County Government of Meru v Macharia (Environment and Land Appeal E061 of 2022) [2024] KEELC 4818 (KLR) (12 June 2024) (Judgment)

Neutral citation: [2024] KEELC 4818 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT AND LAND APPEAL E061 OF 2022

CK NZILI, J

JUNE 12, 2024

BETWEEN

COUNTY GOVERNMENT OF MERU ..... APPELLANT

AND

ZACHARIA MANYUIRI MACHARIA ..... RESPONDENT

(Being an appeal from the judgment of Hon. T.M Mwangi – SPM delivered on 26.11.2021 in CMELC No. 46 of 2019)

JUDGMENT

1. The appellant, as the defendant, was sued by the respondent as the plaintiff at the lower court through a plaint dated 2.5.2019, for revoking ownership of Plot No. 16B Kauthene market on 4.4.2019 alleging that it was hived from LR No. Nyaki/Munithu/1029, belonging to the national government.

2. It was averred that the respondent had extensively developed his plot with all the approvals from the appellant; hence, the revocation had occasioned him loss and damage.

3. The respondent prayed for an order compelling the appellant to allocate him an alternative plot of similar value within the vicinity or in alternative, monetary compensation.

4. Through a statement of defense dated 23.5.2019, the appellant denied the contents of the respondent's plaint. It was averred that Plot No. 16B was outside the market limits of the Kauthene market and confined within LR No. Nyaki/Munithu/1029, which was reserved for Kauthene Headman Camp and, as such, was government property.

5. The appellant averred that the respondent had no good title since the purported allocation of plots on LR No. Nyaki/Munithu/1029 amounted to grabbing government land that had not been set aside for the allocation of plots to individuals; otherwise, the respondent was a trespasser.

6. Similarly, the appellant averred that even if the respondent had been paying county government annual rates and rent payments alone could not reverse the illegality of the allocation of government land, and the only recourse was to seek a refund.

7. Moreso, the appellant averred that its predecessors in the title never allocated Plot No. 16B to the respondent, and if at all it ever happened, then the same was done by rogue councilors whose decision was not binding on the appellant to compensate any beneficiary of a land-grabbing scheme.

8. The appellant averred that the cause of action could not be directed at it since the respondent never purchased the plot from the county government of Meru.

9. At the hearing, Zacharia Manyiri Macharia testified as PW 1 and adopted his witness statement dated 2.5.2019 as his evidence in chief. He told the court that he used to co-own Plot No. 16B Kauthene market with Christopher Manyara, and upon making an application for transfers, the same was approved on 13.7.1993, becoming the sole lessee. PW 1 said that he submitted for and upon approval of his building plan, he constructed a shop and tea rooms. The respondent said that he had been paying annual land rents and all other charges to the appellant while enjoying quiet possession until 4.4.2019, when his ownership was revoked on the basis that his plot was on land parcel LR No Nyaki/Munithu/1029, owned by the national government. The respondent said that he had suffered a loss. PW 1 prayed for an order compelling the appellant to allocate him an alternative plot or in the alternative, monetary compensation for all the developments he has erected on the plot.

10. The respondent relied on a copy of the Meru County Council Trader & Markets by laws plot transfers dated 4.5.1992, minutes dated 13.7.1993; sketch map of Kauthene market bundle of land rates receipts, letters dated 19.11.2018 and 4.4.2019, copy of development plan dated 24.6.1994 and valuation report.

11. In cross-examination, PW 1 told the court that going by P. Exh No. (5), he could not tell who fenced off his plot, for the area chief alleged the land belonged to the national government, while the appellant wrote to him saying that the plot did not lie within its jurisdiction. Further, PW 1 said that from the official search, the plot LR No. Nyaki/Munithu/1029 was registered in the name of the county council as a reservation for the Kauthene headman camp, while his plot was allocated in 1992. PW 1 said that whenever he applied for the plot, and was called by the area chief in 1992, who gave him an allotment letter. He said that the county council allocation minutes approved (P. Exh No. (2), the change of ownership but did not have the one allocating him the plot. PW 1 said that according to the valuer, his plot was worth Kshs.600,000/=, which he has occupied for 25 years and therefore was entitled to compensation for all his development since he was allocated a vacant plot. PW 1 said that nobody stopped him from developing the plot. Asked about the receipts for the rent, PW 1 told the court that he only brought receipts for the period between 2017 and 2019, but not those and between 1992 – 2017.

