



Ngalo & 2 others (Suing as the Chairman, Secretary and Treasurer Respectively of Githunguri Riverside Dwellers Self Help Group) v Njoroge (Environment and Land Appeal E028 of 2021) [2024] KEELC 6326 (KLR) (25 September 2024) (Judgment)

Neutral citation: [2024] KEELC 6326 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL E028 OF 2021
A NYUKURI, J
SEPTEMBER 25, 2024**

BETWEEN

ABSALOM NGALO 1ST APPELLANT

MICHAEL KONDI 2ND APPELLANT

MUTHOMI MWANGI 3RD APPELLANT

**SUING AS THE CHAIRMAN, SECRETARY AND TREASURER
RESPECTIVELY OF GITHUNGURI RIVERSIDE DWELLERS SELF HELP
GROUP**

AND

MARGARET WAIRIMU NJOROGE RESPONDENT

((Being an Appeal from the Judgment of Chief Magistrate's Court at Machakos by Hon. C. A. Ocharo, SPM delivered on 11th day of June 2021 in Machakos CM ELC Case No. 27 of 2018))

JUDGMENT

Introduction

1. This appeal was filed by the officials of Githunguri Riverside Dwellers Self Help Group against Margaret Wairimu Njoroge, challenging the judgment of Honourable C. A. Ocharo Senior Principal Magistrate, delivered on 11th June 2021 in Machakos SPMC ELC Suit No. 27 of 2018. In the impugned judgment, the learned trial magistrate dismissed the plaintiff's (appellant herein) claim over the parcel of land known as LR. No. 7340/22 and upheld the defendant's (respondent herein) counterclaim thereby finding that the aforesaid property belongs to the defendant.



Background

2. By a plaint dated 22nd May 2018, the plaintiffs averred that they were the registered owners of the parcel of land known as LR. No. 7340/22 in Athi River (suit property) worth Kshs. 18,000,000/-. They stated that the defendant had without any right trespassed upon the suit property and interfered with their ownership rights. They sought the following orders;
 - a. A declaration that the plaintiff is the lawful owner of the plot known as LR. No. 7340/22 – Athi River.
 - b. An order of injunction restraining the defendant either by herself, servants, agents or anyone acting through her from trespassing on, harassing the plaintiff's members, developing, offering for sale, selling or in any other manner interfering with the plaintiff's quiet and peaceful occupation of the land known as LR. No. 7340/22 – Athi River.
 - c. General damages for trespass.
 - d. Costs of the suit and interest thereon.
 - e. Any other or further relief that this Honourable Court may deem just and fit to grant.
3. By a defence and counterclaim dated 4th May 2018 and amended on 8th March 2021, the defendant denied the plaintiff's claim in its entirety and averred that she was the owner of the suit property which she was lawfully allocated from parcel LR 7340 belonging to Githunguri Njiru Farm [1966] Limited (hereinafter referred to as Githunguri Limited) as she was a member of the said company and the suit property was her share. She stated that the plaintiffs trespassed on the suit property in 2018. She faulted the plaintiff's letter of allotment and stated that the suit property had a title and therefore the plaintiff's letter of allotment was unlawful. She therefore counterclaimed for the following orders;
 - a. That the plaintiff's suit against the defendant be dismissed with orders as to costs.
 - b. The plaintiffs, agents servants, purchasers, agents, and employees be evicted from LR. No. 7340/22.
 - c. A permanent injunction be issued against the plaintiffs, their agents, servants, purchasers, and employees from trespassing, subdividing, disposing, living on, erecting on buildings whatsoever, transacting any business and or interfere in any manner whatsoever with LR. No. 7340/22.
 - d. Cost of this suit.
 - e. Interest thereon.
 - f. An order be and is hereby issued directed to Officer Commanding Station (OCS) Utawala Police Station to ensure compliance with prayer (ii) above.
 - g. Any/or further relief this Honourable Court might deem fit and just to grant thereon.
4. The matter proceeded by way of viva voce evidence. The plaintiff's chairman Absalom Ngalo testified in support of the plaintiff's case while the defendant was the only witness in support of her case.

Plaintiff's evidence

5. PW1 was Absalom Ngalo the Chairman of Githunguri Riverside Dwellers Self Help Group. He adopted his witness statement as his evidence in chief and produced the documents filed. His testimony



was that the plaintiff was the original owner of LR. No. 7340/22 situated in Athi River having been allocated that land by the Government of Kenya vide a letter of allotment dated 17th September 2006. He stated that the plaintiff's members had been in quiet possession of the suit property and that around February 2018, the defendant trespassed on the suit property causing the plaintiff loss and damage. He produced a certificate of registration; letter of allotment; deed plan; rates statement; and rates clearance certificate.

