



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERICHO**

**ELC CIVIL APPEAL NO 5 OF 2019**

**JOSHUA KIBE ROH.....APPELLANT**

**VERSUS**

**AVTAR SINGH BHACHU.....RESPONDENT**

**SAMWEL KIPRONO SANG.....INTERESTED PARTY**

***(Being an appeal from the Judgment of Hon. S.K Mokuu, Chief Magistrate in CMELC Case No. 19 of 2018)***

**JUDGMENT**

1. In this appeal, the Appellant has challenged the judgment of Hon S.K Mokuu (Chief Magistrate) delivered on 29<sup>th</sup> January 2019 in Kericho CMELC Case Number 19 of 2018 entered against him. The Appellant was the Plaintiff before the subordinate court while the Respondent was the Defendant.

2. The Appellant's case before the lower court was that he is the registered proprietor of plot number Kericho Municipality Block 5/388 having acquired ownership thereof as a gift from the Interested party who is his father in the year 1999. The Appellant contended that the Respondent unlawfully trespassed onto the suit property and stopped construction work that was going on thus occasioning the Appellant loss and damage. The Appellant claimed that because of the Respondent's illegal acts, he has been unable to develop the suit property. He thus sought the following reliefs;

*a. A permanent injunction restraining the defendant, his servants, agents and/or any other persons claiming under his name from trespassing onto, interfering or any in any other way adversely dealing with the plaintiff's plot number Kericho Municipality Block 5/388*

*b. General damages*

*c. Special damages for Kshs 26,625,000/-*

*d. Mesne profits*

*e. Adverse possession*

*f. Cost of the suit*

*g. Interest on (b) and (c) above at court rates*

*h. An order of declaration that the plaintiff is the legal and lawful proprietor of Kericho Block 5/388*

*i. Any other or further relief this court may deem fit to grant*

3. In support of his case the Appellant testified as PW1 and called two witnesses; Samwel Kiprono Sang (Interested Party) as (PW2) and Nicholas Chirchir (PW3).

4. The Appellant testified that the Respondent trespassed onto the suit property. He told court that the suit property was given to him by PW2 as a gift and he proceeded to pay the necessary rents and rates. He told court that they were running an educational institution known as Rift Valley Central Teachers College. He recalled that sometime in 2012 the Respondent came to the suit property accompanied by police officers, stopped the ongoing construction work and took the materials and tools that his workers had. The Appellant, PW2 and PW3 were

subsequently arrested by the police and charged with the offences of forgery, conspiracy to defraud and acquiring title by false pretenses in **Kericho Criminal Case No. 1464 of 2012**. The matter was heard and they were acquitted under section 210 of the Criminal Procedure Code. The Appellant testified that they had built 3 classrooms and they were due to complete 2 more classrooms, an administration block and dormitories but the construction was stopped as the court ordered that the status quo be maintained. He testified that they had to refund their 86 students admitted to Rift Valley Central Teachers College the tuition fees they had paid. He told the court that as a result he suffered great loss as the rains swept away the sand on the construction site while the iron sheets rusted.

5. On cross examination he stated that he was issued with a title in 2009. He testified that the land was initially registered under the Registration of Titles Act but it was later converted to registration under the Registered Land Act. He said that he had seen the letter written by DW3 which stated that there had been double allocation. He explained that he sued the Respondent alone although the Respondent was jointly registered as proprietor of the suit property with other parties.

6. PW2 testified that he gifted PW1 the suit land and that PW1 is the proprietor of the land. He recalled that in 1991 he noticed that there was a vacant plot next to his plot in Kericho town. Upon making inquiries at the Lands office and making a formal application he received a confirmation that the land was unoccupied and he was issued with a letter of allotment dated 20<sup>th</sup> December 1991. He testified that he complied with the requisite conditions by making the necessary payments. He testified that he took occupation of the land and later sought consent from the Commissioner of Lands to transfer the land to the Appellant. The transfer to the Appellant was done in 1999 upon receiving consent from the Commissioner of Lands. He testified that the Appellant had intentions of putting up a school and the building plans were approved on 6<sup>th</sup> March 2006. He told court that they were advanced Kshs 15,000,000/- for the construction of the classes. In 2012 the Respondent claimed ownership of the suit property and had him, PW2 and PW3 arrested and charged in **Kericho Criminal Case No. 1464 of 2012**. He testified that they lost the materials that were on site worth Kshs 19,000,000/-.

