



**Kimondo v Tenga & another (Environment & Land Case 291 of 2008)  
[2024] KEELC 1071 (KLR) (22 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 1071 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 291 OF 2008**

**JE OMANGE, J**

**FEBRUARY 22, 2024**

**BETWEEN**

**PETER KURIA KIMONDO ..... PLAINTIFF**

**AND**

**EDWARD M. TENGA ..... 1<sup>ST</sup> DEFENDANT**

**NAIROBI CITY COUNTY ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. This suit was initially filed by Peter Kuria Kimondo in exercise of a Power of Attorney donated by James Njenga Wagachire on 29<sup>th</sup> April, 2005. In the suit the Plaintiff sought a declaration that Plot S28 Kahawa West Phase II is lawfully and legally owned by James Njenga Wagachire; an order of eviction to issue against the 1<sup>st</sup> Defendant; a permanent injunction restraining the Defendants, their agents, servants and or employees from entering, possessing, occupying, fencing and or in any other way interfering with Plot No S 28 Kahawa West Phase II; an order compelling the 2<sup>nd</sup> Defendant to cancel the letter of allotment for Plot A Kahawa West Phase II issued to the 1<sup>st</sup> Defendant; Mesne profits for the Tort of Trespass.
2. The Plaintiff averred that at all material times the said James Njenga Wagachire was the registered owner of Plot S 28 Kahawa West Phase II vide a letter of allotment dated 22<sup>nd</sup> January, 2003. That in November, 2004 the 1<sup>st</sup> Defendant started claiming four plots and filed a case against James Njenga Wagachire. Following the filing of this case the 2<sup>nd</sup> Defendant unlawfully issued a letter of allotment to the 1<sup>st</sup> Defendant in respect of Plot A Kahawa West Phase II which the Plaintiff contends includes Plot S28 Kahawa West Phase II on the ground.
3. It is the Plaintiff's case that he has all along been paying rates for Kahawa S28 and presented a Development Plan to the 2<sup>nd</sup> Defendant which has been approved.



4. The 1<sup>st</sup> Defendant filed a defence dated 8<sup>th</sup> June 2009 denying all averments in the plaint indicating that he had been in occupation of the suit property for 40 years and that pursuant to an authority by the ministry of local government was allotted the suit property and subsequent lease. He averred the allotment to the Plaintiff was an illegality. The 2<sup>nd</sup> Defendant in its statement of defence denied the contents of the plaint and instead stated that the suit property had been allocated to the 1<sup>st</sup> Defendant and not the Plaintiff.
5. During the long period that the matter was in court the Plaintiff who held a power of attorney fell ill. James Njenga Wagachire who had donated the power of attorney to Peter Kuria Kimondo was replaced in the pleadings by oral amendment and the hearing commenced afresh.
6. The Plaintiff told the court that he bought the suit property then Plot S28 from one Salome Maina in 2003. It was his evidence that Salome had made all the necessary payments before transferring the property to him. That he had been paying rates and rent for the said plot. He had also paid for a development plan. Upon cross examination he stated that he had not obtained consent of the Nairobi City Council then for the transfer. He also does not have a beacon certificate. It was also his evidence that he does not have minutes with a resolution that the property be allocated to him.
7. The 1<sup>st</sup> Defendant insisted that he was born on the suit property and has lived there until the Plaintiff tried to evict him and his family from the same. During cross examination he told the court that his grandfather had purchased the suit property in 1957. He said that when the County Council took over the Kahawa West area they were overlooked by the surveyor on the ground. That when the Plaintiff tried to evict him he brought the matter to the attention of the City Council. After investigations had taken place and several letters later which he produced as exhibit in court a new part development plan was issued in respect of the area and a letter of allotment was issued. Plot A was divided into A1 -A5 which was given to his sister, himself, his uncle, his brother and his cousin respectively.
8. The 2<sup>nd</sup> Defendant chose not to call any witnesses and associated itself with the testimony of the 1<sup>st</sup> Defendant. All counsels filed submissions which the court has duly considered. The Plaintiff submitted that the Plaintiff had a valid allotment letter as he purchased the same from Salome Wanjiku who requested the 2<sup>nd</sup> Defendant to facilitate a transfer to the Plaintiff. The Plaintiffs submitted that the 2<sup>nd</sup> Defendant has paid rent and even paid an application fee for construction and for occupation.
9. The Plaintiffs submit that the 1<sup>st</sup> Defendant was claiming a property that it could not identify and that it could not explain how it came into his possession. The Plaintiffs strongly submitted that the fact that the 1<sup>st</sup> Defendant has a title does not make him the valid owner as it is now fairly settled by judicial precedents that the court must inquire into the root of a title that is under challenge. The court should not accept a title which has been mysteriously obtained without following the proper procedure.
10. The 1<sup>st</sup> Defendant on his part submitted that upon threat of eviction from a property that his family had resided on for over 40 years he filed a case against the 2<sup>nd</sup> Defendant. This suit was withdrawn after the 2<sup>nd</sup> Defendant agreed to sort out the matter. That after carrying out investigations into his claim the 2<sup>nd</sup> Defendant discovered that when the area was being surveyed the 2<sup>nd</sup> Defendant failed to consider the occupation of his family in the area. That due to this oversight the 2<sup>nd</sup> Defendant decided to gazette a Part Development Plan which went through all the processes after which he and his family members were allocated the subplots.
11. The 2<sup>nd</sup> Defendant on their part submitted that the Plaintiff had not produced a search certificate, beacon certificate, or receipt to indicate that he paid stamp duty. In a nutshell it was the argument of counsel for the 2<sup>nd</sup> Defendant that the Plaintiff had failed to carry out due diligence and as such disassociated itself from the allotment letter produced by the Plaintiff.



