



Wamugu v District Land Registrar, Nyandarua & 2 others (Land Case 87 of 2023) [2024] KEELC 7097 (KLR) (24 October 2024) (Judgment)

Neutral citation: [2024] KEELC 7097 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
LAND CASE 87 OF 2023
YM ANGIMA, J
OCTOBER 24, 2024**

BETWEEN

JEREMIAH MUUTI WAMUGU PLAINTIFF

AND

THE DISTRICT LAND REGISTRAR, NYANDARUA 1ST DEFENDANT

THE HON ATTORNEY GENERAL 2ND DEFENDANT

**PENINA WAMBUI GAKURE (SUBSTITUTED WITH NANCY LEAH WEDIA
KABAKI, CATHERINE WANJIKU KABAKI & SYLVIA WANJIRU KABAKI
AS LEGAL REPRESENTATIVE OF THE ESTATE OF GEOFFREY GAKURE
KABAKI (DECEASED) 3RD DEFENDANT**

JUDGMENT

A. Plaintiffs' Claim

1. By a plaint dated 30.09.2016, and amended on 15.01.2018 the Plaintiff sued the Defendants seeking the following reliefs:
 - a. An order directing the 1st Defendant to remove and/or cancel the restriction placed in the register on the 22nd April, 2016 in respect of Title No. Nyandarua/Ol'Kalou Salient/525.
 - b. In the alternative, an order directing the 3rd Defendant to withdraw the restriction placed in the register on the 22.04.2016 in respect of Title No. Nyandarua/Ol'Kalou Salient/525.
 - c. Damages.
 - d. Costs of the suit.
 - e. Any other or further relief which by this honourable court may deem fit to grant.



2. The Plaintiff pleaded that at all material times he was the registered proprietor of Title Nos. Nyandarua/Ol'Kalou Salient/525 (the suit property). He pleaded that he was allocated the suit property by the Director of Land Adjudication & Settlement (the Director) in 2015 and upon satisfying all the conditions of allotment he was issued with a title deed in the same year.
3. The Plaintiff pleaded that sometime in 2016 he sought to obtain a loan facility from Equity Bank Ltd and charge the suit property as security for repayment of the loan but was unable to do so due to a restriction which had been registered against the title by the 1st Defendant at the instance of the 3rd Defendant. It was his contention that the registration of the said restriction was unlawful and without any legal basis. He further pleaded that despite requesting the 1st and 3rd Defendants to remove the said encumbrance they had failed to oblige. It was also pleaded that the 1st Defendant had failed to conduct a hearing to establish the propriety of the said restriction as required by law.
4. The Plaintiff contended that despite issuance of a demand and notice of intention to sue, the Defendants had failed to make good his claim thereby rendering the suit necessary.

B. 1st and 2nd Defendants' Defence

5. The record shows that the Attorney General filed a defence dated 01.04.2019 in response to the suit. The 1st and 2nd Defendants admitted that the Plaintiff was the registered proprietor of the suit property. They also conceded that a restriction had been registered against the suit property at the instance of the 3rd Defendant who was claiming an interest on behalf of the estate of the late Geoffrey Gakure Kabaki (the deceased).
6. The 1st and 2nd Defendants pleaded that the 1st Defendant had acted lawfully and in accordance with the power conferred upon the land registrar to register the restriction hence the Plaintiff had no legitimate complaint in that regard. The Attorney General denied that a demand and notice of intention to sue were ever served and contended that the suit was legally defective for offending the mandatory provisions of Section 13A of the *Government Proceedings Act*, (Cap.40).

C. 3rd Defendant's Defence

7. The 3rd Defendant filed a defence and counterclaim dated 16.02.2018. By her defence, the 3rd Defendant denied liability for the Plaintiff's claim. She conceded that the Plaintiff was the registered owner of the suit property but pleaded that the registration ought to be cancelled because it was obtained on account of fraud or mistake.
8. The 3rd Defendant pleaded that the deceased was the legitimate allottee of the suit property by virtue of a letter of allotment dated 07.12.1981 issued by the Settlement Fund Trustees (SFT). It was further pleaded that the said allocation had never been revoked or nullified hence the suit property was not available for allocation to the Plaintiff in 1995 or at any other time.
9. It was pleaded that the deceased and his family had made all the necessary payments to the SFT and that there was no breach of any of the conditions of allotment to warrant cancellation of the allocation. The 3rd Defendant further pleaded that at all material times the deceased or his agent was in occupation of the suit property hence the ground status report which was used to facilitate the allocation to the Plaintiff was fraudulent.
10. The 3rd Defendant denied that the restriction registered against the suit property was wrongful or unlawful and put the Plaintiff to strict proof thereof. She pleaded that she received the Plaintiff's



demand letter and notice of intention to sue but contended that she was not under any legal obligation to comply.

