



**REPUBLIC OF KENYA**

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

**ELC SUIT NO. 747 OF 2007**

**PAUL MUIRA.....1<sup>ST</sup> PLAINTIFF**

**RUTH WANGUI MUIRA.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**JANE KENDI IKINYUA.....1<sup>ST</sup> DEFENDANT**

**NAIROBI CITY COUNCIL.....2<sup>ND</sup> DEFENDANT**

**CHIEF LAND REGISTRAR.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**The Plaintiff's Case**

This suit commenced in 2002 by a Plaint dated 30/7/2002 filed in HCCC No. 1289/2002. Upon the establishment of the Environment and Land Court, the suit was transferred to this court and allocated its current case number. The Plaintiffs are praying for judgment against the Defendants as follows:

1. A declaration that Plot No. 2 Jamuhuri Phase II belong to the Plaintiffs.
2. The Certificate of Lease, reference Nairobi/Block 63/578 issued to the 1<sup>st</sup> Defendant be cancelled and a lease be issued to the Plaintiffs.
3. A declaration that the document of lease existing in the 1<sup>st</sup> Defendant's name is unlawful, fraudulently obtained, null and void.
4. An order of rectification of the register in possession of the 3<sup>rd</sup> Defendant to cancel the entry in favour of the 1<sup>st</sup> Defendant and to insert the names of the Plaintiffs as the legal and lawful owners of Nairobi/Block 63/578.
5. A permanent injunction restraining the 1<sup>st</sup> Defendant from trespassing, constructing, alienating, mortgaging, transferring or otherwise interfering with the proprietary interests of the Plaintiffs in NAIROBI/BLOCK 63/578 in any manner whatsoever.
6. Alternatively, the Plaintiffs be fully compensated by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, the full value NAIROBI/BLOCK 63/578 (hereinafter referred to as the "suit property").
7. Costs be borne by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

The Plaintiff called two witnesses. The first witness was Ruth Wangui Muira, the 2<sup>nd</sup> Plaintiff (PW1), who testified that she and her deceased husband entered into a sale agreement with Bishop Arthur Kitonga (PW2) in respect of the suit plot at an agreed purchase price of Kshs. 250,000/-, which was paid

between the years 1997 – 2000. Thereafter, by a letter dated 12/3/2000, PW2 wrote to the 2<sup>nd</sup> Defendant instructing it to transfer the allotment letter to the Plaintiffs which was acknowledged by the 2<sup>nd</sup> Defendant. PW1 testified that the 2<sup>nd</sup> Defendant handed over to them another allotment letter dated 6/8/2000 which cited that it was a transfer from the original allottee namely PW2.

PW1 also testified that she paid standing premium rent and rates to the 2<sup>nd</sup> Defendant amounting to Kshs. 18,000/-, and that they also submitted building plans which they paid for, and were issued with receipts for all payments made. It was her evidence that they were directed to the firm of M/s Mbesa & Kitur Advocates which prepared a lease agreement for L.R. No. Nairobi/Block 63/578 which they executed on 2/7/2002 upon payment of the legal fees.

PW1 further testified that on 15/7/2002, they learnt that people had encroached onto the property and commenced construction which caused them to make a report at Kilimani Police Station. That on the 19/7/2002 the OCS Kilimani Police Station summoned them and notified them that the 1<sup>st</sup> Defendant was on the property and that she had left a copy of a Certificate of Lease in her name dated 10/12/2001 to demonstrate that she is the rightful owner of the property.

PW1 testified further that the 1<sup>st</sup> Defendant's title is not a first registration as the property was originally L.R. No. Nairobi/Block 63/286 under the name of the Nairobi City Council which was surrendered to the Government for sub-division, and thus Nairobi/Block 63/578 was derived from Nairobi/Block 63/286. PW1 referred the court to a Certificate of Lease dated 15/2/1994 in the name of the 2<sup>nd</sup> Defendant to support this claim. PW1 testified that the 1<sup>st</sup> Defendant's allotment letter from the 2<sup>nd</sup> Defendant dated 12/2/1992 whereas there was a subsisting allotment letter to PW2 dated 10/2/1992 was evidence of fraud on the part of the 2<sup>nd</sup> Defendant.

