



**Kamau v City Council of Nairobi & another (Environment & Land Case
703 of 2013) [2024] KEELC 5461 (KLR) (24 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5461 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 703 OF 2013**

**JA MOGENI, J
JULY 24, 2024**

BETWEEN

BENSON MUCHUNU KAMAU PLAINTIFF

AND

CITY COUNCIL OF NAIROBI 1ST DEFENDANT

JOSEPH IRUNGU MATHENGE 2ND DEFENDANT

JUDGMENT

1. The Plaintiff instituted the present suit vide a plaint dated 14/06/2013. Together with the plaint the plaintiff filed a Notice of Motion Application of even date seeking interlocutory injunctive orders. The Notice of Motion Application was compromised via consent by the parties leading to the issuance by Justice Nyamweya (as she then was) of a temporary injunction issued on 29/01/2014.
2. The Plaintiff claimed that he was lawfully allocated Plot No.M54 Ex-Muoroto re-settlement scheme Dandora within Nairobi the property having been bought from John Ngigi and transferred to the plaintiff in 2005 and officially allotted and identified on the ground on 12th September, 1994.
3. He averred that despite the 1st defendant having knowledge that the plaintiff is the lawful and legal allottee of the suit plot (Plot No. M54), they and their servants, agents and or representatives have insisted to maliciously, illegally and unlawfully allow 2nd defendant to proceed with encroachment, trespassing, demolition and destruction with an intention of evicting the plaintiff. That the 2nd defendant has illegally erected permanent structures thereby completely alienating the suit property from plaintiff.
4. The Plaintiff thus prays for orders against the defendants jointly and/or severally wholly for:
 - a. A permanent injunction restraining the defendants, their agents, servants, representatives, and/or assigns from evicting, trespassing, encroaching or interfering in any way with the



plaintiffs quiet and peaceful occupation and enjoyment of the suit plot no. M54 Ex Muoroto Re-settlement scheme Dandora, within Nairobi.

- b. A declaration that the allocation, alienation, demolition, intended eviction and encroachment thereto are illegal, unlawful, null and void and that the legal allottee/plaintiff be and is hereby declared the rightful, legal and lawful allottee and or owner of Plot No. M54 Ex Muoroto Re-settlement Scheme Dandora, within Nairobi.
 - c. Costs and interest of this suit.
5. The defendant filed a statement of defence 12/11/2013. The defendant denied the Plaintiff was the owner of Plot No.M54 Ex-Muoroto Re-settlement Scheme Dandora(herein suit property) within Nairobi. The defendant contends that the suit property belongs to one Joseph Irungu Mathenge.
 6. The 2nd defendant filed his statement of defense dated 6/02/2019 and denied all the averments by the plaintiff in his amended plaint of 1/11/2018. He avers that he is the legal and lawful allottee of plot No. M-54 A Ex Muoroto Re-settlement Scheme Dandora having been allocated by the 1st defendant. The plaintiff filed a reply to the 2nd defendant's defence dated 10/07/2019 and reiterated his averments in the plaint.
 7. The suit was heard before me on diverse dates. The plaintiff testified as PW and adopted his witness statement dated 5/05/2023 and produced 15 exhibits contained in the list of documents adopted by the court in support of the Plaintiff's case. The 2nd defendant testified as DW1 in support of the 2nd Defendant's Case and called on Cecilia W. Koigu, Chief Officer Lands who testified as DW2. At the instance of the Court DW3 Peter Ndungu Wanyoike a Surveyor with the Nairobi City County Government testified as DW3.

The Plaintiff's Case

8. The Plaintiff in his evidence testified that he was allotted Plot M54. Upon cross-examination he stated that his assertion and claim is supported by his production of the original letter at page 17 and that the 2nd defendant did not have any letter of allocation. On further cross-examination he stated that the letter did not refer to M54 but bore the names of names of Josephine Muthoni Muhia, John Ngigi Mwaniki and Patrick Mungora of whom all the names are crossed out and his name is the only one left at the bottom.
9. He also referred to another letter at page 18 of his bundle which was from the District Commissioner and he testified that the District Commissioner told him to take the letter to the City Council one of the squatters who were evicted from Muoroto. He reiterated when cross-examined by Ms Ngugi Counsel for the 2nd defendant that his plot was M54 – Ex Muoroto and that the 2nd defendant has settled on his plot and that the 2nd defendant's plot is M 54A.
10. He testified that he used to pay rent and rates for the said suit property and referred the court to the documents produced at pages 23 to 26. He further requested the court to expunge its separate list of issues dated 18/04/2023 and their being no objection raised the same was expunged and prayed. He further contended that the maps contained in the 2nd defendant's bundle should be expunged from the court record since they did not bear a stamp nor signature of the authors.

