



REPUBLIC OF KENYA



**Wanjohi & another v City Council of Nairobi & another (Environment and Land Appeal E089 of 2021) [2024] KEELC 1311 (KLR) (7 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1311 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL E089 OF 2021**

**J OMANGE, J**

**MARCH 7, 2024**

**BETWEEN**

**JOSEPH MWANGI WANJOHI ..... 1<sup>ST</sup> PLAINTIFF**

**NANCY NYAMBURA MWANGI ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**CITY COUNCIL OF NAIROBI ..... 1<sup>ST</sup> DEFENDANT**

**PAUL JOHN KIMANI ..... 2<sup>ND</sup> DEFENDANT**

*(Being an appeal from the Judgment of the Chief Magistrate Court at Nairobi, Hon. L. L. Gicheba (Ms) dated 30th July 2021 in Milimani Civil Suit No 9266 of 2001)*

**JUDGMENT**

1. This appeal arises out of a dispute in respect of- Plot no A105 Umoja Innercore now Nairobi/Umoja/ Block 83/14/ 438 (hereinafter referred to as the suit property. At the heart of the dispute is whether the suit property was validly allotted to Rosemary Njambi who then transferred it to the Appellants in the appeal No E 089 of 2021. The 2<sup>nd</sup> Defendant case in the lower court and before this court is that he is the genuine allottee who subsequently acquired good title over the suit property. His case is that the title issued to the Plaintiffs should be cancelled and an order of eviction issue. He filed an appeal in ELC No.3 of 2022 which this court will consider alongside this appeal. Given that there are two appeals I will for ease of reference use the titles in the Lower Court to refer to the parties.
2. In the lower court, the Plaintiffs had on 16<sup>th</sup> October, 2001 moved the court first seeking a permanent injunction restraining the 1<sup>st</sup> Defendant then Nairobi City Council from demolishing a building they were constructing on the suit property. The Plaintiffs had also sought a declaration that they are the rightful owners of the suit property. The complaint of the Plaintiffs then was that the 1<sup>st</sup> Defendant who had sanctioned their purchase of the suit property from one Rosemary Njambi was now trying



to demolish the building on grounds that they did not have a valid allotment letter and no approved building plan which they insisted they had paid for.

3. The Nairobi City Council, the 1<sup>st</sup> Defendant filed a defence in which they stated that the alleged letter of allotment and all other documents alleged to have been issued by them to the Plaintiffs were forgeries. They deponed that the property in question Plot no A105 Umoja Innercore now Nairobi/Umoja/Block 83/14/438 belonged to Paul Kimani who was the 2<sup>nd</sup> Defendant in the lower court.
4. The 2<sup>nd</sup> Defendant on his part filed an amended statement of defence in which he deponed that the allotment to Rosemary Njambi was fraudulent for a number of reasons which he highlighted. He sought an order of permanent injunction, cancellation of the Plaintiffs title, eviction and damages.
5. All parties gave evidence before the lower court. However, there was an objection raised by the Plaintiffs on the production of certain documents. The court ordered that certified copies or originals of the documents be produced. This was not done as the 1<sup>st</sup> Defendant closed its case without recalling the witness.
6. In a Judgement delivered by Hon. Gicheha the Plaintiffs case was dismissed while the counterclaim succeeded partially. The Plaintiffs and the 2<sup>nd</sup> Defendant have appealed against this decision.
7. Vide the Memorandum of Appeal dated the 12<sup>th</sup> November 2021 the Appellants herein have appealed against the Judgement of the Learned Chief Magistrate Hon. L.L Gicheha rendered on the 30<sup>th</sup> July 2021 and same has raised the following grounds of Appeal;
  - a. That the Learned Magistrate erred in law in proceeding to unprocedurally render a judgement in the manner she did without first rendering a ruling on a pending application and consequently failing to afford parties a chance to tender written submissions on full trial.
  - b. That the learned magistrate erred in law and fact by finding that the suit property was not available for reallocation despite the fact that the period between passing of the minutes of the housing development and management committee dated 23/9/1993 and the issuance of the notice dated 5/11/1993, the 2<sup>nd</sup> defendant's arrears were well over Ksh 20,000/=.
  - c. That the learned magistrate erred in law and fact by finding that the allocation to Rosemary Njambi was unlawful, despite the fact that the 2<sup>nd</sup> Defendants arrears were well over Ksh 20,000/= at the time of the notice dated 5/11/1993.
  - d. That the learned magistrate erred in law and fact by failing to consider that the 2<sup>nd</sup> defendant failed to clear the arrears from the time of the notice dated 23/9/1993 upon which the suit property was lawfully repossessed and reallocated.
  - e. That the learned magistrate erred in law and fact in finding that the allotment to Rosemary Njambi and consequent assignment to the plaintiff was unlawful despite the defendants failing to tender proof that the Plaintiffs documents were forgeries.
  - f. That the learned magistrate erred in law and fact by failing to consider that the 2<sup>nd</sup> defendant failed to clear the alleged arrears for a period in excess of 7 years from the date of notice to repossess given by the 1<sup>st</sup> defendant in the year 1993.
  - g. That the learned magistrate erred in law and fact by failing to consider the plaintiff's uncontroverted documents including documents signed by the 1<sup>st</sup> defendant produced in proof of their ownership of the suit property.



