



**IN THE COURT OF APPEAL AT NYERI**  
**(CORAM:WAKI, NAMBUYE & KIAGE J.J.A.)**

**CIVIL APPEAL NO.54 OF 2014**

**BETWEEN**

**MBAU SAW MILLS LIMITED.....APPELLANT**

**VERSUS**

**THE HON. ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**WILSON KARUNGARU (the Personal representative**

**of the estate of GEOFFREY KABUA KARUNGARU.....2<sup>ND</sup> RESPONDENT**

*(An appeal from the whole judgement of the Honourable Judge Justice A.OMBWAYO given on 16<sup>th</sup> May, 2014)*

*in*

*NYERI E.L.C.CAUSE .NO.59 OF 2008*

*(FORMERLY NAIROBI HCC NO. 2325 OF 1993))*

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**JUDGMENT OF THE COURT**

This appeal is from a judgment of the Environment and Land Court in Nyeri given on 16<sup>th</sup> May 2014 which decided a legal tussle that had lasted more than two decades. It was a dispute over the ownership of Plot No. Karatina Block 1/639 measuring some 0.4 Hactares within Karatina Township (hereafter “the suit property”).

The suit property started out as an unsurveyed piece of land originally meant for a lorry depot for which a Part Development Plan (PDP) was prepared dated 19<sup>th</sup> May 1971. After approving that PDP the Ministry of Lands and Settlement in Nairobi forwarded the same to the Clerk of the then Nyeri County Council vide a letter dated 30<sup>th</sup> August 1971. In that letter, one Erica Mann, writing on behalf of the Town Planning Adviser advised, **“that the plot be properly fenced along its road frontage since lorry depots are not exactly beautiful”**.

Subsequent events were not exactly beautiful.

By a letter of allotment dated 21<sup>st</sup> October 1971, one Joseph K Mugambi (Mugambi) was offered the suit property on a 99-year lease with effect from 1<sup>st</sup> November 1971. That letter was from the District Commissioner, Nyeri and requested Mugambi to express his acceptance of the offer and pay some tabulated charges amounting to Ksh. 12,528.30. He was required to do so within a month from the date of the offer failing which the offer would be considered to have “lapsed”.

That letter of allotment has inscribed on it by hand **“15/3/72 paid 4000/- R.No. 26338”** against the total sum requested.

Mugambi later entered into an agreement where under he sold his interest in the suit property to Mbau Saw Mills, the appellant herein. The transfer was executed by Mugambi and on behalf of the appellant as transferee on 20<sup>th</sup> March 2015. It was on the standard form for transfer of plots prepared by the Karatina Town Council and was duly witnessed and stamped by the Town clerk. That transfer was subsequently tabled before the Town Planning, Works and Housing Committee Meeting held on 29<sup>th</sup> March 1985 and was approved under Minute 8/85. The Full Council of Karatina in its meeting of 26<sup>th</sup> April 1985 by resolution confirmed and adopted that Minute authorizing the transfer to the appellant.

By a letter dated 28<sup>th</sup> April 1986, the Town Clerk Karatina Town Council informed the Commissioner of Lands of Mugambi’s request to have the suit property transferred to the appellant. He then requested the Commissioner to effect the transfer and advised that **“all dues owing to the Council are fully paid up”**. He attached extracts of Council Minutes chronicling the transaction.

There is no indication that the Commissioner responded to that letter. Instead, by a letter dated 17<sup>th</sup> June 1988 under the hand of Mrs P. Amiani, the Commissioner of Lands addressed the District Commissioner, Nyeri; the Town Clerk, Karatina; and the District Land Officer, Nyeri, as follows;

**“RE: KARATINA TOWNSHIP UNSERVEYED PLOT – LORRY DEPOT**

**Unserveyed plot not numbered and no plan attached was allocated to Mr. Joseph M. Mugambi of P.O. Box 75, Karatina in 1971 vide the District Commissioner’s Letter Ref. LS/10/Vol.VII dated 21.10.71 for a lorry depot. However, the plot has not been paid for nor accepted and since I don’t have a plan showing the same, I would like to have confirmation that such a plot exists and forward a plan showing the same.**

