



**Nyambura v Shikhule & 4 others (Environment & Land Case 2228 of 2007)
[2024] KEELC 13994 (KLR) (17 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13994 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 2228 OF 2007
LN MBUGUA, J
DECEMBER 17, 2024**

BETWEEN

CATHERINE NYAMBURA PLAINTIFF

AND

PETER SHIKHULE 1ST DEFENDANT

PAULINE WAHOME 2ND DEFENDANT

PAUL RADALO ODWESO 3RD DEFENDANT

CITY COUNCIL OF NAIROBI 4TH DEFENDANT

REGISTAR OF LANDS 5TH DEFENDANT

JUDGMENT

Background

1. The Plaintiff commenced this suit vide a plaint dated 29.10.2007 and amended on 26.1.2022. She contends that she is the proprietor of parcel LR No. Nairobi/Block 63/418 formerly Plot No. 307 situated in Jamuhuri Phase 11, having purchased it from the 1st defendant vide a sale agreement dated 8.7.1998 and being issued with an allotment letter dated 21.7.1998 as well as a deed of assignment dated 22.12.1998 by the 4th defendant. But to her surprise, she discovered that the 4th defendant prepared a lease hold interest in favour of the 1st defendant dated 18.1.1999 instead of granting her the said lease.
2. It is also her case that the 5th defendant knowingly and fraudulently issued a certificate of lease to the 2nd defendant and subsequently to the 3rd defendant through fraudulent transactions and she therefore prays for judgment against the defendants jointly and severally as follows;
 - a. A declaration that the plaintiff is entitled to be registered as proprietor of the land being LR No. Nairobi/Block 63/418.



- b. An order for cancellation and rectification of the land register by the 5th defendant by registration of the plaintiff as proprietor of the land.
 - c. In the alternative but without prejudice to the above, indemnification by the 4th and 5th defendants of the loss occasioned by them in the line of duty owed to the Plaintiff in the whole transaction in terms of monies expended in purchasing the land special damages being a total of kshs. 602, 685/=
 - d. General damages.
 - e. Costs of this suit together with interest on (c) above.
 - f. Any other just relief.
3. The 1st defendant was apparently not served with summons to enter appearance (after the ex parte judgment of 25.11.2026 was set aside), and on 27.9.2023, the plaintiff withdrew the case against the said defendant.
 4. The suit is opposed by the 2nd defendant vide a statement of defence dated 15.6. 2021 where she contends that she was the first registered owner of the suit plot and as such, her title is impeachable unless specific grounds of fraud are proven against her.
 5. The suit is also opposed by the 3rd defendant vide his statement of defence and counterclaim dated 25.2.2020 where he denies the allegations levelled against him in the plaint and contends that he lawfully purchased the suit plot from the 2nd defendant who was then the lawful registered proprietor thereof. In his Counterclaim, the 3rd defendant prays for a declaration that he is the lawful proprietor of the suit land and seeks orders that any trespassers thereon be evicted forthwith. He also seeks costs of the suit.
 6. The 4th defendant filed a statement of defence dated 6.11.2007 where it denies allegations levelled against it in the plaint and in particular denies any knowledge of any sale agreement as between the plaintiff and the 1st defendant and denies ever assigning the suit plot to the plaintiff.
 7. On its part, the 5th defendant filed a statement of defence dated 25.1.2008 denying all allegations levelled against it in the plaint.
 8. The plaintiff initially took to the dock way back on 3.2.2016 via ex parte proceedings culminating in a judgment delivered on 25.11.2016. However, vide a ruling delivered on 10.2.2020, the said judgment was set aside triggering the filing of the defences by the 2nd and 3rd defendants.
 9. Way back on 26.11.2019, counsel for the Attorney General did bring it to the attention of the court and the parties that this matter was related to ELC 1135 of 2014, of which the court gave directions for the two matters to be mentioned on 10.12.2019, but there are no records to indicate that the two matters were ever mentioned together. This court however recollects having delivered a judgment in which the 3rd defendant was a party.

The Evidence

10. The plaintiff testified as the sole witness in her case (PW1). She adopted her witness statement dated 26.1.2022 as her evidence in chief and produced 31 documents contained in her list dated 27.6.2008 (page 16-84 of her trial bundle) and 1 item from her supplementary bundle filed on 16.12.2008 as P. Exhibit 32.



