



Ndirangu & 3 others (Suing as the personal representatives of the Estate of Gitahi Wamungunda Kabati - Deceased) v Settlement Fund Trustees & another (Land Case 57 of 2023) [2024] KEELC 6406 (KLR) (26 September 2024) (Judgment)

Neutral citation: [2024] KEELC 6406 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
LAND CASE 57 OF 2023
YM ANGIMA, J
SEPTEMBER 26, 2024**

BETWEEN

**MARY MUTHONI NDIRANGU 1ST PLAINTIFF
JOSEPH GITONGA NDIRANGU 2ND PLAINTIFF
PATRICK WAMUGUNA WACHIURI 3RD PLAINTIFF
IRENE NJERI WACHIURI 4TH PLAINTIFF
SUING AS THE PERSONAL REPRESENTATIVES OF THE ESTATE OF GITAHI
WAMUNGUNDA KABATI - DECEASED**

AND

**THE SETTLEMENT FUND TRUSTEES 1ST DEFENDANT
WILSON GACANJA 2ND DEFENDANT**

JUDGMENT

A. Plaintiffs' Claim

1. Vide a plaint dated 09.09.2010 and amended on 08.06.2022 the Plaintiffs sued the 1st and 2nd Defendants seeking the following reliefs against them:
 - a. A declaration that the deceased was allocated land measuring 14.88 Hectares or thereabouts in Muruai Scheme by the 1st Defendant in 1983 and which said 14.88 hectares were then known and described as Plot No. 457, Muruai Scheme.
 - b. A declaration that the deceased is the lawful allottee of 14.88 hectares or thereabouts by the first Defendant and the deceased's said 14.88 Hectares were fraudulently, unlawfully and or illegally made part of Plot No. 300, Ol bollosat Scheme by the first Defendant.



- c. A declaration that a portion of 14.88 hectares in Plot No. 300, Ol bollosat Scheme (now known and described as Land Title Number Nyandarua/Ol Bollosat/300) was lawfully allocated to the deceased by the first Defendant long before the said Plot No. 300, Ol bollosat Scheme was created.
 - d. A declaration that the creation of Plot No. 300, Ol bollosat Scheme by the 1st Defendant was done by fraud or mistake and the same is illegal, null and void.
 - e. An order for nullification and cancellation of all documents and records concerning Plot No. 300, Ol bollosat Scheme (now known and described as Land Title Number Nyandarua/Ol bollosat/300).
 - f. An order that Plot Number 300, Ol bollosat (now known and described as Land Title Number Nyandarua/Ol bollosat/300) be obliterated from the relevant R.I.M. (Registry Index Map) and all other Government land records.
 - g. A declaration that the allocation of Plot No. 300, Ol bollosat Scheme to the 2nd Defendant by the 1st Defendant and the subsequent registration of the 2nd Defendant as the absolute proprietor of Land Title Number Nyandarua/Ol bollosat/300 was done by fraud or mistake and the same is illegal, null and void.
 - h. An order for rectification of the register by way of cancellation of the 2nd Defendant's registration as absolute proprietor of Land Title Number Nyandarua/Ol bollosat/300 and the Title Deed thereof on grounds of fraud or mistake.
 - i. An order for amendment of the relevant map(s) to reflect and capture the deceased's land measuring 14.88 hectares in Muruai Scheme.
 - j. An order directing the 1st Defendant to open a file for the deceased's 14.88 hectares in Muruai Scheme and allow the Plaintiffs to pay the settlement loan and any other Government dues over the deceased's 14.88 hectares to facilitate and enable issuance of Title documents to the Plaintiff's over the deceased's 14.88 hectares.
 - k. An order for a permanent injunction restraining the 2nd Defendant by himself, members of his family, his proxies, servants, employees or agents from interfering with the Plaintiff's quiet and peaceful possession and enjoyment of the deceased's portion of 14.88 hectares which is now occupied and cultivated by the Plaintiff's or in any other manner interfering or dealing with the deceased's said portion of 14.88 hectares.
 - l. Costs of this suit and interest thereon.
 - m. Any other or further relief that this Honourable court may deem fit and just to grant to the Plaintiff.
2. The Plaintiffs pleaded that they were the personal representatives of the estate of the late Gitahi Wamugunda Kabati (the deceased) who was said to have been the legitimate allottee of Plot No. 457 in Muruai Scheme (Plot 457) measuring about 14.88 ha. It was pleaded that although the deceased was allocated Plot 457 in 1983 and paid a deposit of Kshs.325/= for it and although the deceased had occupied the plot between 1983 and 2000 when he died, the 1st Defendant had sometime in 1993 purported to move the plot into Ol bollosat Scheme whereby it was combined with additional land and allocated to the 2nd Defendant as Plot No. 300 measuring about 26.1 ha (Plot 300).