**Signed**

**P. AMIANI (MRS)**

**FOR: COMMISSIONER OF LANDS”**

What seems to have happened next is that by a Letter of Allotment dated 30<sup>th</sup> July 1992, the Commissioner of lands offered one Geoffrey Karungaru Kabua (Kabua) of P.O. Box 89 **“Alternative Plot No. 16A- Karatina Township”**. That plot measured 0.4 Hactares, and there is little doubt that it referred to the suit property.

The appellant got wind of this development and on 18<sup>th</sup> December 1992 addressed a detailed letter to the Commissioner of Lands laying claim to the suit property on account of the matters we have set out herein above, and attaching copies of the transfer done before the town clerk. It proceeded to assert that it had since the transfer paid, the Council’s rent and rates, the latest being for Ksh. 16,935/- made a couple of days previously. It then expressed alarm that some rumour was circulating that somebody had been given a letter of allotment for the suit property by the Commissioner of Lands and was therefore claiming its ownership. The appellant therefore requested that a lease be prepared in its name to give it security of ownership of the property it was using as a timber and logs depot. The letter was copied to the Town Clerk requesting that he does confirm ownership to the Commissioner of Lands. This the Town Clerk

did vide a letter dated 23<sup>rd</sup> February 1993 in which the Commissioner of Lands was informed, in relevant part, as follows;

***“I wish to confirm that as far as our records are concerned, the plot was allocated to Mr. J. K. Mugambi who latter (sic) transferred the same to Ms Mbau Sawmills Limited. Our letter Ref KTC/LD/DEV/1/25 of April 28, 1986 is relevant”.***

Previous entreaties notwithstanding, the Commissioner of Lands issued a letter of allotment, accepted by Kabua and on 4<sup>th</sup> February 1993 a Certificate of Lease was issued to him under the Registered Lands Act, Cap 300 (now repealed).

Upon learning of that development, the appellant filed suit at the High Court in Nairobi on 12<sup>th</sup> May, 1993 against the Attorney General, the Karatina Town Council and Kabua in which he laid claim to the suit property, alleging that the Commissioner of Lands had unlawfully allocated it and issued a certificate of title to Kabua. He also charged that all the defendants all along knew that the suit property belonged to him and that its reallocation to Kabua ***“was done secretly and in concert between all the Defendants”***. He sought the following prayers;

***“(a) A declaration that the allotment of Karatina Block 1/639 by the Commissioner of Lands is illegal, unconstitutional and void ab initio.***

***(b) A declaration that the said plot belongs to the Plaintiff and an Order directing the Commissioner of Lands and the Principal Lands Registrar to cancel the registration of the 3<sup>rd</sup> Defendant as proprietor and the registration of the said plot in the name of the Plaintiff.***

***(c) An injunction against the 3<sup>rd</sup> Defendant from interfering with the Plaintiff’s user and enjoyment or otherwise dealing with the plot.***

***(d) And against all the Defendants jointly and severally for damages and costs of the suit”.***

To that suit the Hon. Attorney General filed a Defence in which was pleaded *inter alia*, as follows;

***“2. The first defendant denies the contents of paragraph 5 of the Plaint and states that if there was any sale and or transfer of all that piece of land known as Karatina Block 1/639 to the Plaintiff the same was done without the consent of the 1<sup>st</sup> Defendant and therefore the said transfer is unlawful”.***

The Attorney General moreover dismissed as misconceived and scandalous the appellant’s allegations that the defendants had acted secretly and in concert in procuring and effecting the reallocation of the suit property to Kabua.

