



Maciazinex Africa Company Limited v Mugo & 2 others (Environment & Land Case 440 of 2014) [2024] KEELC 13978 (KLR) (20 December 2024) (Judgment)

Neutral citation: [2024] KEELC 13978 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 440 OF 2014
JO OLOLA, J
DECEMBER 20, 2024**

BETWEEN

MACIAZINEX AFRICA COMPANY LIMITED PLAINTIFF

AND

MICHAEL MUGO 1ST DEFENDANT

DAVID GITHAMBO 2ND DEFENDANT

KENYA FARMERS ASSOCIATION 3RD DEFENDANT

JUDGMENT

Background

1. This suit was initially filed at the High Court at Nyeri as Nyeri HCCC No. 33 of 2011. It was transferred to this court on 26th November 2014 and given its current reference.
2. By a Plaint dated 4th April 2011, Maciazinex Africa Company Ltd (the Plaintiff) prays for Judgment against the Defendants for:
 - a. An order that the Defendants do vacate, quit and yield possession to the Plaintiff or alternatively the court issues an order for the eviction of the Defendants, their servants and/or agents;
 - b. Mesne profits at the rate of Kshs. 20,000/= per month from 3rd November 2007 till yielding of possession; and
 - c. Costs of the suit and interest thereon.
3. Those prayers arise from the Plaintiff's contention that at all times relevant to this suit, the Plaintiff was the registered Lessee from the Government of Kenya of all that commercial property known as Nyeri Municipality Block II/371 for a period of 99 years effective 17th July 1989. It is the Plaintiff's



case that the three Defendants have jointly and severally illegally occupied and continue to occupy the suit premises without any colour of right.

4. But in their joint Statement of Defence dated 24th May 2011, Michael Mugo and David Githambo (the 1st and 2nd Defendants respectively) deny trespassing into and occupying the suit property. It is their case that the Plaintiff's claim is bad in law and that the same does not disclose the date and year when the Defendants allegedly trespassed onto the suit property.
5. Similarly, the Kenya Farmers Association (the 3rd Defendant) denies the Plaintiff's claim. It is the 3rd Defendant's case that it is the lawful allottee of the suit property which it has leased out to some individuals to operate a garage business. The 3rd Defendant accuses the Plaintiff of fraudulently causing the suit property to be registered in its name.
6. By way of its Counterclaim, the 3rd Defendant prays for the cancellation of the Plaintiff's title and a declaration that the 3rd Defendant is the lawful owner of the suit property.

The Plaintiff's Case.

7. In support of its case, the Plaintiff called one witness at the trial which commenced way back in the year 2016.
8. DW1- Joseph Machira Mugweru is the Managing Director of the Plaintiff's company. He told the court the Plaintiff was issued with an allotment letter for the suit property on 15th June 1998 before being issued with a Certificate of Lease on 1st February 1999. PW1 further told the court that the Plaintiff had been paying rates and land rent and that the Defendants had wrongfully occupied the same and had refused to vacate the land.

The Defence Case.

9. On their part, the Defendants called two witnesses in support of their case at the trial.
10. DW1 – Ojwang Omollo Patroba is an Assistant Director of Land Administration at the Ministry of Lands, Public Works and Housing. He told the court that the suit land was allocated to the 3rd Defendant on 25th June 1981 even though they were yet to be issued with a Certificate of Lease. DW1 testified that they did not have in their records any document relating to the lease issued to the Plaintiff and that the receipts produced by the Plaintiff did not appear on their records.
11. DW2- Kenneth Kiptoo Chesina is a retired former Property Manager of the 3rd Defendant. Relying on his recorded statement dated 2nd October 2013, DW2 testified that the suit property was allocated to the 3rd Defendant in 1981 and that they took immediate possession and leased it to some individuals for use as a garage for repairing motor vehicles.

Analysis and Determination.

12. I have carefully perused and considered the pleadings filed herein, the testimonies of the witnesses as well as the evidence adduced at the trial. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates representing the parties herein.
13. By their suit as filed herein, the Plaintiff Company prays for an order that the Defendants do vacate, quit and yield possession of all that parcel of land known as Nyeri/Municipality Block II/371 (the suit property). In the alternative the Plaintiff urges the court to issue an order for the eviction of the Defendants, their servants and/or agents from the suit property. In addition, the Plaintiff has sought



an order for mesne profits at the rate of Kshs. 20,000/= per month effective 3rd November 2007 until such a time that the Defendants shall yield possession of the suit premises.