12. Jefferson Musyoka Paul testified ad DW 1 as the Director of Physical Planning and Urban Development of the appellant. He relied on a witness statement dated 20.12.2019 as his evidence in chief and produced a letter dated 4.4.2019 and an official certificate of the search for LR No. Nyaki/Munithu/1029 as D. Exh No's. (1) & (2). He told the court that following a letter dated 19.10.2018 from the respondent, he visited the locus in quo and made his findings as per D. Exh No. (2).

13. In cross-examination, DW 1 said that the respondent had erected a shop and several rear rooms on the plot after the defunct County Council of Nyambene approved his building plans. According to D.W. 1, before construction could start, a building plan would be approved after a surveyor has beaconed the plot so that the developer knows the boundaries of his plot. However, DW 1 could not tell who was

allocated plot No. 16B. In this case, D.W. 1 was unable to ascertain if the respondent followed the laid down procedures indicated above; otherwise, he could have been in possession of a beacon certificate. Further, D.W. 1 said that the process of approving a building plan was not equivalent to authenticating ownership of the plot.

14. With the close of the respondent's case, the trial court rendered its decision on 26.11.2021. The appellant challenged the said judgment by a memorandum of appeal dated 26.10.2022. The appellant contends that the trial court erred in law and in fact in:

    i. Finding the acquisitions of the plot legal, yet in paragraphs (7), (8) & (9) of the judgment, it found that the plot was a result of land grabbing.

    ii. Allowing the respondent to gain from an illegality.

    iii. Ignoring the appellant's defense and evidence.

    iv. In awarding of Kshs.1,000,000/=, which was not supported by any law, was manifestly excessive and arrived at without any justification or based on a legally accepted doctrine of compensation.

    v. Ruling against the weight of evidence and the law.

15. The appeal was canvassed by way of written submissions. The respondent relied on written submissions dated 17.4.2024. It was submitted that the appellant failed to substantiate their defense based on fraud by laying evidence to that effect. Reliance was placed on *Black Laws Dictionary* definition of fraud (edition not indicated), *Denis Noel Mukhulo Ochwada & another v Elizabeth Murungari Njoroge & another* (2018) eKLR, *Evans Otieno Nyakwara v Cleophas Bwana Ongaro* (2015) eKLR, *CBK Ltd v Trust Bank Ltd & others*, Section 107 – 109 of the *Evidence Act* and *Moses Parantai & peris Wanjiku Mbeere (deceased) v Stephen Njoroge Macharia* (2020) eKLR.

16. Regarding compensation, the respondent submitted that the valuation report dated 22.4.2019 was for Kshs.600,000/=, and development of Kshs.1,400,000/= ,which were not challenged by way of a rival valuation by the appellant. Given that the allocation of the plot was regular and in compliance with the appellant's requirements, including the payment of annual land rates and all other charges, the respondent submitted that he was entitled to compensation under Article 40 (3) of the constitution. Reliance was placed on *Christopher Ndarathi Murungaru v Kenya Anti-corruption Commission & another* (2006) eKLR, *Virendra Ramji Gudka & others v Attorney General* ELC No. 48 of 2011, Section 13 (7) (c) & (d) of the *ELC Act*, *Livingstone v Rawyard Coal Co* (1880) 5 Appeal Cases 25.

17. The mandate of an appellate court of the first instance is to analyze, review, and reappraise the entire record of the trial court and come up with independent findings and conclusions as to facts and the law while giving allowance to the trial court, which had an opportunity to see and hear the witnesses first hand. See *Abok James Odera t/a AJ Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* (2013) eKLR, *Selle & another v associated motor boar & Co. Ltd & others* (1968) EA 123.

18. The primary pleading before the trial court was the plaint dated 2.5.2019, a defense dated 23.5.2019, and a reply to the defense dated 25.5.2019. The respondent's complaint was against the purported cancellation or revocation of his ownership of Plot No. 16B Kauthene market on account of being part of or within LR Nyaki/Munithu/1029, which was outside the mandate of the appellant.

