



**Elmi t/a Elmi Traders v Nyambeki & 2 others (Civil Appeal
611 of 2019) [2023] KECA 283 (KLR) (17 March 2023) (Judgment)**

Neutral citation: [2023] KECA 283 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 611 OF 2019
DK MUSINGA, J MOHAMMED & KI LAIBUTA, JJA
MARCH 17, 2023**

BETWEEN

ABDIRAHMAN MOHAMED ELMI T/A ELMI TRADERS APPELLANT

AND

MARY NYAMBEKI 1ST RESPONDENT

FRANCIS KIMANI T/A ALFED AGENCIES 2ND RESPONDENT

CHIEF LAND REGISTRAR 3RD RESPONDENT

*(Being an appeal from the Judgment and Orders of the Environment and Land Court
at Nairobi (K. Bor, J.) delivered on 1st July 2019 in E.L.C. Case No. 302 of 2017.)*

JUDGMENT

1. By way of a plaint dated May 3, 2017, the appellant instituted proceedings against the 1st and 2nd respondents, stating that by a letter of allotment dated April 10, 1997 he was allotted a grant of a residential plot near Wilson Airport, Nairobi, referred to as “Plot XVI” in the allotment letter, measuring 0.4047 hectares for a term of 99 years, subject to payment of Kshs 275,230.
2. Similarly, by a letter of allotment dated April 15, 1996, the appellant, trading as Elmi Traders, was allotted another parcel of land in the same location known as residential Plot D, measuring 0.6069 hectares for a term of 99 years, subject to payment of allotment fees of Kshs 422,110.
3. The appellant stated that before he could pay the allotment fees, the deed files, and records in respect of the two parcels of land went missing at the Lands Registry. Evidence to that effect and of subsequent investigations that was initiated was initiated by the police was tendered before the trial court. We shall revert to that evidence later.



4. Sometime in the year 2014 the missing records were recovered and the appellant was asked to make the necessary payments, which he did. However, the appellant realised that the 3rd respondent had already registered the two parcels of land (“the suit properties”) and issued Grant Numbers IR 159431, Land Reference Number 21926 in favour of the 1st respondent, and Grant Number IR 159491, Land Reference Number 21936, in favour of the 2nd respondent.
5. Thereafter, the appellant engaged the 1st and 2nd respondents in negotiations with a view to settling the dispute over the suit properties. By a Deed of Settlement dated June 13, 2016, the appellant and the first two respondents entered into an agreement by which the appellant would abandon all his claims of ownership of the suit properties in consideration of the 1st and 2nd respondents paying to him Kshs 53 million within thirty (30) days from the date of the agreement.
6. The 1st and 2nd respondents failed to make the agreed payment, and the appellant filed suit against them seeking payment of Kshs 53 million plus interest at commercial rates from July 13, 2016 until payment in full. He also sought and obtained an order to inhibit the registration of any dealing with the suit properties until determination of the suit.
7. Subsequently, the appellant amended his plaint and added the Chief Land Registrar, the 3rd respondent. He alleged, *inter alia*, that the two Grants were issued in a fraudulent manner; that the 1st and 2nd respondents had failed to pay him Kshs 53 million as per the Deed of Settlement; and that, in the circumstances, the 3rd respondent ought to be directed to revoke the two Grants and issue him with the documents of title in respect of the suit properties; or in the alternative, a sum of Kshs 53 million plus interest thereon at commercial rates from July 13, 2016 be paid to him by the respondents jointly and severally.
8. The 1st and 2nd respondents neither entered appearance nor filed any statement of defence. The 3rd respondent filed a statement of defence and stated, *inter alia*, that the allotment of the suit properties was a mandate of the Commissioner of Lands, currently the National Land Commission, and it was only that office that could authenticate the alleged allocation to the appellant, as well as the alleged payment of the allotment fees; that if the deed plans for the suit properties were issued and registered in the names of the 1st and 2nd respondents, then the same was based on documents that were presented to him. The 3rd respondent therefore denied any fraudulent intent or act on his part in issuance of the two Grants.
9. During the hearing before the Environment and Land Court (K Bor, J), only the appellant testified. The 1st and 2nd respondents were served with the hearing through advertisement in the newspapers. The 3rd respondent, who was represented by the Attorney General, did not adduce any evidence.
10. The appellant produced before the trial court records from the Commissioner of Lands as to how the allotment was done; the allotment letters; the survey plan; a letter dated November 17, 2015 addressed to the County Criminal Investigation officer by Dr Gordon Wayumba, Licenced Land Surveyor, of Geometer Land Surveys Ltd certifying that he had done the survey in 1996 and the plan duly authenticated by the Director of surveys, but the deed plans for the suit properties were released to unknown persons.
11. The appellant also produced a copy of a letter dated September 23, 2015 addressed to the County Criminal Investigations officer by one Peter K Kahuho, Acting Land Secretary, Ministry of Land, Housing & Urban Development. The letter stated as follows:

“Re: Wilson Airport Plots Nos. 21926, 21929, 21935, 21936, 21937 and 21939



We write to you in respect of the above referenced parcels of land which stand on a Government Land.

In 1996, the Government of Kenya commissioned a surveyor by the name of GO Wayumba of Geometer Surveys Ltd to survey the land and sub-divided it, which was done as per F/R No 300/9 of 1996 and the land was allocated accordingly. However, all the deed plans went missing and frustrated the processing of title deeds to bona fide allottees.

This office has now discovered that the said deed plans that went missing were actually issued fraudulently to unknown persons. The said documents were verified and released back to this Ministry on December 23, 2014 and title deeds processed to different people other than those who were genuinely allocated the land through collusion with the Ministry of Land, Housing and Urban Development officers. It is clear from the foregoing that serious criminal acts have been perpetuated by some fraudulent people.

This letter is, therefore, to request you to undertake in- depth investigations into the said matter and give the Ministry a report to enable us take appropriate action.”

12. Prior to the issuance of the above letter, on March 11, 2014, Dr Muhammed A Swazuri, Chairman, National Land Commission, had written to the cashier, Land Registry, asking him to receive payment of the requisite allotment fees for the suit properties, among others, from the appellant. The appellant tendered a copy of that letter as well as copies of the Bankers cheques and the official receipt that was issued to him after he made the payments.
13. The appellant also produced as an exhibit a copy of the Deed of Settlement dated June 13, 2016 that was drawn by Kipkenda & Company Advocates and executed by the appellant on the one hand, and the 1st and 2nd respondents on the other hand.
14. In the impugned judgment, the learned judge held that the appellant had not established that the 1st and 2nd respondent obtained the Grants over the suit properties irregularly; and that the appellant ought to have joined the National Land Commission (‘NLC’) as a defendant and not the 3rd respondent. For those reasons, the suit was dismissed with costs to the 3rd respondent, thus provoking this appeal.
15. The appellant’s memorandum of appeal raises 13 grounds of appeal. However, this appeal stands or falls on two main issues: whether the learned judge erred in law in holding that the appellant had failed to establish on a balance of probabilities that the 1st and 2nd respondents obtained the Grants to the suit properties irregularly, and secondly, whether the learned judge erred in law in finding that the appellant ought to have joined the NLC as a respondent, rather than the Chief Land Registrar, the 3rd respondent.
16. During the hearing of the appeal, the appellant was represented by Prof Tom Ojienda, Senior Counsel, and Mr Ntongaiti, learned counsel, who held brief for Mr Busaidy. Mr Wachira, learned counsel, represented the 2nd respondent. There was no appearance for the 1st and 3rd respondents, although the 3rd respondent filed submissions through Ms Mwhiki Ndundu, Litigation Counsel, Attorney General’s office.
17. The 2nd respondent filed brief submissions through Kipkenda & Company Advocates, which Mr Wachira wholly adopted without any oral highlighting. The 2nd respondent’s main contentions are three fold. That he is the lawful registered owner of LR No 21936; that a letter of allotment is not a title; and the Deed of Settlement that was executed with the appellant is not proof of irregular allotment of the said suit property.



18. The appellant's written submissions as well as those of the 3rd respondent are a rehash of their respective pleadings and submissions before the trial court.
19. We have taken into consideration the pleadings, the oral and written submissions, as well as the authorities cited by counsel. The first issue for our determination is whether the learned judge erred in law in holding that the appellant failed to establish that the 1st and 2nd respondents obtained their respective titles to the suit properties irregularly. The learned judge stated, *inter alia*:

“The Plaintiff did not lead any evidence on the survey process undertaken on the two plots after the letters of allotment were issued to him, which resulted in the new numbers given for the plots. He did not lead any evidence to show how the deed plans that he claimed went missing were prepared and by whom. ... The Plaintiff failed to establish that the 1st and 2nd Defendants obtained their titles over the two parcels of land irregularly.”
20. To determine the first issue, we must consider whether the appellant proved his case on a balance of probabilities. The burden of proof as per section 108 of the [Evidence Act](#) lay on the appellant. In [Palace Investments Limited vs Geoffrey Kariuki Mwenda & Another](#) [2015] eKLR, This Court held that:

"Denning, J in *Miller v Minister of Pensions* [1947] 2 All ER 372 discussing the burden of proof had this to say:

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but, if the probabilities are equal, it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties ... are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”
21. We must, therefore, ask ourselves and determine: between the evidence of the appellant and that of the respondent, which was more probable and convincing? In our view, the appellant's evidence before the trial court as to how the suit properties were allotted to him; the disappearance of the deed plans; the investigations that were undertaken; and the eventual payment of the allotment fees was unassailable as it was not challenged at all.
22. The letter dated September 23, 2015 from the Ministry of Lands, Housing & Urban Development that we have already cited was categorical that the “deed plans that went missing were actually issued fraudulently to unknown persons.” Dr Wayumba's letter of November 17, 2015 confirmed that after he did the survey work, the survey plan was authenticated by the Director of Surveys, but the deed plans were released to unknown persons, and not to his office.
23. The National Land Commission certified that the appellant was the rightful allottee of the suit properties and asked the cashier at the Lands registry to accept payment of the allotment fees from the appellant, and the appellant produced copies of receipts as proof of payment.
24. In our view, therefore, the appellant proved, on a balance of probabilities, that the title documents were issued to the 1st and 2nd respondents irregularly. Section 26 of the [Land Registration Act, 2012](#) states as follows:

"26.



- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor 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, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, 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."

25. In the absence of any evidence from the 1st and 2nd respondents, we find and hold that the appellant proved to the required standard that the titles to the suit properties were acquired illegally and unprocedurally. The first and major limb of this appeal thus succeeds.
26. We now turn to the second issue, that is, whether the trial court erred in law in holding that the appellant ought to have joined the NLC as a defendant, rather than the Chief Land Registrar, the 3rd respondent. In our view, the amended plaint necessitated the joinder of the 3rd respondent because the appellant alleged recklessness and negligence on the part of the 3rd respondent, and sought, inter alia, cancellation of the title documents for the suit properties.
27. The NLC had tendered documents showing that the appellant was the rightful allottee of the suit properties, and we do not think it was necessary to join it as a defendant in the suit before the trial court.
28. The learned judge did not also consider the provisions of Order 1 rule 9 of the *Civil Procedure Rules* that: "No suit shall be defeated by reason of misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it." See this Court's decision in *William Kiprono Towett & 1597 Others v Farmland Aviation Ltd & 2 Others* [2016] eKLR.
29. In any event, we agree with the appellant that it is the 3rd respondent's office that is in charge of land registration and management in Kenya, as set out by the *Land Registration Act, 2012*, not the NLC.
30. Lastly, in view of our findings as articulated herein, what orders should this Court..... regarding the suit properties? The 1st and 2nd respondents did not adduce any evidence to disprove the appellant's evidence that the Grants were issued irregularly. The 1st respondent did not participate in the appeal at all. The 2nd respondent through his advocates, Kipkenda & Company, filed submissions before this Court. It is the 2nd respondent's same advocates who drew the Deed of Settlement between the appellant and the 1st and 2nd respondents, in which the two respondents undertook to pay the appellant Kshs 53 million as consideration for the appellant to drop his claims over the suit properties.
31. The 2nd respondent did not, therefore, deny the authenticity of the Deed of Settlement, he merely asserted that it was not proof of irregular allotment of the suit properties. On the face of it, that may be so, because it was not expressly stated in the Deed of Settlement that the two respondents would pay the appellant the said sum because they were irregularly registered as the owners of the suit properties.



But it is indisputable that they agreed to pay such a colossal sum of money to the appellant so that the appellant could forego his rightful claims over the suit properties.

32. All in all, we are satisfied, that the appellant proved his case on a balance of probabilities. Consequently, we hereby set aside the trial court's judgment and substitute therefor an order that the 3rd respondent forthwith revokes the Grants in respect of the suit properties and issue them to the appellant. The 1st and 2nd respondents shall bear the costs of this appeal as well as the costs of the proceedings before the trial court. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY MARCH, 2023.

D. K. MUSINGA (P)

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