14. It is the Plaintiff's case that at all times relevant to this suit, it was the registered lessee from the Government of Kenya of the said commercial property measuring some 0.719 Ha. The Plaintiff accuses the defendants of illegally occupying and continuing to occupy the said premises without any colour of right to the Plaintiff's detriment.
15. The 1st and 2nd Defendants did not deny that they were in occupation of the suit property. However, contrary to the Plaintiff's assertions that they had trespassed into and were occupying the premises illegally, the two Defendants asserted that they were legally in occupation thereof as tenants of the Kenya Farmers Association Limited (KFA) who according to them were the rightful owners of the suit property.
16. The position taken by the Defendants gained support when by a Notice of Motion Application dated 3rd May 2013, the Kenya Farmers Association (KFA) sought to be enjoined in the suit on account that they were the owners of the suit property and that they are the ones who had leased the same to the 1st and 2nd Defendants to operate a garage business thereon. In a Ruling delivered herein on 28th June 2013, Ombwayo J. then seized of the matter allowed the application thereby enjoining the Kenya Farmers Association (KFA) as the 3rd Defendant.
17. In its statement of Defence and Counterclaim dated 2nd October 2013, the 3rd Defendant reiterated its position that it was the lawful allottee of the suit property and that it had leased the same to various individuals to operate an open garage business thereon. The 3rd Defendant accused the Plaintiff of causing the suit property to be registered in its name fraudulently and urged to the court to cancel the Plaintiff's title and declare the 3rd Defendant as the lawful owner of the suit property.
18. From the material placed before the court, both the Plaintiff and the 3rd Defendant traced their ownership claims to certain documents in their possession. In support of its case, the 3rd Defendant produced a Letter of Allotment issued to itself by the Commissioner of Lands and dated 25th July 1981. On the other hand, the Plaintiff produced a Letter of Allotment issued by the same office of the Commissioner of Lands and dated 15th June 1998. In addition, the Plaintiff produced a Certificate of Lease issued in its name for the suit property dated 1st February 1999.
19. According to the 3rd Defendant, it was the first allottee of the suit property and the Plaintiff could only have been registered as proprietor of the same fraudulently and hence the prayer for the Plaintiff's title to be cancelled. The particulars of the alleged fraud committed by the Plaintiff are particularized at Paragraph 4 of the 3rd Defendant's Statement of Defence and Counterclaim as follows:-
 - i). Deliberately making misrepresentation to the Commissioner of Lands that the suit plot was vacant and free for allocation to it;
 - ii). Causing the suit plot to be registered in its name while the process of the registration of the Third Defendant had stagnated; and
 - iii). Causing a double allocation of the suit plot.
20. As it were, fraud had been defined in Black's Law Dictionary 11th Edition as:-

“A knowing misrepresentation or knowing concealment of material facts made to induce another to act to his or her detriment.”



21. As was stated in Vijay Morjaria –vs- Nansingh Madhusingh Darbar & Another [2000] eKLR:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud must be stated on the face of the pleading. The acts alleged to be fraudulent must be of course set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.

22. Similarly, in Kinyanjui Kamau –vs- George Kamau [2015] eKLR, the court held thus:

“It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo –vs- Ndolo [2008] 1KLR (G & F) 742 wherein the court stated that “.....we start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove the allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the Standard of Proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond reasonable doubt as in criminal cases.....” In a case where fraud is alleged, it is not enough to simply infer fraud from the facts.”

23. In the matter before me, the 3rd Defendant called two witnesses. Kenneth Kiptoo Chesina (DW1) was its Property Manager at the relevant time. DW1 testified that the 3rd Defendant applied for and was allocated the suit property to enable it carry out their business of selling farm inputs to farmers. DW1 told the court that the 3rd Defendant complied with the conditions set out in the Letter of Allotment by paying the requisite fee of Kshs. 12,698/= to the Commissioner of Lands on 16th July 1981.

