



**Kamweti & another v Thamia Investments Limited & 4 others (Environment and Land Case Civil Suit 227 of 2009 & Environment & Land Case 246 of 2009 (Consolidated)) [2023] KEELC 18906 (KLR) (18 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18906 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 227 OF 2009 &  
ENVIRONMENT & LAND CASE 246 OF 2009 (CONSOLIDATED)**

**LN MBUGUA, J**

**JULY 18, 2023**

**BETWEEN**

**AGNES WANJIKU KAMWETI ..... PLAINTIFF**

**AND**

**THAMIA INVESTMENTS LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**BASELINE ARCHITECTS LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**COUNTY GOVERNMENT OF NAIROBI ..... 3<sup>RD</sup> DEFENDANT**

**CHIEF LANDS REGISTRAR ..... 4<sup>TH</sup> DEFENDANT**

**AS CONSOLIDATED WITH**

**ENVIRONMENT & LAND CASE 246 OF 2009**

**BETWEEN**

**BASELINE ARCHITECTS LIMITED ..... PLAINTIFF**

**AND**

**THAMIA INVESTMENTS LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**AGNES WANJIKU KAMWETI ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff Agnes Wanjiku filed this case vide a plaint dated 14.5.2009 where she avers that on or about 20.7.1992, she was lawfully allotted the parcel of land known as Plot No. 465 situated at Jamhuri



Estate Phase II. The Plot was subsequently allocated registration No. Nairobi /Block /63/738 after surveying. Some years after, she discovered that there was some construction which was being carried out on the suit land by the 1<sup>st</sup> Defendant (Thamia investments) who had allegedly fraudulently and unlawfully obtained title documents from the lands office. The city council of Nairobi and the District Land Registrar Nairobi were named as the 2<sup>nd</sup> & 3<sup>rd</sup> defendants respectively.

2. The plaintiff accuses the Defendants of knowingly and willfully colluding with each other to fraudulently and illegally obtain the lease title and the ownership of the suit premises so as to defeat her interest. She prays for judgement against the Defendants jointly and severally in the following terms;
  - a. Spent.
  - b. A permanent injunction to issue restraining the Defendants, their agents, servants or any person duly authorized by them to act on their behalf from selling, transferring, alienating, disposing, partitioning, building or dealing in any way with that parcel of land known as Nairobi Block 63 /738.
  - c. An order directed to the Land Registrar for rectification of the register and certificate of lease to substitute the names of the 1<sup>st</sup> Defendant with the Plaintiff's name and/or in the alternative, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to compensate the Plaintiff for the value of the land at the current market rate and refund the stand premium and rent received, the quantum thereof to be determined by this court.
  - d. A declaration that the Plaintiff is the lawful owner of the parcel of land known as Nairobi/ Block 63/738.
  - e. Cost and interest of this suit.
  - f. Any other relief that this Honourable Court may deem fit and just to grant.
3. The plaintiff's case is opposed by the 1<sup>st</sup> Defendant Thamia Investment Limited vide its statement of defence dated 28.8.2009. It avers that it was allotted the suit premises and was issued with a certificate of lease by the Land Registrar. It further avers that in exercise of its proprietary rights, it sold the property to Baseline Architects Limited, the plaintiff in the case ELC 246 of 2009 which proceeded to develop the suit premises.
4. On 7.4.2014, the matter was consolidated with ELC 249 of 2009, where the case of Baseline Architects is contained in its plaint dated 22.5.2009. It avers that on or about 21.5.2008, it entered into a sale agreement with the 1<sup>st</sup> Defendant herein for purchase of the parcel of land known as Nairobi/Block 63/738. That it was a term of the said agreement that once it paid a deposit of ksh.1.5 million, the 1<sup>st</sup> Defendant would grant it possession of the suit premises.
5. It also avers that the Plaintiff herein has filed a caution over the suit property to frustrate the sale, yet she has no legal claim over it. It seeks specific performance as against the 1<sup>st</sup> Defendant and removal of the caution placed by the Plaintiff. After consolidation Baseline Architects were identified as the 2<sup>nd</sup> defendant.
6. The Nairobi City County now the 3<sup>rd</sup> defendant filed a statement of defence dated 9.7.2009, admitting that it allocated Plot No. 465 Jamhuri Estate Phase II to the Plaintiff which plot was given a new number, Nairobi Block 163/1738. It also admits that the Plaintiff paid the prerequisite fee of ksh.44,000/= being stand premium and also admits drawing a lease in Plaintiff's favour on 31.3.1998.



