



**County Government of Nyeri & 2 others v Ali (Environment and Land Appeal 21 of 2020) [2024] KEELC 4534 (KLR) (7 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4534 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYERI  
ENVIRONMENT AND LAND APPEAL 21 OF 2020**

**JO OLOLA, J**

**JUNE 7, 2024**

**BETWEEN**

**COUNTY GOVERNMENT OF NYERI ..... 1<sup>ST</sup> APPELLANT**

**NYERI MUSLIM HOUSING CO-OPERATIVE SOCIETY LTD .. 2<sup>ND</sup> APPELLANT**

**MAKATA ABDI MWINYI, HALIMA JAFARE, KAMUNYI MAIDAI (SUED AS THE OFFICIALS OF MUSLIM HOUSING) ..... 3<sup>RD</sup> APPELLANT**

**AND**

**ABDIKADIR HUSSEIN ALI ..... RESPONDENT**

**JUDGMENT**

1. This is an Appeal arising from the Judgment and decree of the Honourable Nelly Kariuki, SRM delivered on 9<sup>th</sup> July 2020 in Nyeri CMELC Case No. 53 of 2018.
2. By a Complaint dated and filed on 22<sup>nd</sup> November 2012 as amended on 10<sup>th</sup> December 2018, Abdikadir Hussein Ali (the Respondent herein) had sought Judgment against some four (4) Defendants for orders that:
  - a). The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants be ordered to transfer Plot No. Majengo J15 (formerly number 14 Line 3 Majengo) to the Plaintiff;
  - aa). The Honourable court do declare that the transfer of Nyeri Municipality Block 2/ Majengo/537 formerly Majengo J15 (formerly No. 14 Line 3 Majengo) to the 4<sup>th</sup> Defendant was done by people who had no title to pass to him and during the pendency of this suit (sic) and the transaction be declared null and void;
  - b). The 4<sup>th</sup> Defendant be ordered to transfer this plot to the Plaintiff;



- c). A permanent injunction be issued to restrain the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, their agents or anybody claiming ownership of this plot from threatening the Plaintiff's tenants with eviction or in any way dealing with the plot to the detriment of the Plaintiff;
  - cc). A permanent injunction be issued to restrain the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants, their agents or anybody claiming ownership of this plot from threatening the Plaintiff's tenants with eviction or in any way dealing with this plot to the detriment of the Plaintiff;
  - d). Costs of this suit to the Plaintiff;
  - e). Interest on (d) above at court rates;
  - f). Any other or better relief the court may deem fit to grant.
3. Those prayers arose from the Respondent's contention that the original allottee of Plot No. 14 Line 3 Majengo (currently Majengo- J15) one Fatuma Haji Hirsi died in 1969 and that the same went to the Respondent and one Mohammed Hussein Ali (now deceased) by way of transmission.
  4. It was the Respondent's case that since both himself and his now deceased brother were living far away they left the same under the management of the Nyeri Muslim Housing Co-operative Society Ltd (the 1<sup>st</sup> Defendant) as a waqf in accordance with the Islamic Law of Succession and inheritance. The waqf was to hand over the property to the Respondent and his brother upon their return.
  5. The Respondent asserted that he came back and physically took over the plot after it was transmitted to them by the Public Trustee but the 1<sup>st</sup> Defendant whose officials were sued as the 2<sup>nd</sup> Defendant refused to transfer the plot to them.
  6. It was further the Respondent's case that it had applied to the Appellant which was sued as the 3<sup>rd</sup> Defendant to facilitate the transfer of the plot to him but the Appellant had declined to do so in conspiracy with the other Defendants.
  7. But in their Joint Statement of Defence dated 28<sup>th</sup> December 2012 as amended on 28<sup>th</sup> March 2019, Nyeri Muslim Housing Co-operative Society Ltd (the 1<sup>st</sup> Defendant) and its officials – Makata Abdi Mwinyi, Halima Jafare and Kamunyi Maidai (the 2<sup>nd</sup> Defendant) deny that the original allottee of Plot No. 14 Line 3 Majengo was one Fatuma Haji Hirsi and/or that the said plot was placed under them as a waqf following the death of the said Fatuma.
  8. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants asserted that Plot No. 14 Line 3 Majengo was not the current Plot No. J15 Majengo. They denied that any such plot was placed under its officials as a waqf on behalf of the Respondent and his brother and invited the Respondent to strict proof.
  9. It was the 1<sup>st</sup> and 2<sup>nd</sup> Defendants case that as at the time they sold the plot to the 4<sup>th</sup> Defendant, they were the bonafide proprietors thereof.
  10. The Municipal Council of Nyeri (the 1<sup>st</sup> Appellant's predecessor) was opposed to the orders sought by the Respondent. In its Statement of Defence dated and filed in court on 19<sup>th</sup> December 2012, the 1<sup>st</sup> Appellant denied refusing to transfer the suit plot to the Respondent and invited him to strict proof.
  11. It was the 1<sup>st</sup> Appellant's case that the said plot was registered in the name of the 1<sup>st</sup> Defendant and that the said 1<sup>st</sup> Defendant had never applied and obtained the necessary transfer forms seeking to transfer the plot to the Respondent and that it could only act on a transfer presented to it.