On cross-examination, PW1 stated that she was not aware of any double allocation of the suit property as she had never met the 1<sup>st</sup> Defendant, and only became aware of the allotment and title in 2002 when the 1<sup>st</sup> Defendant started excavating the plot. PW1 maintained that there was fraud committed by the Defendants as there are two allotment letters with respect to the suit property, whereas the previous owner (PW2) had complied with all the requirements of the allotment letter. PW1 produced a bundle of documents dated 15/12/2011 in support of their case.

The Plaintiff's second witness Bishop Arthur Kitonga (PW2) testified that at the time of allotment he was a Commissioner with the City Commission of Nairobi, the predecessor of the 2<sup>nd</sup> Defendant. It was his evidence that he made the necessary payments as shown on the receipts dated 25/2/1992 and 14/12/1993 for payment of Survey and Stand Premium fees respectively. PW2 stated that he was approached by the Plaintiffs for the purchase of the plot and he sold it to them for Kenya Shillings Two Hundred and Fifty Thousand (kshs.250,000/=) which was fully paid to him. PW2 said that after the sale he surrendered the allotment and paid Kenya Shillings One Thousand (Kshs.1000/=) for the transfer of the plot to the Plaintiffs. It was his evidence that his letter of allotment was never cancelled and it was issued earlier than that of the 1<sup>st</sup> Defendant.

On cross-examination PW2 stated that some allotments were done irregularly as there was no criterion for allotment, but denied that there was backdating and fresh allocation of letters of allotment to commissioners, and specifically that he was not involved in fraud at the City Council. PW2 also stated that he satisfied the requirements of the allotment letter in terms of making payments and that no money was returned to him by the 2<sup>nd</sup> Defendant. PW2 confirmed that leases were being processed by the M/s Mbesa & Kitur Advocates.

The Plaintiff's last witness was Rose K. Muema (PW3), a Director at the City Planning Department of the 2<sup>nd</sup> Defendant. PW3 confirmed that she wrote a letter dated 6/11/2012 to the Plaintiff in which she confirmed that its contents were correct in that as per their records the allottee is Bishop Arthur Kitonga (PW2). And produced the said letter marked Plaintiff's exhibit 2.

On cross-examination PW3 affirmed contents of the letter is as per the records on allocation at the City Planning Department. She stated that she would have carried a comprehensive search and consulted the legal department on more information about the plot had she been aware that it was subject of pending litigation. As a result, she testified that the contents may thus not reflect the true position of ownership. In re-examination, however PW3 stated that she had worked with the 2<sup>nd</sup> Defendant from the year 2002 as an Assistant Director of Planning and she confirmed that as per the records at her department the contents of the letters are correct.

### **The Defendant's Case**

The 1<sup>st</sup> Defendant filed a defence dated 2/9/2002 wherein she denied the contents of the Plaintiff in its entirety save for the descriptive paragraphs. The 1<sup>st</sup> Defendant avers that her allocation of the suit property by the 2<sup>nd</sup> Defendant being Nairobi/Block 631/286 was through proper procedure and that she complied with all the terms thereof. Further, that she was not aware of the allocation to the Plaintiffs and that she acted in good faith in the said transaction. The 1<sup>st</sup> Defendant, Jane Kendi Ikunyua, (DW1) gave evidence in court as a witness.

DW1 testified that she was allotted Plot No. 2 in February 1992 and issued with a title in 2001. It was her evidence that she complied with the conditions on the letter of allotment by making payments and receipts were issued to her. DW1 did not produce the receipts and offered an explanation that the receipts were taken by 2<sup>nd</sup> Defendant for their records and that this was a requirement in the letter of allotment. DW1 testified that on receipt of the title dated 10/12/2001 she proceeded to put up a fence around the plot and developed it by building houses for rent which have cost her up Kshs 22 Million. DW1 testified that she only came to know of the Plaintiff's claim when she received summons. DW1 further testified that she was not involved in the registration of the title by the City Council. In support of her defence, DW1 produced a copy of letter of allotment dated 12/2/1992, Certificate of Lease dated 10/12/2001 and Certificate of Rates Clearance dated 8/8/2002.

On cross-examination, DW1 stated that sometimes in the year 2000 she surrendered her original letter of allotment and original receipts on request by the 2<sup>nd</sup> Defendant. She stated that the 2<sup>nd</sup> Defendant directed her to do so in order to obtain title. DW1 stated that she paid all the requisite fees including legal fees but did not keep any receipts.