7. The 3<sup>rd</sup> Defendant denies the allegations of fraud, collusion and illegality and accuses the Plaintiff of lack of commitment and negligence on her part. It points out that she failed to develop the suit plot within the statutory 2 year period and that she allowed trespassers into her own parcel of land.
8. The Chief Land Registrar is now the 4<sup>th</sup> defendant. They filed a list of documents on 29.11.2019 but did not file a statement of defence.

### **The Evidence**

9. The Plaintiff Agnes Wanjiku Kamweti called 2 witnesses to advance her case and she testified as PW1. She adopted her witness statement dated 18.12.2012 as her evidence. She told the court that parcel Nairobi Block 63/738 was initially plot No. 465 which was allotted to her by the Commissioner of Lands on 20.7.1992. Conditions of the letter of allotment were that she accepts the offer in writing and pay ksh.44,000/=. She complied and was issued with a receipt thereof. The 3<sup>rd</sup> Defendant then prepared a lease agreement dated 31.3.1998 which was witnessed by the mayor and Town Clerk and drawn by Mercy M Muyu Advocates for City Hall. The Plot was then surveyed and issued with a new number being Nairobi Block 63/738.
10. She caused a caution to be registered on the suit land on 7.7.2004 as she was claiming interest as the owner of the suit land. She later filed a case at Milimani Commercial Court but later withdrew it and filed this suit. She added that this court issued an injunction against the Defendants on 12.6.2009 which remains in force to date.
11. It was also PW1's testimony that vide a letter dated 2.8.2004, the City Council of Nairobi confirmed the plot in question as belonging to her.
12. She added that in the year 2004, the suit plot was valued at ksh.1.2 million.
13. Pw1 produced as exhibits the documents in her bundle save for the letter from Nairobi City council dated 2.8.2004 and a valuation report which were marked for identification as PW1 (a) and (b) respectively.
14. Upon cross-examination by counsel for the 1<sup>st</sup> defendant, PW1 stated that she was allocated the suit plot located in Jamhuri Estate though at the time, she was teaching at Jamhuri High School which is located in Parklands area. She further stated that she was supposed to pay a stand premium of 40,000/= but she paid a total of ksh.44,000/=. That from 1993, she did not pay annual rent of ksh.4000/= at that time, she paid later.
15. She further stated that she was shown the suit plot and the beacons in 1992 and took possession. She paid ground rent on 3.8.2004 when she got the money since she was a simple high school teacher. She was planning to build a nursery school thereon and only filed the suit after about 18 years since all this time she was not aware that the 1<sup>st</sup> Defendant had invaded her land.
16. She stated that while the suit parcel was identified to her by someone from City Council of Nairobi, she was not issued with a beacon certificate. She further stated that she has a lease agreement for plot No. 465 Jamhuri Estate Phase II and not Plot No.738. She does not know the documents that the 1<sup>st</sup> Defendant possessed and does not know if plot No.738 has a title. After resurveying, the plot was given No. 738.
17. PW1 also stated that she went to the lands office and found that the 1<sup>st</sup> Defendant had already obtained a title document; that is when she moved to court.



18. On cross examination by counsel for the 2<sup>nd</sup> defendant, Pw1 stated that she visited the suit premises with a surveyor from City Council of Nairobi but she cannot recall the year. At the time, a fence had been erected. She wrote to City Council of Nairobi who confirmed vide the letter dated 2.8.2004 that the suit land belongs to her. The said letter from City Council of Nairobi, emanated from the Department of City Planning and was addressed to the Chief Land Registrar as well as her lawyers Michira & Company Advocates indicating that Plot No. 465 Jamhuri Estate had been changed to Plot No.738.
19. She further stated that when she filed this suit, there were structures on the suit land. She also stated that when she signed the lease with the 3<sup>rd</sup> Defendant on 31.3.1998, there was nothing on the suit land, it was empty. She went there a 3<sup>rd</sup> time in 1994 and found a fence and some people living there. She registered a caution with the help of her advocates who also wrote to the land Registrar vide the letter dated 23.6.2009 requesting to know about the ownership of the suit property. The said advocate also wrote to 1<sup>st</sup> defendant warning them not to put up any construction on the suit property.
20. She stated that she is claiming plot No. 465 which she was allocated to her in 1992 and which the City Council of Nairobi later confirmed that it was Plot No. 738.
21. PW2, Paul Mbatia Githaiga, a registered land valuer produced a valuation report dated 31.8.2004 which is item no. 18 in plaintiff's bundle as P-Exh 18. He avers that he was commissioned to undertake the task of compiling the report by Mr. Kamweti, the Plaintiff's husband. The suit plot was No. 465 Jamhuri Estate, which is registered as Nairobi Block No. 63/738. At the time, he valued it at ksh.1.2 million, it was vacant and undeveloped plot.
22. Upon cross-examination by counsel for the 1<sup>st</sup> defendant, Pw2 stated that Mr. Kimweti, the Plaintiff's husband instructed him verbally and that he gave him receipts and an allotment letter with respect to the suit land that were issued by Nairobi city council which were in the name of the Plaintiff. He then confirmed the authenticity of the information. The allotment letter had the plot number but the plot had no title.
23. He then visited the site, which was pointed out to him by Mr. Kamweti. There was no perimeter wall and there were no activities on the suit land save for temporary structures, so he only valued the empty land. He added that the value of land does not depend on the title, it depends on the economic value, so his 2004 report represented the actual market value of the suit land.
24. Upon cross examination by counsel for the 2<sup>nd</sup> defendant, Pw2 stated that he did a comparative survey and made inquiries even though he has not described any other property in the report. He further stated that in his report, he made reference to Plot no. 465 by mistake as the land is known as Block 63/738. He added that a plot can be given a survey number without the title deed having been issued.
25. The case of the 1<sup>st</sup> Defendant was advanced by 2 witnesses. DW1 Maurice Gitonga Njue stated that himself and his wife Mercy Muthoni Gitonga own the 1<sup>st</sup> defendant company by virtue of being the shareholders and directors thereof. He adopted his witness statement dated 24.6.2013 as his evidence. The documents produced by Dw1 during his testimony are a certificate of lease (D-EXH 2), bundle of receipts (D-EXH 3) and a sale agreement (D-EXH 4). The said documents can be traced in 1<sup>st</sup> defendant's bundle dated 29.1.2018.
26. The testimony of DW1 is that Plot No. 465 Jamhuri Estate Phase II was allocated to him sometime in 1992. At that time, he was working with the Ministry of Public Works, Architectural department, where part of his duty was to liaise with the local government-City Council of Nairobi. It was in the