12. In addition, the 1<sup>st</sup> Appellant denied acting in conspiracy with any other Defendant and urged the court to dismiss the same against itself on account that it disclosed no reasonable cause of action against itself, was frivolous, vexatious, misconceived and incompetent.
13. Simon Mwangi Gichiru (the 4<sup>th</sup> Defendant) was similarly opposed to the orders sought by the Respondent. He denied that the original allottee of plot No. 4 Line 3 Majengo was Fatuma Haji Hirsi and that the same plot was the one now registered as Nyeri Municipality/Block 2/Majengo/537.
14. The 4<sup>th</sup> Defendant asserted that he acquired the suit property, Nyeri Municipality Block 2 (Majengo)/537 from the 1<sup>st</sup> Defendant for value after expressing interest in the property and after a meeting with officials of the 1<sup>st</sup> Defendant who unanimously agreed to sell the property.
15. Having heard the dispute and in her Judgment delivered on 9<sup>th</sup> July 2020 aforesaid, the Learned Trial Magistrate came to the conclusion that the 1<sup>st</sup> Appellant had wrongfully failed to honour the Respondent's application to have the plot registered in the name of the Respondent and allowed the Respondent's suit as prayed with costs.
16. Aggrieved and dissatisfied by the said determination, the 1<sup>st</sup> Appellant moved to this court vide the Memorandum of Appeal dated 27<sup>th</sup> July 2020 urging this court to set aside the said Judgment on the grounds that:-
  1. The Learned Senior Resident Magistrate erred in law and fact in finding and holding that the Appellant or its predecessor, Municipal Council of Nyeri, played any role in the transfer of LR No. Nyeri Municipality Block 2/Majengo/537;
  2. In so far as the Respondent did not produce evidence or documents to show the relationship between Plot No. 14 Line 3 Majengo, the Learned Trial Magistrate erred in law and in fact in holding that the Plaintiff had proved his case on a balance of probabilities;
  3. In so far as it is not the roles of the County Governments to issue and/or transfer leases, the Learned Trial Magistrate erred in law in holding that it is the Appellant who issued the lease and transferred LR. No. Nyeri Municipality Block 2/Majengo/537 to the 4<sup>th</sup> Defendant and declaring such transfer illegal ab initio, null and void;
  4. The Appellant not being the registered owner, the constitutional or legally mandated legal body to issue and/or transfer leases under law, the Learned Trial Magistrate erred in law and in fact in ordering the Appellant to transfer LR. No. Nyeri Municipality Block 2/Majengo/537 to the Plaintiff.
  5. In so far as the Plaintiff had not made any prayers against the Appellant in the Complaint, the Learned Senior Resident Magistrate erred in law in granting and issuing orders against it, and
  6. The Learned Trial Magistrate erred in law in not holding and finding that the Plaintiff had not proved his case on a balance of probabilities.
17. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants were equally aggrieved by the determination. In their Memorandum of Appeal dated 7<sup>th</sup> August 2020 and lodged in Nyeri ELC Civil Appeal No. 26 of 2020, they urged this court to set aside the Judgment and decree of the Learned Trial Magistrate on the grounds;
  1. That the Learned Resident Magistrate erred in law and fact in relying on the findings of bodies which have no legal status;
  2. That the Learned Trial Magistrate erred in law and in fact in holding that Majengo Line 3 Plot 14 was renamed Majengo Plot 5 whereas no evidence was adduced to that effect;