19. As a result of the cancellations the respondent averred that he had suffered loss. He did not plead any particulars of the loss value of both the plot and the developments on the plot as of the date of the cancellation. The respondent sought an order compelling the appellant to allocate him an alternative plot or monetary compensation for the value and the developments on the plot.

20. In response to the claim the appellant indicated that the allocation of the plot was null and void ab initio for the alleged plot fell within LR No. Nyaki/Munithu/1029, reserved for Kauthene headman camp. The appellant averred that the respondent had no good title since the purported allocation amounted to land grabbing of land already set apart for the Government. It termed the respondent as a trespasser to the land, whose illegality could not be cured or regularized by payments of land rents and other charges to the county government of Meru as a predecessor of the defendant.

21. There is no evidence that the respondent made a reply to the statement of defense and denied that the allocation was illegal, irregular, and unlawful on account of the land having been set apart for the national government.

22. It is trite law that Article 40 (3) of the *Constitution*, as read together with Sections 24, 25 & 26 of the *Land Registration Act*, protects only a title to land that is regularly, legally, formally, and procedurally obtained. Further, it is trite law that when a title to property is under attack, it is not enough to wave the instrument of title, and a party must go beyond the title and prove the legality of the process of its acquisition in a formal, regular, and procedural manner. See *Dr. Ngok v Moijo Ole Keiwua & others* (1997) eKLR and *Alice Chemutai Too v Nickson & 2 others* (2015) eKLR and *Munyu Maina v Hiram Gathiha Maina* (2018) eKLR.

23. It is the respondent who was alleging that he was regularly and procedurally allocated plot No. 16B Kauthene market by the defunct County Government of Nyambene. The burden of proof under section 107 – 111 of the *Evidence Act* is on who is likely to lose if certain acts are not affirmed as true or probable.

24. To sustain his claim, the respondent relied on P. Exh No. (1). The exhibit is silent on Plot No. 16B. Parts C & D of the forms are missing the approval minutes numbers. The respondent was unable to produce town planning and markets committee minutes allocating him Plot No.1 6B in 1992, followed by a full county council meeting minutes approving Plot No. 16B to him. No letter of allotment was produced to sustain the respondent's allegations that he was a lawful and regular allottee of plot No. 16B by the predecessor of the appellant. No copy of the plots register was produced indicating the date of allocation of the plot, terms and conditions of the allocation, balloting date, pegging of the plot, erection of the beacons, the site visit, and a deed plan or part development plan.

25. In *Nelson Kazungu Chai & others v Pwani University College* (2014) eKLR, the court underscored the fact that under the repealed *Government Land Act*, a Part Development Plan (PDP) had to be drawn and approved by the Commissioner of Lands or the Minister for Lands before any unalienated government land could be allocated together with a letter of allotment based on an approved PDP plan.

26. In *African Line Transport Co. Ltd v The Hon. Attorney General* Mombasa HCCC No. 276 of 2013, the court observed that planning comes first, then a survey follows.

27. The appellant had pleaded that Plot No. 16B was unavailable since the land had been set apart for the national government as a chief's camp. Title deed as per D. Exh No. (1) had been issued on 12.8.1970. A land already allocated for public use is not available for reallocation for private use.

28. In *M'Iberi v Inspector General of Police & another* (Environment and land case 178 of 2017) (2023) KEELC 17923 (KLR) (31st May (2023) (Judgment), the court observed that under Section 22 & 27 of the repealed *Physical Planning Act* (Cap 296), the role of the Director of Physical Planning included authorizing alterations, amendments, change of user, revision of physical plans and approval of PDP's. The court cited with approval *Munyu MaIna v Hiram Gathiha Maina* (*supra*) and *Chemey Investments Ltd v A.G. & others* (2018) eKLR that the sanctity of title was never intended to be a vehicle for fraud, illegalities, and an avenue for unjust enrichment.

29. In *M'Iberi v Inspector General of Police* (*supra*), the court and since the subject plot had already been reserved for public purposes in 1988, it was no longer an unalienated government land by virtue of Sections 3, 12, 20 & 128 of the *Government Land Act* (repealed).

30. An action taken by the county council councilors to reallocate the plot already reserved for public purposes to the respondent in 1992 was an act in futility. P. Exh No. (1) was of no consequence, for the land was already having a title deed. In *Said Bin Seif v Mohammed Shaty* (1970) 19 KLR 9, the court observed that an action taken by the Commissioner of Lands without legal authority was null and void.