- line of his work that he came to know that Nairobi City Council was allocating plots in Jamhuri Phase 11 to Nairobi residents.
27. He applied for allocation in early 1992 and a month later, they were informed to collect allotment letters from the legal department, City Council of Nairobi. The allotment letters were conditional. They required allottees to send acceptance letters to the council and pay kshs.44,000/=, which he paid and was issued with a receipt and told to wait for the survey.
  28. He testified that every year, allottees were paying ksh.4,000/= to the council as ground rent which he paid annually. In 1996, they were asked to pay for the beacon certificate, of which they paid ksh.10.500/=.
  29. He further testified that in 1995, all his documents relating to the suit land including his allotment letter were stolen from his motor vehicle in town. He reported the matter to the police on 12.4.1995 and was given an abstract.
  30. He stated that he was shown the suit plot in 1995 after they paid ksh.10,000/= for survey work. He then put up a 2 roomed house made of iron sheets and timber inside as he intended to move to the suit land.
  31. It is his testimony that in 1998, the council omitted him and other plot owners from issuing them with lease agreements which were prepared in 1998 as the survey work had been completed by then and plot No. 465 had been allocated Nairobi /Block 63/738. However, still in the same year 1998, they were invited to the legal department of City Council of Nairobi which was preparing leases where a lease for plot 465 was prepared and it was signed by himself and the Town Clerk.
  32. He stated that they agreed to transfer the suit plot to the 1<sup>st</sup> Defendant, nominating it as the registered owner. After the documents were signed and taken to the lands office, the title deed was issued in the name of the 1<sup>st</sup> Defendant registered on 22.10.2001.
  33. After the issuance of the title, they put up more houses on the suit plot which they were letting out. They also paid ground rent of ksh. 4000/=.
  34. They then sold the property to Baseline Architects Limited (2<sup>nd</sup> Defendant) for ksh, 3 million.
  35. He testified that he complied with the terms set by the allocating authority and further that he did not know that the Plaintiff had a lease to the property. He stated that Baseline Architects Limited paid the initial deposit, but the sale was not completed since the Plaintiff had placed a caution on the title.
  36. Upon cross-examination by counsel for the plaintiff, Dw1 stated that he is one of the directors of the 1<sup>st</sup> Defendant though he did not have the Articles of Association /a letter authorizing him to testify in Court. He reiterated that his allotment letter was among his documents that were stolen from his vehicle and that he reported the loss on 12.4.1995.
  37. Upon being probed further on the averments set out in their defence regarding the fate of the letter of allotment, DW1 stated that in their defence dated 28.8.2009, they stated that the 1<sup>st</sup> Defendant surrendered the allotment letter to City Council of Nairobi and he was issued with a replacement allotment letter which indicates original allotment letters.
  38. He also stated that he made payments and wrote to city council of Nairobi expressing interest in the suit plot but he did not produce them since they were among the documents that he lost. He also stated that while he signed a lease with the council, he did not keep a copy of it as they returned the original