3. That the Learned Trial Magistrate erred in law and in fact by holding that there was no evidence that the 1<sup>st</sup> Defendant was the registered owner of the suit property;
  4. That the Learned Senior Resident Magistrate erred in law and in fact in holding that the suit property was registered by the 3<sup>rd</sup> Defendant under the entity of Muslim Housing in trust for the Respondent; and
  5. That the Learned Senior Resident Magistrate erred in law and in fact by failing to consider all the evidence adduced and on record.
18. The 4<sup>th</sup> Defendant was similarly aggrieved by the Judgment. In his Memorandum of Appeal equally dated 7<sup>th</sup> August 2020 as lodged in Nyeri ELC Civil Appeal No. 27 of 2020, the 4<sup>th</sup> Defendant urged this court to set aside the said Judgment and Decree on the grounds:-
1. That the Learned Senior Resident Magistrate erred in law and in fact by disregarding the entire evidence adduced by the Appellant;
  2. That the Learned Senior Resident Magistrate erred in law and in fact by failing to consider that the Appellant appeared before a committee established by the National Land Commission for purposes of adjudication of disputes relating to the property and other properties in the suit land area before being registered as the proprietor of the suit property;
  3. That the Learned Senior Resident Magistrate erred in law and in fact by failing to consider that the Appellant was an innocent purchaser for value; and
  4. That the Learned Senior Resident Magistrate erred in law and in fact in holding that the transfer of the suit property to the Appellant was illegal despite the evidence adduced.
19. By an order issued on 15<sup>th</sup> December 2021, the three (3) Appeals emanating from the Judgement delivered on 9<sup>th</sup> July 2020 were all consolidated with ELC Appeal No. 21 of 2020 as the lead file. The court will therefore refer to the County Government of Nyeri as the 1<sup>st</sup> Appellant while the Nyeri Muslim Housing Co-operative Society Ltd and its officials shall be referred to as the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants respectively. The 4<sup>th</sup> Defendant is hereafter referred to as the 4<sup>th</sup> Appellant.
20. This being a first Appeal, this court is mandated to re-evaluate the evidence before the trial court as well as the Judgment and to thereafter arrive at its own independent Judgment on whether or not to allow the Appeal. A first Appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand {See *Selle & Another – v- Associated Motor Boat Co. Ltd & Others* [1968] EA}.
21. I have accordingly carefully perused and considered the Record of the Consolidated Appeals herein as well as the impugned Judgment. I have similarly perused and considered the written submissions and authorities that were placed before this court by the Learned Advocates representing the parties herein.
22. In his suit as filed in the Lower Court, the Respondent herein had sought an order to compel the 1<sup>st</sup> and 3<sup>rd</sup> Appellants herein to transfer unto himself what he described as Plot Number Majengo J15 and formerly known as Number 14 Line 3 Majengo. The Respondent further urged the court to declare that the transfer of Nyeri Municipality Block 2/Majengo/537, which according to him was the same plot No. Majengo J15, was done by people who had no title to pass to the 4<sup>th</sup> Appellant and that hence the transaction was null and void.