Defendant's Case

11. DW1 Joseph Irungu Mathenge the 1st defendant herein adopted his witness statement that he wrote on 5/07/2021 and produced his list of documents dated 6/02/2013. He testified that he was allotted



- the plot in 2012 after paying the requisite fees. It was his testimony that he had constructed and that he stays on the said plot, the suit property.
12. Upon cross-examination, he testified that the maps he had produced did not bear a stamp for certification, neither did he have any receipts to prove the claim for payment nor did the maps bear any signature from the issuing authority. When cross-examined further by the Plaintiff who was representing himself after filing the Notice to Act in Person dated 29/01/2021, he stated that in his witness statement he testified that Plot M54 does not belong to him but his plot is M54A and that he pays rates for Plot M54A. In re-examination he reiterated that his plot is M54A. With this the 2nd defendant closed his case.
 13. As explained earlier in this judgment Peter Ndungu Wanyoike a surveyor with the Nairobi City County was summoned to testify at the instance of the Court to shed light on the records held by the County. He testified as DW3 and it was his evidence that the suit property is on the County's map that the beacon certificate has a stamp of the Nairobi City Council of 1994. It was his testimony that he did not have a map that tallies with the beacon certificate but that he was seeing that it was stamped by their Chief Land Surveyor.
 14. It was his testimony that the plots in proximity to M54 were not the same. And that the plot drawn on the Beacon Certificate differs from the one on the map. That looking at the beacon certificate map the plots appearing at the lower line are M 52, 53, 54 and 59 whereas those appearing on the map at the lower level are M 52 , M53, M54 and M59.
 15. With this testimony of DW3- The Plaintiff moved to close his case

Analysis and determinations.

16. The parties filed their final closing submissions as directed by the Court. I have reviewed the pleadings, the evidence and I have considered the submissions by the parties and the following issues emerge for determination
 - i. Whether the plaintiff was the lawful allottee of plot no. Plot M 54 Ex- Muoroto Re-Settlement Scheme by virtue of Special Power of Attorney?
 - ii. Whether the defendant allotted the plot M 54 Ex- Muoroto Re-Settlement Scheme in 2012 to the 1st defendant?
 - iii. What reliefs and/or orders should the Court grant?
17. In the present suit what is really in issue is who between the plaintiff and Joseph Irungu Mathenge was the allottee of the suit property Plot Plot M54 Ex- Muoroto Re-Settlement Scheme. The plaintiff claimed to have been the person who was allocated the plot by virtue of a sale agreement dated 26/01/2005 and a Power of Attorney from the said vendor to the purchaser on 26/01/2005.
18. At paragraph 2 of his verifying affidavit sworn on the 5/04/2023 filed with the Re-Amended Plaint on even date, the plaintiff has deponed that he is swearing the affidavit on his own behalf and this is in order since he alleges that the person who sold him the suit property gave him power through the Power of Attorney.
19. The copy of the power attorney is attached to the said verifying affidavit and is dated the 26/01/2005. It authorizes the Plaintiff "to act as my lawful attorney and to act as my attorney in my name to manage sell and receive rents pay any outgoings and in any other way to deal with my property in Nairobi namely; PLOT No. M54 Ex Muoroto also to surrender or obtain or accept the surrender of any document".