11. By her counterclaim, the 3rd Defendant reiterated the contents of her defence and pleaded that she was the legal representative of the deceased who was the original allottee of the suit property vide a letter of allotment dated 07.12.1981. It was her case that the deceased complied with the terms and conditions of allotment, fenced the suit property and occupied the permanent improvement which was already on the land. It was contended that the allotment to the deceased was never revoked hence the second allotment to the Plaintiff was procured either through fraud or mistake.
12. As a result, the 3rd Defendant sought the following reliefs in her counter-claim:
 - a. A declaration that the Plaintiff's registration as proprietor of Title No. Nyandarua/Ol'Kalou Salient/525 was procured fraudulently or by mistake.
 - b. An order for cancellation of the Plaintiff's registration as proprietor of Title No. Nyandarua/Ol'Kalou Salient/525 and substitution therefor the name of the 3rd Defendant as legal representative of the estate of Geoffrey Gakure Kabaki (deceased).
 - c. Costs of the counter-claim plus interest thereon at court's rate.
 - d. Any other relief deemed fit by the honourable court.

D. Plaintiff's Reply

13. The Plaintiff filed a reply to defence and defence to counterclaim dated 07.03.2018. By his reply to defence the Plaintiff joined issue with the 3rd Defendant on her defence and reiterated the contents of his plaint. He denied that he obtained registration of the suit property through fraud or mistake and denied all the particulars thereof as pleaded in the defence and counter-claim.
14. By his defence to counter-claim, the Plaintiff denied all the allegations therein and put the 3rd Defendant to strict proof thereof. It was denied that the deceased was ever allocated the suit property by the SFT and that he ever took possession or settled thereon. The Plaintiff pleaded that he was lawfully and procedurally allocated the suit property by the Director since there were no records at Nyahuru indicating that the deceased was ever allocated the suit property and issued with any legal documents. The Plaintiff therefore prayed for dismissal of the defence and counter-claim and entry of judgment in his favour as prayed in the plaint.

E. Trial of the Action

15. At the hearing hereof, the Plaintiff called 2 witnesses in support of his claim and adopted the contents of his witness statement dated 15.01.2018 as his evidence in chief. His evidence simply mirrored what was contained in his amended plaint. The second witness who testified as PW2 was John Welangai who was an assistant director of land adjudication and settlement. He was summoned by the Plaintiff to attend court and produce documents in support of his allocation.
16. The 1st and 2nd Defendants did not tender any evidence at the trial. The Attorney General opted to close their case without calling any evidence. The 3rd Defendant on her part testified on her own behalf as the sole witness. She adopted the contents of her witness statement dated 05.04.2018 as her evidence in-chief. The contents of her statement were a replica of her defence and counterclaim.



F. Directions on Submissions

17. Upon conclusion of the hearing the parties were granted timelines within which to file and exchange their respective submissions. The record shows that the Plaintiff's submissions were filed on 10.07.2024 and supplementary ones on 01.10.2024 whereas the 3rd Defendant's were filed on 16.09.2024. However, the Attorney General's submissions were not on record by the time of preparation of the judgment.

G. Issues for Determination

18. The court has noted that the parties did not file an agreed statement of issues for determination. The record shows that the parties filed separate issues except the Attorney General who did not file any issues. As such, the court shall frame the issues for determination as stipulated 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 in 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.
19. The court has considered the pleadings, evidence and documents on record and is of the opinion that the following are the key issues for determination herein:
- a. Whether the deceased was the original allottee of the suit property.
 - b. Whether the allotment to the deceased was legally and procedurally cancelled.
 - c. Whether the Plaintiff obtained allotment and registration of the suit property through fraud or mistake.
 - d. Whether the Plaintiff is entitled to the reliefs sought in the plaint.
 - e. Whether the 3rd Defendant is entitled to the reliefs sought in the counterclaim.
 - f. Who shall bear costs of the suit and counter-claim.

