



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 134 OF 2018

JOHN NGATA PLAINTIFF

-VERSUS-

HON. ATTORNEY GENERAL DEFENDANT

JUDGMENT

BACKGROUND

1. By his Complaint dated 25th June, 2018 and filed herein on 26th June 2018, John Ngata Kariuki (*the Plaintiff*) prays for Judgment against the Honourable the Attorney General (*the Defendant*) for the following:

(a) An order against the Defendant to indemnify the Plaintiff the current market value of the parcel of land equivalent in value to the one allocated to the Plaintiff i.e. grant No. CR 22126 for LR No. Portion No. 5646 measuring 4.000 Hectares;

(b) Special damages of Kshs.188,464;

(c) Costs and interests of the suit; and

(d) Any other remedy or relief deemed appropriate by this Honourable court.

2. Those prayers arise from the Plaintiff's contention that on 31st August, 1991, the Commissioner of Lands issued him with a letter of Allotment for all the piece of land in Malindi Municipality in Kilifi District measuring 4.000 Ha being LR NO. 5646, Grant No. 22126. Upon complying with the terms and conditions of the allotment including payment of Kshs.184,174 for the requisite charges and Kshs.4,290/- as survey fees, the Plaintiff was registered as the proprietor of the land and was issued with a certificate of title for the same.

3. Subsequently, the Plaintiff took physical possession of the property with the intention of putting up a five star tourist resort. However in the year 2009, the Plaintiff was served with summons and pleadings emanating from Malindi HCCC No. 123 of 2009; **Fleetwood Enterprises -vs- John Ngata Kariuki and the Attorney General**. To his utter surprise he came to learn that the Plaintiff in the said suit was the registered owner of Plot No. 514R Malindi measuring approximately 43.02 Ha.

4. The Plaintiff avers that he later realized that his parcel of land measuring 4.000 Ha was part of the said larger Plot No. 514R measuring 43.02 Ha and the court subsequently ordered the rectification of the register to reflect the correct position.

5. The Plaintiff avers that he did acquire his parcel of land lawfully, procedurally and on the strength of the letter of allotment issued to him by the Government. He accused the Department of Survey and the Ministry of Lands of acting negligently and in breach of trust by allocating and issuing two certificates of title in respect of the same property. As a result, the Plaintiff asserts that he was deprived of the use, enjoyment and his right to own property and hence the orders sought herein.

6. The Honourable the Attorney General (*the Defendant*) is however opposed to the grant of the orders sought. In his statement of Defence dated 11th July, 2018 as filed herein on 19th July, 2018, the Defendant avers that if indeed any allotment letter was issued to the Plaintiff as he states, then the same was issued under specific terms and conditions and the Plaintiff has failed to demonstrate that he complied therewith.

7. The Defendant further avers that he is unaware that the Plaintiff was allocated the said land with the measurements and dimensions given by the Plaintiff and/or that the Plaintiff made any payments as required under the Letter of Allotment. The Defendant further avers that he is a stranger to and hence unaware that the Plaintiff was registered as proprietor of the land measuring 4.000 Ha. and/or that the Plaintiff took

physical possession thereof for the purpose of putting up a five star tourist hotel.

8. In further response, the Defendant asserts that the Plaintiff was party to the said Malindi HCCC No. 123 of 2009 and that he had an opportunity to participate and defend his alleged title and ownership of the suit property.

THE PLAINTIFF'S CASE

9. At the trial herein the Plaintiff called two witnesses who testified in support of his case.

10. PW1 – John Ngata Kariuki is the Plaintiff himself. Adopting his written statement dated 25th June 2018, PW1 testified that he was issued with a Letter of Allotment dated 13th June, 1991 by the

Commissioner of Lands. He accepted the offer by paying for the requisite charges in the sum of Kshs.184,174/- and was issued with a receipt on 20th September, 1991. He also later paid for survey fees being Kshs.4,290/- and was issued with a receipt on 22nd January, 1992.

