



**Kassiwa v Kilifi County Co-operative Union Limited (Environment & Land
Case 177 of 2016) [2023] KEELC 17635 (KLR) (29 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17635 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 177 OF 2016**

**MAO ODENY, J
MAY 29, 2023**

BETWEEN

EMMANUEL JAMES KASSIWA PLAINTIFF

AND

KILIFI COUNTY CO-OPERATIVE UNION LIMITED DEFENDANT

JUDGMENT

1. By an Amended Plaintiff dated 4th February, 2021 the Plaintiff herein sued the Defendant seeking the following orders;
 - a. A declaration that the Plaintiff is the rightful and legal proprietor of the parcel of land known as Title No Kilifi/ Municipality Block 3/1181 on which the business premises known as Ushirika Bar is situated.
 - b. An order of permanent injunction restraining the Defendant, its agents, representatives and/ or servants from levying distress, evicting or in any manner interfering with the Plaintiff's peaceful occupation of the parcel of land known as Plot No 528/ Kibaoni Kilifi Title No Kilifi/ municipality Block 3/1181.
 - c. Damages for the destruction of fixtures and fittings and items of trade in the business premises known as Ushirika bar.
 - d. Costs and interests of this suit.

Plaintiff's Case

2. PW 1 Emmanuel James Kassiwa adopted his Witness Statements as his evidence in chief and produced exhibits as per the list of documents. It was PW1's evidence that on or before 2018, he was the proprietor of the business premises known as Ushirika Bar which is situated within Kilifi Township in a piece of land comprised in Title Number Kilifi/municipality Block 3/1181 registered in his name.



That he started the business in the year 1996 when the Defendant presented itself as the proprietor of a large piece of land in which PW1's business stood alongside other businesses.

3. PW1 further testified that after about four (4) years the defunct Kilifi District Co-operative Union collapsed and the then Kilifi Town Council made it known that the said parcel of land belonged to them which led him to apply for allotment of that parcel of land which was eventually given to him making him the proprietor after complying with the conditions.
4. It was PW1's evidence that in 2013, the defunct Kilifi District Co-operative Union which had collapsed claimed that it was now known as Kilifi County Co-operative Union Limited and started harassing and demanding rent from him.
5. PW1 told the court that he is the owner of Plot No Kilifi/ Municipality Block 3/1181 of which he was granted a Certificate of Lease on 30th January 2017 from the County Government of Kilifi for 99 years from 1st January 2002.
6. PW1 further stated that he applied for allotment of plot vide a letter dated 5th November 1998 to the District Plot Allocation Committee and was issued with an allotment letter dated 9th December 2002 of which he produced a copy together with a receipt of Kshs 3,550/- dated 19th July 2016. It was PW1's evidence that he got a map from the Ministry of Lands for Kibaoni squatters Upgrading Kilifi for commercial plot measuring 0.072 Ha dated 7th February 1997.
7. PW1 also testified that he was in possession of the suit plot by the time he applied for allocation as he had entered into the suit land in 1996 and opened a bar and restaurant. That the property initially had an original Plot No 528 and was issued with a beacon certificate. He stated that he acquired the plot legally and procedurally.
8. Upon Cross examination by Fatuma Mwakidudu, he told the court that when he took possession of the plot there was a building and that it was not true that she sublet the premises to him for purposes of doing business. He also told the court that he had an allotment letter and that he was not aware that she also had an allotment letter. He confirmed to having entered into an agreement dated 1st January 1997. PW1 denied that he had been given a lease by the Defendant and that he was paying rent

Defence Case

9. DW1 Fatuma Mwakidudu adopted her witness statement as her evidence in chief and the list of documents which she produced as Defence Exhibit No 1 to 29. She further stated that when she assumed office, PW1 was already their tenant at their Ushirika building known as Ushirika Bar and Restaurant along Mombasa- Malindi Road.
10. DW1 stated that at the time, the initial lease had expired and the union officials executed a fresh lease on 15th November, 2011 and that they co-existed well until sometime in June 2014 when PW1 ignored the contractual agreement by constructing the premises without their consent.
11. It was DW1's evidence that PW1 eventually refused to pay rent and this led to the society giving notice to vacate from the premises and hand over vacant possession which notice was issued on 18th November, 2014.
12. DW1 further testified that they sought the services of an Auctioneer to recover the rent arrears plus costs on 29th April, 2015. DW1 stated that they have filed a counter claim for a declaration that the Plaintiff settles all rent arrears and an order that the property belongs to Kilifi District Co-operative Union.



