUKU MUTOKO PLAINTIFF

AND

ISAAC MOHAMMED HASSAN 1ST DEFENDANT

CHIEF LAND REGISTRAR 2ND DEFENDANT

**PRINCIPAL SECRETARY, LANDS AND PHYSICAL PLANNING 3RD
DEFENDANT**

JUDGMENT

1. Through a Plaint dated the 18th June, 2021, the Plaintiff prays for Judgment against the Defendants jointly for:
 - a. A declaration that the Plaintiff is the bona fide owner of the residential Plot number 840-Athi River, also known as title IR 184632 LR 28506.
 - b. Cancellation of the Certificate of Title for residential Plot number 840 - Athi River in the name of the 1st Defendant for the title No. IR 184632 LR 28506.
 - c. In the alternative to (a) above, this Honourable Court be pleased to declare the Plaintiff as owner by way of adverse possession.
 - d. An injunction order restraining the 1st Defendant from interfering with the residential Plot number 840 Athi River also known as IR 184632 LR 28506.
 - e. The 2nd Defendant be ordered to issue the Plaintiff with a Certificate of Title bearing the Plaintiff's name for ownership of the residential Plot number 840 - Athi River, IR 184632 LR 28506.



- f. The 1st Defendant be ordered to execute all documents to enable the Plaintiff obtain a Certificate of Title in her name. In default of which the Deputy Registrar Environment and Land Court do execute all necessary documents and transfer to enable the title of residential Plot Number 840 - Athi River IR 184632 LR 28506 be issued in the Plaintiff's name.
 - g. Payment of mesne profits.
 - h. Costs of the suit and interest at court's rate until payment in full.
 - i. Such further reliefs that this Honourable Court may deem fit.
2. The 1st Defendant though duly served through the Daily Nation Newspaper on 12th November, 2021, failed to enter appearance nor file a Defence to controvert the Plaintiff's averments.
 3. The 2nd and 3rd Defendants filed their Statement of Defence dated the 17th November, 2021 on 14th February, 2022 where they deny the averments in the Plaint except the descriptive and jurisdiction of the court. They contend that if any registration was effected in respect to the suit property, then the same was done in accordance with statute and upon presentation of all relevant documentations from the proprietor. They aver that if at all the Plaintiff was allegedly granted a Letter of Allotment, she failed to comply with the terms of allotment. Further, she failed to accept the terms and pay the requisite payment within thirty (30) days from the date of the alleged allotment which was 9th March, 1995 as she made payments in June, 1995. They argue that the alleged Letter of Allotment granted to the Plaintiff was a letter of offer which lapsed by dint of effluxion of time. Further, it ceased to have legal effect on 9th April, 1995, the said date being the 31st day of the alleged Letter of Allotment. They deny the alleged particulars of fraud and irregularity attributed to them.
 4. The matter proceeded for hearing where the Plaintiff had one witness but the 2nd and 3rd Defendants failed to avail a witness despite being granted several opportunities to do so.

Evidence of the Plaintiff

5. The Plaintiff as PW1 testified that she was the legal allottee of Plot No. CF 207408 LR 28506 contained in IR 184632 with Deed Plan 362983 hereinafter referred to as the 'suit plot'. She confirmed that on 9th June, 1995 she received a Letter of Allotment dated the 9th March, 1995 from the Government of Kenya in respect to the suit plot situated in Mavoko Municipality, giving her an offer for the said plot. It was her testimony that on 14th June, 1995, she wrote to the Commissioner of Lands confirming her acceptance of the offer as per the allotment letter. She testified that she made payments for the sum of Kshs. 25,177 as was stipulated in the Letter of Allotment, in favour of the Commissioner of Lands. She claims to have taken possession of the suit plot in 1995, built a house and has been in peaceful and uninterrupted occupation thereon for awhile, as she waited for the Certificate of Title of the Leasehold to be prepared in her names, on representation from the Ministry of Lands that the said Lease was being processed. She further testified that efforts to obtain the Certificate of Title proved futile despite her several visits to the Ministry of Lands as the officials failed to assist her but advised her to be patient. She later discovered that a Certificate of Title IR No. 184632 LR 28506 on the suit plot had been processed in the name of the 1st Defendant without her knowledge or communication yet the Letter of Allotment was in her name. It was her further testimony that on 15th April, 2019, through her advocates, she registered a caveat forbidding any registration on the land. Further, on 19th November, 2019 she filed a complaint at the National Land Commission and copied to the Office of the Ombudsman but she never received any assistance. She produced the following documents as exhibits: Letter of Allotment for Rose Nduku Mutoko for Plot No. 840 – Athi River and Identifying Map; Acceptance Letter from Rose Nduku Mutoko to Commissioner of Lands dated the 14th June, 1995; Letter from Standard