11. PW1 further testified that after fulfilling all the requisite conditions, he was issued with a Certificate of Grant Number CR 22126 dated 20th January, 1992 in his favour for what was described as LR No. 5646 measuring 4.000 Ha. PW1 thereafter took physical possession of the land.

12. PW1 told the court that sometime in the year 2009, he received summons and pleadings filed by M/S Fleetwood Enterprises Limited in which he was named as the 1st Defendant in a case filed as Malindi HCCC No. 123 of 2009. The Defendant herein was named as the 2nd Defendant in those proceedings. The Plaintiff in the said case alleged that it had in the year 2007 purchased land registered as Plot No. 514 R measuring 43.02 Ha. which acreage included the 4.000 Ha. that had been allocated to PW1.

13. PW1 further told the court that the said Malindi HCCC No. 123 of 2009 proceeded to full trial. On 20th March, 2014, Judgment was entered in favour of the said M/S Fleetwood Enterprises Limited. It is PW1's case that he had acquired the land procedurally after full compliance with the terms and conditions of the letter of offer issued to him by then Commissioner of Land.

14. PW1 further testified that upon being issued with the Certificate of Grant, he had a legitimate expectation that the title cannot be challenged as the same was issued by the Government. He further told the court that he intended to put up a five star hotel on the land and that as a result of the Judgment he had been deprived of his constitutional right to ownership of property through no fault of his own. He told the court he had suffered a huge financial loss and loss of business opportunities and sought to be indemnified by the Government for his loss.

15. In cross-examination, PW1 conceded that the Defendant herein filed a Defence in Malindi HCCC No. 123 of 2009 which was in support of his case. He told the court he only saw the land after it

was identified by the Commissioner of Lands and was allocated to himself in 1991. He did not however check its status as he assumed the Commissioner of Lands knew the land.

16. PW1 further conceded that he paid for the land outside the 30 days indicated in the terms and conditions. He attributed the delay to the possibility that he received the notification late. PW1 told the court he was in possession of the property after receipt of his title in 1992 and only realized in 2009 that there was another claimant thereto. He had not done any development on the land and only tried to fence it in 2009. He did not appeal the decision by the court to have his title cancelled.

17. PW2 – Edwin Otieno Oduor is a Valuer by Profession based at Basemark Realtor Valuers where he is the Director. PW2 testified that his firm received instructions to carry out a valuation of the suit property situated in Casuarina area of Malindi. PW2 prepared a Report dated 8th December, 2017 which puts the value of the property at Kshs.120,000,000/-.

18. On cross-examination, PW2 told the court he went to the site on 8th December, 2017 and was able to access the land. He told the court he used the sales over the years to arrive at the value of the land. He however conceded that he had not put the examples he compared the land with in his Report and insisted he had questioned the neighbours in adjacent pieces of land to arrive at the value.

THE DEFENCE CASE

19. The Defence did not call any witness in support of their case. By consent of the parties however, they did produce a Valuation Report dated 23rd October, 2019 and filed in court on 19th November, 2019 as Defence Exhibit 1.

ANALYSIS AND DETERMINATION

20. I have carefully perused and considered the pleadings filed herein, the testimonies of the witnesses and the evidence adduced at the trial. I have similarly perused and considered the written submissions and authorities placed before me by the Learned Counsels for the parties.

21. The Plaintiff instituted this suit on 26th June, 2018 seeking to be indemnified by the Defendant at the current market value of the parcel of land described as LR No. 5646 situated at Malindi and said to be measuring 4.0 Ha. He also sought an order of special damages in the sum of Kshs.188,464 as well as costs and interest.

22. It is the Plaintiff's case that he had requested the Government to allocate him some land. Subsequently, by a letter dated 31st August, 1991, the Commissioner of Lands allocated to him the parcel of land described as LR No. 5646 aforesaid. It is also the Plaintiff's case that upon complying with the terms and conditions of the allotment, including payment of Kshs.184,174/- for the requisite charges and further Kshs.4,290/- as survey fees, he was issued with a Certificate of Title for the said parcel of land in 1992.