13. DW1 testified that the Commissioner of Lands allocated land formerly Kilifi Agricultural Institute for a term of 99 years from 1st May, 1997, vide a letter of allotment dated 15th May, 1997 to the Defendant. DW1 stated that they paid premium and the allocation has never been revoked or altered by the Commissioner of Lands. That the Plaintiff was a tenant vide a letter dated 15th October 1996 with a lease commencing on January 1997.

Plaintiff's Submissions

14. Counsel identified three issues for determination as to whether the Plaintiff is the rightful and legal proprietor of Title Number Kilifi/ Municipality Block 3/1181, whether the Plaintiff has met the threshold for grant of an injunction against the Defendant and whether the Plaintiff is entitled to damages and costs of the suit.
15. On the 1st issue as to whether the Plaintiff is the rightful owner of the suit land , counsel relied on Section 26 (1) of the [Land Registration Act](#), 2012 and the cases of [Judith Julia Wanjiro Njoroge v Samuel Ngeru Mwangi](#) (2019) eKLR and [Ahmed Ibrahim Suleiman & another v Noor Khamisi Suru](#) (2013) eKLR where the court observed that the Plaintiffs having been registered as proprietor and issued with the certificate of lease over title No Nairobi/ Block/ 61/69 are in terms of Section 26 (1) of the [Land Registration Act](#) entitle to protection of the law.
16. Counsel further submitted that the Plaintiff has demonstrated that he was the legally registered and rightful owner of the suit premises by production of a letter of allotment and Certificate of Lease for Title Number Kilifi/ Municipality Block 3/1181 and that despite the Plaintiff not being in possession he is still the legal owner of the property.
17. On whether the Plaintiff has met the threshold for grant of an injunction, counsel relied on the case of [Giella v Cassman Brown](#) (1973) E.A 358 and submitted that the Plaintiff has a valid certificate of Lease and followed all legalities in regards to procuring the property. Counsel further submitted that the Deputy Registrar's report on the status of the suit property confirmed what was on the ground.
18. On whether the Plaintiff is entitled to damages, counsel submitted that the purpose of damages is to put the party whose rights have been violated in the same position as far as possible if his rights had been observed and relied on the case of [Duncan Nderitu Ndegwa v Kenya Pipeline Company Limited & another](#) (2013) eKLR.

Defendant's Submissions

19. The Defendant submitted that the relationship between the Plaintiff and the Defendant started when the Plaintiff sought to rent the Defendant's premises which were already constructed vide a letter dated 15th October, 1996 which letter culminated in signing a lease agreement between the parties as landlord/tenant commencing January, 1997 at the rate of Kshs 7,000/- per month.
20. That a further agreement was executed between the parties on 15th November, 2011 where the rent was increased to Kshs 25,000/- per month, that the rent was later increased to Kshs 40,000/- per month upto June 2014 when the Plaintiff stopped making payment.
21. It was the Defendant's submission that first letter of allotment was issued on 15th May 1997 in favour of Kilifi District Co-operative Union and six years later, on 9th December, 2002 the Commissioner of Lands issued a letter of allotment in favour of the Plaintiff.
22. The Defendant submitted that the National Land Commission was made aware of the double allocation of the property in dispute immediately the Plaintiff produced a copy of his letter of allotment



alleging that he had been allotted the Defendant's land and the Plaintiff proceeded to illegally procure Certificate of Lease on 30th January, 2017.

23. The Defendant relied on the cases of *Kamau James Njendu v Serah Wanjiru & another* [2018] eKLR, *Naftali Ruthi Kinyua v Patrick Thuita Gachure & another* [2015] eKLR and *African Inland Church – Kenya (Registered Trustees) v Catherine Nduku & 12 others* [2017] eKLR where the court concluded that there cannot be double allotment of a suit property unless there is an element of forgery and/or fraud but ultimately the first allottee is given preference based on the authenticity of the documentation.

Analysis And Determination.