- to the council. He stated that he does not have a document of nomination of the 1<sup>st</sup> Defendant for registration as well, it was among the documents that were stolen.
39. DW1 also stated that he fenced the suit plot with barbed wire in 1995 then fenced it with stone in 2003 and he was served with an injunction in the year 2008.
  40. He further stated that he is also a director and shareholder of the 2<sup>nd</sup> Defendant alongside one Domina Mutenya and Timothy Wanjohi and that since he owed the 2<sup>nd</sup> Defendant some money, the suit plot was transferred to it for ksh 3million to offset the debt though there isn't a board resolution allowing the sale.
  41. He also stated that he has no letter inviting him to Nairobi City Council's legal department to surrender the documents or sign the lease agreement since the invitation was verbal and placed at the Notice Board of the City Council of Nairobi.
  42. On cross examination by counsel for the 2<sup>nd</sup> defendant, Dw1 indicated that though he lost his documents, he was left with a copy of the sale agreement. He reiterated that he has no documents to show that he was allocated the plot since the documents were stolen. However, he was issued with a replacement allotment letter.
  43. DW2 is one Police Constable Stanley Kerring attached at Industrial Area Police Station performing crime duties. He told the court that a report was made to Industrial Area Police Station about 3 weeks before he testified requesting for an abstract that had been issued by the station. Subsequently, he went to archives to confirm the O.B. It took him about 3 days to check the OB since it is over 25 years ago. He did not get the actual OB, but he confirmed that the abstract is the one involving a report relating to theft of DW1's property which included an allotment letter for Plot No. 465 and 494. He produced the abstract as D. Exhibit 1.
  44. Upon cross-examination by counsel for the 4<sup>th</sup> defendant, Dw2 stated that they could not find the OB itself; that some OB's are available while others are not. He further stated that they keep OB of not less than 10 years, so he cannot vouch for the authenticity of DW1'S OB. He added that in the 90's, Police abstracts would be typed on a type writer if there was one at the station, or they would be handwritten. He added that the stamp on D. Exhibit 1 has a date of 12<sup>th</sup> April without the year.
  45. Upon cross examination by counsel for the plaintiff, Dw2 stated that he is not the one who issued the abstract at the time, he only met the reportee at the time he went to their station and gave them the abstract and that he verified it as an abstract as all abstracts are issued in that manner. He compared it with other abstracts of that year but unfortunately, OB is not in the archives and he has no gazette notice to show that the records were destroyed.
  46. The case of the 2<sup>nd</sup> Defendant was advanced by 1 witness, DW3 who is Timothy Kagundu Wanjohi, its director. He adopted his witness statement dated 15.7.2014. He produced 14 items in their list dated 13.9.2018 as D. Exhibit 1-14.
  47. In his witness statement, he avers that on or about 21.5.2008, the 2<sup>nd</sup> Defendant purchased the suit parcel Nairobi /Block 63/738 from the 1<sup>st</sup> Defendant. That as per the terms of the sale agreement, the 2<sup>nd</sup> Defendant was entitled to possession after paying a deposit of ksh.1.5 million which it paid in January 2009. Thereafter, the 1<sup>st</sup> Defendant executed the transfer in respect of the property but the same is pending registration.
  48. He states that before entering into the transaction, they had conducted a search at the Lands registry which showed that the 1<sup>st</sup> Defendant was the registered owner of the said property. He further stated



- that the Plaintiff herein has been interfering with the suit property yet the 1<sup>st</sup> Defendant had furnished it with evidence of ownership as well as evidence of payment of rates to the City Council of Nairobi.
49. That currently, the 2<sup>nd</sup> Defendant is engaged in development of the suit property by construction of commercial residential flats, but due to interference by the Plaintiff who has lodged a caution at the lands office, the 1<sup>st</sup> Defendant has been unable to effect a transfer to the 2<sup>nd</sup> Defendant.
  50. Upon cross-examination by counsel for the plaintiff, DW3 stated that he has produced the sale agreement between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants as D. Exhibit 6 showing that the 2<sup>nd</sup> Defendant bought the suit land but it has no title in its name. Further, the 2<sup>nd</sup> Defendant has no receipts for payment of rates and has no documents to show that the purchase money was paid.
  51. When re-examined, DW3 stated that they purchased the suit land from the 1<sup>st</sup> Defendant, they had no issue with the 3<sup>rd</sup> Defendant. He further stated that to his knowledge, there was sale consideration whereby one of the directors of the 2<sup>nd</sup> Defendant is also the one who had bought the suit land so he wanted to sell it so that the 2<sup>nd</sup> Defendant could have its own plot to build its offices. By then, the said Director had borrowed money from the 2<sup>nd</sup> Defendant, so they agreed that he would sell the suit plot to the 2<sup>nd</sup> Defendant so as to offset the debt. Therefore, the consideration of ksh.3 million was pegged on what one of the directors of the 2<sup>nd</sup> Defendant had overdrawn.
  52. DW3 also stated that in the same agreement at page 11, there was a clause which stipulated that ksh.1.5 million would be paid as a deposit, and the balance was to be paid to the seller after registering a transfer in favour of purchaser, but to date, there is no transfer, that is why the 2<sup>nd</sup> defendant sued the plaintiff herein alongside the 1<sup>st</sup> defendant.
  53. Dw3 also stated that the 2<sup>nd</sup> Defendant has been in uninterrupted occupation of the suit land.
  54. The 3<sup>rd</sup> Defendant closed its defence on the basis that it had no evidence to offer. The Case of the 4<sup>th</sup> Defendant was closed as the said entity failed to appear in court on the date set for hearing.