Chartered Bank to Cabinet Secretary, Ministry of Lands and Physical Planning dated 16th April, 2019; Copy of Certificate of Title in the name of Isaac Mohammed Hassan for IR 184632 for a term of 99 years from 1st April, 2008; Registration of Caveat dated the 15th April, 2019 registered over title No. IR 184632/2 by Rose Nduku Mutoko; Letter to National Land Commission lodging complaint for Residential Plot No. 840 – Athi River; Letter from the Commission on Administrative Justice date 13th December, 2019 for a complaint over Residential Plot 840 – Athi River; Letters for National Land Commission dated 13th January, 2020 and 13th April, 2021 and Letter of Allotment of Residential Plot No. 840 – Athi River for Isaac Mohammed Hassan dated 1st April, 2008.

Submissions

6. The Plaintiff in her submissions reiterated the averments in her Complaint, facts as per the evidence she had tendered and relied on the documents she produced as exhibits. She submitted that she was the lawful owner of the suit plot which was illegally and fraudulently registered in the 1st Defendant's name. She insisted that she had become entitled to the suit plot through adverse possession as she had been in occupation thereon from 1995 to date. She argued that she has a registrable interest in the suit plot since she was issued with a Letter of Allotment dated the 9th March, 1995 which she received on 9th June, 1995 and accepted the terms vide her letter dated the 14th June, 1995 wherein she forwarded a Banker's Cheque to meet the conditions set out in the said Letter of Allotment. She also submitted that she met all the conditions set in the Letter of Allotment hence it conferred registrable interest to her. She further submitted that it was not proper for the 1st Defendant to be issued with a title over the suit plot. Further, that even though the 1st Defendant was issued with the Certificate of Title from the 1st April, 2008, he had never come to the suit plot as she has been in occupation thereon from 1995. To support her averments, she relied on Section 3 and 9 of the Government Lands Act (repealed), Section 26 and 80 of the *Land Registration Act*, Section 38 of the *Limitation of Actions Act*, Section 27 of the *Civil Procedure Act* as well as the following decisions: *Mako Abdi Dolal v Ali Duane & 2 Others* (2019) eKLR; *Ali Mohamed Dagane (Granted Power of Attorney by Abdullahi Muhamed Dagane, suing on behalf of the Estate of Mohamed Haji Dagane) v Hakar Absbir & 3 others* (2021) eKLR; *Republic v City Council of Nairobi & 3 Others* (2014) eKLR; *Samuel Odhiambo Oludhe & 2 Others v Jubilee Jumbo Hardware Limited & Another* (2018) eKLR; *Ali Wanje Ziro v Abdulbasit Abeid Said & Another* (2022) eKLR; *Mary Ruguru Njoroge v John Samuel Gachuma Mbugua & 4 Others* (2014) eKLR; *Samuel Kihamba v Mary Mbaisi* (2015) eKLR; *Margaret Wangui Njugi & 2 others v George Kimani & Another* (2019) eKLR; *Joseph Kiprono Too v Unilever Tea Kenya Limited* (2021) eKLR; *Cecilia Karuru Ngayu v Barclays Bank of Kenya & Another* (2016) eKLR and *Morgan Air Cargo Limited v Everest Enterprises Limited* (2014) eKLR.

The Defendants failed to file their submissions.

Analysis and Determination

7. I have considered the Complaint, 2nd and 3rd Defendants' Statement of Defence, Evidence of the Plaintiff, Exhibits and submissions and the following are the issues for determination:
- Whether the Plaintiff has a registrable interest over the suit plot.
 - Whether the Certificate of Title for the suit plot in the name of the 1st Defendant should be revoked.
 - Whether the Plaintiff is entitled to mesne profits.
 - Who should bear the costs of this suit.