- h. That the learned magistrate erred in law and fact in coming to the conclusions and the judgement she came to contrary to the totality of evidence, the law and the submissions urge before her.
8. In the appeal in E003 of 2022 filed by the 2<sup>nd</sup> Defendant who was acting in person cited the following grounds of appeal;
- a. That the learned trial magistrate erred in law and in fact when she failed to consider the amended counterclaim.
  - b. That the learned trial magistrate acted in error when she failed as she did to properly evaluate the evidence on record thus reaching an erroneous decision on the issue of cancellation of illegal and irregular certificate of lease of land Nairobi Umoja Block/83/14/438.
  - c. That the learned trial magistrate acted when she failed to consider as she did to consider the Appellants submissions on the issue of costs and evictions thus arriving at erroneous decision.
  - d. That the learned trial magistrate erred in law and in fact by basing her decision on irrelevant facts and failing to base her decision on the evidence on record.
  - e. That the learned trial magistrate acted in error when she gave the Respondents 60 days to vacate as she did ignoring the continued financial and other gains made by the Respondents at the expense of the appellant.
9. The Plaintiffs thus sought the following orders;
- a. That the Appeal be allowed.
  - b. That the Judgement and decree of the Hon. L. L. Gicheha, Chief Magistrate dated 30<sup>th</sup> July, 2021 in Milimani CMCC 9266 of 2001 be set aside and or varied and the decree made thereon be vacated and this court do either:
    - i. Remit the matter back to the trial court for consideration of the Appellants/Plaintiffs' submissions on the full trial; or
    - ii. Substitute therefore its own assessment and judgment in favour of the Plaintiffs on both the main suit and dismiss the counterclaim.
  - c. That costs before this court and the subordinate court be awarded to the Appellants.
10. The appeal was canvassed and disposed of by way of written submissions. Submissions were filed by all the parties. The Plaintiffs submitted that the trial magistrate failed to take into account the definition of the paragraph in the minutes of the housing Development management committee that gave the 1<sup>st</sup> Respondent the power to reallocate the suit property herein to one Rosemary Njambi whom they bought the suit property from .That the minutes stated that any allottees whose plots were in arrears of Ksh 20,000/= and above were to be given a period of 30 days to clear the arrears failing which the plots were to be repossessed by the 1<sup>st</sup> Defendant/Respondent. That the 2<sup>nd</sup> Defendant was in arrears of Ksh 32,900/= on the two plots and therefore, the 1<sup>st</sup> Defendant acted lawfully in repossessing the plot. That the learned magistrate interpreted the same to mean arrears on each individual plot while the notice meant accumulated arrears of 1 or more plots together as long as they summed up to Ksh 20,000/=. Further, they submitted that the 2<sup>nd</sup> Defendant had not proved the allegations of fraud as set out in the counterclaim to warrant Judgment in his favour. To buttress this argument, they cited the case of *Kuria Kiarie & 2 others v Sammy Magera* (2018) eklr.