### **Submissions**

55. The submissions of the plaintiff are dated 17.1.2023 where she extensively cites the decision of the Court in *Koinange v Joyce Ganchuku & 2 others* [2015] eKLR contending that the facts in that case bear the same similarity to the instant suit. She points out that the 1<sup>st</sup> Defendant never produced his alleged allotment letter, letter of acceptance of the terms and conditions in the letter of allotment, proof of payment of the standard premium together with annual ground rent and even a copy of the lease which was allegedly registered at the lands registry.
56. She also submits that as long as the process of acquiring title by the 1<sup>st</sup> Defendant was tainted by fraud, then any subsequent transfer or title or attempts to transfer the same is null and void. She also relies on the case of *Catherine Nyambura v Peter Shikhule & 4 others* [2016] eKLR as well as the case of *Henry Mwitari v Commissioner for Lands & another* [2017] eKLR.
57. The submissions of the 1<sup>st</sup> defendant are dated 24.2.2023 where they address the following issues;
  - a. Whether the Plaintiff has proved the particulars of fraud and unlawfulness as pleaded against the 1<sup>st</sup> Defendant.
  - b. Whether the 1<sup>st</sup> Defendant's title in respect of Nairobi Block 63/739 should be revoked and/or cancelled as sought in the plaint.



58. They cite the case of Paul Muira & another v Jane Kendi & 2 others [2014] eKLR to submit that instead of proving fraud as against the 1<sup>st</sup> Defendant, the Plaintiff is inviting this Court to infer fraud just because the 1<sup>st</sup> Defendant did not produce a letter of allotment, letter of acceptance and the receipts for payment of stand premium, yet DW1 clearly testified that when the 2<sup>nd</sup> Defendant issued leases, they were called upon to surrender all the above documents as a condition precedent and it was upon the surrender that a certificate of title was issued to the 1<sup>st</sup> Defendant. It argues that the Plaintiff is still holding onto her documents because no title was issued to her.
59. The 1<sup>st</sup> Defendant also submits that by dint of the supreme court decision in Samuel Kamau Macharia & Another v Kenya Commercial Bank Ltd & 2 Others [2012] eKLR, the applicable law in this case is the Registered Land Act cap 300 (repealed) and not the Land Registration Act 2012 since the suit was filed in year 2009 before the enactment of the Land Registration Act.
60. It also argues that the Plaintiff is under strict obligation to satisfy the provisions of Section 143 of the repealed Registered Land Act for the court to nullify the 1<sup>st</sup> Defendant's title.
61. The 1<sup>st</sup> Defendant also submits that no evidence, oral or documentary was tendered by the Plaintiff in support of the particulars of fraud and collusion as against the 1<sup>st</sup> Defendant.
62. It is also the 1<sup>st</sup> Defendant's submission that it has the certificate of title, while the Plaintiff only holds a letter of allotment, thus its title cannot be impeached. Citing the case of Obiero vs Opiyo and Others [1972] EA 227, the 1<sup>st</sup> defendant invites the Court to take notice that it is the 1<sup>st</sup> registered proprietor of the suit property. Reference was also made to the case of C.O Okere v Esther Nduta Kiiyukia & 2 Others [2007] eKLR as well as the case of Ambale v Mosocia [1976] eKLR to buttress the point that the protection from rectification accorded to a first registration of title has been affirmed in various decisions of the courts.
63. The submissions of the 2<sup>nd</sup> defendant are undated. They raise the following issues;
- a. Whether the 2<sup>nd</sup> Defendant is the bonafide purchaser for value of the suit property.
  - b. Whether the 2<sup>nd</sup> Defendant's registration as owner of the suit land was a first registration.
  - c. Whether the 2<sup>nd</sup> Defendant is entitled to costs and interest.
  - d. Whether the Plaintiff has proven in her evidence that the property she was allocated is the same as the property held by the 2<sup>nd</sup> Defendant.
64. The 2<sup>nd</sup> Defendant cites the case of Weston Gitonga & 10 others v Peter Rugu Gikanga & Another [2017] eKLR, Cross Current Indegeneous Network v Commissioner of Lands & Another [2018] eKLR and Katende V. Haridor & Co. Limited [2008] EA. 173 to submit that it is a bona fide purchaser for value of the suit land and therefore its ownership cannot be defeated as the same was done without any fraud or collusion with the vendor.
65. It further submits that the title held by the 1<sup>st</sup> Defendant has not been challenged by all the government agencies involved in this case, thus it cannot be said to be fraudulent. Further, the plaintiff did not prove that the letter of allotment that she currently holds relates to the same property that is registered in the name of the 1<sup>st</sup> Defendant.
66. On the 2<sup>nd</sup> issue, the 2<sup>nd</sup> Defendant submits that the 1<sup>st</sup> defendant was the 1<sup>st</sup> registered owner of the suit land and hence the Plaintiffs averments are malicious. To this end, reference was made to Section 143(1) of the Registered Land Act Cap 300 Laws of Kenya as well as the case of Hannah Wangui Ithebu & another v Joel Ngugi Magu & 2 others [2005] eKLR.