8. As to whether the Plaintiff has a registrable interest over the suit plot.
9. The Plaintiff as PW1 claimed that vide a Letter of Allotment dated the 9th March, 1995 which she received on 9th June, 1995, she was allotted Plot No. CF 207408 LR 28506 contained in IR 184632 with Deed Plan 362983 (suit plot). PW1 in her testimony confirmed that upon receipt of the letter dated the 9th June, 1995, she wrote to the Commissioner of Lands on 14th June, 1995, accepting the offer as per the Letter of Allotment and included a Banker's Cheque in favour of the Commissioner of Lands for Kshs. 25,177 being payment as stipulated in the said allotment letter, in fulfilment of the conditions set out therein. The 2nd and 3rd Defendants' in their Defence insisted that since the Plaintiff failed to adhere to the terms of the Letter of Allotment within thirty (30) days from its date, then the offer was deemed to have lapsed. I note in the said Letter of Allotment dated the 9th March, 1995, it indicated that:

“I should be glad to receive your acceptance of the attached conditions together with banker's cheque for the amount as set out below within thirty (30) days of the postmark.”
10. The Plaintiff in her acceptance letter dated the 14th June, 1995 stated that:

“I wish to inform you that I have accepted the above plot with pleasure and wish to thank you very much for the same. However, due to delay in receiving your letter of offer which I got on 9th June, 1995, I have made arrangements to pay today and enclosed is a copy of a Banker's Cheque No. 850776 of 14th June, 1995 for Kshs. 25, 177.00 being payment for the above plot.”
11. Since there was no indication of the postmark as stated in the Letter of Allotment, this court deems it to be the day the said letter was received. From the above excerpts alone, it confirms the Plaintiff indeed adhered to the terms set out in the Letter of Allotment within thirty (30) days from the date of receipt of the Offer. Further, the 2nd and 3rd Defendants did not confirm if they refunded the Plaintiff the amount she paid for the suit plot, nor did they furnish court with a document confirming the Letter of Allotment was revoked. I note as per a Letter dated the 16th April, 2019 from Standard Chartered Bank addressed to the Cabinet Secretary, Ministry of Lands and Physical Planning, whose subject was Mutoko Nduku Rose 01 – 001 – 790073 - 00 it stated that:

“We confirm that we issued bankers cheque 850776 of Kshs. 25, 177 on 14th June, 1995 payable to Commissioner of Lands. The Cheque is not pending in our books.”
12. Despite receiving the Cheque from the Plaintiff, wherein she had fulfilled the terms set out in her Letter of Allotment, the Commissioner of Lands on 1st April, 2008 which was almost thirteen (13) years later, proceeded to issue a fresh Letter of Allotment to the 1st Defendant and process his Certificate of Title on 19th August, 2016. Further, despite the Plaintiff following up with various government agencies including the National Land Commission and Office of the Administration of Justice (Ombudsman), they declined to assist her obtain title to the suit plot yet she was residing thereon. Which brings me to the question on whether there was available land to be allotted to the 1st Defendant once the Plaintiff had fulfilled the terms set out in the previous Letter of Allotment.



13. In the case of *Ali Gadaffi & another v Francis Mubia Mutungu & 2 others* [2017] eKLR Olola J while dealing with a matter with similar facts as herein held as follows:

“Where land has been allocated, the same land cannot be reallocated unless the first allocation is validly and lawfully cancelled. There can never be any allocation unless the land is an unalienated land. Consequently, when the Appellant was allocated the land on 27th April 1998, he acquired a legal interest which could not and was not defeated by the purported subsequent allocation to the 2nd Respondent, on 6th May 1998. As at 27th April 1998, there was a commitment made on Plot 96. Kaloleni and it was therefore not available to the 2nd respondent for allotment. As Warsame J (as he then was) observed in *Rukiya Ali Mohamed (Supra)*, the authority who issued the 2nd Respondent’s letter of allotment had no such powers to grant the same. It was an illegal transaction, it amounts to no allotment and in total there was no benefit, no interest, and no legal right which could be derived from an act which amounted to nothing.” Emphasis mine

14. While in the case of *Rukaya Ali Mohamed Versus David Gikonyo Nambacha & Another* (Kisumu HCCS No. 9 of 2009) Warsame J (as he then was) 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 outrightly illegal or it was against the public interest.” Emphasis mine

15. See also the case of *Caroget Investment Limited V Aster Holdings Limited & 4 others* (2019) eKLR.

16. Based on the facts before me while associating myself with the decisions cited above, I find that once the suit plot was allotted to the Plaintiff who fulfilled all the conditions set out in the Letter of Allotment, the said plot was no longer available for alienation and allocation to a third party unless the previous Letter of Allotment issued to the Plaintiff was expressly and legally cancelled and the monies she paid refunded to her, which was not the case herein. In the foregoing, I hold that the Plaintiff indeed held a registrable interest over the suit plot.