H. Analysis and Determination

Whether the deceased was the original allottee of the suit property

20. The court has considered the material and submissions on record on this issue. Whereas the 3rd Defendant submitted that the deceased was the original allottee of the suit property by virtue of a letter of allotment dated 1981, the Plaintiff disputed this and contended that there was no evidence of such allocation and that, in any event, it had been cancelled by the concerned authorities.
21. The material on record shows that there is a letter dated 07.06.1982 from the General Manager Ol'Kalou Salient Scheme confirming allocation of Plot 670 to the deceased vide a letter ref.no.DS.6/19/A/Vo.11/1176 Dated 07.12.1981. There is a letter of acceptance of the offer dated 09.06.1982 and a charge dated 11.06.1982. Most importantly, PW2 conceded that the deceased was indeed allocated the suit property much earlier and legal documents processed in his favour. However, he contended that the allotment was cancelled in 1995 prior to allocation of the suit property to the Plaintiff. In the premises, the court is satisfied on a balance of probabilities that the deceased was the



original allottee of the suit property under the file for Plot No.670 which was later assigned a new number being Plot 525.

Whether the allotment to the deceased was legally and procedurally cancelled

22. The court has considered the material and submissions on record on this issue. Whereas the 3rd Defendant contended that the deceased was never given notice of default of the terms and conditions of allotment or notice of cancellation of his allotment, PW2 contended that proper notices, were duly issued and sent by post. However, the latter conceded that he did not have any evidence of postage of the relevant notices.
23. On the notice to remedy breach of conditions by the deceased, PW2 stated as follows during cross-examination by the 3rd Defendant's advocate:

“...the notice to remedy breach was sent by ordinary post. I have no evidence or certificate of postage. The death certificate shows that the allottee died in 2011. We were not aware that the deceased had died...”
24. Regarding service of notice of cancellation, PW2 stated as follows:

“...the notice of cancellation was also sent by post. I have no evidence of service of the notice...”
25. In the circumstances, the court is of the opinion that there is really no credible evidence on record to demonstrate that the deceased as the initial allottee of the suit property was ever served with either a notice to remedy any alleged breaches or of a notice of cancellation of his allotment. The material on record shows that he died in 2011 and there is no evidence to show that the relevant notices were brought to the attention of his legal representative or his family members in 2015.
26. The court finds it strange that the Plaintiff purported to apply for allocation of the suit property in 2014 before the purported cancellation of the original allotment to the deceased. It is also strange that the allocation process to the Plaintiff was done at lightning speed and he was issued with legal documents soon after cancellation of the initial allotment in 2015.
27. In the case of *Thananga v Nyaga & 2 Others* (Environment & Land Case 100 of 2023 [2023] KEELC 22011 (KLR) (30 November 2023) (Judgment) Neutral Citation [2023] KEELC 22011 (KLR) this court considered the issue of service of notice upon an allottee before re-possession as follows:

“The court has also considered the decision in the case of Arthur Matere Otieno v Dorina Matsanza [2003] eKLR which was cited by the Defendants' advocates on the question of service of notice of repossession. The court is not prepared to go as far as the High Court went in holding that the SFT has no power of repossession under any circumstances. The court is content to adopt the High Court's holding on the issue of service. The court is thus of the opinion that in the absence of any evidence of service of the requisite notices upon the 3rd Defendant, the purported repossession and sub-division of Plot 588 was irregular, unlawful and of no legal consequence and did not extinguish the 3rd Defendant's interest over Plot 588”.
28. In the premises, the court finds and holds that the allotment of the suit property to the deceased was not legally and procedurally cancelled for want of evidence of service of a notice to remedy any breaches and notice of cancellation of the allotment.



Whether the Plaintiff obtained allotment and registration of the suit property through fraud or mistake