24. DW1 further testified that after the plot was surveyed, they were unable to follow up the processing of the title deed and the file relating to the suit property disappeared from the Lands Office and that their letters to the Commissioner of Lands went unanswered for a long time. It was his testimony that as stated in their Statement of Defence, the 3rd Defendant believed that if the Plaintiff holds a title deed to the suit property, then the title deed was obtained fraudulently.

25. In support of that position, the 3rd Defendant called Ojwang Omollo Patroba (DW2) an Assistant Director of Land Administration at the Ministry of Lands, Public Works and Housing. It was DW2’s testimony that the suit property was allocated to the 3rd Defendant on 25th June 1981 as a commercial plot.

26. DW2 told the court that even though the 3rd Defendant paid the requisite fee of Kshs. 12,698/=, the Lease was not processed. It was further his testimony that there were correspondences in their file (which he produced) indicating that the Commissioner of Lands had sought for the Certificate of Incorporation for the 3rd Defendant and the by-laws of the 3rd Defendant’s affiliate known as the Kenya Grain Growers Co-operative Union (KGGCU) but the same were not provided.

27. When cross-examined on the Plaintiff’s Certificate of Lease by Mr. Nderi, the Learned Counsel for the Plaintiff, DW2 responded as follows:

“It refers to the suit property and (is) registered on 1st February 1999. It shows a Certificate of Lease was issued to the Plaintiff.

We have never prepared a Lease or sent any for registration to the Land Registrar Nyeri. That was issued by a different Department of our Ministry.”



28. As it were, I was not persuaded that the testimony of the two witnesses could be relied on to ascertain the fact that the Plaintiff had obtained its title fraudulently as particularized in the Statement of Defence. There was nothing to demonstrate that the Plaintiff had deliberately misrepresented to the Commissioner of Lands that the suit land was vacant and or that the Plaintiff was made aware that the 3rd Defendant's application for registration had stagnated as alleged.
29. From the testimony of DW2, it was evident that he acknowledged that the lease granted to the Plaintiff had emanated from their Ministry. While he stated that the same had come from a separate Department, he neither disclosed the name of that Department nor did he testify that the said Department was not authorized to process the Lease.
30. In its Further List of Documents dated 16th December 2013, the Plaintiff has produced the application dated 3rd January 1998 which it made to the same Commissioner of Lands seeking to be allocated the suit property. The letter signed by the Plaintiff's Managing Director Joseph M. Mugweru (PW1) reads in the relevant part as follows:
- “RE: APplication For A Commercial Plot Nyeri Municipality Block Ii/371 As Per Attached Plan Marked ‘a’ In Red.
- We humbly apply for allocation to the above mentioned plot which is government land.
- We are the residence (sic) of Nyeri trading as the above company here in Nairobi and Nyeri, but if allocated the plot we shall develop it and put some godown for our use and as our offices instead of renting the premises.
- We therefore assure you that if allocated, we are ready to pay all the government dues that might be demanded in terms of rent, conveyancing fees, registration fees and rates respectively.”
31. From a perusal of the various remarks made on the body of the letter, it was evident that upon receipt of the Letter on 15th January 1998, the recipient assigned it to two officers to confirm its status. On 22nd January 1998, the Commissioner of Lands was informed by his officers that “the plot is Government land reserved for commercial purposes.” On an unclear date, a Ground Report was supplied following which the Commissioner of Lands gave authority for the allocation to be done on 21st May 1998.
32. It was apparent from a perusal of the above letter and the remarks thereon that the Plaintiff followed the process of applying for the land and that the officers at the Ministry of Lands carried out their own investigations before it was issued with its own Letter of Allotment and the subsequent Lease Certificate registered on 1st February 1999.
33. While the 3rd Defendant contended that the Commissioner of Lands had never revoked their Letter of Allotment, it was apparent to me that the Letter issued on 25th June 1981 was to enable them develop the land within certain timelines as stipulated in the Special Conditions attached thereto.
34. Under Special Condition No 5, the land and buildings that were to be erected on the land were to be used for shops, offices and flats excluding the sale of petrol. Some 18 years after the allotment, the 3rd Defendant had not only left the plot undeveloped but had also contrary to clause 9 thereof sub-let the same to the 1st and 2nd Defendants to run a garage business without the consent of the Commissioner of Lands and/or the Municipal Council of Nyeri. In those circumstances, it was my considered view that the Commissioner of Lands who has not in any event been enjoined as a party in the 3rd Defendant's Counterclaim was justified to re-allocate the suit property.