11. The testimony of PW1 is that she purchased the suit parcel from the 1st defendant vide a sale agreement dated 8.7.1998 at a consideration of ksh.550,000/= of which she paid ksh.100,000/= at execution and the balance later. That the 4th defendant formally allotted the plot to her after paying allotment fees of ksh.10, 800/= and the parcel was formally assigned her vide a deed of assignment dated 22.12.1998 which was registered after she paid ksh.20,000/=.
12. That she embarked on the process of processing her title, but she discovered that the 4th defendant had granted the 1st defendant a leasehold interest in the same plot vide an agreement for lease dated 18.1.1999. That upon inquiring about the strange developments leading to the issuance of that lease, she was advised to see the 4th defendant's Advocates at the time known as Messrs. Mbesa & Kitur Advocates who were to prepare a fresh lease bearing her names and to whom she paid ksh.32, 685/= being legal fees for lease processing.
13. That after paying legal fees, the said 4th defendant's advocates availed 4 copies of the lease agreement they had prepared in her name to which she appended her signature, and was then informed that the lease document had been forwarded to the 5th defendant for registration.
14. However, the registration took longer than expected, thus she made several follow ups with the 4th defendant who told her that her lease was being processed. That in 2002 when the process seemed not to be coming to an end, she decided to conduct a search at the 5th defendant's offices and to her surprise, she found out that the suit property had been registered in the name of the 2nd defendant.
15. That upon inquiring from the 4th defendant the reason for transfer of the suit plot to the 2nd defendant, she was told that it was not the case and since the property was not occupied by the 2nd defendant, she took possession, fenced it then dug and built a foundation and was still in possession by the time she was filing the instant suit.
16. That on 22.1.2007, she did a search at the 5th defendant's offices and interestingly, it revealed that the suit plot had passed to the 3rd defendant and a certificate of lease issued in that regard, prompting her to lodge a caution on 8.6.2007 though the receipt issued by the 5th defendant reads 8.6.2006 in error.
17. In cross-examination by the 2nd and 3rd defendants, PW1 stated that in the sale agreement between her and the 1st defendant, it is stated that the vendor (1st defendant) was allotted Plot 307 on 13.2.1992 by the Government of Kenya adding that she did see the said letter of allotment.
18. She stated that the letter of allotment issued to her by the 4th defendant is dated 21.7.1998 while the sale agreement is dated 8.7.1998 thus they are just 2 weeks apart, adding that the allotment letter from the 4th defendant refers to plot 307 and that it was meant to ease the transfer process because at the time of the sale agreement, a transfer had not been effected to the 1st defendant.
19. Referred to the deed of assignment dated 22.12.1998 at page 28 of her bundle, PW1 averred that the assignor is the 4th defendant and the assignee is Peter Shikule 1st defendant. While at page 29 of the same bundle, the 1st defendant is assigning to her an agreement he had with the 4th defendant.
20. She averred that she got the lease agreement dated 18.1.1999 between the 1st and 4th defendant (page 34 of her bundle) from the 4th defendant's lawyer and it was executed by the 4th defendant's then Town clerk known as Wandera.
21. She averred that by the time of the official search dated 17.1.2007, the 3rd defendant was the registered owner of the suit parcel, a certificate of lease having been issued on 21.12.2006.



22. Referred to the caution at page 44 of the same bundle, PW1 averred that she lodged it herself and it was witnessed by Albert Kuloba Advocate, adding that it is not a forgery even though it is dated 8.6.2007 and has a “received” stamp of 8.6.2006 from the ministry of lands.
23. Referred to the letter dated 2.7.2007 addressed to the 4th defendant by her advocates, she averred that she cannot confirm that plot 307 is Nairobi /Block 63/418 and that the said letter was also seeking to confirm the said position adding that she does not have any evidence connecting plot 307 to Nairobi / block 63/418.
24. She also averred that ZM Wandera was the Town Clerk when all transactions herein were happening, but she (Wandera) later got her own law firm and acted for the 4th defendant adding that she is the one who wrote the letter dated 18.9.2007 to her advocates informing them that the lease in her favour was prepared and duly executed by the 4th defendant and registered as Nairobi/Block 63/418 and she gave her a small print showing her the plot but she did not have it in court.
25. PW1 also averred that when she entered into a sale agreement with the 1st defendant, he was not the registered owner of the suit parcel, he just had an allotment letter for plot 307 and as per the certificate of lease at page 57 of her bundle, it appears that the parcel was registered in the 4th defendant’s name but she does not know if the suit land had a caution by that date.
26. On cross-examination by counsel for the 4th defendant, PW1 stated that she did not know whether the 1st defendant met the terms of the allotment letter issued to him by the 4th defendant. She also stated that she did not pay stand premium for her allotment letter, and had nothing to show that she did a search before purchase from the 1st defendant. She also had no proof that she forwarded a lease to the 4th defendant after signing and that she did not know if the assignment herein was registered.
27. On cross-examination by counsel for the 5th defendant, PW1 stated that the allocating authority of the suit land was the 4th defendant but she did not confirm the authenticity of the allotment letter and did not know whether the suit plot was surveyed at the time she purchased it, she also had no beacon certificate or a survey document. She does not know how the number changed from plot 307.
28. Referred to the lease at page 86 of her bundle between her and the 4th defendant, she stated that she did not pay for stamp duty and she did not appear before the Registrar of Titles.
29. In re-examination, PW1 stated that she saw the allotment letter from the 4th defendant when they were exchanging details and that it was referring to plot 307 Jamuhuri phase 2 and was authored by the 4th defendant. She further stated that her allotment letter dated 21.7.1998 from the 4th defendant also refers to plot 307 and it indicates on the right hand corner that it is a transfer from the 1st defendant.
30. She averred that she was part of the deed of assignment at page 28 of her bundle. Stamp duty was also paid to assign her plot 307 Jamuhuri Phase 2. She also has a receipt at page 33 of her bundle issued by the 5th defendant which bears her name for the assignment of plot 307 in which she paid Ksh. 20 000. She reiterated that Mbesa & Kitur Advocates were acting for the 4th defendant and are the ones who were to prepare the lease agreement.
31. She further stated that she does not believe that the 1st defendant defrauded her because they went with him together to the 4th defendant who confirmed that the 1st defendant was owner of the suit plot.
32. The case of the 2nd and 3rd defendants was advanced by the two parties, with the 2nd defendant testifying as DW1, while 3rd defendant was DW2.