The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants did not call any witnesses. However, in a Defence filed by the 2<sup>nd</sup> Defendant on 20/8/2002, it denied the contents of the Plaintiff and put the Plaintiffs to strict proof. In particular, the 2<sup>nd</sup> Defendant denied that the Plaintiffs had cleared all the outstanding rates upto 31/12/2002 and that they had presented a building plan for approval. The 2<sup>nd</sup> Defendant also denied the allegations of fraud as set out by the Plaintiffs, and likewise that the Plaintiffs had suffered loss or damage.

The office of the Attorney General placed a defence on behalf of the 3<sup>rd</sup> Defendant dated 4/8/2008. The 3<sup>rd</sup> Defendant denied any knowledge or mischief or misrepresentation carried out by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and that his office was a stranger to the contents of the Plaintiff. The 3<sup>rd</sup> Defendant further denied any knowledge of fraud, illegality and conspiracy as alleged by the Plaintiffs and further denied occasioning the Plaintiff any loss or damage. The 3<sup>rd</sup> Defendant averred that in the event the 1<sup>st</sup> Defendant was erroneously registered as the owner of the suit property, then the same was lawfully done and based on valid documents received by him.

### **The issues and Determination**

It is not disputed that the suit property was allocated to PW2 by the 2<sup>nd</sup> Defendant and that PW2 later transferred the allocation to PW1. It is also not disputed that the suit property was also allocated by the 2<sup>nd</sup> Defendant to the 1<sup>st</sup> Defendant, who was later issued with a certificate of lease with respect to the said property under the repealed Registered Land Act. The dispute herein revolves around the circumstances of the allocation to and registration of the suit property in the 1<sup>st</sup> Defendant's name, and there are three

main issues for determination in this regard. The first is whether the registration of Nairobi/Block 63/578 in the 1<sup>st</sup> Defendant's name was a first registration and therefore entitled to the protection afforded by section 143 of the repealed Registered Land Act, and secondly whether the registration of the said property in the 1<sup>st</sup> Defendant's name was fraudulent. The third issue is whether the Plaintiffs are entitled to the reliefs sought.

### **1. Whether the 1<sup>st</sup> Defendant's Title was a First Registration**

Counsel for the 1<sup>st</sup> Defendant submitted on this issue that the suit plot upon being surveyed was renamed Nairobi/Block 63/578 and the register to this property was opened on 10/12/2001 and the entry made on the proprietorship section showed the 1<sup>st</sup> Defendant as the first person to be so registered. Counsel submitted that by virtue of Section 143 of the repealed Registered Land Act, the 1<sup>st</sup> Defendant's title was protected and that the effect of the said section was to protect the sanctity of title. Counsel submitted further that the Plaintiff's letter of allotment is inferior to the 1<sup>st</sup> Defendant's title which is already registered and recognized in law. Counsel referred the court to a number of authorities in support of this submission including **Wreck Motor Enterprises v The Commissioner of Lands & Others, Nairobi Civil Appeal No. 71/1997**. The 1<sup>st</sup> Defendant produced as evidence the certificate of lease with respect to Nairobi/Block 63/578 issued to her on 10<sup>th</sup> December 2001.

Counsel for the Plaintiffs on the other hand submitted that the 1<sup>st</sup> Defendant's title was not a first registration as the 2<sup>nd</sup> Defendant was the original owner of a larger property from which the suit property is derived. It was his submission that the Nairobi/Block 63/578 is derived Nairobi/Block 63/286 which the 2<sup>nd</sup> Defendant is the registered proprietor and the Government being the Lessor. Counsel submitted that the 2<sup>nd</sup> Defendant surrendered the Certificate of Lease of Nairobi/Block 63/286 to the Commissioner of Lands in exchange of separate titles following sub-division into smaller portions. Counsel referred the Court to the bundle of supporting documents filed by the Plaintiffs and specifically copies of Certificate of Lease of Nairobi/Block 63/286 issued on 15/2/1994; and Instrument of Surrender of the title for Block 63/286 to the Commissioner of Lands dated 22/3/1994.

The 3<sup>rd</sup> Defendant did not call any witnesses to either affirm or dispute the Plaintiff's averments, but submitted that it has a statutory duty to receive and register documents properly presented to its office, and that it carried out its mandate in accordance with Section 32 of the Land Registration Act, after it consulted with the 2<sup>nd</sup> Defendant who confirmed that it could proceed with the registration and issuance of title to the 1<sup>st</sup> Defendant.