23. According to the Plaintiff, he then took physical control of the parcel of land and remained in possession until the year 2009 when he was served with summons and pleadings emanating from Malindi HCCC No. 123 of 2009; **Fleetwood Enterprises Limited –vs- John Ngata Kariuki and the Attorney General**. It was then that the Plaintiff was surprised to learn that the said Fleetwood Enterprises Limited was the registered owner of Plot No. 514R Malindi measuring approximately 41.02 Ha.

24. The Plaintiff told the Court that he then came to realise that the 4.0 Ha. parcel of land allocated to him was part and parcel of the larger parcel of land known as Plot No. 514 R. The said suit in which both the Plaintiff and the Defendant herein were sued as Defendants proceeded to full hearing and by a Judgment rendered on 20th March, 2014, the Honourable Lady Justice Meoli issued an order directing cancellation of the Plaintiff's title after finding that the issuance thereof was illegal, null and void.

25. The Plaintiff avers he acquired the land lawfully and that he had intended to build a five-star tourist hotel on the land and that as a result of the Judgment, he has now been deprived of the use, enjoyment and right to own the property whose value he now puts at Kshs.120 million.

26. In seeking compensation from the Government, the Plaintiff accused the Department of Survey and the Ministry of Lands of acting negligently and in breach of trust by allocating and issuing

two certificates of title in respect of the same property.

27. Testifying at the trial herein, the Plaintiff told the court that he applied for the land but did not identify the same. The land was instead identified by the Commissioner of Lands who proceeded to allocate the same to him. He did not check the status of the land and agreed to take it as it was.

28. That was indeed the same evidence given by the Plaintiff herein when he testified as the 1st Defendant (DW1) at the trial in Malindi HCCC No. 123 of 2009. At Paragraph 26 of the Judgment of the Court, his testimony is captured as follows:

“26. In cross-examination, DW1 admitted that he paid the requisite stand premium stipulated in the Letter of Offer outside the 30 days that he was required to make the payments. It was the evidence of DW1 that prior to the issuance of the Letter of Offer, he had not visited the suit property. However when he visited the land later, he found the place bushy and (*it*) was not occupied by anybody. He stated that he was not in position to tell whether the land he was allocated was Government land or not. The map that he was given was marked “GL” meaning the land was Government Land.”

29. As it turned out, the Learned Judge went on to establish in her Judgment that the portion of land that was purportedly allocated to the Plaintiff herein was private land that was no longer available for alienation. At paragraph 58 of the Judgment the Learned Judge observed and found that the land that was allocated to the Plaintiff herein was within land that had been surveyed and registered as Portion No. 514 in 1914. The said land was therefore unavailable for allocation by the Government and the Commissioner of Land **letter purporting to allocate the same was therefore worthless.**

30. As was noted by the court in **Mako Abdi Dolai -vs- Ali Duane & 2 Others (2019) eKLR**, prior to the promulgation of the 2010 Constitution and the 2012 amendments to the body of Land Laws in Kenya, disposition of Government land was governed by the Government Lands Act (*now repealed*). Under the repealed Act, power to dispose of public land was vested in two entities, namely the President and the Commissioner of Lands as per **Section 3 and 9** respectively of the said Act.

31. A perusal of the process of disposition of Government land even at that time reveals that certain procedures and processes had to be followed. Those included the identification of land by the Local Government Council within which the land was situated to *inter alia* find out if the parcels of land set for alienation was indeed Government Land and second, if it was available for disposition.

32. That does not appear to have happened in the matter before me and that is how the Plaintiff appears to have ended up being allocated land that was already in private hands. The Plaintiff did not make his position better as it is apparent that he did not do any due diligence on the property that was purportedly allocated to himself to establish its position. He did not exhibit a copy of the application he claims to have written to the Commissioner of Lands in 1989 and it was unclear to me which parcel of land he had applied for given his admission that he neither identified the same nor visited it prior to the allocation.