67. On the 3<sup>rd</sup> issue, the 3<sup>rd</sup> Defendant relies on the case of *Cicilia Karuru Ngayu v Barclays Bank of Kenya & Another* [2016] eKLR to submit that it should not be denied the chance to enjoy the fruits of its successful litigation.

### Determination

68. Having considered the pleadings, the evidence and the rival submissions, I deem it fit to frame the issues for determination as follows;
- a. Whether the Plaintiff was allocated Plot No. 465 and whether it was registered as Nairobi Block 63/738?
  - b. Was the 1<sup>st</sup> Defendant fraudulently registered as owner of the suit land?
  - c. What relief is available to the parties.
69. The Plaintiff claims ownership of Plot no. 465 which was allegedly fraudulently registered as Nairobi Block 63/738 to the 1<sup>st</sup> Defendant in collusion with the 3<sup>rd</sup> and 4<sup>th</sup> Defendants. In ELC No. 246 of 2009 which was consolidated with this matter, the 2<sup>nd</sup> Defendant herein claims to have purchased the suit land from the 1<sup>st</sup> Defendant. As things stand, the Plaintiff's claim to the suit land is pegged on an allotment letter while the 1<sup>st</sup> Defendant has a title to the suit land and goes on to state that being a first registration, then their title should not be impeached.
70. From the outset, it is pertinent to bring to the fore the provisions of Article 40 (6) of *the Constitution* which stipulate that;
- “The rights under this article do not extend to any property that has been found to have been unlawfully acquired”.
71. In *Chemei Investments Limited v The Attorney General & Others Nairobi Petition No. 94 of 2005* cited in *Kenya National Highway Authority v Shalien Masood Mughal & 5 others* [2017] eKLR the Court held that;
- “*The Constitution* protects a higher value, that of integrity and the rule of law. These values cannot be side stepped by imposing legal blinders based on indefeasibility. I therefore adopt the sentiments of the court in the case of *Milan Kumar Shah & 2 Others vs. City Council of Nairobi & Another* (supra) where the Court stated as follows, “We hold that the registration of title to land is absolute and indefeasible to the extent, firstly, that the creation of such title was in accordance with the applicable law and secondly, where it is demonstrated to a degree higher than the balance of probability that such registration was procured through persons or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law and the public interest.”
72. For decades, courts had been shackled by the decisions of yester- year; primarily the earth shaking but infamous case of *Obiero V Opiyo* [1972] EA, cited by the 1<sup>st</sup> defendant and the case of *Esiroyo v Esiroyo* [1973] EA which affirmed the indefeasibility of a title. That position no longer holds in the



current legal regime. In the Supreme Court case of Isack Minanga Kiebia vs Isaaya Theuri M' Linturi & Another [2018] eKLR, the court had this to say of the aforementioned decisions.

“These two decisions would unleash a jurisprudential maelstray, the real effect of which, wove and continued to weave around the courts like an albatross. Some courts imbibed this school of thought whole heartedly without any question whatsoever...”

73. Even though the court in the case of Isack Minanga Kiebia vs Isaaya Theuri M' Linturi & Another (Supra) was dealing with the question of customary law, it termed the decisions in Obiero v. Opiyo and Esiroyo v. Esiroyo (Supra) as being “Based on faulty conceptual and contextual premises...”