Kabua also filed a Statement of Defence in which he denied that the appellant had ever been the lawful owner of the suit property. While denying the appellant’s occupation of the same, Kabua also pleaded that such occupation, if extant, did not confer upon the appellant any proprietary right or claim. He asserted the lawfulness of the transmission of the suit property to himself and dismissed as mere supposition the appellant’s claims that the defendants had acted secretly and in concert in the matter of the reallocation of the suit property. Kabua asserted his legal ownership of the suit property and prayed for the dismissal of the appellant’s suit with costs.

There was no defence filed on behalf of the Karatina Town Council and its brief engagement with this dispute as a party ended when the appellants’ then advocate withdrew the suit as against it vide a letter dated 7<sup>th</sup> January 1997.

The suit then proceeded to trial after the usual preliminaries and was heard before the Nyeri Environment and Land Court where it had been transferred.

For the appellant, its chairman ELIUD MATU WAMAE (PW1), a Nyeri businessman and Member of Parliament for Mathira Constituency at the time, gave an account of how the appellant came into possession of the suit property along the lines we have already set out herein. His account was supported materially by PATRICK NJUGUNA WAINAINA (PW2) who was the Town Clerk, Karatina Municipal Council and produced correspondence and other documentary proofs of the dealings relating to the suit property. He was categorical that the same belonged to the appellant, the transfer to which the Council had approved.

Regarding the allocation of the suit property to Kabua (who he referred to by his other name, Karungaru), PW2 stated as follows;

***“According to our records around February, 1993, this plot was not available for allocation to Karungaru by the Commissioner of Lands. Our Council was not consulted when the plot was being allocated to Karungaru. Plots available for allocation are so allocated by the District Commissioner. Names of allottees are then recommended to the Commissioner of Lands. This procedure was followed in relation to allocation of the plot to Mr. Mugambi but not in relation to Karungaru”.***

On the part of the defense, the Attorney General did not call any witnesses, and did not adduce any evidence. As for Kabua, he had expired as at the time the matter went to trial and was substituted by WILSON NGATIA KARUNGARU, who is the 2<sup>nd</sup> Respondent herein. He testified as to how the suit was applied for and a letter of allotment was issued and accepted and the attached conditions thereof were satisfied. Payment was made on 18<sup>th</sup> August 1992 whereafter a beacons certificate was issued and finally a Certificate of Lease. He asserted, therefore, that the suit property had properly belonged to his late father Kabua.

On being cross examined, the 2<sup>nd</sup> Respondent admitted to being aware of a letter from the Commissioner of Lands asking Kabua to voluntarily surrender the suit property as the same was committed to another person. Kabua did not comply with that request and the 2<sup>nd</sup> Respondent stated that he did not know why. He also stated that he had not been paying rates ***“because we are in court”*** but conceded on being shown some documents that ***“Mbau Saw Mills [the Appellant] had been paying rent and rates since 1993. We have not been paying anything”***. He had not as yet done any developments on the suit property as there was a court order that stopped him from doing so.

After hearing the witnesses and the submissions of the parties, Ombwayo, J dismissed the appellant’s suit. In doing so, the learned judge found that as Mugambi had not accepted the offer contained in the letter of allotment of 21<sup>st</sup> October 1971 within the stipulated 30 days, that offer lapsed by affluxion of time and that;

***“The offer having lapsed, the allottee Mr. Joseph M. Mugambi did not have any interest to transfer to the plaintiff (the appellant) and therefore all transactions between the allottee and the plaintiff were a nullity in law. Moreover that any purported transfer whether or not approved by a Committee of the Karatina Town Council is void ab initio as the conditions of the letter of allotment were not met hence Mr. J. K. Mugambi acquired no transferable interest in the property as the purported transfer was null and void”.***

Conversely, the learned Judge found and held that the allotment to Kabua was effective as he accepted it and complied with the conditions of the letter. The certificate of lease issued on 4<sup>th</sup> February 1993 was lawfully issued upon registration as there was no evidence of fraud by Kabua, held the Judge, as he dismissed the appellant’s claim that he was being deprived of his property rights. The learned Judge took the view that the appellant could not claim under the letter of allotment, at any rate, as he was not privy thereto.

