



Chege (Suing as Legal Representative of the Estate of Margaret Muthoni Chege - Deceased) v Land Settlement Fund Board of Trustees & 2 others (Environment and Land Case 52 of 2023) [2024] KEELC 95 (KLR) (18 January 2024) (Judgment)

Neutral citation: [2024] KEELC 95 (KLR)

FORMERLY NYAHURURU ELC. 303 OF 2017

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
ENVIRONMENT AND LAND CASE 52 OF 2023**

YM ANGIMA, J

JANUARY 18, 2024

BETWEEN

**JAMES MUCHURU CHEGE PLAINTIFF
SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF MARGARET
MUTHONI CHEGE - DECEASED**

AND

**LAND SETTLEMENT FUND BOARD OF TRUSTEES 1ST DEFENDANT
DAN ENOS AORO 2ND DEFENDANT
LUCY NJERI NDIBA 3RD DEFENDANT**

JUDGMENT

A. Plaintiffs' Claim

1. By a plaint dated 21.12.2016 the original Plaintiff Margaret Muthoni Chege (now deceased), sued the Defendants seeking the following reliefs:
 - a. A declaration that the allotment and or reallocation of Plot No. 1190 Ndemi Settlement Scheme by the first Defendant to the second Defendant was fraudulent, illegal and unlawful and the same ought not to have been reallocated.
 - b. A declaration that the issuance and transfer of the subsequent title deed for land parcel known as Nyandarua/Ndemi/1190 by the Land Registrar Nyahururu to second Defendant was fraudulent, illegal and unlawful.



- c. A declaration that the Plaintiff should be declared the rightful owner of land parcel known as Nyandarua/Ndemi/1190.
 - d. An order directing the Land Registrar Nyahururu to forthwith cancel the title issued to third Defendant and all subsequent dealings and transactions registered and touching the suit property.
 - e. A permanent injunction restraining the third Defendant, her agents, servants and or employees from trespassing into, cultivating, constructing upon, leasing and or in any way whatsoever interfering with all land known as Nyandarua/Ndemi/1190.
2. The original Plaintiff (hereafter “the deceased”) pleaded that at all material times she was the allottee of Plot No. 1190 Ndemi Settlement Scheme (the suit property) having been allocated the same by the 1st Defendant in 1982. She further pleaded that she took possession thereof and developed the same but she was never informed how much she was to pay for it and where such payment was to be made.
 3. It was her pleading that later on the 1st Defendant illegally and fraudulently allocated the suit property to the 3rd Defendant who subsequently sold and transferred the same to the 3rd Defendant despite the subsistence of a restriction against the suit property. She also attributed fraud to the 2nd Defendant and pleaded several particulars of fraud against him. It was further pleaded that despite issuance of a demand and notice of intention to sue, the Defendants had failed to make good her claim hence the suit.

B. Defendants’ Defenceclaim

4. The record shows that the 1st Defendant neither entered appearance nor filed a defence to the action despite service of court process. The 1st Defendant did not participate at the trial of the action.
5. The 2nd and 3rd Defendants filed a defence and counter claim dated 03.08.2017 in response to the suit. By their defence, they denied that the deceased was an allottee of the suit property and put her to strict proof thereof. They pleaded that she had not exhibited any letter of allotment in her name.
6. The 2nd Defendant pleaded that he followed the laid down procedure in acquiring the suit property by making an application for allocation, obtaining a letter of allotment and making the requisite payments to the 1st Defendant. He denied any fraud or illegality in his acquisition of the suit property and put the deceased to strict proof thereof.
7. The 2nd Defendant further pleaded that the restriction registered against the property by the deceased was removed by a court order made in Nyeri Civil Suit No. 71 of 2005 on 03.03.2015. He conceded that he sold and transferred the suit property to the 3rd Defendant but pleaded that he did so in exercise of his legal rights as the proprietor at the material time.
8. The 2nd and 3rd Defendants pleaded that the Plaintiff was guilty of non-disclosure of material facts in failing to disclose the existence of several previous suits over the suit property most of which were filed by her and most of which were never prosecuted to their logical conclusion.
9. By their counterclaim, the 2nd and 3rd Defendants reiterated the contents of their defence and pleaded that the Plaintiff’s claim was time barred under the *Limitation of Actions Act*, (Cap. 22) since her alleged cause of action arose in 1982. The Defendants also referred to the previous suits and demanded to be paid costs of those which were withdrawn. As a result, they sought the following reliefs in their counter claim:



- a. A declaration do issue that land parcel No. Nyandarua/Ndemi/1190 lawfully belonged to the 2nd Defendant who legally transferred the same to the 3rd Defendant on 03.03.2015.
- b. The suit herein be struck out with costs for being time barred and an abuse of the judicial process.
- c. The Plaintiff be ordered to pay the 2nd and 3rd Defendants costs for the withdrawn cases:
 - i. SPMCC of 2008 (Nyahururu),
 - ii. ELC No. 455 of 2007 (Nairobi),
 - iii. ELC No. 71 of 2007 (Nyeri) &
 - iv. HCC No. 3 of 2012 (OS) Nakuru).
- d. A mandatory injunction do issue ordering that the Plaintiff, her agents or anybody else found on the suit of land LR. No. Nyandarua/Ndemi/1190 be evicted and what ever structures built thereon be demolished at the Plaintiff's cost.