7. PW3 recalled that on 1<sup>st</sup> August 2012 he was at the construction site when the Respondent came to the site in the company of police officers and chased away all the workers at the site. He testified that on 28<sup>th</sup> August 2012, the Respondent once again came to the site and chased them out of the suit property after which they were arrested and charged in **Kericho Criminal Case No 1464 of 2012**.

### **THE RESPONDENT'S CASE**

8. In response to the Appellant's case the Respondent filed a defence and counterclaim. The Respondent claimed that he is both the registered and beneficial owner of the suit property having been issued with the lease title on 23<sup>rd</sup> April 1996, under Cap 281 Laws of Kenya. He testified that the suit property was later registered as Kericho Municipality Block 5/388 under Cap 300 of the Laws of Kenya. He alleged that the certificate of title currently being held by the Appellant is a forgery and the Appellant alongside two other people were facing criminal charges in **Kericho Court Criminal Case No. 1464 of 2012** where they were charged with forgery, conspiracy to defraud and obtaining registration by false pretenses.

9. In his counterclaim the Respondent avers that he jointly owns the suit property with his 4 brothers who have not been made parties to the suit under the business name Safari Motors Services and that they were issued with the original grant I.R 68985. The title to the suit property conferred on them an indefeasible title which is guaranteed by the state and therefore the Appellant cannot bring a rival title to defeat the Defendant's grant. He alleged that the Appellant is a trespasser and sought a permanent injunction against the Appellant restraining him from occupying or developing the suit property.

10. Nelson Ongera Migiro, Advocate (DW1) testified that Johnson Makori and Avtar Singh (Respondent) went to his office and instructed him to prepare an agreement for sale of the suit property. He acted for both parties and prepared the agreement. The consideration was Kshs. 1,000,000/- and the vendors paid Kshs. 500,000 a down payment. He recalled that on 13<sup>th</sup> March 1996 the parties executed an informal transfer which he witnessed and forwarded the same to Nairobi.

Edwin Mugore (DW2) testified that he was based at Ardhi House in Nairobi at the RTA registry. He told the court that he did not find the files in respect of Grant I. R 68985 and Grant No. 198881.

11. Patroba Ojwang Omollo (DW3) testified that the entire area where the suit land is located was allotted in 1979 for purposes of putting up go downs, garages and workshops. He testified that he searched for file No. 101232 and found that it contained documents confirming the position that Safari Motors is the proprietor of the suit property. He testified that grant No. 198881 was allegedly forwarded through file No.78540 which did not belong to Kericho.

12. The Respondent, (Avtar Singh Bhachu) testified as DW4. He told the court that the suit property belongs to Safari Motors. He testified that the land was bought from one Mr. Makori and transferred to Safari Motors. He told court that when a dispute arose as to ownership, he contacted the interested party and explained how they acquired the land. The interested party had no documents pertaining to the land. He then reported the matter to Kericho Police Station. On cross examination he told court that the grant was issued in the name of Safari Motors and he signed the agreement on behalf of the partners. Mark Muigai Watidete (DW5) told court that he had been a land registrar for over 10 years. He testified that he issued the certificate of title confirming that the suit property was owned by the Respondent and 4 other persons.

13. After hearing both parties and their witnesses the trial court came to the conclusion that the Appellant (then Plaintiff) had failed to prove his case and dismissed it with costs, He then entered judgment for the Defendant on his counter claim with costs to the Defendant.

14. Being dissatisfied with the said Judgment dated 29/1/2019, the Appellant filed this Appeal citing 18 grounds of Appeal, the essence of which is that the Judgment of the trial court was against the weight of the evidence. The appeal was prosecuted by way of written Submissions and counsel for the Appellant filed his submissions on 26.8.2019, while counsel for the Respondent filed his submissions on 24.9.2019.

### **APPELLANT'S SUBMISSIONS**

15. Learned counsel for the Appellant submitted that the learned trial magistrate erred in holding that his registration as proprietor of the suit property was fraudulent without any compelling evidence. He relied on the Court of Appeal decision of **Arthi Highway Developers Limited v West End Butchery Limited & 6 others (2015)** in support of his arguments. He contended that the registrars who testified failed to properly guide the court on the legality of either grant number 198881 or 19888/1 registered in the Appellant's name and grant number 68985 which is registered in the Respondent's name. He pointed out that DW2 conceded that there was a possibility that grant number 198881 had been mistakenly recorded.