Its suit having been dismissed with costs, the appellant was aggrieved and has preferred this appeal. In its memorandum of appeal, it has contended that the learned Judge erred or misdirected himself on the law

and the facts by;

- **holding that the 2<sup>nd</sup> respondent had acquired legal title to the suit property and not the appellant who was in occupation for over 35 years.**
- **holding that the appellant did not have a good legal title.**
- **dismissing the original letter of allotment as conferring no rights.**
- **ignoring the requisite payments made by the appellant.**

**Mr. Gori**, learned counsel for the appellant took us through the chronology of events as we have stated them herein and elucidated on the grounds of appeal by making reference to the various documents that were tendered by the parties and witnesses at the trial. He contended that the suit property having been first allocated to Mugambi in 1971 who then transferred it to the appellant with the consent of the Town Council, it was not available for re-allocation to Kabua when it was clearly under the appellant's lawful occupation.

Counsel in particular referred us to a letter dated 18<sup>th</sup> May 1993 addressed to Kabua by the Commissioner of Lands which clearly indicated that the suit property had been allocated to him by mistake.

As we consider the said letter to be important to our consideration of this appeal, we set it out herein in full;

***“MINISTRY OF LANDS & HOUSING***

***DEPARTMENT OF LAND***

***P.O. Box 30089***

***NAIROBI***

***18<sup>th</sup> May, 1993***

***Ref. No. 117900/30***

***Mr. Geoffrey Karungaru Kabua,***

***P.O. Box 89***

***KARATINA***

***RE: ALTERNATIVE PLOT NO. 16 (NOW BLOC 1/639 KARATINA)***

***With reference to a letter Ref. KTC/BL 639/1/4 dated 7<sup>th</sup> May, 1993 from Ag. Town Clerk, Karatina town council addressed to me, copy to you, I am instructed by the Government to inform you that the above plot was way back in 1971 allocated a Mr. Joseph Mugambi of Post Office Box 73, Karatina for a Lorry Depot.***

***Although you have collected the lease for the plot, the allocation of this plot to you was erranous(sic) or by mistake as the same was already committed or allocated to Mr. Mugambi.***

***I am therefore instructed to inform you to arrange for voluntary surrender of the lease for the above plot for cancellation. It is further agreed that upon surrender of the lease, you may identify an alternative vacant plot for allocation to you in lieu of.***

***Your co-operation in this regard would be highly appreciated.***

*Signed*

**Z. MABEA.**

**FOR: COMMISSIONER OF LANDS”**

It is noteworthy that the said letter was prompted by a letter dated 7<sup>th</sup> May 1993 by the Ag. Town Clerk of Karatina Town Council seeking guidance from the Commissioner of Lands as to the ownership of the suit property given the rival claims.

**Miss Masaka**, learned counsel for the Attorney General opposed the appeal and was in full support for the judgement of the learned Judge. She maintained that not having been allocated the suit property, the appellant had no title to it. Even the alleged transfer by Mugambi to the appellant was hollow and inefficacious, in counsel’s view, because Mr. Mugambi the original allottee, had not complied with the terms attached to the conditional allotment which then expired after 30 days and reverted to its status as unalienated public land available for allotment to Kabua. She asserted that the payments made by the appellant in 1985 were not in satisfaction of the conditions in the original allotment.

Citing this Court’s decision in **DR JOSEPH M.K. NG’OK –VS- MOIJO OLE KEIWUA & 4 OTHERS**, Civil Application No. 60 of 1997, Counsel posited that the right to property attaches only to those who have legally acquired the same, which the appellant had not but Kabua, and therefore the 2<sup>nd</sup> Respondent, had. She urged us to dismiss the appeal.