74. What resonates from the above analysis of the law is that it matters not whether ones claim is anchored on an allotment or a title or whatever document of ownership; as long as the acquisition of the rights and interests in disputed land are found to be unlawful, then such claims cannot be protected by the courts.

75. The burden of proof however lies on the party alleging a fact.

The provisions of Section 107 (1) of the *Evidence Act* stipulates 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.”

76. In the Court of Appeal case of Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR, the court held that:

“... The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of a rebuttal by the other side...”

77. 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.”

78. The Plaintiff has alleged that the 1<sup>st</sup> Defendant’s registration was fraudulent. Thus the burden of proving the allegations of fraud levelled against the Defendants lies squarely on the Plaintiff. In Vijay Morjaria v Nansingh Madhusingh Darbar & Another [2000] eKLR, the Court stated that;

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be 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 distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

79. The Plaintiff led evidence of how she acquired the suit property. She produced an allotment letter which indicates that she was allocated Plot No. 465 on 20.7.1992 by the 3<sup>rd</sup> Defendant. The said allotment letter which was produced before this Court was conditional, she was required to accept it in



writing and to pay ksh.44, 000/= being stand premium in 30 days. A receipt dated 20.7.1992 issued by Nairobi City Commission indicates that she paid as required. She also accepted the offer in writing by a letter dated 31.7.1992. On 31.3.1998, she executed a lease for the plot with Nairobi City Commission.

80. In her testimony, she stated that she intended to construct a nursery school on the suit plot. She tabled the letter dated 17.3.1993 (see page 56 of her bundle) from Nairobi City Commission which indicates that she applied for change of user from residential to nursery school but the same was denied by the city Planning and Architecture department on the basis that the plot was too small to accommodate a nursery school. This is evidence that the Plaintiff was shown the suit plot. Correspondences from the 3rd Defendant also show the nexus between plot No. 465 and Nairobi Block 63/738, it is without a doubt one and the same plot. To this end, I find that the plaintiff has proved that indeed the suit plot was allotted to her. It follows that the title of the 1<sup>st</sup> defendant has been put to challenge.

81. In the Court of Appeal Case of Mwangi James Njehia v Janetta Wanjiku Mwangi & another [2021] eKLR, the court cited its own case in Munyu Maina v. Hiram Gathiha Maina, Civil Appeal No. 239, where it was held that;

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and 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”.

82. DW1, just like the plaintiff identifies 3<sup>rd</sup> defendant as the allotting authority. He told this Court that he was allotted the suit property in 1992. He did not produce an allotment letter to prove the claim and was rather casual in regard to the actual date of allotment. In his recorded statement, he simply refers to “sometime in 1992” in reference to the allotment, while in his oral testimony he states that “the plot was allocated to me in February 1992?.” If indeed DW1 was allocated the suit land, then he ought to have mentioned the precise date of allotment, but he failed to do so.

83. Dw1 further told the court that he lost all documents relating to the suit land in 1995. He stated that he reported the loss to the police on 12.4.1995 and he was issued with an abstract. The abstract was produced by PW2 who could not vouch for its authenticity as the OB that was allegedly issued to Dw1 when he reported the loss of the documents relating to the suit land could not be traced at Industrial Area Police station.

84. However, a question was put to DW1 in cross examination as to how the suit plot passed to him. He changed tune stating that;

“As per my defence , I stated that I surrendered the allotment letter to City Council of Nairobi. I was issued with a replacement allotment letter!”

85. The question begging for an answer is; Did Dw1 lose the allotment letter or did he surrender the same to the allotting authority?. Even the alleged replaced allotment letter has not been availed before this court by the 1<sup>st</sup> defendant. The bottom-line is that the said crucial document (allotment letter) was not placed before this court and no plausible explanation has been given for its absence.

86. DW1 was also at pains to explain how he nominated the 1<sup>st</sup> Defendant for registration of the suit property, since the suit plot was allegedly allotted to him. Further, there is no evidence that the 1<sup>st</sup> Defendant resolved to sell the suit land to the 2<sup>nd</sup> Defendant. DW3’s theory that consideration for the



alleged sale between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants was a set off for debt owed to the 2<sup>nd</sup> Defendant by DW1 who is also a director of the 1<sup>st</sup> Defendant was not backed up by any tangible evidence.

