



**Museto Women Group (Suing through its officials) Sarah Njeri  
Mwangi & 2 others v Ngugi & 4 others (Environment & Land Case  
436 of 2017) [2024] KEELC 4962 (KLR) (20 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4962 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT & LAND CASE 436 OF 2017**

**LC KOMINGOI, J**

**JUNE 20, 2024**

**BETWEEN**

**MUSETO WOMEN GROUP (SUING THROUGH ITS OFFICIALS) SARAH  
NJERI MWANGI ..... 1<sup>ST</sup> PLAINTIFF  
MARY WAIRIMU NJOROGE ..... 2<sup>ND</sup> PLAINTIFF  
BENEDETA MBELENGWA WATHOME ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**JOSEPH KARIUKI NGUGI ..... 1<sup>ST</sup> DEFENDANT  
JOHN KASALE ..... 2<sup>ND</sup> DEFENDANT  
MRS. SARAH MUTUNGO ..... 3<sup>RD</sup> DEFENDANT  
COUNTY GOVERNMENT OF KAJIADO ..... 4<sup>TH</sup> DEFENDANT  
NATIONAL LAND COMMISSION ..... 5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. By the plaint dated 9<sup>th</sup> March 2015 filed at the High Court in Machakos and later transferred to this court, the Plaintiff claims that it was registered as a Self Help Group in 1989. It was allotted plot no. 4480/202 by the defunct Olkejuado County Council and they put up structures on it. At the time, the 3<sup>rd</sup> Defendant was the Chairlady and all the documents regarding the plot were in her custody. She was tasked with following upon the lease from the County Council but this never happened as the Plaintiff would later learn that the plot was sold to the 2<sup>nd</sup> Defendant who is the 3<sup>rd</sup> Defendant's son, who later sold it to the 1<sup>st</sup> Defendant. The same was converted to plot No. Ngong township B2/29. The Plaintiff claims that it lodged a dispute with the defunct County Council and which recommended that the said plot was theirs and that the 1<sup>st</sup> Defendant would be allotted another plot at Kibiko. That



notwithstanding, the 1<sup>st</sup> Defendant filed CMCC No. 1091 of 2014 at Nairobi seeking to evict the Plaintiff from the plot. An ex parte judgement was issued granting him the eviction order. He evicted the Plaintiff and demolished the structures on the plot. The Plaintiff is thus seeking:

- i. An order of injunction restraining the 3<sup>rd</sup> Defendant or his servants and or agents from trespassing into the Plaintiff's property.
  - ii. An order that the lease title held by the 3<sup>rd</sup> Defendant is illegal and the same be revoked.
  - iii. The 4<sup>th</sup> Defendant do revoke the said title and the same be issued to the Plaintiff.
  - iv. General damages.
  - v. Any other reliefs that his Hon. Court may deem just and fit to grant.
  - vi. Costs of this suit.
2. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in their Statements of Defence, denied the allegations in the plaint and sought that the suit against them be dismissed. The 2<sup>nd</sup> Defendant acknowledged that the suit property belonged to him having been allotted the same by the then Olkejuado County Council and that he sold it to the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant acknowledged that he purchased the suit property from the 2<sup>nd</sup> defendant without any encumbrances. It is his case that he lodged CMCC 1091 of 2014 in Nairobi between him and the Plaintiff and the suit was heard and determined. Dissatisfied by the outcome, the Plaintiff lodged an appeal High Court Civil Appeal 484 of 2014 Nairobi which is pending determination. It is his case that, this suit is res judicata. He also indicated that there was also another suit lodged by the Plaintiff HC 339 of 2012 at Machakos which was also pending determination.

### **Evidence of the Plaintiff**

3. Sarah Njeri Mwangi testifying as PW1 adopted her witness statement dated 9<sup>th</sup> May 2015 and produced as evidence seven documents which were marked as P. Exhibit 1- 7.
4. She stated that she took over as chairlady of the Plaintiff in the year 2000 and it was in the year 2010 when they discovered that the plot had been transferred to the 2<sup>nd</sup> Defendant. At the time of the transfer, all the documents were in the custody of the 3<sup>rd</sup> Defendant who was the previous chairlady. She testified that after the plot was allotted to them, they put up a posho mill and some structures.
5. On cross examination she confirmed that she was the current chairlady having taken over from the 3<sup>rd</sup> Defendant. She also indicated that the 2<sup>nd</sup> Defendant was the 3<sup>rd</sup> Defendant's son and that his mother was also a member of the Plaintiff. She stated that when they informed the 4<sup>th</sup> Defendant about the dispute, they were informed to stay on the plot. On the issue of the pending suits; HCCC 87 of 2002 and 339 of 2012 (OS) Machakos, she stated that they were informed that the said suits had been transferred to Kajiado but their then advocate never gave them any further information on their progress or hearing dates and that is why they filed this current suit. She also indicated that the 1<sup>st</sup> Defendant after demolishing their structures on the suit plot, has put up a building which is occupied.
6. On re-examination she stated that they expected that the 4<sup>th</sup> Defendant would act on the recommendation that the plot should remain with the Plaintiff and another one allocated to the 1<sup>st</sup> Defendant. She also stated that the sale of the plot to the 1<sup>st</sup> Defendant was irregular because it was done without the plaintiff's authority and consent.
7. The Plaintiff then closed their case.