24. The issues for determination are whether there was a landlord/Tenant relationship between the Plaintiff and the Defendant, who is the rightful registered owner of the suit land, whether the Plaintiff is entitled to the orders sought and whether the Defendant has proved the counterclaim for payment of rent arrears and declaration that they are the rightful owners of the suit land.
25. It is not disputed that the Plaintiff started off as a tenant of the Defendant in the suit premises known as No Kilifi/Municipality Block 3/1181 which is backed by a lease agreement dated 15th October 1996 and a further one 15th November 2011 and the payment receipts exhibited. The Plaintiff also admitted that the Defendant presented itself as proprietor of a large piece of property and in 1996 the Plaintiff agreed to get into a lease agreement for the sole purpose of running Ushirika Bar and Restaurant.
26. It was the Plaintiff's case that Kilifi District Co- Operative Union collapsed and the then Kilifi Town Council indicated to them that any person living on the suit land could apply for allocation of which he stated that he made an application and the suit land was allocated to him.
27. The issue is when did the Landlord/tenant relationship cease and when did the ownership of the suit plot begin. It is also not disputed that the Plaintiff fell in rent arrears which the Defendant distrained for which culminated in a suit Misc Civil Application No 7 Of 2015 Yosi E Timothy & another v Emmanuel James Kassiwa where the court ordered that the Plaintiff pays the rent arrear within 30 days failure to which the Applicant is at liberty to break open the Plaintiff's premises to distrain for the unpaid rent owing to the landlord, and that the Plaintiff to vacate the premises within 30 days with the supervision of OCS Kilifi Police station.
28. Counsel in her submission also stated that the Plaintiff is not in possession of the suit premises though he is the owner of the suit land. It is therefore prudent to find that the Plaintiff and the Defendant were in a tenant/landlord relationship which is not disputed. The Plaintiff after signing a lease to do business in the Defendant's premises opted to disown the lease an upstage the Defendant to become an owner.
29. The next issue for determination is who is the rightful owner of the suit land. The Plaintiff claims to have applied for the allotment of the suit land vide a letter dated 5th November 1998 and was subsequently issued with an allotment letter dated 9th December 2002 and a certificate of lease.
30. It should be noted that this was happening while the Plaintiff was still a tenant and paying rent to the Defendant. The Plaintiff subsequently entered into another lease agreement dated 15th November 2011 and continued paying rent until 2014 when he started to default which led to him being kicked out of the premises. He did all this behind the Defendant's back not knowing that the Defendant also had a certificate of lease to the suit premises.



31. It was the Defendant's case that through a letter of allotment dated 15th May, 1997 the Defendant was allocated land formerly Kilifi Agricultural Institute for a term of 99 years from 1st May, 1997 by the Commissioner of Lands which allocation has never been revoked or altered.
32. This is a case of double allocation. There are two letters of allotment, the first one was issued on 15th May, 1997 in favour of Kilifi District Co- Operative Union for an acreage of 0.23 Hectares and the 2nd letter of allotment dated 9th December 2002 was issued to Emmanuel James Kassiwa for a portion of 0.033 Hectares. It is clear that the land was first allotted to the Defendant way back in 1997.
33. In the case of *Gitwany Investment Limited v Tajmal Limited & 2 others*, (2006) eKLR, Lenaola, J. (as he then was) correctly stated:
- “The title given to Gitwany in the first instance and which I have held to be as regards the suit land is the earlier grant and in the words of the Court of Appeal in *Wreck Motors Enterprises v commissioner of Lands*, C.A. No 71/1997 (unreported)” – is the “grant [that] takes priority. The land is alienated already.” This decision was gain upheld in *Faraj Maharus v J.B. Martin glass Industries and 3 others* C.A 130/2003 (unreported). Like equity keeps teaching us, the first in time prevails so that in the event such as this one where, by a mistake that is admitted, the Commissioner of Lands issues two titles in respect of the same parcel for land, then if both are apparently and in the fact to them, issued regularly and procedurally without fraud save for the mistake, then the first in time must prevail. It must prevail because without cancellation of the original title, it retains its sanctity.”
34. As in the Gitwany case above, the Defendant's allotment letter was first in time and there was no evidence that it was procured fraudulently, by error, mistake or unprocedurally. There is further no evidence that it was either revoked or cancelled.
35. In the case of *Ali Gadaffi & another v Francis Mubia Mutungu & 2 others* [2017] eKLR the court held that;
- “In other words, where land has been allocated, the same land cannot be reallocated unless the first allocation is validly and lawfully cancelled....”
36. In addition, the letter of allotment must have attached to it a part development plan (PDP), of which the Defendant has duly attached the letter of allotment issued on 15th May, 1997 and has also attached the PDP.
37. On the issue whether the Plaintiff is entitled to the reliefs sought, having found that the Defendant's allocation was first in time, followed the allotment procedures with no evidence of irregularity, or fraud, the Plaintiff is not entitled to the reliefs sought in the plaint.
38. It follows that the Plaintiff has not proved his case on a balance of probabilities and the same is dismissed with costs. On the issue whether the Defendant has proved her counterclaim for payment of rent arrears, no evidence was led to show how the Defendant arrived at the arrears owing as no explanation was given to show how much they had recovered when they distrained for rent. There was further no evidence to show whether the Plaintiff complied with the order of Kilifi Court to pay the outstanding amount within 30 days. This limb of the claim also fails.
39. The Defendant is therefore the rightful owner of the suit plot and hence entitled to the rights that appertains to ownership. The upshot is that the Plaintiff's suit is dismissed with costs to the Defendant.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 29TH DAY OF MAY, 2023.



M.A. ODENY

JUDGE

NB: In view of the Public Order No 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