23. In addition, the Respondent urged the court to direct the 4<sup>th</sup> Appellant to transfer the title back to himself and for a permanent injunction to issue restraining the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Appellants from threatening his tenants in the premises constructed on the said property.
24. The basis of these prayers are to be found at Paragraphs 5 (a) to 8 of the Amended Complaint dated 10<sup>th</sup> December 2018 wherein the Respondent states that the original allottee of the said property was his aunt one Fatuma Haji Hirsi Odhey who passed away in 1969. It was the respondent's case that following the death of Fatuma during a pilgrimage in Mecca, the property passed to himself and his brother one Mohammad Hussein Ali (who is now deceased) by way of transmission.
25. It was further the Respondents position that since his brother and himself were far away from Nyeri, that property was left as a waqf under an organization known as Muslim Housing which was to safeguard the same on their behalf as the rightful heirs until such a time that they would return to claim the same.
26. The Respondent pleaded that some 20 years later, he returned to Nyeri and that he was able to physically take back the property after it was transmitted to him by the Public Trustee. His grievances and reason for filing the suit was the fact that the said Muslim Housing and the 1<sup>st</sup> Appellant herein had failed, refused and/or neglected to transfer the suit property to himself.
27. But in their Amended statement of Defence dated 28<sup>th</sup> March 2019, the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants denied the Respondent's contention that the original Plot No. 14 Line 3 Majengo was currently the Plot No. Majengo J15 and that it is what became registered as Nyeri Municipality Block 2/Majengo/537.
28. On its part, the 1<sup>st</sup> Appellant denied that it had refused to transfer Plot No. Majengo J15 to the Respondent. It was the 1<sup>st</sup> Appellant's case that the said plot was registered in the name of the 2<sup>nd</sup> Appellant and that the said 2<sup>nd</sup> Appellant had not applied to itself (the 1<sup>st</sup> Appellant) seeking to transfer the same to anyone.
29. Having considered the said issues and the evidence placed before her, the Learned Trial Magistrate concluded as follows at Paragraph 17 of her Judgment:

“ 17. In summary, I am persuaded that the Plaintiff has proved on a balance of probability that his late brother and himself were the rightful heirs of the suit property and that the same was registered by the 3<sup>rd</sup> Defendant under the entity of Muslim Housing in trust for purposes of preserving the same on behalf of the rightful heirs of their late aunt Fatuma Haji Hirsi until they brought their claim which they eventually did. I also find that the 3<sup>rd</sup> Defendant while being aware of the true ownership of the suit property failed to honour the Plaintiff's application to have the same registered in his name despite having presented them with concrete evidence of the veracity of his claim for many years.

Additionally, I find that the Plaintiff has proved without a doubt that the 1<sup>st</sup> Defendant had no legal interest in the suit property whatsoever and therefore its dealings with the same were illegal and a nullity.

As a consequence of the 2<sup>nd</sup> Defendant's lack of capacity at the time of sale of the suit property to the 4<sup>th</sup> Defendant, the title deed issued to the 4<sup>th</sup> Defendant cannot stand the veracity test as it was acquired and/or obtained under illegal means.”



30. That conclusion did not however appear to me to be entirely in consonance with the facts before the court. For a start, while Makata Abdi Mwinyi (DW1), Halima Jafare and Kamunyi Maidai are listed in the Respondent's pleadings as having been sued as the officials of the said Muslim Housing and named jointly as the 2<sup>nd</sup> Defendant, it was apparent that there was no such entity known as Muslim Housing. As it turned out, the three individuals were officials of the 2<sup>nd</sup> Appellant Nyeri Muslim Housing Co-operative Society Ltd, a society that was registered on 25<sup>th</sup> July 1963. It was also clear that the Respondent has assumed that the 2<sup>nd</sup> Appellant is the organization which held the property as a waqf on his behalf. That was actually not the position as the 2<sup>nd</sup> Appellant did not hold any property as a waqf on his behalf.
31. While it was not denied that at the beginning there was a plot of land that was described as Majengo Line 3 Plot No. 14, there was nothing official that was placed before the court to demonstrate that it is the one that became Plot No. Majengo- J15 that was being claimed by both the Respondent and the 2<sup>nd</sup> Appellant herein. Asked in cross examination about the relationship, the Respondent told the court he did not know if LR. No. 537 was related to Plot No. Majengo – J15. All that was clear that from the records held by the 1<sup>st</sup> Appellant County Government was that, Plot No. Majengo J15 was in the name of the 2<sup>nd</sup> Appellant herein.
32. Even where it could be assumed that the Respondent was right and that the parcel of land known as Majengo Line 3 Plot No. 14 was the very same one as Majengo J15, it was difficult to see on what basis the Respondent would be entitled thereto. According to the Respondent, the said plot of land had belonged to his aunt Fatuma Haji Hirsi who passed away in a pilgrimage to Mecca in 1969.
33. It was the Respondent's case that following his aunt's death, the plot of land was transmitted to himself and his now deceased brother as the only heirs of the said Fatuma Haji Hirsi Odhey. Asked during cross examination how his aunt came to own the land, the Respondent responded that she had inherited it from her husband who was then deceased and that Fatuma had a temporary occupation license for temporary ownership of the land (Pg 161 of the Record).
34. That was the same position taken by the Respondent's witnesses Idd Menjon Suleiman (PW2), Uledi Abdi Majid (PW3) and Osman Mohamed Hussi (PW4). That being the case, both the Respondent and his witnesses were in agreement that the late Fatuma Hirsi Odhey occupied the plot that she did occupy before her death on the basis of a license issued to her by the Government.
35. In that respect, Section 40 of the now repealed [Government Lands Act](#), Cap 280 of the Laws of Kenya did provide as follows:-
- “ 1. Licences to occupy unalienated Government land upon temporary purposes may be granted by the Commissioner.
  2. Unless it is expressly provided otherwise, a licence under this Section shall continue for one year and thenceforward until expiration of any three months' notice to quit:  
  