87. I find that there is glaring lacuna as to how the suit property was being transferred from DW1 to his company (1<sup>st</sup> defendant) and then to their other company (the 2<sup>nd</sup> defendant). In particular, there is no document of transfer authenticated by the allotting authority (3<sup>rd</sup> defendant) that was availed to confirm the alleged transfer transactions.
88. Another point for consideration is that the 1<sup>st</sup> defendant did not tender any evidence relating to acquisition of a lease from the allotting authority. After all, the suit title could not be registered to the 1<sup>st</sup> Defendant in the absence of a lease. In his recorded statement at paragraph 5, Dw1 stated that;
- “The 1<sup>st</sup> defendant was issued with a lease by the City Council of Nairobi which was duly registered and certificate of lease issued”.
89. It is quite telling that just like on the issue of allotment letter, the above statement is devoid of any facts as to when and how the 1<sup>st</sup> defendant got the lease which enabled him to get a title from the ministry of lands; more so when the 1<sup>st</sup> defendant does not have a copy of the said lease.
90. The end result is that the 1<sup>st</sup> defendant has not tendered any plausible evidence to confirm the root of its title. The logical conclusion to make therefore is that the title issued to the 1<sup>st</sup> defendant was obtained unlawfully through fraud.
91. As regards the claim in ELC 246 OF 2009 that the 2<sup>nd</sup> Defendant is a bona fide purchaser for value, I disagree with that notion. DW1 himself told the Court that he is a director and shareholder of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. Therefore, the 2<sup>nd</sup> defendant must have been privy to the dealings of the 1<sup>st</sup> Defendant in acquisition of the suit property which was not procedurally acquired.
92. Further, the 2<sup>nd</sup> Defendant’s claim that it took possession of the suit land in 2009 is not supported with any evidence. In the contrary, the Plaintiff’s payments request bill for building plans dated 5.5.2010 issued to her by City Council of Nairobi, (the allotting authority) shows that as at that time, she was the legally recognized owner of the parcel of land L.R.63/738 by that allotting authority.
93. It follows that, the title issued to the 1<sup>st</sup> Defendant having been issued fraudulently, then the register should be rectified under Section 79 (2) of the Land Registration Act (LRA). While making similar findings, the Court held as follows in Peter Kamau Mwangi (Suing as the Administrator of the Estate of the late Mwangi Kamau) v Esther Chelagat Nyangweso [2020] eKLR;
- “It will be seen from the above that the court has power to order the cancellation of an entry in the land register if it is satisfied that the same was made through fraud or mistake. In the case at hand, I have no doubt in my mind that the registration of the defendant as proprietor of the suit land was made through fraud and I am further persuaded there is no way that the defendant could have become registered as proprietor without her being an active party to the fraud. Her title is thus subject to cancellation under Section 143 of the RLA and I do proceed to cancel the same.”
94. In the final analysis, I find that the plaintiff has proved her case on a balance of probabilities. What then are the reliefs available?. The 2<sup>nd</sup> defendant claims that he has all along been in occupation of the suit property. However, even as the 1<sup>st</sup> and 2<sup>nd</sup> defendants were entering into their sale agreement in year 2008, there was already a caution lodged by the plaintiff years earlier on 7.7.2004.



95. What more, the plaintiff filed this suit simultaneously with an application seeking injunctive orders against the defendants, of which prayer 2 thereof “temporary injunction pending the hearing of the suit” was allowed on 12.6.2009.
96. Based on the above analysis, I find that any occupation of the suit land by the defendants is unlawful. They must vacate the said land.
97. In the case of Amos Kibata Githeko v Loise Gachiku Kinuthia [2021] eKLR. I decried the crafty machinations of parties suing each other after perpetuating illegalities together. I find that the filing of the case ELC 246 of 2009 by Baseline Architect reflects a similar scenario of crafty machinations of the 1<sup>st</sup> and 2<sup>nd</sup> defendants geared towards perpetuating a conundrum so as to scuttle the claim of the plaintiff.
98. I proceed to give the following orders;
1. An order is hereby issued declaring the plaintiff to be the lawful owner of the parcel of land known as Nairobi/Block 63/738.
  2. A permanent injunction is hereby issued restraining the Defendants, their agents, servants or any person duly authorized by them to act on their behalf from alienating or dealing in any way with that parcel of land known as Nairobi Block 63 /738.
  3. An order is hereby issued for cancellation of the certificate of lease issued to the 1<sup>st</sup> defendant; Further, an order is issued directing the Land Registrar to rectify the register and to substitute the names of the 1<sup>st</sup> Defendant with the Plaintiff’s name and to issue the plaintiff with a certificate of lease.
  4. In The Alternative, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are directed to compensate the Plaintiff for the value of the land at the current market value within a period of 3 months. In the event that there is no such compensation, then an order of eviction of the 1<sup>st</sup> and 2<sup>nd</sup> defendants is to take effect forthwith.
  5. The 1<sup>st</sup> and 2<sup>nd</sup> defendants are jointly and severally condemned to pay Cost of the suit and interest thereof from the date of filing the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18<sup>TH</sup> DAY OF JULY, 2023 THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**