20. A power of attorney is defined simply as a legal document that allows an individual or a company to give someone else the authority to make decisions on your behalf. This means that the Power of Attorney is a Legal Documents. Infact a power of attorney that is lawfully donated, accepted and registered, and where necessary notarized allows the person (donee) to whom it is directed by the donor (principal) to act in accordance with the instructions thereon. That when such donee (agent) so acts, he/she does so as if it was the donor (principal).
21. Infact the power of attorney must as of necessity contain the full name and address of the donor and donee, signed by both of them, and properly executed. It must be stamped upon the stamp duty being paid under the [Registration of Documents Act](#). The provision of Section 4 of the said Act provides that all documents conferring any right, title or declare, limit or extinguish any right, title or interest, whether vested or contingent to, in or over immovable property (emphasis added) shall be registered.
22. Section 4 of the [Registration of Documents Act](#) provides as as follows :-
4. Documents to be registered
- All documents conferring, or purporting to confer, declare, limit or extinguish any right, title or interest, whether vested or contingent to, in or over immovable property (other than such documents as may be of a testamentary nature) and vakallas shall be registered as hereinafter prescribed:
- Provided that the registration of the documents following shall not be compulsory—
- (i) any composition deed;
 - (ii) any document relating to shares in a joint stock company, notwithstanding that the assets of such company consist in whole or in part of immovable property;
 - iv. any debenture issued by such a company, and not creating, declaring, assigning, limiting or extinguishing any right, title or interest to, in or over any immovable property, except in so far as it entitles the holder to the security afforded by a registered instrument, whereby the company has mortgaged, conveyed or otherwise transferred the whole or part of its immovable property, or any interest therein, to trustees upon trust for the benefit of the holders of such debentures;
 - (iv) Any endorsement upon or transfer of any debenture issued by any such company
 - (v) any document not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest to, in or over any immovable property but merely creating a right to obtain another document, which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest;
 - (vi) any lease or licence of land for any term not exceeding one year; or
 - (vii) any document registrable under the provisions of the Government Lands Act (Cap. 280), the Registration of Titles Act (Cap. 281), the Land Titles Act (Cap. 282) or the Registered [Land Act](#) (Cap. 300):
- Provided that, if any such document relates to land registrable under any such Act and also to land not so registrable, such document shall also be registered under this Act.
23. That whereas the power of attorney is not specifically mentioned in the said provision to be among those requiring registration, but it falls under the documents which declare certain rights or limitations over immovable properties which must be registered. The special power of attorney allegedly signed



- by the vendor and the purchaser on 26/01/2005 was all about the immovable property of Plot No. M54 Ex Muoroto in terms of charging and leasing, varying contract agreements upon a lessee tenant or occupier of the said property among other immovable property related tasks.
24. From my understanding of the provisions of Section 4 of the *Registration of Documents Act*, it therefore follows that the power of attorney which confers upon the donee a right to deal with immovable property, like the one the Plaintiff relies on, must be registered. That failure to register such a power of attorney means the donee, in this case the Plaintiff, cannot claim any right under it.
 25. Under the repealed Registered *Land Act*, Section 116 which was the law governing registration of interest in land when the plaintiff obtained the alleged power of attorney, it required that powers of attorney "which contain any power to dispose of any interest in land" be registered. There is therefore no contention that any power of attorney allowing the donee to deal with land will need to be registered since land is immovable property.
 26. Similarly, under section 46 of the *Land Registration Act*, a power of attorney whose stamp duty has not been paid cannot be accepted for registration thus the Plaintiff had an obligation in law under Section 107 of the *Evidence Act* Chapter 80 of Laws of Kenya to tender evidence to show that the power of attorney he sought to rely on as the basis of his capacity had been registered in accordance with the law, but failed to do so.
 27. The court in the case of Francis Mwangi Mugo Vs David Kamau Gachago [2017] eKLR, held that;