33. DW1 adopted her witness statement dated 14.9.2021 as her evidence in chief where she avers that she was the previous owner of the suit land, having been allotted the same by the 4th defendant and that she sold it to the 3rd defendant in year 2006.
34. Upon cross-examination of DW1 by the plaintiff, DW1 stated that she was allocated the suit land on a date she cannot recall and that she did not have ownership documents with her. She averred that she sold the plot for ksh. 2,150,000/= but cannot recall the date of the agreement, or how she was paid consideration.
35. On cross-examination by counsel for the 4th defendant, DW1 stated that she did not have any evidence of the allotment to her and that she did not do any search adding that the plot was allocated to her by late Mate. She moved houses, that is why she doesn't know the whereabouts of her documents.
36. In re-examination, DW1 stated that she is not demanding any payments from the 3rd defendant, so she has no dispute with him. She confirmed that she had a title during the process of transferring the suit property to the 3rd defendant and she is not aware of any claim by the 4th defendant as it did not sell the suit land to her.
37. DW2 adopted his witness statement dated 12.8.2021 as his evidence in chief, he also produced 10 documents contained in his list dated 4.10.2021 as D. Exhibit 1-10. His testimony is that he is the registered proprietor of Title No. Nairobi Block 63/418 having purchased the same from the 2nd defendant in 2006. That he carried out due diligence before he purchased it and that he also established that the 2nd defendant was upto date with payments of ground rent and land rates to the 4th defendant who issued a rates clearance certificate to her.
38. He avers that he was shown the suit plot then took possession and placed a caretaker who operated a food kiosk adding that no one ever claimed ownership of that land.
39. He avers that he lives abroad, but in November 2018, he was in Kenya to start developing the suit plot of which he obtained all necessary approvals and has been paying rates. That before his contractor could commence construction, someone claiming to be from city hall called him to inform him that the plot had a dispute as judgement had been entered herein ex parte but it was set aside.
40. On cross-examination by the plaintiff, DW2 averred that since he lives outside the country, he did not personally conduct a search, but he sent his brother and cousin to do the search. That at the time of the search on 17.11.2006, there was no caution registered on the title.
41. Referred to the search and caution at page 43-44 of the plaintiff's bundle, DW2 stated that the certificate of official search dated 17.1.2007 shows he is the registered owner while the caution indicates that it was registered on 8.6.2007. The search certificate was issued on 17.11.2006 which was before the caution was registered.
42. That as per his agreement, consideration was ksh.2.1 million but it is indicated that he paid ksh.1.9 million which was paid via cash and bankers cheque. That his brother signed the sale agreement on 14.11.2006 on his behalf.
43. He reiterated that he followed due process by engaging his lawyer who confirmed that the plot was registered in the name of the 2nd defendant.
44. On cross-examination by counsel for the 5th defendant, DW2 averred that he is claiming parcel Nairobi/ Block 63/418 and that he is aware that there was a judgment in which the court has pronounced him as the owner of that land. Similarly, the records at the 5th defendants indicate that he is the owner.



45. In re-examination, DW2 stated that there is no dispute between him and the 2nd defendant.

Submissions

46. Despite being directed to file submissions by 7.11.2024, the defendants neglected to do so. On her part, the plaintiff filed submissions dated 15.11.2024 urging the court to find that there was a valid sale agreement between her and the 1st defendant and that by the time the said agreement was entered into, there was no evidence of prior interest on the suit land by anyone else adding that the 4th defendant never disowned allotting the suit parcel to her.