**Mr Lusi**, learned Counsel for the 2<sup>nd</sup> Respondent was equally dismissive of the appeal. He insisted that the original letter of allotment was not accepted. Nor was payment of the requisite sums made within time. That being the case, the same had long expired by the time transfer occurred between Mugambi and the appellant in 1985 and any payments made thereafter were irrelevant and unproductive of any rights.

In brief reply to those counter arguments, **Mr. Gori** asserted that the proper procedure was never followed in the allotment and issuance of the Certificate of Lease to Kabua. He also contended that Mugambi did make payment in 1972 which was acknowledged by the Town Council and that the appellant itself did make payment of all dues including some Ksh.16,935/- paid on 15<sup>th</sup> December 1992 and was duly receipted.

We have considered all the submissions made by learned counsel and thoroughly scrutinized the record.

We have interrogated the documents that were tendered in the court below and also subjected all the evidence, which we have set out herein in detail, to a fresh and exhaustive analysis and re-appraisal in obedience to our duty as a first appellate court. See, **Rule 29** of the **Court of Appeal Rules**. We have done so cognizant that we have not had the advantage the learned Judge had of seeing and hearing the witnesses as they testified so as to make an assessment on their credibility. See, **SELLE –VS- ASSOCIATED MOTOR BOAT CO.** (1968)EA 123.

The Central issue in this appeal is whether the learned Judge was right to hold that the appellant had no cognizable legal rights over the suit property notwithstanding his occupation with the consent of the Karatina Town Council, to which he paid rents and rates, for over 35 years. A concomitant issue is whether, given the said occupation under those antecedents, it was open to the Commissioner of Lands to ignore the same and issue a new letter of allotment and eventually a certificate of title to Kabua.

It is not in dispute that a letter of allotment was issued to Mugambi on 21<sup>st</sup> October 1971. What does not appear to have been given due weight is the fact that the said letter was not from the Commissioner of Lands, but from the District

Commissioner, Nyeri. Nowhere did that letter of allotment make mention of the Commissioner of Lands or require Mugambi to communicate his acceptance or make payment to the Commissioner of Lands. It

is with this fact in mind that the letter from the Commissioner of Lands dated 17<sup>th</sup> June 1988 must be viewed. In that letter the Commissioner, while acknowledging an allotment to Mugambi, by the District Commissioner in 1971, stated that the same had **“not been paid for nor accepted”**. He was then requesting confirmation that the plot existed. That letter was written notwithstanding that the Karatina Town Clerk had, by a letter written more than two years previously on 28<sup>th</sup> April 1986, expressly informed the Commissioner of Lands that Mugambi had already requested transfer of the plot to the Appellant. The Clerk therefore requested the Commissioner to effect the transfer, informing him that **“all dues owing to the Council had been fully paid up”**. By this time the Council had already approved the transfer which had been witnessed by the Clerk and done on standard transfer forms of the Karatina Town Council.

Such transfer was contemplated in the letter of allotment itself which, under special condition 7 provided that,

***“7. The Grantee shall not alienate the land or any part thereof by sale, charge transfer or of possession, sublease, bequest or otherwise, howsoever without the previous written consent in writing of the County Council in accordance with Sect. 34(1) of the Trust Land Ordinance (Chapter 100)”***

(Our emphasis)

Such consent was given and we must, respectfully, differ with the learned Judge’s view that it availed nothing. We hold the view that the consent was contractual and perfectly legal. As at the time the Town Council was giving it, it must have been satisfied that Mugambi had a transferable interest in the suit property and that he was compliant with the conditions imposed by the District Commissioner. At any rate, we have already noted the endorsement on the letter of allotment indicative of accepted payments by the original allottee as well as the confirmation to the Commissioner of Lands that all dues had been paid up. Receipts indicative of those payments as late as December 1992 were exhibited.