11. The 1<sup>st</sup> Defendant submitted that the trial magistrate had correctly interpreted the wording of the Minutes of the Housing and development committee. That there was no other meaning to the wording any “allotees whose plots had accumulated arrears of Ksh 20,000/= and above be given 30-day notice in the local press to clear their balance failure to which their plots will be repossessed”. The 1<sup>st</sup> Defendant insisted that accumulated here meant arrears that sum up to and not accumulated in plurality to various plots and as such the learned magistrate made the correct interpretation hence there was no error in the Judgement as the 2<sup>nd</sup> Defendant’s arrears for each of his plots fell below the given figure. The 1<sup>st</sup> Defendant submitted that there was no repossession of the suit property and any documents in the Plaintiffs possession conferring title was forged. In this event Rosemary Njambi could not pass good title on what she did not own. Counsel cited the case of Hubert L.Martin & 2 others v Margaret J.Kamar and 5 others(2016) Eklr.
12. The 2<sup>nd</sup> Defendant in his submissions reiterated that the documents relied on by the Plaintiffs to claim ownership were a forgery and stated that enough evidence had been tendered by the 1<sup>st</sup> Defendant’s witness in criminal case 9221 of 2001 to prove that the documents conferring title to one Rosemary Njambi the purported initial owner were forged hence she could not pass title to the Plaintiffs. That the 1<sup>st</sup> Defendant being the rightful authority that issued allotment letters was better placed to prove the fraud which it did.
13. This being a first appeal, this court is under a duty to reconsider the evidence adduced and analyze it so as to be able to reach its own independent conclusions and thus determine whether the conclusions reached by the trial court are consistent with the evidence and the applicable law, and we will only depart from the findings by the trial Court if they were not based on evidence on record; where the said Court is shown to have acted on wrong principles of law or where its discretion was exercised injudiciously as held in *Mbogo & Another v Shah* (1968) EA 93 In Gitobu Imanyara & 2 Others v Attorney General [2016] eKLR the Court held that:

“this being a first appeal, it is trite law that this court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.
14. In considering the appeal, the court is mindful that it would be wrong to interfere with the exercise of the trial court’s discretion merely because the Court’s decision would have been different. An appellate Court would not normally interfere with the exercise of the discretion unless it has not been exercised judiciously. As to what the term “discretion” means the Court in *The Supreme Court of Uganda, in Kiriisa v Attorney-General and Another* [1990-1994] EA 258 stated that: “Discretion simply means the faculty of deciding or determining in accordance with circumstances and what seems just, fair, right, equitable and reasonable in those circumstances.” That discretion being wide, the main issue before this court is for the court to do justice to the parties, and in so doing the court will not impose conditions on itself to fetter the wide discretion given to it by the rules of procedure.
15. Having considered the record of appeal filed by both parties and the written submissions the court identifies the following issues for determination; Whether the learned trial magistrate erred in dismissing the Plaintiffs claim. Whether the learned trial magistrate erred in failing to cancel the Plaintiffs title as sought by the 2<sup>nd</sup> Defendant. Whether the learned trial magistrate erred in failing to award damages or *mesne* profits.



16. In dismissing the Plaintiffs claim, the learned trial magistrate found that in the minutes of the meeting of the 1<sup>st</sup> Defendant held on 27/9/1993 it was resolved that only plots which had accumulated arrears of over 20,000 were to be repossessed. The learned magistrate found that the suit property allotted to the 2<sup>nd</sup> Defendant had not met this threshold hence was irregularly allocated to the said Rosemary Njambi. The Plaintiffs/Appellants and the 2<sup>nd</sup> Defendant/ Respondent take issue with this finding. The Appellants argue that since the 2<sup>nd</sup> Respondent owed arrears in respect of a second plot no 22 the cumulative arrears exceeded the Kshs 20,000 envisaged for repossession. On the other hand, the 2<sup>nd</sup> Respondent insist that learned magistrate erred in finding that the plot was ever allocated to Rosemary Njambi at all, his case being that Rosemary Njambi was not a valid allottee at all.
17. Having considered the submissions and the evidence it is clear that the case in the lower court and indeed in this court turns on whether the 1<sup>st</sup> Defendant had repossessed the suit property on the basis of the arrears owed in respect of both plots. The recorded minutes of the 1<sup>st</sup> Defendant state;