To determine if the 1<sup>st</sup> Defendant's registration was a first registration, I have sought guidance from the definitions given under the repealed Registered Land Act, which was the legal regime under which the 1<sup>st</sup> Defendant land was registered and which still applies by virtue of the transitional provisions in section 107 of the Land Registration Act of 2012 and section 162 of the Land Act of 2012. Section 3 of the said repealed Act defines the phrases "the register" and "to register" and as follows:

**“ ‘the register’ means the leaf of the land register kept in respect of a parcel of land or a registered lease;**

**‘to register’ means to make an entry, note or record in the register under this Act, and ‘registered’, ‘unregistered’ and ‘registration’ bear a corresponding meaning”**

Registration therefore is the making of a entry, note or record in the register of a parcel of land. A first registration in my view and given its natural meaning is the first such note, entry or record made in the register of any parcel of land. The parcel of land that is the subject of this dispute is Nairobi/Block 63/578 and not Nairobi/Block 63/286 which had long ceased to exist by the time the suit herein was filed. I have perused the certificate of lease issued to the 1<sup>st</sup> Defendant with respect to Nairobi/Block 63/578, and it shows that the register was opened on 10.12.2001 and the first entry is the 1<sup>st</sup> Defendant's registration as

proprietor on the said date. The Plaintiffs did not bring any contrary evidence that the 1<sup>st</sup> Defendant's registration was the first on the said register. It is therefore the finding of this court that the registration of the 1<sup>st</sup> Defendant as the proprietor of the leasehold interest in Nairobi/Block 63/578 was a first registration.

Being a first registration, this court is conscious of the provisions of section 143 of the repealed Registered Land Act, which read as follows:

**“(1) Subject to subsection (2) of this section, the court may order rectification of the register by directing that any registration be cancelled where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.**

**(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.”**

The protection from rectification accorded to first registration has been affirmed in various decisions of this court including **Obiero & Opiyo and Others (1972) E.A 227**, and by the Court of Appeal in **Kanyi vs Muthiora (1984) KLR 712**. The 1<sup>st</sup> Defendant in this suit is therefore also afforded similar protection, and her first registration cannot be rectified.

## ***2. Whether the registration of the suit property in the 1<sup>st</sup> Defendant's name was fraudulent.***

Having found that the registration of the 1<sup>st</sup> Defendant as proprietor of the leasehold interest in Nairobi/Block 63/578 cannot be rectified, the consideration of the second issue as to whether the said registration was fraudulent will only be for purposes of laying the issue to rest. The Plaintiffs argued in this regard that there was no evidence to indicate that PW2's allotment was cancelled. They contended that PW2's allotment was first in time, and having met all the requirements of the allotment letter as evidenced by the receipts, he was the bona fide owner of the suit plot and had capacity to transfer the same.

Further, that the 2<sup>nd</sup> Defendant had no authority to allocate the same plot without following the laid down procedures of reallocation. Counsel cited the case of **Samuel Mbugua Gachuhi –vs- City Council of Nairobi and 2 others**, HCCC NO. 1595 of 2002, where the Court found that the allotment and subsequent registration of title in favour of the 2<sup>nd</sup> allottee was irregular, null and void, and revoked the 2<sup>nd</sup> allottee's title.

As regards fraud, the Plaintiffs submitted that it was suspect how the 1<sup>st</sup> and 2<sup>nd</sup> Defendants did not produce any receipts as evidence of payments made such as rates, survey plans, land rent, stamp duty whereas the 1<sup>st</sup> Defendant is the custodian of all the records. They also submitted that DW1 was being dishonest in stating that she was instructed to surrender all the receipts to the 2<sup>nd</sup> Defendant as it was not a condition in the allotment letter. According to the Plaintiffs, this was evidence that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were acting in collusion and therefore the process of allocation and issuance of lease by the 2<sup>nd</sup> Defendant to DW1 was fraudulent.

The 1<sup>st</sup> Defendant on the other hand argued that the Plaintiff's letter of allotment is just but an invitation to treat and that it does not confer interest in land at all, therefore it cannot be used to defeat the 1<sup>st</sup> Defendant's title which is protected by law. The 1<sup>st</sup> Defendant referred the Court to a number of authorities in support of this submission including **Wreck Motor Enterprises v The Commissioner of Lands & Others, Nairobi Civil Appeal No. 71 of 1997**. The 1<sup>st</sup> Defendant further submitted that an allegation of fraud must be strictly proved, and that the Plaintiff failed to produce or adduce any evidence

to support that allegation against the 1<sup>st</sup> Defendant. She also contended that the Plaintiff had no locus to claim damages from her, as there was no contract between them.