16. He submitted that the Respondent's claim was premised on the purchase of land from Johnstone Makori. It was his submission that there was no evidence that the terms of the letter of allotment were met. This included payment of registration fees, conveying/preparation fees, survey fees, stamp duty and stand premium. He further submitted that the Respondent did not provide evidence pertaining to the payment of land rent and rates for the period 1979 to 2012. He cited the case of **Mbau Saw Mills Ltd v Attorney General for and on behalf of the Commissioner of Lands & 2 others (2014) eKLR** and **Abdia Dabaso v Sangab Kalicha Huka (2019) eKLR**.

17. The Appellant contended that the acreage of the property in the letter of allotment is stated as 0.13 hectares whereas that in the grant no. 68985 is 0.1115 hectares. The appellant also cited the case of **Daudi Kiptugen vs Commissioner for Lands and 4 others** where the court held as follows;

*"...if the plaintiff had a letter of allotment showing he was actually allotted the suit land, and not the unsurveyed residential plot B26, then, he would have some weight in his favour. But he has nothing to show that he was allotted the property ELDORET MUNICIPALITY BLOCK 7/154 and he has not demonstrated that the unsurveyed residential plot B26 is the same as ELDORET MUNICIPALITY 7/154."*

## RESPONDENT'S SUBMISSIONS

18. Learned Counsel for the Respondent submitted that the Respondent chronologically stated how he purchased the land and provided all the necessary documentary evidence to prove ownership of the suit property. Whereas the interested party alleged that the land was first allocated to him in 1991, the land had already been allocated by the government to the original allottee, Johnstone Makori t/a G.T.T Development. It therefore follows that once the property was allotted to Johnstone Makori in 1979 the same plot was therefore not available for alienation to the interested party in 1991. It was his submission that the Respondent's rights to the property are cemented by the **Article 40 of the Constitution** and **section 24 (a) of the Land Registration Act 2012**.

19. He argued that the letter of allotment issued to the interested party did not bear any official stamp from the Land Registry hence its authenticity was questionable. The officers based at the Land Registry testified that grant I.R 198881 issued to the interested party was not in existence and this further casts doubt on the Appellant's ownership of the suit property. He cited the case of **Faraj Maharus vs J.B Martin Glass Industries and 3 Others C.A 130/2003 (unreported)** where the court held that;

*"...at the time another grant was being made to the appellant, the suit land had already been alienated; there was nothing for the 5<sup>th</sup> respondent to allot and alienate to the original allottee."*

20. In **Benja Properties Limited vs Syedna Mohammed Burhannudin Sahed & 4 others (2015) eKLR**;

*"...What then happens to the second title issued apparently procedurally but subsequent to an earlier valid title? Again, my view is that the answer lies in section 23 (1) aforesaid. Whereas the first title cannot be challenged, the second one can be challenged because whereas it exists and even if procedurally issued, or so it appears, it is neither absolute nor indefeasible and is relegated to a level of legal disability and the remedy for a party holding it if aggrieved, lies elsewhere"*

21. The interested party was issued with an allotment letter on 20<sup>th</sup> December 1991 by the Commissioner of Lands however the allotment letter was not stamped. Upon the issuance of the letter the interested party paid the standard premium, rent, conveyancing fees, registration fees, rates, stamp duty, survey fees, road and road drain fees and was issued with a receipt from the department of lands on 4<sup>th</sup> August 1992. The interested party later sought the consent from the Commissioner of lands to transfer the suit property to the Plaintiff. He obtained consent to transfer on 29<sup>th</sup> July 1999. The Plaintiff produced a Certificate of Lease title number Kericho Municipality block 5/388 issued on 13<sup>th</sup> March 2009 in his name after the transfer from the interested party to him was processed.

22. On the other hand, it was the Respondent's case that he bought the land from Johnstone Makori trading as G.T.T Development. The suit land had been allotted to Johnstone Makori on 21<sup>st</sup> December 1979. Thereafter the said Johnstone Makori transferred the suit land to the Respondent, Pritam Singh Bachu, Nirmal Singh Bachu, Pyara Singh Bachu and Malvinder Singh Bachu. The Respondent was issued with grant I.R No. 68985 and he maintains that he has a valid legal claim to the suit property.