“The Director of Housing Development recommended that any allottees whose plots had accumulated arrears of Ksh 20,000/= and above be given 30 days notice in the local press asking them to clear the balances, failure to which their plots would be repossessed.”
18. The schedule of plots under consideration is in the minutes. Each plot was itemized individually with the amount owing against each plot clearly indicated. There was no itemization of amounts owed by individuals with several plots. There is no basis whatsoever for the argument that the arrears were to be calculated based on what an individual owed. I therefore find that the learned trial magistrate correctly interpreted the minutes.
19. In view of this finding the learned trial magistrate found that the said Rosemary Njambi could not pass good title as she was not validly allotted the suit property. The 2<sup>nd</sup> Defendant/ Respondent takes issue with this in his appeal as he avers that Rosemary Njambi was not allocated a letter of allotment at all. He contends that all the documents were forgeries. This is the basis upon which he seeks cancellation of the title that the Plaintiffs hold. It is now accepted that where a title is under challenge, the court must consider the root of the title. It is not sufficient to wave a document whose origins cannot be explained satisfactorily.
20. On the question of fraud, counsel for the Plaintiffs submitted that the threshold for fraud as set by the Court of Appeal in the case of *Nyangate Guto Alias Watson Mogere Mogoko Versus Maxwell Okemwa Mogoro and Another* had not been met. In that case the court of appeal underscored that fraud must not only be specifically pleaded but must also be proved on a standard that falls short of beyond reasonable doubt but that is higher than a balance of probabilities.
21. In the instant case, the evidence that was before the court was that first, as found above, the suit property had not been lawfully repossessed from the owner, Paul Kimani. Secondly it emerged through Criminal case 9231 of 2002 and ELC 2020 of 2021 which was in the Plaintiffs Record of Appeal page 136 that a suspect Geoffrey Kamau Ayub had been charged with forging a letter of allotment. It was alleged that he was responsible for other forgeries in properties which included the suit property. Although he was acquitted, it is trite law that the standard of proof in criminal cases is different from that of civil cases. As such acquittal in the criminal trial does not mean the documents in question were genuine.
22. In addition, the 1<sup>st</sup> Defendant though they missed the opportunity to present crucial documents were categorical that the documents held by the Plaintiffs were forgeries. The Plaintiffs corroborate their evidence in this regard as the reason they moved court in the first place was that the 1<sup>st</sup> Defendant



refused to approve development plans on the basis of the forged title and other documents. Indeed, in the document produced by the Plaintiffs from the Housing Development Committee dated 21<sup>st</sup> September, 2001 the 1<sup>st</sup> Defendants are categorical that after investigations they were satisfied the allotment letter and other documents the Plaintiffs had were forgeries.

23. Taking the evidence in totality including the findings in ELC 2020 of 2001, even in the absence of a handwriting experts evidence, only one conclusion is possible; that the documents which were issued to the Plaintiffs were fraudulent. The Plaintiffs could not obtain good title from Rosemary Njambi who purported to obtain an allotment letter to a plot which belonged to someone else. I therefore find that the learned trial magistrate erred in not cancelling the title.
24. On the question of mesne profits, the Judgement of the learned trial magistrate is silent on this issue. In this claim, the onus was on the 2<sup>nd</sup> Defendant/Appellant to prove the profits if any that the Plaintiffs may have made or could with due diligence have made from their wrongful occupation of the suit property. There was no evidence adduced on this aspect. As such I find that this was not proved and the court correctly did not make any award on the same.
25. There was also a prayer for general damages. I have considered the circumstances of this case and note that the Plaintiffs are set to lose their investment on the property. I therefore find that the trial magistrate correctly did not penalize them to pay damages.
26. As I end I will say this, during the period that the matter was in court, the 2<sup>nd</sup> Defendant who appeared in person, made several allegations against various judicial officers and Judicial staff. As correctly pointed out by the Counsel for the Plaintiffs in his submissions, this court has no jurisdiction to investigate these complaints. Any complaints should be directed to the various administrative offices in the Judiciary.
27. Regarding the complaint by the 2<sup>nd</sup> Defendant that certain documents were missing, the court is satisfied that the record of appeal as filed by the Plaintiffs in A089 of 2021 and that filed by the 2<sup>nd</sup> Defendant in E003 of 2022 which filled any gaps in the record of appeal filed in A089 of 2021 contained sufficient information to make a determination in the matter.
28. In the end, the appeal by the Plaintiffs/Appellants is hereby dismissed with costs. The appeal by the 2<sup>nd</sup> Defendant/ Appellant succeeds partially. The court therefore makes the following orders;
  - a. The Plaintiffs/Appellants appeal is dismissed with costs.
  - b. The 2<sup>nd</sup> Defendant/Appellant appeal succeeds partially. An order is hereby issued that the certificate of lease of land Nairobi Umoja Block/83/14/438 issued in the names of Joseph Mwangi Wanjohi and Nancy Nyambura Mwangi be and is hereby cancelled.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 7<sup>TH</sup> DAY OF MARCH 2024.**

**JUDY OMANGE**

**JUDGE**

**In the presence of: -**

Mr. Hans Oichoe for the Appellants

Mr. Ojonga for 1<sup>st</sup> Respondent

2<sup>nd</sup> Respondent in person