31. In this appeal, the respondent was unable to dislodge the fact that the government, which had fenced off the land, was claiming a superior or radical title to his P. Exh No. (1).

32. Once the appellant pleaded irregularity and lack of good title, the respondent had to do more and avail before the court all the documentation to show that he was regularly and procedurally allocated the land by the appellant when it knew that the plot was not available for reallocation. The respondent failed to call the issuing authority as witnesses to sustain his claim that the appellant had issued him valid documents. See *Sammy Mwangangi & others v Commissioner of Lands & 3 others* (2018) eKLR and *Richard Kipkemei Limo v Hassan Kipkembei Ngeny & others* (2019) eKLR, *Harrison Mwangi Nyota v Naivasha Municipal Council & 20 others* (2019) eKLR and *Mbau Saw Mills Ltd v AG* (2014) eKLR.

33. The law is that the first in time prevails. The plot was not available for reallocation by the defunct county council since it had already been allocated or reserved and registered in 1970. See *Gitwany Investment Ltd v Tajmal Ltd & others* (2006) eKLR. In *Funzi Island Development Ltd & others v County Council of Kwale & others* (2014) eKLR, the court said that where there is a presumption of regularity, the burden of proof is on the plaintiff to prove the contrary. It is the respondent in this appeal who sought for the appellant to be compelled to allocate him another plot or alternative monetary compensation.

34. The respondent had not pleaded any breach of duty by the appellant in offering or re-allocating the plot to him when it belonged to the national government. Section 29 of the *Land Registration Act* imposes a duty on a potential buyer or allotee to undertake due diligence. See *Dina Management Ltd v County Government of Mombasa & 5 others* (Petition (E010 of 2021 (2023) KESC 30 (KLR) (21st April 2023) (Judgment).

35. The respondent, in his evidence admitted that he never made any application for an allocation of any plot to the defunct County Government of Nyambene or Meru. He was emphatic that it was the area chief who told him that there were some plots for distribution.

36. The respondent never produced receipts showing that he paid a fee to be allocated the plot in the first place and appeared before any office of the appellant to regularize his plot after the appellant was established in 2013. There is no evidence of conducting due diligence to establish the beacons and the legality of ownership before the respondent lodged building plans and embarked on developing the plot.

37. Above all there was no evidence produced before the court to establish as a matter of fact that the appellant revoked or canceled the respondent ownership of Plot No. 16B on 4.4.2019. DW 1 made it clear through D. Exh No. (1) & (2) that the appellant was not the owner of LR No. Nyaki/ Munithu/1029 and, therefore had nothing to do with the fencing or entry into the plot for purposes of enforcing the right of a bonafide owner.

38. A cause of action refers to action on the part of the defendant that triggers action by the plaintiff. See *D.T. Dobie & Company (Kenya) Ltd v Muchina* (1982) KLR. The appellant, in paragraphs 3 (f) and 4 of the statement of defense dated 23.5.2019, had pleaded that the plaintiff's cause of action or compensation against it was misplaced for its predecessor never allocated Plot No.16B to the respondent at any given time.

39. The appellant was unable to plead and prove any breach of any statutory duty or negligence on the part of the appellant or its predecessor, in the manner the respondent acquired and developed the plot. The respondent could not lay any legal duty on the part of the appellant or its employees for taking the risk of developing the plot without authentic bonafide and valid ownership documents issued to him by way of an allotment letter or a certificate of lease.

40. Additionally, even if there was to be any liability on the part of the appellant, the respondent failed to pray as special damages for the value and developments of his plot. It is not enough to produce documentary evidence in support of special damages without pleading loss and damage in the body of the plaint. It was not enough to plead loss without particulars and pray for compensation for the value and developments without specifying the figures and paying filing fees for the special damages.

41. In the circumstances, I find the trial court was wrong to find liability on the part of the appellant and proceed to condemn it to pay compensation to the respondent without any basis in law.

42. The appeal is allowed with costs.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 12TH DAY OF JUNE, 2024

In presence of

C.A Kananu

Mwirigi for Appellant

Mugo for Respondent

HON. C K NZILI

JUDGE