47. It is submitted that in the event that this was a case of double allocation, the 1st allotment which was to her should prevail. To this end, the case of Esther Katunda Mbatha v Agness Irungu & 2 Others [2015] eKLR was relied upon.

48. It is also submitted that the 2nd -5th defendants colluded in perpetuating fraud and as such, the title to the 3rd defendant should be cancelled. It is pointed out that the 2nd, 3rd and 5th defendants did not have evidence of a transfer /payment of stamp duty to show that the suit land passed hands and evidence by DW1 and DW2 in terms of consideration paid was contradictory.

Determination

49. I have considered the pleadings, the evidence tendered and the submissions of the plaintiff. The issue falling for determination is;

Who is entitled to the suit land as between the plaintiff and the 3rd defendant?.

50. The plaintiff claims ownership of LR No. Nairobi/Block 63/418 formerly Plot No. 307 averring that she purchased the same from the 1st defendant vide a sale agreement dated 8.7.1998. She led evidence that she was issued with an allotment letter dated 21.7.1998 by the 4th defendant and the suit plot was also assigned to her vide a deed of assignment dated 22.12.1998.

51. The 3rd defendant led evidence that he was issued with a certificate of lease for Nairobi/Block 63/418 issued on 21.12.2006. He claimed to have purchased the suit plot from the 2nd defendant.

52. The provisions of Section 107 of the *Evidence Act* stipulate that;

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”.

53. In Samson S. Maitai & Another V. African Safari Club Limited & Another [2010] eKLR, the court had this to say in relation to proof.

“Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute.”



54. A perusal of the sale agreement dated 8.7.1998 between the plaintiff and the 1st defendant defines the interest in the suit property as follows;

“The vendor is the rightful owner as allottee from the Government of Kenya for a term of 99 years at such rent and on such terms as appear on the Letter of Allotment reference number CP & ARCH/001327 13th February 1992”

55. Nowhere in the evidence of the plaintiff can this interest be discerned. Indeed, in the entire bundle of documents availed by the plaintiff there is no document of ownership that can be associated with the 1st defendant bearing a date prior to the sale agreement save a receipt of 11.12.1997 at page 20 of plaintiffs bundle. Indeed, during cross examination, PW1 stated that she didn't have the letter of allotment issued to the 1st defendant and she did not know the terms of the said allotment.

56. Further, there is no evidence to indicate the nature and extent of due diligence conducted by the plaintiff confirming that the 1st defendant was the owner of the suit property.

57. It is trite law that when a person's ownership to a property is called into question, the proprietor has to show the root of his ownership. In *Munyu Maina v Hiram Gathiba Maina, Civil Appeal No. 239 of 2002*, the Court of Appeal stated that:

“When a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

58. The above citation would also apply to the 3rd defendant. But again, the suit was brought forth by the plaintiff who then bears the burden of proof in the 1st instance, before the opposite party can be called upon to discharge the said burden of proof. In the case at hand the plaintiff did not proffer sufficient evidence to trace the root of her claim to an allotment of 13.2.1992 issued to the 1st defendant. It follows that all these other documents that plaintiff is clinging upon including her own allotment, deed of assignment and the lease agreement are anchored on nothing.

59. I do note that DW1 had no evidence of how she acquired the suit plot, there was no evidence of allotment to her either, save stating that she was allocated the plot by one Mate. Nevertheless, the plaintiff had a statutory duty to prove her case to the required standard on a balance of probability. In the case of *Gichinga Kibutha v Caroline Nduku [2018] eKLR*, the Court held that;

“It is not automatic that in instances where the evidence is not controverted, the claimant's claim shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.

60. That being the case, the plaintiff cannot shift the burden of proof to the 3rd defendant. Similarly, the doctrine of the 1st in time cannot apply in respect of the claim of the plaintiff vis a vis that of the 3rd defendant in absence of any trace of ownership of the suit land by the 1st defendant and by extension, the plaintiff.

61. In totality, I find that the plaintiff has not proved her case on a balance of probabilities. There is no evidence to challenge the title held by the 3rd defendant, as such, I find that the counter claim of the 3rd defendant is merited, and an order is hereby issued declaring him as the owner of the suit land. On



costs, I find that the conundrum relating to the rival claims was perpetuated by the 4th defendant who appears to have been the allotting authority but they offered no evidence on how the allotments were done. In that regard, I direct that each party shall bear their own costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17th DAY OF DECEMBER 2024 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:

Kwaba for Plaintiff

Ogutu for 2nd and 3rd Defendants

Allan Kamau for 5th Defendant

Court Assistant: Vena