“20...I think the more fatal omission is not necessarily payment of stamp duty important as it is, but the failure to register the power of attorney before filing suit, for to me, it is the act of registration which then vests the donee with capacity to deal with the immovable property claimed by the donor. The power of attorney in this instance, is not similar to a sale agreement or a lease, whose value is only evidentiary. The power of attorney here, falls under the purview of capacity for one cannot act for another without having the legal capacity to do so. I hold the view that before a donee of a power of attorney can act, on a matter, at least that involving immovable property, then he must register that power of attorney before he can allege to have capacity to act.”
 28. Whereas this decision is not binding to this Court but I do agree with the finding that before a donee of a power of attorney can be clothed with capacity to act in respect of immovable property, the power of attorney must be registered in accordance with the law, and among others after payment of stamp duty.
 29. Now I am aware the issue of registration of the power of attorney was never raised in the pleadings or at the time of admitting the document as an exhibit. My sister Justice Dr Millicent Odeny in the case of Kenneth Omollo Simbiri & another v Daniel Ongor [2020] eKLR. quoted a decision of the Court of Appeal which I find very persuasive of John K. Malembi v Trufosa Cheredi Mudembei & 2 others [2019] eKLR where the Court of Appeal held that:

“An issue urged in this appeal is that the trial judge considered matters not raised in the pleadings. The appellant contends that the issue of validity or otherwise of the sale agreement between the appellant and the deceased was never pleaded by either party. That the judge erred in considering the issue and invoking the provisions of the Section 3 (3) of the *Law of Contract Act* when the matter had never been pleaded.”

“On our part, we find it was proper for the trial court to suo moto raise and determine the issue of its own jurisdiction.....”.



30. At the same time, the Court of Appeal on the same issue of new issues arising in the course of the trial held, in the case of *Kinyanjui Kamau v George Kamau Njoroge* [2015] eKLR that:

“Of course if an issue arises in the course of hearing, and the same is fully canvassed by the parties, then even if that issue was not pleaded, then the court will make a determination on the matter. As was held in *Odd Jobs v Mubia* [1970] EA 476, “a court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision.”

31. In the present case, the 1st and 2nd defendants did not raise the issue of the legality of the power of attorney or the standing of the plaintiff’s power of attorney in their two statements of defence or during the hearing. The court is under an obligation to evaluate the case in its totality and if there is any anomaly or illegality with the process which is mandatory in nature then the court cannot sanitize such anomaly or illegality even though it was not raised as an issue for determination. The court also has an obligation to frame issues from the pleadings or summarize the issues put forth by the parties.

32. The parties might ignore pertinent issues which the court may find to be the real issue for determination. This does not mean that the court would be dealing with unpleaded issues for determination. Thus I do find that the plaintiff by failing to register the power of attorney collapsed the suit since he had no capacity to institute it at all. I have chosen not to even analyse how the plaintiff sold to himself as the purchaser the suit property noting that he had the power of attorney of the seller. It suffices to note that the failure to register power of attorney rendered the suit a nullity ab initio.

33. I will digress here to raise a critical procedural issue for parties to note whenever they are exchanging interrogatories. This issue was raised as a critical point the case of the case of *Kenneth Nyaga Mwigwe v Austin Kiguta & 2 others* (2015) eKLR where the court noted that;

The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents- this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the court would look not at the document alone but it would take into consideration all facts and evidence on record.

34. Thus, the fact that the power of attorney was produced as an exhibit did not mean that the probative value had already been established. The court is under an obligation when making a judicial opinion to look at the document and the facts and evidence on record together with the relevant laws including precedents on the issue.

35. The plaintiff in this case therefore finds himself in a situation where he filed a suit without the capacity to do so by failing to register the power of attorney. Since the plaintiff was devoid of this capacity then



the entire suit fails. I have no choice but to agree with the finding in Francis Mwangi Mugo Vs David Kamau Gachago (supra), where it was held that;

“ 21. At the time of filing suit, Francis Mwangi Mugo, in my view did not have capacity because he had not registered the power of attorney. I therefore have no option but to strike out the suit with costs...”

36. That likewise, the Plaintiff's suit should be struck out with costs without even dealing with the other issues set out above for determination.

37. That in view of the findings above, the Court orders as follows;

(a) That the Plaintiff's claim against all the Defendants is hereby struck out with costs for lack of capacity.

(b) Each party to bear their own costs.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 24th DAY OF JULY 2024.

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MOGENI J

JUDGE

In the Virtual presence of: -

Ms Wambui for 2nd Defendant

Mr. Nyakoe for 1st Defendant

Mr. Benson Muchunu Plaintiff in person

Caroline Sagina - Court Assistant

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MOGENI J

JUDGE