23. This being a first appeal, I am alive to the principle that the first appellate court is required to reconsider the evidence, evaluate it and draw its own conclusions making an allowance for the fact that it neither heard nor saw the witnesses testify (see **Selle v Associated Motor Boat Company Ltd [1968] E.A. 123, 126**)

## ISSUES FOR DETERMINATION

24. Having considered the evidence tendered by the parties, the Judgment of the trial magistrate, the Grounds of Appeal and parties' submissions the following are the main issues for determination;

**1. Whether the Appellant acquired his title through fraudulent means.**

2. Who is the legal proprietor of the suit property and whether the proprietor is entitled to the orders sought.

3. Who should bear costs of this appeal.

## ANALYSIS AND DETERMINATION

25. With regard to the first issue, the Respondent in his defence and counterclaim alleged that the Appellant unlawfully and fraudulently obtained a certificate of lease from the Kericho District Lands office. He pleaded particulars of fraud against the Appellant as follows;

- a) Making untrue representation to the Kericho District Lands registrar and Kericho District lands officer that he is the true allottee (sic) of the parcel L.R NO. 631/776 Kericho Municipality now plot block 5/388 Kericho Municipality measuring 0.115 Hectares.
- b) Unlawfully and fraudulently converting land parcel No. 631/776 Kericho municipality now plot block 5/388 Kericho municipality into his name knowing the same to be a false transaction.
- c) Fraudulently procuring registration of certificate of lease for Block 5/388 Kericho Municipality pretending that the said parcel L.R No. 631/776 Kericho Municipality belonged to him.
- d) Unlawfully forcing himself on parcel L.R No. 631/776 Kericho Municipality now plot block 5/388 Kericho Municipality and erecting structures thereon without the Defendant (now plaintiff's) consent.
- e) Presenting false claims to Kericho District surveyors so as to issue a beacon certificate.
- f) Compromising the District lands officer to issue contradictory statements.

26. It is trite law that any allegation of fraud must be pleaded and strictly proved. DW3 testified that the title for L.R No. 19881 held by the interested party was forged. He told court that he had searched for file no. 101232 pertaining to the grant and found that it did not exist. The Court of Appeal in **Kinyanjui Kamau v George Kamau Njoroge [2015] eKLR**, this Court pronounced itself as follows;

*“In cases where fraud is alleged, it is not enough to simply infer fraud from the facts. In **Vijay Morjaria v Nansingh Madhusingh Darbar & another [2000] eKLR** (Civil Appeal No. 106 of 2000) Tunoi JA (as he then was) stated as follows:*

*‘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 as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.’*

27. Interestingly, DW3 had written to Safari Motors Services on 20<sup>th</sup> September 2012 informing it that the suit property had been allocated to the interested party. The said letter reads in part as follows;

*“I have received a letter from the Commissioner of Lands ref. 138766/16 dated 10<sup>th</sup> September, 2012 which confirms that the same plot was allocated to Samwel Kiprono Sang vide letter of allotment ref 21350/III dated 20/12/1991. The contents of this letter are self-explanatory and I hereby attach the same for your perusal. He obtained a land rent demand notice and cleared all his outstanding land rent and was cleared vide land rent certificate serial number 124510.*

*I am therefore in the process of identifying an alternative plot and will inform you in due time when the same is identified.”*

28. Even though the Commissioner of Lands seems to be authenticating the letter of allotment issued to the interested party, it is not lost to me that his letter was written after the Appellant and Interested party were charged with the offence of forgery. At any rate the Commissioner of Lands did not invalidate the Respondent's allotment letter.

29. During cross examination DW2 testified that the grant issued to the interested party had a stamp indicating the grant number as 19888/1 and attributed the grant reading 198881 to be have been caused by some mistake. It is however not clear how the said grant was converted to a title under the Registered Land Act and registered as L.R No. Kericho Municipality/Block 5/388, as the letter purportedly written by A. W. Kuria from the Ministry of Lands to the District Land Registrar Kericho indicating that L.R No. 631/776 Kericho Municipality had been converted from RTA to RLA was disowned by the said A.W. Kuria. The document examiner in the Criminal Case stated that the signature did not belong to Agnes Kuria. While I recognize the well-established principle that the court has the duty to uphold the sanctity of the record at the Lands office (see **Solomon Omwega Omache & another –v- Zackery O. Ayieko & 2 others (2016) eKLR**), in this case it appears that the Land Registrars were unhelpful as they were not clear on the records they hold. In this case, two Land Registrars and a land administrator officer testified in regard to both titles held by the Appellant and the Respondent but they could not shed light as to why they had registered the suit property in the names of the Appellant and Respondent as both parties hold documents that originated from their office. To make matters worse, the files in respect of both grants were missing from the Central Registry.