17. As to whether the Certificate of Title for the suit plot in the name of the 1st Defendant should be revoked.

18. Insofar as the 1st Defendant was issued with a Certificate of Title for the suit plot on 19th August, 2016, but having failed to enter appearance to rebut the Plaintiff’s averments including allegations of fraud, I find that the said allegations remain uncontroverted. Further, since the Plaintiff already held Letters of Allotment to the suit plot and taken possession thereon, it was not clear how the 1st Defendant was once more allotted the said plot as there was no proof that her Letters of Allotment had been cancelled. It is my considered view that by virtue of the Plaintiff holding the Letters of Allotment, this indeed confirmed her proprietary rights over the suit plot in accordance with the provisions of Section 7(a) of the *Land Act* which provides that land can be acquired through allocation. Since I have already held that the suit plot was no longer available for allocation, I hence find that the 1st Defendant’s title cannot stand since the root of his title is challenged.

Section 26 (1) (b) of the *Land Registration Act* stipulates that:

“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.”

19. From this legal provision, it is clear that a title acquired unprocedurally can actually be challenged. On the issue of rectification of register, I wish to make reference to Section 145 of the [Registered Land Act](#) (repealed) which is similar to Section 80 of the [Land Registration Act](#) that provides thus:

- “(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.
- (2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.”

20. In the case of [Munyu Maina Vs Hiram Gatbiha Maina](#), Civil Appeal No. 239 of 2009, the Court of Appeal held that:

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to 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.”

21. While in the case of [Ali Wanje Ziro v Abdulbasit Abeid Said & another](#) [2022] eKLR the Judge held that:

“The law is clear that, the Certificate of Title issued by the Registrar upon registration 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 – On the ground of fraud or misrepresentation to which the person is proved to be a party; or Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

22. Based on the facts before Court while relying on the legal provisions I have cited as well as associating myself with the decisions quoted, I find that the 1st Defendant obtained his title unprocedurally since the suit plot was no longer available for allocation. In the circumstance, I will proceed to revoke the said title.



Whether the Plaintiff is entitled to mesne profits.

23. On the prayer for mesne profits, I wish to refer to Section 2 of the Civil Procedure Act Cap 21 which defines it as follows: -

“mesne profits”, in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession;”

24. From the evidence tendered in court, since the Plaintiff has been in occupation of the suit land, I find that she did not provide any proof on the basis for her demand for mesne profits and I will not award her the same.

Who should bear the costs of the suit.

25. Since the Plaintiff is the inconvenienced party, I find that she is entitled to costs.

26. It is against the foregoing that I find that the Plaintiff has proved her case on a balance of probability and will proceed to enter Judgment in her favour and make the following orders:

- a. A declaration be and is hereby issued that the Plaintiff is the bona fide owner of the residential Plot number 840 - Athi River, also known as title IR 184632 LR 28506.
- b. An order be and is hereby issued cancelling the Certificate of Title for residential Plot number 840 - Athi River in the name of the 1st Defendant for the title No. IR 184632 LR 28506.
- c. An order of injunction be and is hereby issued restraining the 1st Defendant from interfering with the residential Plot number 840 - Athi River also known as IR 184632 LR 28506.
- d. The 2nd Defendant be and is hereby ordered to issue the Plaintiff with a Certificate of Title bearing the Plaintiff's name for ownership of the residential Plot number 840 - Athi River, IR 184632 LR 28506.
- e. The 1st Defendant be and is hereby ordered to execute all documents to enable the Plaintiff obtain a Certificate of Title in her name. In default of which the Deputy Registrar Environment and Land Court do execute all necessary documents and transfer to enable the title of residential Plot Number 840 - Athi River IR 184632 LR 28506 be issued in the Plaintiff's name.
- f. Costs of the suit is awarded to the Plaintiff.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 31ST DAY OF JANUARY, 2024

CHRISTINE OCHIENG

JUDGE