3. It was the Plaintiffs' pleading that the subsequent allocation of what was Plot 457 Muruai Scheme to the 2nd Defendant as Plot 300 in Ol bollosat Scheme as Plot 300 was done through fraud or by mistake hence the same was illegal, irregular, null and void. The Plaintiffs enumerated 6 particulars of alleged fraud against the Defendants in paragraph 18 of the amended plaint.
4. The Plaintiffs further pleaded that the Defendants' said actions were a violation of the proprietary rights of the deceased which are now vested in his estate. It was further pleaded that despite issuance of a demand and notice of intention to sue the Defendants had failed to make good the Plaintiffs' claim hence the suit.

B. 1st Defendant's Defence

5. The 1st Defendant filed a written statement of defence dated 06.06.2023 denying the Plaintiffs' claim in its entirety. Apart from admitting the description of the parties, the 1st Defendant denied knowledge of all the allegations contained in the amended plaint and put the Plaintiffs to strict proof thereof. It denied the fraud and particulars of fraud pleaded in the amended plaint and put the Plaintiffs to strict proof thereof. It further denied involvement in any form of fraud or mistake as alleged by the Plaintiffs. It denied violating any proprietary rights in the deceased and put the Plaintiffs to strict proof thereof. As a result, it prayed for dismissal of the Plaintiffs' suit with costs.

C. 2nd Defendant's Defence

6. The 2nd Defendant filed a statement of defence dated 17.12.2010 similarly denying the Plaintiffs' claim in its entirety. He denied in toto all the adverse allegations pleaded in the plaint and put the Plaintiffs to strict proof thereof. He denied the fraud and particulars of fraud alleged in the plaint and sought strict proof thereof. He further denied service of a demand and notice of intention to sue. He denied that the Plaintiffs had a legitimate cause of action against him and prayed for dismissal of the suit with costs.

D. Trial of the Action

7. At the hearing hereof, the Plaintiff called Joseph Gitonga Ndirangu (PW1) who testified on their behalf as the sole witness. He adopted the contents of his witness statement dated 04.04.2023 as his evidence in chief. He also produced the documents and photographs contained the Plaintiffs' original and supplementary lists of documents as exhibits. The Plaintiffs' evidence essentially mirrored what they had pleaded in their amended plaint. They considered the deceased to have been the only legitimate allottee of Plot 457 and 2nd Defendant's allocation of plot 300 to have been irregular and fraudulent.
8. The 1st Defendant did not call any evidence at the trial but the 2nd Defendant did. The 2nd Defendant testified on his own behalf as the sole witness and adopted the contents of his witness statement dated 09.05.2023 as his evidence in chief. He also produced the documents in his list of documents as exhibits. He defended the allocation of Plot 300 to him on the basis that when he had applied for it in 1992 it was vacant and unoccupied and that upon being issued with a letter of offer he accepted the same and made all the necessary payments to the government. He testified that he was ultimately issued with a title deed in 2009.

E. Directions on Submissions

9. Upon conclusion of the trial the parties were given timelines within which to file and exchange their respective submissions. The record shows that the Plaintiff filed written submissions dated 20.06.2024 whereas the 2nd Defendant's submissions were dated 11.07.2024. However, the Attorney General did not file any submissions on behalf of the 1st Defendant.



F. Issues for Determination

10. The court has noted that the parties did not file an agreed statement of issues. The record shows that whereas the Plaintiffs filed their version of issues the Defendants did not file any. As a result, the court shall frame the issues for determination as provided for under Order 15 rule 2 of the Civil Procedure Rules. Under the said rule, the court may frame issues from any of the following:
 - a. The allegations contained in the pleadings or answers to interrogatories.
 - b. The allegations contained in statements sworn by or on behalf of the parties.
 - c. The contents of documents produced by the parties.
11. The court has considered the pleadings, evidence and documents on record. The court is of the opinion that the following key issues arise for determination herein:
 - a. Whether the deceased was the legitimate allottee of Plot 457.
 - b. If the answer to (a) is in the affirmative, whether the 2nd Defendant acquired the same on account of fraud, mistake or other unlawful manner.
 - c. Whether the Plaintiffs are entitled to the reliefs sought in the suit.
 - d. Who shall bear costs of the suit.