Provided that the notice to quit may be served upon the licensee at any time after the expiration of nine months from the date of the license.



36. Considering the legal position of such a license in *Faraj Maharus – v- J.B. Martin Glass Industries & 3 Others* [2005]eKLR, the Court of Appeal held as follows:-

“Thirdly, the Temporary Occupation Licence issued in 1926 could not oust the certificate of title granted under the Registration of Titles Act. The Appellant does not possess title under the Act.

It is indeed settled law in Kenya that a Temporary Occupation Licence to occupy Government land is not sufficient to create or transfer title to the grantee or his personal representative. As was stated in *Runda Coffee Estate Ltd – v- Ujagar Singh* [1966] EA 564:

“It is the essence of a licence of this nature that it is personal to the licensee and creates no interest which can be disposed by the licensee. As has been said well over 100 years ago, it creates nothing substantial which is assignable.

We would agree therefore, with the Learned Judge that the licence to occupy the suit property came to an end upon the death of Effendi Maharus and his widow and as the appellant had nothing to show for the continued occupation of the suit land, his occupation as such amounted to trespass as against the registered proprietor.”

37. Being guided by the above decision it was clear to me that the licence to occupy the parcel of land then known as Majengo Line 3 Plot 14 came to an end upon the death of Hirsi Odhey and his widow Fatuma in 1969 and it was therefore not open for the Respondent to make an appearance some 20 years later to claim an interest thereon. The said parcel of land did not form part of the estate of Fatuma Haji Hirsi Odhey and could not therefore be transmitted to the Respondent in the manner that was purported in the suit.

38. Arising from the foregoing, it was clear to me that the Learned Trial Magistrate fell in error in her finding that the Respondent and her brother were “the rightful heirs” of the suit property. The records available from the 1<sup>st</sup> Appellant were clear that the same belonged to the 2<sup>nd</sup> Appellant and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Appellants were therefore under no legal obligation to transfer the same to the Respondent.

39. In the premises, I am persuaded that the three (3) consolidated Appeals herein had merit. I allow the same, set aside the Judgment dated 24<sup>th</sup> July 2020 and substitute the same with an order dismissing the Respondent’s suit in the Lower Court with costs.

40. Each party shall however bear their own costs of the Appeal.

**DATED, SIGNED AND DELIVERED AT NYERI THIS FRIDAY 7TH DAY OF JUNE, 2024.**

In the presence of:

Ms. Wandia Njuguna holding brief for W. Gikonyo for 1<sup>st</sup> Appellant.

Mr. Kabira Kioni for 2<sup>nd</sup> and 3<sup>rd</sup> Appellants.

Mr. Kebuka Wachira for the Respondent.

Court Assistant: Kendi

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**J. O. OLOLA**

**JUDGE**