35. Having been registered as the proprietor of the suit property, the Plaintiff's title is protected under Section 26 (1) of the [Land Registration Act](#), 2012 which affirms the sanctity of title to immovable property and the indefeasibility thereof in the absence of fraud, misrepresentation or other unlawful conduct in its acquisition. The doctrine of indefeasibility of title was initially recognized under Section 23(1) of the now repealed Registration of Titles Act. Considering the effects of the doctrine as recognized in the repealed statute in *Dr. Joseph Arap Ng'ok –vs- Justice Moiwo Ole Keiwua & 5 Others*, Civil Appeal No. 60 of 1997, the Court of Appeal categorically declared thus:

“Section 23 (1) of the Act gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and the law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”

36. While the 3rd Defendant had indeed obtained its Letter of Allotment some 18 years before the Plaintiff obtained its title, it is settled law in this respect that an allotment does not confer any registrable interest in land. As was explained by the Supreme Court in *Torino Enterprises Ltd –vs- The Attorney General* [2023] KESC 79 (KLR):

“ 58. 58. So, can an allotment letter pass good title? It is settled law that an allotment letter is incapable of conferring interest in land, being nothing more than an offer, awaiting the fulfillment of conditions stipulated therein. In *Dr. Joseph N. K. Arap Ng'ok –vs- Justice Moiwo Ole Keiwua & 4 Others* CA 60.1997 (unreported); and in *Gladys Wanjiru Ngacha –vs- Teresa Chepsaat & 4 Others* HC Civil Case No. 182 of 1992; [2008] EKLR, the Superior Courts restated these principles as follows:

“It has been held severally that a letter of allotment is nothing but an invitation to treat. It does not constitute a contract between the offerer and the offeree and does not confer an interest in land at all.....”

37. It follows that I am not persuaded that the 3rd Defendant's claim had any merit. The Defendant's letter of allotment cannot be used to defeat the title issued to the Plaintiff who is the registered proprietor of the suit property. Since the 1st and 2nd Defendants derive their right to occupation of the suit property from the said allotment letter, it follows that they must surrender the same to the rightful owner failure to which they must be evicted therefrom.

38. In its suit before the court, the Plaintiff has asked that it be paid mesne profits of Kshs. 20,000/= per month from 3rd November 2007 until such a time that it obtains vacant possession thereof. Mesne profits are defined under Section 2 of the [Civil Procedure Act](#), Cap 21 Laws of Kenya as those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits. It does not however include profits due to improvements made by the person in wrongful possession.



39. As the Court of Appeal did hold in Peter Mwangi Mbuthia & Another –vs- Samow Edin Osman [2014] eKLR:

“We agree with counsel for the appellants that it was incumbent upon the respondent to place material before the court demonstrating how the amount that was claimed for mesne profit was arrived at. Absent that, the Learned Judge erred in awarding an amount that was neither substantiated nor established.”

40. In the matter herein, the Plaintiff has not tendered any evidence as to how the figure of Kshs. 20,000/ = per month was arrived at as the mesne profits for the Defendants’ wrongful use of the suit premises. Accordingly that claim must fail.

41. In the circumstance, I hereby enter Judgment for the Plaintiff as against the Defendants as follows:

- a). The 3rd Defendant’s Counterclaim is hereby dismissed with costs to the Plaintiff.
- b). An order is hereby issued directing the Defendants to vacate, quit and yield possession of LR. No. Nyeri Municipality Block II/371 within 30 days from today, failure to which the Court Bailiff is hereby directed to evict them forthwith.
- c). The 3rd Defendant shall also bear the costs of the Plaintiff’s suit.

DATED, SIGNED AND DELIVERED AT NYERI THIS FRIDAY 20TH DAY OF DECEMBER, 2024.

In the presence of:

No appearance for the Plaintiff.

Ms. Lucy Mwai for the Defendants.

Court Assistant: Kendi.

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J. O. OLOLA

JUDGE