33. In her Judgment delivered as aforesaid on 20th March, 2014, Lady Justice Meoli did a thorough scrutiny of the Plaintiff's documents produced herein and makes a finding thereon at Paragraphs 59 and 61 as follows:

“59. I have perused the Defendant's exhibits. According to the Letter of Allotment dated 13th August, 1991, the 1st Defendant was allocated unsurveyed residential Plot. The plot that was allocated was depicted in a Plan Number TP 47/1/VIII/117 B which was supposed to have been attached to the letter of allotment.

60. The Part Development Plan that was attached on the 1st Defendant's Letter of Allotment, although approved, does not have a development plan number. A number TP 47/1/VIII/117 B has been inserted using a pen in the middle of the document rather than printed at the usual lower part. Indeed, the Defence produced in evidence a letter dated 28th June, 1991 by the then Kilifi District

Physical Planning Officer addressed to the Commissioner of Lands as D.Exh.3. In the said letter, the Physical Planner forwarded to the Commissioner of Lands two Part Development Plan (PDP) numbers 55/KLF/19/91 and 55/KLF/20/91. This particular letter was never copied to the 1st Defendant. It is not clear as to which of these two PDPs were in respect to the suit property and if they were ever approved by the Commissioner of Lands. Indeed, the PDP which has been attached on the 1st Defendant's letter of allotment, as I have already stated, does not have a PDP number. The portion where the number ought to be has seemingly been cut off.

61. The absence of a properly documented PDP therefore renders the 1st Defendant's Letter of Allotment incomplete. It is not possible to know the property that the 1st Defendant was actually allocated."

34. Unfortunately for the Plaintiff herein, those are the very same documents upon which he has sought to rely in proof of the fact that he lawfully applied for and was procedurally and regularly allocated the suit property. There is nothing to demonstrate that the applied for the particular piece of land in issues and/or that the same was allocated to himself. It is trite law that under the repealed Government Lands Act, a Part Development Plan had to be drawn and approved by the Commissioner of Lands before any unalienated Government Land could be allocated. A letter of allotment, is then based on the Part Development Plan.

35. At any rate, the Plaintiff admitted that the terms of the Letter of Allotment required him to fulfil certain obligations within a period of 30 days. He conceded in cross-examination that he did not accept the offer within the 30 days blaming the failure to do so on the possibility that he received the notification of the allotment late. There was however no evidence that the notification had arrived late. As the Court of Appeal stated in **D. Joseph N. K. Arap Ng'ok -vs- Justice Moijo Ole Keiwa & 4 Others C.A. 60/1997:**

"It has been held severally that a letter of allotment per se is nothing but an invitation to treat. It does not constitute a contract between the offerer and the offeree and does not confer interest in land at all. It cannot thus be used to defeat a title of a person who is the registered proprietor of the said parcel of land."

36. Having failed to accept the offer within the period stipulated in the Letter of Offer, the Plaintiff did not acquire any interest in the suit land or against the offeree capable of enforcement in the manner sought herein. While he purports to have desired to put up a five-star hotel on the suit land, there was no reason given why he held onto the title without as much as putting up a fence on the land some 17 years after he acquired Certificate of Grant.

37 At any rate the Plaintiff had a chance to air the grievances he has raised herein in the said Malindi ELC 123 of 2009 and to seek to be indemnified to avoid a multiplicity of suits herein. He chose not to do so and instead chose to file a separate suit on matters that had already largely been dealt with in the previous suit. That is an attempt to abuse the Court process and I decline to aide him in such pursuit. He should have sought the special damages paid to the Defendant in the previous suit and can only blame himself for failing to do so.

38. The upshot is that I find no merit in the Plaintiff's suit. I dismiss the same with no order as to costs.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NYERI THIS 27TH DAY OF JANUARY, 2022 VIA MICROSOFT TEAMS.

In the presence of:

No appearance for the Plaintiff

No appearance for the Defendant

Court Assistant - Mugambi

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J. O. OLOLA

JUDGE