I note that the Plaintiffs in this regard relied on the lack of any documents on the part of the 1<sup>st</sup> Defendant of the fulfilment of the conditions in her letter of allocation and the absence of a lease document entered into between the 1<sup>st</sup> and 2<sup>nd</sup> Defendant as proof of their allegations of fraud. The Plaintiffs in their Plaint outlined the particulars of fraud on the part of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants as: preparing documents of ownership in favour of the 1<sup>st</sup> Defendant over same plot whereas those with the Plaintiff were valid; Misleading the 3<sup>rd</sup> Defendant to prepare a lease in the favour of the 1<sup>st</sup> Defendant when they knew that it was fraudulent; the 2<sup>nd</sup> Defendant knowingly and fraudulently colluding with the 1<sup>st</sup> Defendant to create documents of title in favour of the 1<sup>st</sup> Defendants when the documents of title in favour of the Plaintiff had not been invalidated; and Knowingly and fraudulently creating a double allocation to the Plaintiffs' detriment.

The burden of proof in this regard was on the Plaintiffs and not the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. It was held in **Mutsonga –vs- Nyati 1984 (KLR) 425** and in **Koinange & 13 Others vs. Koinange (1986) KLR 23** in this respect that allegations of fraud must be strictly proved, and though the standard of proof may not be as to require proof beyond reasonable doubt, it ought to be more than on a balance of probabilities. The onus of discharging this burden is on the party alleging the fraud. PW3 who was an officer of the 2<sup>nd</sup> Defendant was not sure who the proprietor of the suit property was, and admitted that the true position may not be as reflected in her letter dated 6<sup>th</sup> November 2012 wherein she had stated that the 2<sup>nd</sup> Defendant's records show that PW2 was the allottee of the suit property.

No other evidence was brought by the Plaintiffs that showed an intention on the part of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to commit any of the said fraudulent acts or of their actual commission, or to disprove the 1<sup>st</sup> Defendant's explanation that she had to surrender her documents of allotment and lease upon to facilitate her registration as proprietor of the suit property. It is thus the finding of this court that the Plaintiffs have not discharged their burden of proof in showing that the registration of the suit property in the 1<sup>st</sup> Defendant's name was fraudulent.

### ***3. Whether the Plaintiffs are entitled to the reliefs sought.***

The Plaintiffs are accordingly not entitled to any declarations of ownership and consequent orders sought in light of the findings hereinabove, and also in light of the legal effect of the 1<sup>st</sup> Defendant's title. I wish to refer to the Court of Appeal's decisions in **Dr. Joseph N.K arap Ng'ok v Justice Moijo ole Keiwua and 4 others, Civil Application No NAI 60 of 1997** and in **Caneland v The Commissioner of Lands and 5 others, Civil Application No NAI 311 of 1998** in this regard. The Court of Appeal in those two decisions held that in cases of double allocation, the allottee who perfects the allotment to title gets the benefit of sanctity of title in the absence of fraud or misrepresentation. Likewise, the Court of Appeal in **Wreck Motor Enterprises v The Commissioner of Lands & Others, Nairobi Civil Appeal No. 71 of 1997** held as follows in this regard:

**“The pleadings do not disclose any fraud on the part of the second respondent. In such event, therefore, the second respondent is a bona-fide purchaser for value without notice. His title takes precedence and is supreme over all other alleged equitable rights of title. The Act is very specific on this protection and sanctity of title. In such circumstances, it is now too late and irrelevant whether or not the Commissioner of Lands ignored the appellant's application for the suit plot.”**

The Plaintiffs' suit is accordingly dismissed. However, I note that since this is a case arising out of double allocation of the suit property by the 2<sup>nd</sup> Defendant, the said 2<sup>nd</sup> Defendant is hereby ordered to pay the Plaintiffs' and 1<sup>st</sup> Defendant's costs of this suit.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this \_\_\_\_30<sup>th</sup> \_\_\_\_ day of  
\_\_\_\_January\_\_\_\_, 2014.

**P. NYAMWEYA**

**JUDGE**