## Evidence of the Defendants

8. Kasale John Mutongo testifying as DW1 adopted his witness statement dated 28<sup>th</sup> August 2023 and produced his bundle of documents as evidence which was marked D. Exhibit 1-6. He stated that in 1992 he applied for allotment of a plot at Ngong and he was allotted plot No. 4480/02, he then paid the requisite fees and was given a letter of allotment. In 2002 he sold and transferred the plot to Joseph Kariuki Ngugi having followed due process and obtained consent from the then Olkejuado County Council.
9. On Cross-examination he stated that he did not buy the plot from the chairlady of the Plaintiff but was allotted the same by Olkejuado County Council and had the documents in that regard. He also stated that he got spousal consent to sell the plot.
10. DW 2, Joseph Kariuki Ngugi testified on 19<sup>th</sup> September 2023. He adopted his witness statement dated 28<sup>th</sup> August 2023 and produced his bundle of documents marked as D.Exhibit 1-5. He stated that he purchased the suit plot from the 2<sup>nd</sup> Defendant and has title to the plot.
11. On re-examination he indicated that there was a sale agreement between him and the 2<sup>nd</sup> Defendant and that he got consent from the 2<sup>nd</sup> defendant's wife as well as Olkejuado County Council before he purchased it. He stated that he neither had any relation with the Plaintiff nor its officials. He further stated that he did not evict the Plaintiff from the suit plot because they had never occupied it.
12. At the close of the oral testimonies, parties tendered final written submissions.

## The Plaintiff's Submissions

13. Despite Mr. Adede confirming that they had filed submissions, the court noted on 11<sup>th</sup> December 2023 that the same were not on record and granted the Plaintiff's counsel seven (7) days to do so. By the time of writing this Judgement, the Plaintiff's submissions are not on record.

## The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendant's Submissions

14. Counsel submitted that before the 1<sup>st</sup> Defendant purchased the suit plot, he carried out due diligence and confirmed that suit was leased to the 2<sup>nd</sup> Defendant and there was no encumbrance. Counsel further submitted that upon allotment of the suit plot to the 2<sup>nd</sup> Defendant, it was no longer available for allotment to any other person unless the allotment was by fraud, mistake or misrepresentation as was held by Odunga J. in *R vs City Council of Nairobi & 3 others* (2014) eKLR and *Swaleh Mohamed Waziri & 3 others vs Houd Mobmuod Athman & another* [2020] eKLR. It was held that: ".....an allottee having been allotted land by the Commissioner of Lands and duly paid all the standard premiums and other related charges, is considered to have acquired rights over such land, which thereafter rendered it unavailable for allocation to other persons or entities."
15. Counsel also submitted that the 2<sup>nd</sup> Defendant having being the lawful owner of the plot passed good title to the 1<sup>st</sup> Defendant who followed due process in acquiring the plot including executing a valid sale agreement, getting the necessary consents and paying the requisite fees. The 1<sup>st</sup> Defendant was thus a bonafide purchaser for value as outlined in *Lawrence Mukiri vs Attorney General & 4 others* [2017] eKLR and was entitled to enjoy his right to property as enshrined in Article 40 of *the Constitution*.
16. Counsel went on to submit that the Plaintiff had not met the requirements of Section 107 and 108 of the *Evidence Act* because it had not proved with evidence that the plot was allotted to it in 1989. Additionally, the claim that the transfer was fraudulent was not proved to the required threshold as held in *Ratilal Gordhanbhai Patel vs Lalji Makanji* [1957] EA 314, 317; *Kuria Kiarie & 2 others vs*



*Sammy Magera* [2018] eKLR, *Kinyanjui Kamau vs George Kamau* [2015] eKLR and *Central Bank of Kenya Ltd vs Trust Bank Ltd & others* [1996] eKLR.

17. On whether the suit was res judicata it was submitted that because the CMCC No. 1091 of 2014 between the 1<sup>st</sup> Defendant and the Plaintiff was in regard to the same subject matter which had already been determined. Reference was made to *Rasoa Nabifwo Wataka & another vs Peter Wamalwa Kiberenge* [2019] eKLR and *Masudi Tsumo Hamisi & another v Rama Hussein Bwafumo & another* [2022] eKLR. Additionally, the Plaintiff had appealed against that decision in HCCA No. 484 of 2014 which was pending determination.
18. Counsel for the 3<sup>rd</sup> Defendant also submitted that the Plaintiffs had not established a case against their client and she was an unnecessary party to the suit.
19. Counsel for the Defendants sought for dismissal of the suit with costs.