6. On cross examination, he stated that he deals in properties. It was his testimony that the suit property was allocated to the plaintiff by the Ministry of Lands. He stated that he did not know that the mother title belonged to Githunguri Limited. He claimed that their name was in the register where they were allocated the land, only to realize in 2019 September that their name had been replaced by a different name. He stated that he had not conducted a search to establish the owner of the suit property. He confirmed that he did not have a title, but only had an allotment letter. He stated that the person with the title obtained it fraudulently. He stated further that they had a case before the Machakos District Commission but it was not concluded. That marked the close of the plaintiff's case.

Defendant's evidence

7. DW1 was Margaret Wairimu Njoroge. She adopted her witness statement as evidence in chief. She also produced the documents filed in court on her behalf. It was her evidence that she was the legal owner of the suit property, which was a subdivision of LR. No. 7340 owned by Githunguri Limited. She stated that she was given the suit property by Githunguri Limited as her share and that they also transferred the property in her name. She maintained that it was only in February 2018 that the plaintiff's members tried to forcefully enter her land and tried to erect structures whereof she reported the matter to the Directorate of Criminal Investigations, hence the plaintiffs filed this suit to cover up the fact that they were being investigated. She further stated that she issued a caveat emptor notice through a local Daily on 28th March 2018. She urged the court to grant her the orders sought.
8. She produced the certificate of incorporation of Githunguri Limited; conveyance between Josephine Mary Nesfiled Carmichael and Githunguri Limited in regard to the suit property; members [register of 1991](#) of Githunguri Limited showing that the defendant was member No. 145; letter by Githunguri Limited confirming ownership by the defendant; caveat emptor notice dated 28th March 2018; certificate of title and deed plan.
9. On cross examination, she stated that she bought her share of Githunguri Limited from one Kamiti who was a Director. Further that the land had been owned by a white-man who sold it to Githunguri Limited and that the land was subdivided and each member got their portion, and subsequently titles issued accordingly. She stated further that she was member No. 145 at Githunguri Limited and acquired the land in 1991. That marked the close of the defence case.
10. Upon consideration of the above evidence, the learned trial magistrate in her judgment found that as at 2006 when the plaintiff purportedly acquired the suit property, there was no land to acquire or allocate, hence the allotment by the Government in 2006, was unlawful and the plaintiff cannot make a claim based on an illegality. The trial court further held that it was persuaded by the defendant's evidence that the suit property was a subdivision of LR. No. 7340 which belonged to Githunguri Limited and that the defendant having acquired title thereto had proved to the court's satisfaction that she had acquired title through a lawful process. The court also found that the plaintiff had not proved fraud against the defendant. Therefore, the trial court dismissed the plaintiff's claim and allowed the defendant's counterclaim.



11. Being aggrieved with the above judgment, the plaintiff in the lower court (the appellant herein) filed a memorandum of appeal dated 5th July 2021 citing the following five grounds of appeal;
 - a. That the learned magistrate erred in both law and fact in holding that there was no land to be acquired or allocated to the appellant in 2006 hence the purported allotment to the appellant by the Government in 2006 was unlawful.
 - b. That the learned magistrate erred in both law and fact in holding that the Government must have mistakenly allocated the suit property to the appellant.
 - c. That the learned magistrate erred in both law and fact in finding that the appellant does not hold a valid title to the suit property as the allotment was void ab initio.
 - d. That the learned magistrate erred in both law and fact in holding that the respondent holds a valid title to the suit property when the said title was issued on 9th April 2019 when there was a valid court order prohibiting any dealings in the suit property.
 - e. That the learned magistrate erred in both law and fact and arrived to a wrong conclusion that the respondent has satisfactorily proved that she acquired the title through a lawful process.
12. Consequently, the appellant sought the following orders;
 - a. The appeal herein be allowed and a declaration be made by this Honourable Court that the appellant is the lawful owner of Plot No. LR. 7340/22 situated in Athi River within Machakos County.
 - b. This Honourable Court grant such other relief that it may deem fit and trust.
13. The appeal was canvassed by way of written submissions. On record are the appellant's submissions filed on 25th May 2022 and the respondent's submissions filed on 22nd February 2022.