30. Each party in this suit is challenging other party's title and this court must make a determination as to which party legitimately holds a valid title. Johnstone Makori trading as G.T.T Development and the interested party were both issued with letters of allotment dated 21<sup>st</sup> December 1979 and 20<sup>th</sup> December 1991 respectively. The Court of Appeal in **Swaleh Mohamed Waziri & 3 others v Houd Mohmoud**

**Athman & another [2020] eKLR** cited with approval the decision in **M'Ikiara M'Rinkanya and Another vs Gilbert Kabeere M'Mbijiwe [1982 – 1988] 1 KAR 196** where the court stated that;

*“Where a similar situation as in this case arose, there was a double allocation to a plot issued by the Council of the area. The court had noted that the said first allotted letter to the original plaintiff had never been cancelled. That the council had no power to allocate the same property again without following the laid down procedure of re-allocating the property.”*

Recently, this position was followed by this Court in the case of **Kenya Ihenya Company Limited & another vs Njeri Kiribi [2019] eKLR** where it was again stated;

*“... it was clear that the 1<sup>st</sup> appellant had allotted the suit land to both the respondent and the 2<sup>nd</sup> appellant hence the learned Judge's conclusion that there was a double allocation. That being the case, since the respondent was first in time, as the evidence is clear that she completed making payments in the year 1983 whilst the 2<sup>nd</sup> appellant claimed to have purchased the same on 24<sup>th</sup> June, 1997, she was the bonafide proprietor.”*

*In other words, an allottee having been allotted land by the Commissioner of Lands and duly paid all the stand premiums and other related charges, is considered to have acquired rights over such land, which thereafter rendered it unavailable for allocation to other persons or entities.”*

31. Similarly, in **Gitwany Investment Limited -v- Tajmal Limited & 2 Others, (2006) eKLR, Lenaola, J. (as he then was)** correctly stated:

*“[46]... the title given to Gitwany in the first instance and which I have held to be absolute and indefeasible as regards the suit land is the earlier grant and in the words of the Court of Appeal in **Wreck Motors Enterprises vs. 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 vs. 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....”*

32. In the instant case, it is not in dispute that the first allotment letter was issued to Johnstone Makori in 1979 who sold the plot to the Respondents. Although counsel for the Appellant has submitted that the first allottee did not meet the conditions in the letter of allotment, there is no evidence on record that the said allotment was ever cancelled for failure to meet the conditions in the letter of allotment nor was the Respondent told to surrender his title before a new one was issued to the Appellant. It is clear that the suit property was registered in the name of Safari Motor Services and a grant number I.R 68985 issued to them on 23<sup>rd</sup> April 1996. This was a first registration and in terms of section 24 of the Land Registration Act 2012

*“ the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging and appurtenant thereto”*

Furthermore, section 26 of the land Registration Act provides as follows:

*“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject to the encumbrances, easements restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except*

*a) on grounds of fraud, or misrepresentation to which to which the person is proved to be a party; or*

*b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme”.*

33. This therefore means that by the time the allotment letter was issued to the Interested Party on 1<sup>st</sup> November 1991, the land was not available for alienation as it had already been allocated to Johnstone Makori T/A G.T.T Development who in turn sold it to the Respondent and his partners.

34. In the case of **Benja Properties Limited vs Syedna Mohammed Burhannudin Sahed & 4 others (2015) eKLR** the Court of Appeal while quoting the decision in the cases of **Wreck Motors Enterprises v Commissioner of Lands, Civil Appeal No. 71 of 1997 (Unreported)** and the case of **Faraj Maharus v J.B Martin Glass Industries & 3 Others Civil Appeal NO. 130/2003 (Unreported)** held as follows:

*“It is our considered view that the trial court did not err in upholding the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondent's title to the suit property and cancelling the appellant's title. The alienation to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' is the grant that takes priority; at the time another grant was being made to the appellant, the suit land had already been alienated, there was nothing for the 5<sup>th</sup> Respondent to allot and alienate to the original allottee”*

The Court stated further in the said decision at paragraph 25 that:

*“We note that an interest in land cannot be allotted, alienated or transferred when the specific parcel of land allotted is not in existence. Allotment of an interest in land is a transaction in rem attaching to and running with a specific parcel of land.”*

**35.** I therefore agree with the finding of the trial Magistrate that the Appellant’s title was obtained by means of fraud. The said title is not valid as it was acquired unprocedurally since there was already another title in existence.

**36.** For the foregoing reasons, I find and hold that there are no sufficient grounds to interfere with the judgment of the trial court. The appeal has no merit and it is hereby dismissed with costs to the Respondents.

**Dated, signed and delivered via email this 30<sup>th</sup> day of July 2020**

**J.M ONYANGO**

**JUDGE**