29. The Plaintiff portrayed himself as an innocent and law abiding allottee who was simply allocated the suit property without knowledge of any prior or existing claim over the same property by the deceased or his estate. The Plaintiff's case was that he simply applied for Plot 525 which was vacant and unoccupied in 2014 and he paid all the necessary dues upon allotment and was thereafter issued with a title deed in 2015. He denied that he procured the suit property either through fraud or mistake.
30. It is evident from the material on record that the old number for the suit property was No. 670 whereas the new number was No. 525. It is evident from the material on record that the allotment documents for the deceased were processed in the file for Plot No.670 whereas the Plaintiff's allotment was processed in a parallel file bearing the new number. It is really strange that the Plaintiff's allotment was not processed under the initial file upon purported cancellation of the allotment to the deceased.
31. Another strange aspect of this case regards the ground status report dated 08.04.2015 which was prepared by PW2 while he was stationed at Nyahururu. The said report claimed that the suit property was vacant, undeveloped, and not cultivated. It further claimed that the plot was initially allocated to James Kabote who was later transferred to Ndemi Settlement Scheme, leaving the plot vacant. Later on the same officer prepared another status report dated 20.04.2016 in which he indicated that there was an old permanent house on the land and that it was occupied by one Jesse Kariuki Muhari whom he termed as a squatter who had been in occupation since 1982. He further stated that he had fenced a small portion of the land and that he had 4 cows on the land.
32. PW2 did not explain how he failed to see an old (colonial) permanent house on the suit property in 2015 but saw it in 2016. He did not explain how he failed to notice the occupant and his cows in 2015. He did not inform the court how he came to the conclusion that the occupant was a mere squatter on the suit property. During cross-examination by the 3rd Defendant's advocate he stated thus:
- “...There was an old, colonial house which was occupied by a squatter. No, I did not interview him on how he entered the parcel. He was cultivating about ½ acre of the land. He had some cows (4 No.)...”
33. The court is of the opinion that the first report by PW2 dated 08.04.2015 was a false and fraudulent report and that it was on that basis that the Plaintiff was allocated the suit property in 2015. The Plaintiff was not simply an innocent allottee because there is evidence on record to show that he applied for allocation in 2014 long before the SFT had purported to cancel the allocation to the deceased. In fact, the notices for cancellation of the allocation were triggered by the Plaintiff's application for land which was not available for allocation at the material time.
34. The court is satisfied on the basis of the material on record that the Plaintiff's allocation of the suit property on a parallel file was procured through fraudulent means. That explains the reason why a fraudulent ground status report was prepared at lightning speed on the basis of which the Plaintiff was issued with a letter of allotment and other ownership documents. The Plaintiff must have been privy to the fraudulent scheme since he initiated the process by applying for allocation of the plot which was not available for allocation in 2014.
35. At the very least, the allocation to the Plaintiff could have been made by mistake since the suit property was not available for allocation. This flows from the court's finding that the allocation of the suit property to the deceased not legally and procedurally cancelled. Either way, the Plaintiff's title is liable to be cancelled under Section 26 of the [Land Registration Act, 2012](#).



Whether the Plaintiff is entitled to the reliefs sought in the plaint

36. The court has found that the deceased was the original allottee of the suit property. The court has also found that the said allotment was not legally and procedurally cancelled. The court has further found that the Plaintiff obtained his allotment through fraud or mistake. In the premises, the Plaintiff has failed to prove his claim on a balance of probabilities hence he is not entitled to the reliefs sought in the suit or any one of them.

Whether the 3rd Defendant is entitled to the reliefs sought in the counterclaim

37. In view of the court's finding on the preceding issues, the court is satisfied that the 3rd Defendant has proved her counterclaim on a balance of probabilities. As a result, the 3rd Defendant is entitled to the reliefs sought in the counter-claim.

Who shall bear costs of the suit and counter-claim

38. 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 3rd Defendant shall be awarded costs of the suit and of the counter-claim.

I. Conclusion and Disposal Orders

39. The upshot of the foregoing is that the court finds and holds that the Plaintiff has failed to prove his claim against the Defendants on a balance of probabilities. The court, however, finds that the 3rd Defendant has proved her counter-claim to the required standard. As a consequence, the court makes the following orders for disposal of the both the suit and counterclaim:

- a. The Plaintiff's suit be and is hereby dismissed in its entirety.
- b. The 3rd Defendant's counterclaim is hereby allowed in the following terms:
 - i. A declaration be and is hereby made that the Plaintiff's registration as proprietor of Title No. Nyandarua/Ol'Kalou Salient/525 was procured by fraud or mistake.
 - ii. An order is hereby made for cancellation of the Plaintiff's registration as proprietor of Title No. Nyandarua/Ol'Kalou Salient/525 and in substitution therefor the 3rd Defendant be registered in her capacity as the legal representative of the estate of Geoffrey Gakure Kabaki (deceased).
- c. The 3rd Defendant is hereby awarded costs of the suit and counterclaim to be borne jointly and severally by the Plaintiff and the 1st and 2nd Defendants.

It is so decided.

**JUDGMENT DATED AND SIGNED AT NYANDARUA THIS 24TH DAY OF OCTOBER, 2024
AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS PLATFORM.**

Y. M. ANGIMA

JUDGE

In the presence of:



Mr. Wainaina for the Plaintiff

Ms. Chepkirui for the A.G. for the 1st and 2nd Defendants

Ms. Ndegwa holding brief for Mr. Gakuhi Chege for the 3rd Defendant

C/A - Carol