### **Analysis and Determination**

20. I have considered the pleadings, the evidence on record, the written submissions and the authorities cited. I find that the issues for determination are:
  - i. Whether this suit is res judicata.
  - ii. Whether the Plaintiff is entitled to the prayers sought.
  - iii. Who should bear costs of this suit?
21. I will start by dealing with the issue of whether this suit is res judicata because if the answer is in the affirmative, the other issues will be rendered moot.
22. The principle of res judicata serves as a bar to subsequent litigation involving the same parties, subject matter, and issues that have already been adjudicated by a competent court. Section 7 of the *Civil Procedure Act* provides that: “No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”
23. For the doctrine of res judicata to apply, the following elements as elucidated in Section 7 must be satisfied:
  - i. Identity of Parties: The parties in the subsequent suit must be the same as, or in privity with, the parties in the prior suit.
  - ii. Identity of Subject Matter: The subject matter in the current suit must be identical to that in the previous suit.
  - iii. Identity of Issues: The issues in the current suit must have been directly and substantially in issue in the prior suit.
  - iv. Final Judgment on the Merits: The prior suit must have been decided by a court of competent jurisdiction, and the decision must have been final and on the merits.



24. The Supreme Court of Kenya in *John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others* [2021] KESC 39 (KLR) held as follows:

“ 81. ... the doctrine of res judicata is based on the principle of finality which is a matter of public policy. The principle of finality is one of the pillars upon which our judicial system is founded and the doctrine of res judicata prevents a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.”

25. While the Defendants claim that this suit is res judicata, the pleadings and decision in the said Chief Magistrates’ Court case No. 1091 of 2014 were not filed as evidence. However, the plaintiff in its pleadings acknowledged existence of the case CMCC 1091 of 2014 and pleaded that the court granted the 1<sup>st</sup> Defendant their prayer to evict the Plaintiff. The Plaintiff claimed that the exparte judgement was granted in their absence. They too, did not produce evidence of the said decision. While it would be important for the court to have the said pleadings and decision in determining the issue of res judicata, this court shall base its decision on the veracity of the pleaded facts. Because the alternative would be going against the tenets of justice.
26. Since both parties have pleaded that there was a suit regarding the same subject matter and between the same parties which was already determined by a court of competent jurisdiction, then the Plaintiff’s recourse was in filing an appeal and not in filing another suit.
27. From the pleadings, the 1<sup>st</sup> Defendant has also indicated that the Plaintiff appealed this decision and it is still pending. The Plaintiff was silent on the issue of the appeal and this court was also not furnished with the pleadings of the said appeal.
28. On the issue of whether the Plaintiff is entitled to the Prayers sought I find that PW1 admitted that she did not have the letter of Allotment to show that the Plaintiff was the lawful owner of the Plot. She produced none in this court.
29. There was also no evidence to show that the 3<sup>rd</sup> Defendant was the Chairperson of the Plaintiff or that she was able to register the plot in her name. There is also no evidence that she transferred the same to the 2<sup>nd</sup> Defendant who subsequently sold to the 1<sup>st</sup> Defendant.
30. The 4<sup>th</sup> Defendant, in its statement of defence denied that it allocated the Plot to the Plaintiff. Whoever alleges must prove. As things stand there is no evidence to show that the Plaintiff was ever allocated Plot No.4480/202.
31. The 2<sup>nd</sup> Defendant on the other hand was able to demonstrate that he was allocated the said plot which he later transferred to the 1<sup>st</sup> defendant. The Plaintiff’s allegations of fraud have not been proved. The Court of Appeal in the case of *Kuria Kiarie & 2 Others Vs. Sammy Magera* (2018) eKLR held;

“The next and only other issue is fraud. The law is clear and we take it from the case of Vijay Morjaria Vs. Nansingh Madhusingh Darbar & Another (2000) eKLR, where Tunoi, JA (as he then was) states as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It



is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

32. The 1<sup>st</sup> defendant told the court that he bought the plot from the 2<sup>nd</sup> defendant. He produced a sale agreement between him and the 2<sup>nd</sup> defendant. I find that he is a bonafide purchaser of value without notice. In the case of *Arthi Highway Developers Ltd Vs. West End Butchery Ltd & 6 Others* (2015) eKLR quoted with approval in Kenya High Court Case of *Lawrence Mukiri Vs. Attorney General & 4 Others* (2017) eKLR on what amounts to a bonafide Purchaser for value without notice;

“.....a bonafide Purchaser for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchase to successfully rely on the bona fide doctrine, he must prove the following;

- a. He hold a Certificate of Title.
- b. He purchased the property in good faith.
- c. He had no knowledge of the Fraud:
- d. The vendor has apparent valid title;
- e. He purchased without any notice of any fraud:
- f. A bonafide purchaser of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner.”

33. The upshot of the matter is that the Plaintiff has failed to prove their case against the Defendants on a balance of probabilities. The suit is hereby dismissed.

34. Each party to bear own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 20<sup>TH</sup> DAY OF JUNE, 2024.**

**L. KOMINGOI**

**JUDGE.**

In the presence of:

Mr. Adede for the Plaintiff.

Mr. Ondabu for the 1<sup>st</sup> Defendant.

N/A for the 2<sup>nd</sup> – 5<sup>th</sup> Defendants.

Court Assistant – Mutisya.