12. Having considered the pleadings, the evidence that was adduced in court and the submissions by all counsel the following issues emerge for the courts determination; Is the Plaintiff the lawful owner of plot S28, Kahawa West Phase II. Has the 1<sup>st</sup> Defendant trespassed on the Plaintiffs property and if yes should he pay mesne profits. Should an eviction order issue against the 1<sup>st</sup> Defendant.
13. On the question of the ownership of the Plot S 28 Kahawa West II, the Plaintiff averred that he bought the land in question from Salome Wanjiku. It is stated that at the point at which Salome Wanjiku entered into an agreement to dispose of the property to the Plaintiff she was the holder of a letter of allotment not a title. In the case of Torino Enterprises Vs the Attorney General the Supreme Court of Kenya reaffirmed that a letter of allotment is a mere invitation to treat. The apex court went further to state that even after the conditions in a letter of allotment have been fulfilled the allottee should acquire the title to the land through registration under the relevant laws. It is this act of registration that confers a transferrable title to the land.
14. In the instant case the Plaintiff contends that vide a sale agreement dated 3<sup>rd</sup> May, 2000 Salome Wanjiku sold him Plot S28. He does not produce the letter of allotment that was issued to Salome Wanjiku. Without this letter it is not possible to tell what in the first place were the terms of the offer to Salome and if she had crystallized the offer made to her by fulfilling all the conditions in the letter of offer.
15. On the allotment letter which the Plaintiff alleges was issued to him on 22<sup>nd</sup> January, 2003, he needed to take steps to fulfill the conditions therein. Once the Plaintiff completed the purchase price and even before really it was expected that he would have visited the site to physically identify his property that he was purchasing. In spite of the sale having taken place in 2000 it was only in 2003 that he attempted to possess the suit property and discovered the presence of the 1<sup>st</sup> Defendant on the property. It is also not clear why he did not obtain a beacon certificate from Salome Wanjiku. I also note that the first receipt by Salome for payment of rates after the initial payment of stand premium which was receipted vide receipt dated 1992, the next receipts are issued in 2000. This gap of 8 years is not explained. The clear inference is that rates were not being paid.
16. The Plaintiff has stated that the fact the 2<sup>nd</sup> Defendant continued to receive payments is a clear indication that he is the owner of the suit property and was recognized as such. This cannot be true. While it is unfortunate that the 2<sup>nd</sup> Defendant has such gaps that allow payment of rent in respect of a property it has degazetted so does not exist, on its own, the payment cannot confer ownership. The court must satisfy itself that all the other steps have been followed.
17. In the present case, due to the gaps I have pointed out above it has not been established Salome Wanjiku could transfer ownership. The letter of allotment the Plaintiff refers to dated 22<sup>nd</sup> January 2003 cannot thus stand.
18. Regarding the issue of whether the 1<sup>st</sup> Defendant is a trespasser, the 1<sup>st</sup> Defendant told the court that his family had always resided on the land. When the area was being surveyed their presence which is a condition which should have been considered under the *Physical and Land Use Planning Act* was overlooked. He took up the issue with the 2<sup>nd</sup> Defendant who in exercise of powers granted under the Act went through the process of issuing a new Part Development Plan. There is no allegation that the procedure was not followed or that the 2<sup>nd</sup> Defendant exercised powers it does not have. As such I find it has not been proved the 1<sup>st</sup> Defendant is a Trespasser on the property. The prayer for eviction cannot also lie.
19. Costs are given at the discretion of the court. In this present case, I note that while the 2<sup>nd</sup> Defendant has disowned the letter of allotment it did not call any witness to dispute the receipts the Plaintiff



produced. While accepting the payments did not confer ownership, it added to the confusion around the suit property and as such I find that they should pay the 1<sup>st</sup> Defendants costs.

20. The upshot of the foregoing is that I find that the Plaintiff has failed to prove his case on a balance of probability and the suit is dismissed with costs to the 1<sup>st</sup> Defendants. These costs shall be paid by the 2<sup>nd</sup> Defendant.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 22<sup>ND</sup> DAY OF FEBRUARY 2024.**

**Judy Omenge**

**JUDGE**

**In the presence of: -**

Mr. Chaina for Ms Purity Makori for 1<sup>st</sup> Defendant

Mrs Lanoi for Mr. Karuga for Plaintiff

Steve - Court Assistant