Appellant's submissions

14. Counsel for the appellant submitted that the trial magistrate was wrong in concluding that there was no land to be allocated to the appellant and that the appellant does not hold a valid title on the basis that LR. No. 7340 was transferred to Githunguri Limited. Counsel argued that it is not the entire LR. No. 7340 that is in contention as the suit property is only a portion of the land owned by Githunguri Limited, and that unlike the rest of the property in LR No. 7340, the suit property had never been developed from 1966 until 2006 which was 40 years when the government allocated it to the appellants. Counsel argued that Githunguri Limited was not party to the suit and that they never bothered to seek joinder yet the property was allegedly theirs.
15. It was the submissions of the appellant's counsel that the appellant had met conditions on the allotment letter by proof of payment of land rates and land rent to the County Government of Machakos and that they had been issued with the allotment letter by the Government of Kenya which confirmed their ownership. Counsel contended that on the other hand, the only proof of ownership that was presented by the respondent was the register from Githunguri Limited showing her name and a letter alleged to have been written by officials of Githunguri Limited. Counsel argued that the respondent had not met the requirements under Section 3(3) of the [Law of Contract Act](#), and that the respondent was at fault by failing to present a witness from Githunguri Limited.
16. Reliance was placed on the case of Rukaya Ali Mohammed v. David Gikonyo Nambache & Another, Kisumu HCC No. 9 of 2004 for the proposition that once an allotment letter is issued and an allottee



meets the conditions thereof, the land in question is no longer available. Counsel argued that the trial court fell in error as neither the allotting authority (Government) nor the respondent nor Githunguri Limited claimed any fraud, mistake, misrepresentation or illegality on the part of the appellant's allotment letter.

17. Counsel argued that the mother title was issued to Githunguri Limited in 1966 and the allotment issued by the Government for the suit property in 2006 and since the allotment was not for the entire mother title of LR. No. 7340, then it was lawful, as there must have been reasons for the Government to allocate the land to the appellant. Counsel argued that those reasons were that the appellants were a Self Help Group in the slums and the suit property had not been developed since 1966, and that the respondent had not been paying rates.
18. Counsel argued that the judgment was erroneous because the respondent had no share certificate and did not occupy the suit property. In addition, counsel contended that the learned magistrate erred when she held that the respondent's title was valid when it was issued on 9th April 2019 when there was a valid order issued on 23rd July 2018 prohibiting dealings on the suit property.
19. The court was referred to the provisions of Section 26 (1) of the [Land Registration Act](#) for the proposition that the respondent having obtained title when the suit was pending and when there was an order that none of the parties deals in the suit property, it means that the certificate of title held by the respondent was acquired unlawfully, illegally, unprocedurally and through a corrupt scheme.
20. Counsel faulted the findings of the learned trial magistrate and argued that the trial court did not bother to ascertain the manner of acquisition of the title of the suit property by the respondent as no copies of documents used to apply for registration were produced. Counsel argued that there was also no proof of payment of valuation, or stamp duty was exhibited, by the respondent. Counsel argued that the trial court should not have admitted the certificate of title without asking for copies of transfer forms and completion documents. Counsel concluded that the evidence on record showed that the respondent's title was acquired unlawfully.

Respondent's submissions

21. Counsel for the respondent while supporting the findings of the trial court, submitted that the respondent explained how she acquired the suit property by virtue of her being a shareholder at Githunguri Limited which is the company that owned the mother title being LR No. 7340. Counsel argued that the respondent demonstrated her membership of Githunguri Limited as being member No. 145 which was confirmed by Githunguri Limited vide their letter. Counsel further submitted that there could therefore be no lawful allotment of the respondent's property.
22. It was further submitted for the respondent that the allocation by the Government was unlawful as the suit property was not available for allocation and therefore the appellant's claim is anchored on an illegality which cannot be upheld by the courts. Counsel relied on the letter from Githunguri Limited stating that the company was processing the respondent's title and argued that the respondent depended on the company to process her subdivision and that she had no control over the processes by the company. Counsel argued that the appellant's ground 4 of the appeal was never raised in the lower court and cannot be raised in this court. Reliance was placed on the case of *Gitobu Imanyara & 2 Others v. Attorney General* [2016] eKLR.
23. Counsel contended that the trial court was right in concluding that the respondent had lawfully acquired her title. Reliance was placed on Section 26 (1) of the [Land Registration Act](#) and Article 40 of [the Constitution](#) for the proposition that legal protection of the right to acquire and own property is limited to property that is lawfully acquired. The court was referred to the case of [Satra Investments](#)



Ltd v. J. K. Mbugua Court of Appeal No. 164 of 2004 and *Njuwangu Holding Limited v. Langata KPA Nairobi & Others ELC Civil Suit No. 139 of 2013*, for the proposition that a title gives greater rights than a letter of allotment.