C. Plaintiff's Rejoinderclaim

10. The Plaintiff filed a reply to defence and defence to counter claim dated 09.11.2017. By her reply to defence, she joined issue upon the 2nd and 3rd Defendants' defence. She denied that the 2nd Defendant was properly allocated the suit property and reiterated the contents of her plaint. The Plaintiff pleaded that all the previous suits had been withdrawn leaving the instant suit as the only one involving the suit property.
11. By her defence to counterclaim, the Plaintiff denied the 2nd and 3rd Defendants' counterclaim and put them to strict proof thereof. The Plaintiff consequently prayed for dismissal of the defence and counterclaim and for entry of judgment as prayed in the plaint.

D. Summary of Evidence at the Trial

a. Plaintiff's Evidence

12. It is evident from the material on record that the original Plaintiff died during the pendency of the suit in consequence whereof she was substituted with her son, James Muchunu Chege, as the administrator of her estate. The substituted Plaintiff adopted his witness statement dated 07.06.2021 as his evidence in-chief. He also produced the documents in his list of documents dated 21.12.2016 as exhibits. The gist of his evidence was that the deceased was the legitimate allottee of the suit property and that the subsequent allocation thereof to the 2nd Defendant was illegal and fraudulent, as the latter was an employee of the Ministry of Lands at the material time.

b. 2nd Defendant's Evidence

13. The 2nd Defendant testified on his own behalf at the trial. He adopted the contents of his witness statement dated 03.08.2017 as his evidence in-chief. He also produced his supporting documents as exhibits in defence of the suit and in support of his counterclaim. The gist of his evidence was that he applied for allocation of land in the normal manner in consequence whereof he was allocated the suit property in 1995. His evidence was that he duly accepted the offer and made the requisite payments and he was subsequently issued with a title deed for the suit property. He denied any fraud or illegality



in his acquisition of the property and stated that he did not use his position at the Ministry of Lands to influence the allocation.

c. 3rd Defendant's Evidence

14. The 3rd Defendant testified at the trial on her own behalf as the sole witness. She adopted her witness statement dated 03.08.2017 as her evidence in chief and produced her supporting documents as exhibits. The gist of her evidence was that it was her late husband who was the purchaser of the suit property from the 2nd Defendant and that she was registered as proprietor upon his demise. She was not privy to the circumstances leading to the 2nd Defendant's allocation of the suit property by the 1st Defendant.

E. Directions on Submissionsclaim

15. Upon conclusion of the hearing the parties were given timelines within which to file and exchange their respective written submissions. The record shows that the Plaintiff's submissions were filed on or about 30.11.2023 but the 2nd and the 3rd Defendants' submissions were filed on 15.01.2024. However, the 1st Defendant did not file any submissions as it never participated in the proceedings from inception.

F. Issues for Determinationclaim

16. The court has noted that the parties did not file an agreed statement of issues for determination. As such, the court shall frame the issues for determination as provided for in law. Under Order 15 rule 2 of the [Civil Procedure Rules, 2010](#), the court may frame issues from any of the following:
 - a. The allegations contained in the pleadings.
 - b. The allegations made on oath by or on behalf of the parties.
 - c. The contents of documents produced by the parties.
17. The court has considered the pleadings, evidence and documents on record in this matter. The court is of the opinion that the following issues arise for determination herein:
 - a. Whether the deceased was the initial allottee of the suit property.
 - b. Whether the allocation of the suit property to the 2nd Defendant was illegal and fraudulent.
 - c. Whether the Plaintiff is entitled to the reliefs sought in the suit.
 - d. Whether the 2nd and 3rd Defendants are entitled to the reliefs sought in the counter-claim.
 - e. Who shall bear costs of the suit and counter-claim.

G. Analysis and Determination

a. Whether the Deceased Was the Initial Allottee of the Suit Property

18. The court has considered the material and submissions on record on this issue. Whereas the Plaintiff submitted that the deceased was the initial and legitimate allottee of the suit property, the 2nd and 3rd Defendants contended otherwise. The court has noted from the material on record that the Plaintiff did not produce a letter of offer or letter of allotment at the trial. There was no evidence of payment of allotment fee apart from a receipt for a deposit of Kshs. 325/=. There was no evidence of either outright payment of the balance or a charge to secure payment of the outstanding balance. It is also



evident from the record that neither the allocation register nor the area list for the Ndemi settlement scheme was produced at the trial.