G. Analysis and Determination

a. Whether the deceased was the legitimate allottee of Plot 457

12. The court has considered the material and submissions on record on this issue. Whereas the Plaintiffs contended that they had proved that the deceased was the legitimate allottee of the said Plot, the 2nd Defendant contended otherwise. The 2nd Defendant submitted that there was no evidence of such allocation such as a letter of offer, letter of acceptance, a charge document or other evidence of allocation.
13. When PW1 was cross examined by the 1st Defendant at the trial he stated as follows:

“Apart from the receipt, there are no other documents to support the allocation. I don’t know whether my uncle was given a discharge of charge. I am not aware if any schedule of payment of the loan was given to my uncle. No, I do not have any documents to show that Plot No. 457 Muruai was changed to 300 – Ol bollosat...”
14. When the 2nd Defendant’s advocate cross-examined PW1 at the trial on the allocation to the deceased he stated thus:

“...It shows that the receipt is for Plot 457 Muruai Scheme. No, I do not have a letter of allotment to my uncle. I am not familiar with the procedure of allotment. I do not have any other supporting documents. I do not know how much he was supposed to pay in all...”
15. It is evident from the Plaintiffs’ admission that they are not aware if any letter of allotment was issued to the deceased for Plot 457. They were not aware if he accepted any such offer and if payment of the balance of the purchase was ever paid or secured by a charge. The court takes the view that in the absence of such crucial evidence the Plaintiffs cannot be said to have proved that the deceased was the



legitimate allottee of Plot 457. A payment receipt for a deposit of 10% could not, without more, confer proprietary rights upon the deceased.

16. The court has further noted from the copy of the green card for Plot 457 Muruai which was produced by the Plaintiff that the initial registered owner of the plot was the Settlement Fund Trustees. The records shows that the plot which measured about 1.3 ha was transferred to 3 trustees of Muruai FCS Ltd on 29.12.2005. The name of the deceased does not appear in the register at any given time at all. As PW1 conceded at the trial, he had no evidence to show that Plot 457 Muruai was moved to Ol bollosat Scheme and made part of Plot 300. According to his evidence, he obtained such information from officers of the 1st Defendant prior to filing suit. However, the 1st Defendant did not call any evidence at the trial to verify the allegation.
17. In the circumstances, the court comes to the conclusion that the Plaintiffs have failed to prove on a balance of probabilities that the deceased was the legitimate allottee of Plot 457 and that he had acquired any proprietary rights thereon during his lifetime.

b. If the answer to (a) is in the affirmative, whether the 2nd Defendant acquired the same on account of fraud, mistake or other unlawful manner

18. The court has already found and held that the Plaintiffs have failed to prove that the deceased was the legitimate allottee of Plot 457. In the event, the Plaintiffs cannot legitimately complain that the deceased was defrauded of the said plot whereas he had no proprietary rights over it. Since the deceased could not be deprived of property he did not own, it is not necessary to determine whether or not the 2nd Defendant acquired the land in dispute through fraud or mistake.

c. Whether the Plaintiffs are entitled to the reliefs sought in the suit

19. In view of the court's finding and holding that the Plaintiffs have failed to prove their pleaded claim against the Defendants, it would follow that the Plaintiffs are not entitled to the reliefs sought in the amended plaint, or any one of them.

d. Who shall bear costs of the suit

20. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason to depart from the general rule. As a result, the Defendants shall be awarded costs of the suit.

H. Conclusion and Disposal Orders

21. The upshot of the foregoing is that the court finds and holds that the Plaintiffs have failed prove their claim against the Defendants on a balance of probabilities as required by law. As a consequence, the court hereby makes an order dismissing the Plaintiffs' suit with costs to the Defendants.

It is so decided.

JUDGMENT DATED AND SIGNED AT NYANDARUA THIS 26TH DAY OF SEPTEMBER, 2024 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

Mr. Kinyua Njogu for the Plaintiffs



N/A for the Attorney General for the 1st Defendant

Ms. Kagoya for the 2nd Defendant

C/A - Carol

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Y. M. ANGIMA

JUDGE

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