Analysis and determination

24. The court has carefully considered the appeal, the parties' rival submissions and the entire record. This court being a first appellate court has the duty to reevaluate, reassess and reanalyze the evidence and make its own conclusion, bearing in mind that it had no advantage of seeing or hearing the witnesses and therefore make due allowance for that.
25. In the case of *Abok James Odera t/a Odera & Associates v. John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, the court restated the duty of the first appellate court in the following words; This being a first appeal, we are reminded of our primary role as a first appellate court namely; to reevaluate, reassess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.
26. Having considered the appeal and the record, the five grounds of appeal raise two issues, namely;
- a. Whether the appellant's allotment letter dated 17th September 2006 amounted to a lawful acquisition of the suit property by the appellant.
 - b. Whether the respondent's title was lawfully acquired.
27. Article 40 (6) of *the Constitution* limits legal protection to property acquisition and ownership only in regard to lawfully acquired property. The law is concerned not just with the ultimate certificate of title, but also with the legality of the process of acquisition thereof.
28. Section 26 (1) of the *Land Registration Act* provides for conclusiveness of title and instances of impeachment of title as follows;
- Certificate of title to be held as conclusive evidence of proprietorship
1. The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
 - a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
29. In the case of *Elijah Makeri Nyangwana v. Stephen Mungai Njuguna & Another* [2013] eKLR the court held as follows;

Is the title impeachable by virtue of Section 26 (1) (b)? first, it needs to be appreciated that for Section 26 (1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedural, or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through



a corrupt scheme. The title holder need not to have contributed to these vitiating factors. the purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions.

30. In this case, the appellant alleges to have been allocated the suit property by the Government of Kenya, in 2006. As at that date, the applicable law for allocation of Government land was governed by the repealed Government Lands Act. For Government land to be allocated, it ought to have been unalienated Government land. Section 2 of the repealed Government Lands Act defined unalienated Government land as follows;

Unalienated Government land means Government land which is not for the time being leased to any other person, or in respect of which the commission has not issued any letter of allotment.

31. Therefore unalienated Government land referred to land which belonged to the Government and which had not been allocated, reserved or leased to anyone. Hence any land where a grant, lease or disposition had been made by Government was not unalienated Government land since it had already been alienated.

32. Besides, Government had no power to allocate privately owned land. It could only allocate unalienated Government land. Section 2 of the repealed Government Lands Act defined Government land as follows;

“Government land” means land for the time being vested in the Government by virtue of Sections 205 and 205 of *the Constitution* (as contained in Schedule 2 of the Kenya Independence Order in Council 1963) and Sections 21, 22, 25 and 26 of *the Constitution* of Kenya (Amendment) Act.

33. The parties in this case agree that the suit property is a subdivision of LR. No. 7340 which was lawfully owned by Githunguri Limited. That means that the suit property is private land and therefore the same not being unalienated Government land, the Government had no power or capacity to allocate the same, as it was not Government land and the Government could not allocate land it did not own. Therefore indeed the alleged purported allocation to the appellant by Government was unlawful and a nullity.

34. In the premises, I agree with the findings of the trial court that the suit property being private property was not available for allocation by the Government and could not lawfully be allocated to the appellant as the same was not unalienated Government land.

35. On whether the respondent’s title was invalid because it was issued when there were orders prohibiting parties from dealing with the suit property, the evidence shows that the respondent’s title is based on her share at Githunguri Limited and that it was the latter that dealt with subdivision and caused titling of the property. There being no evidence of service of the order on Githunguri Limited who were not parties to the suit, I find nothing against the respondent’s title as she had stated that the process of title was ongoing by Githunguri Limited. In addition, the fact that the title was transferred to her by Githunguri Limited, who had owned the land, confirms legality of her acquisition of the suit property because the same was being transferred from the lawful owner (Githunguri Limited) to a new owner (respondent) who had lawfully acquired the property by subscribing to the shares of Githunguri Limited. The argument by the appellant that a share certificate was not produced does not hold water as Githunguri Limited had confirmed her membership. It is clear that the appellant did not plead or prove fraud, illegality, want of procedure or corruption in the respondent’s acquisition



of her title. It therefore follows that the learned trial magistrate was right in her conclusion that the appellant alleged acquisition was unlawful and that the respondent proved lawful acquisition of the suit property and the appellant's allegation that the respondent's title was obtained fraudulently was neither pleaded nor proved.

36. The upshot is that I find no merit in this appeal which I dismiss with costs to the respondent.

37. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 25TH DAY OF SEPTEMBER, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Mr. Kitinya for appellant

No appearance for respondent

Court assistant – Abdisalam