19. The court is not satisfied that mere occupation of land in a settlement scheme can constitute a valid allocation thereof to the occupant. The court is far from satisfied that the deceased tendered a valid or plausible reason why she did not pay for the plot she believed was 'allocated' to her for over 40 years. The claim that she was not told how much was payable and where the same was payable is simply incredible. The amount payable for an allocation would normally be stated in the allotment letter and accompanying documents. If there was an omission in specifying the amount in those documents, then it was upon the deceased to follow up with the allocating authority on the matter. As it has turned out, the Plaintiff did not even have an allotment letter for the suit property in the first place. In the premises, the court finds no credible evidence of allocation of suit property to the deceased as alleged or at all.

b. Whether the Allocation of the Suit Property to the 2nd Defendant Was Illegal and Fraudulent

20. The court has considered the material and submissions on record on this issue. The Plaintiff impugned the said allocation on the basis that the deceased was the legitimate allottee as at 1982 hence the property was not available for allocation in 1995. The Plaintiff contended that there was collusion between the 1st and 2nd Defendants in the allocation of 1995 since the deceased was still in occupation of the land. The 2nd Defendant on his part contended that there was no evidence of allocation of the suit property to the deceased in 1982 or at all hence the 1st Defendant was at liberty to allocate it to him.
21. The court has already found and held that there was no evidence of a valid allocation of the suit land to the deceased in 1982. The court has found that mere occupation of land without a letter of allotment and payment of the allocation fee cannot constitute a valid allocation of land in a settlement scheme. In the premises, the court is of the opinion that the 1st Defendant was at liberty to allocate the suit property to any willing person without violating any law. There was no double allocation in the circumstances of this case.
22. The court has noted that in his written submissions the Plaintiff sought to challenge the transfer of the suit property to the 3rd Defendant on the basis that the consent of the Land Control Board (LCB) was not obtained for the transaction. It is evident from the pleadings that the transfer to the 3rd Defendant was not challenged on the basis of lack of consent of the LCB. The court is of the opinion that cases ought to be decided on the basis of issues arising from the pleadings and not matters raised in written submissions. As a consequence, the court shall not consider or determine this unpleaded ground.

c. Whether the Plaintiff is Entitled to the Reliefs Sought in the Plaint

23. The court has found and held that the Plaintiff has failed to prove entitlement to the suit property by virtue of an allocation by the 1st Defendant. The court is thus of the opinion that the Plaintiff has failed to prove his pleaded claim to the required standard. In the circumstances, the Plaintiff is not entitled to the reliefs sought, or any one of them.

d. Whether the 2nd and 3rd Defendants are Entitled to the Reliefs Sought in the Counterclaim

24. The court has found and held that the 2nd Defendant was the legitimate allottee of the suit property and that there was no evidence of fraud or illegality in its allocation. The court has found no illegality in the sale and transfer of the land to the 3rd Defendant. The Plaintiff's case all along was that the numerous previous suits filed by the deceased were all withdrawn. There is no indication on record to demonstrate whether or not the 2nd Defendant ever pursued his costs in the said suits. The court is of the opinion that the proper forum for seeking recovery of costs is the respective suits which were withdrawn by



the deceased and not the instant suit. In the premises, the court is inclined to grant only the prayer for declaration of rights and the one of mandatory injunction sought in the counter claim.

e. Who Shall Bear Costs of the Suit and Counterclaim

25. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons -vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court has noted that the Plaintiff was not entirely to blame for the dispute which arose among the parties. The confusion was generated mainly by the 1st Defendant which put the deceased in possession of the suit property but failed to allocate her the land. In the premises, the court is of the opinion that each party should bear his own costs of both the suit and counterclaim.

H. Conclusion and Disposal Orderclaim

26. The upshot of the foregoing is that the court finds that the Plaintiff has failed to prove his claim against the Defendants to the required standard but finds that the 2nd and 3rd Defendants have proved their counterclaim to the required standard. As a consequence, the court makes the following orders for disposal of the suit and counterclaim:

- a. The Plaintiff's suit be and is hereby dismissed in its entirety.
- b. Judgment be and is hereby entered for the 2nd and 3rd Defendants on the counterclaim in the following terms only:
 - i. A declaration be and is hereby made that Title No. Nyandarya/Ndemi/1190 was lawfully allocated to the 2nd Defendant who legally transferred it to the 3rd Defendant.
 - ii. A mandatory injunction be and is hereby made directing the Plaintiff, his agents, servants, and family members to vacate Title No. Nyandarua/Ndemi/1190 within 60 days from the date hereof in default of which they shall be forcibly evicted and any structures thereon removed.
 - iii. Each party shall bear his own costs of both the suit and counterclaim.

It is so decided.

**JUDGMENT DATED AND SIGNED AT NYANDARUA THIS 18TH DAY OF JANUARY, 2024
AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.**

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Y. M. ANGIMA

JUDGE

In the presence of:

Mr. Njoroge Kugwa for the Plaintiff

N/A for the 1st Defendant

Mr. Wanjohi for the 2nd & 3rd Defendants