Part of the confusion surrounding this matter is clearly attributable to the Commissioner of Land’s failure to acknowledge, act upon or respond to some of the correspondence from the Town Council of Karatina, leading to obvious frustration. Such frustration is well-nigh palpable in the letter of the Town Clerk to the Commissioner of Lands dated 7<sup>th</sup> May 1993 seeking guidance in that the latter had issued a letter of allotment and a certificate of lease to Kabua yet Mugambi had been allocated the same more than two decades before. That letter finally elicited what, to our mind, is the most illuminating response from the Commissioner of Lands in the form of the letter dated 28<sup>th</sup> May 1993. That letter, signed by Mr. Z. Mabea for the Commissioner advised Kabua in unambiguous terms that the allocation of the plot to him **“was erranous (sic) or by mistake as the same was already committed allocated to Mr. Mugambi”**. It then instructed him to voluntarily surrender the lease for cancellation.

That letter was copied to the Acting Town Clerk, Karatina Town Council; and to the Land Registrar, Nyeri, who was requested to lodge a restriction on that title to inhibit further dealings. Significantly, it was also copied to the Permanent Secretary in the Ministry of Lands and Settlement with this telling revelation;

***“You may recall this case; the misinformation by Mr. G.K. Kabua and pressure brought to bear on the officers handling the matter which occasioned the issuance of the lease prematurely before exhaustive consultations were finalized”***.

To our mind, this letter was a critical piece of evidence that spoke for itself. It also divested Kabua of the cloak of innocence, blaming him of misrepresentations that led to the allotment to him. This robbed his certificate of lease of the sanctity afforded by **section 23(1)** of the repealed **Registration of Titles Act**. Curiously, the learned Judge, erroneously in our view, paid scant attention to its significance. In fact, he was dismissive of it, using a path of reasoning we find difficult to follow;

***“The allegation that the second allotment letter was issued due to pressure and misinformation is not supported by any evidence as the makers of the documents where it is alleged that the allotment letter was issued due to pressure were not called. This court issued witness summons to the lands officers but no one came to testify on behalf of the Attorney General. There is no evidence of pressure, misinformation or fraud”.***

We are unable to agree that an unchallenged document authored by a party fails to have due probative value by reason only of the failure, refusal or regret of the maker to come and “give evidence” on it. Such an approach flies in the face of the common law evidentiary rule that parole evidence should not ordinarily be admitted to dilute or negate documentary evidence. The rule is codified in **Sections 62 and 100** of the **Evidence Act**. At any rate, it can hardly be right that the truancy of the Commissioner of Lands’ witnesses should somehow be construed as against the appellant, instead of the Attorney General. We think that the letter was fully explanatory of what transpired that led to the rather baffling issuance of a letter of allotment and certificate of title to Kabua. If any inferences were to be drawn from the no-show of the Commissioner’s witnesses, it would be as against the Attorney General. Sufficient opportunity had been afforded the Attorney General to avail witnesses and the record shows that on 19<sup>th</sup> December 2013, the court had this to say;

***“The 1<sup>st</sup> Respondent is absent. His witnesses are absent. The AG is in serious breach of the principles of [the] rule of law. He does not appear in court. He does not summon witnesses and expects the court to sympathize”.***

A party who fails to call evidence in a civil case, an adversarial system of justice runs the risk of the opposite party’s evidence standing unchallenged.

In this case it appears to us that on a balance of probabilities the appellant did make out a case to justify the declarations it sought and the cancellation of the letter of allotment and certificate of title issued to Kabua. The learned Judge fell into error in failing to so hold.

In the result this appeal succeeds. The judgment given by the Environment and Land Court on 16<sup>th</sup> May 2014 is set aside and substituted with orders that the appellant’s suit succeeds with costs.

The 1<sup>st</sup> Respondent shall pay the appellant’s costs of this appeal.

***Dated and delivered at Nyeri this 20<sup>th</sup> day of May, 2015***

**P. N. WAKI**

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**JUDGE OF APPEAL**

**R. NAMBUYE**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

.....

**JUDGE OF APPEAL**

*I certify that this is a  
true copy of the original.*

**DEPUTY REGISTRAR**