

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

LAND AND ENVIRONMENT NO. 311 OF 2013

JOHN K.S. LIMO 1ST PLAINTIFF

EDNAH LIMO 2ND PLAINTIFF

V E R S U S

DR. BERNARD WESONGA OCHIENG 1ST DEFENDANT

JULIUS ALDIN JUMA 2ND DEFENDANT

DISTRICT LAND REGISTRAR KAKAMEGA3RD DEFENDANT

R U L I N G

The 1st defendant filed Kakamega HCCC NO. 305 of 2013 against the 1st defendant. He also filed an application dated 28.10.2013 seeking orders of injunction against the 1st defendant. The 1st defendant and Edna Limo filed Civil Suit No.311 of 2013 and sued the plaintiff in file No. 305 of 2013 together with two other defendants namely JULIUS ALDIN JUMA and the DISTRICT LAND REGISTRAR KAKAMEGA. They also filed an application dated 30.10.2013 seeking orders of injunction against the defendants in that suit. The two suits were consolidated and the main operating file became number 311 of 2013. The two applications were heard together.

Parties filed written submissions in respect of both applications. Mr. Kirwa, counsel for the two plaintiffs, i.e. JOHN K.S. LIMO and EDNA LIMO submitted that the 1st applicant was allocated the suit land plot number **KAKAMEGA/BLOCK II/291**. The allotment letter has not been cancelled. The plaintiffs complied with the requirements of that allocation and have been in occupation of the suit property. The 2nd defendant fraudulently obtained a title deed to the suit premises and sold it to the 1st defendant. There is no allotment letter in favour of the 2nd defendant and the plaintiffs are challenging the registration of the 2nd and 1st defendant as the owners of the land. The plaintiffs are in the process of obtaining a lease from the Commissioner of Lands. Counsel contends that whenever it is shown that there was fraud, corruption or illegality in the process of obtaining a title then such a title should be nullified. The 1st plaintiff is physically disabled and has established a prima facie case. The balance of convenience is also in favour of the plaintiffs. There is no time limit for an allotment and a title can be processed any time.

Mr. Chenge, counsel for the 1st defendant opposed the application. Counsel contends that the 2nd defendant became the registered owner of the suit land and was issued with a title deed. The 1st defendant purchased the suit land after conducting a search at the Land registry. The 1st defendant paid the Municipal rates and has his development plans approved. A consent was obtained from the Commissioner of Lands showing that the land belonged to the 1st defendant. The plaintiffs did not comply with the conditions of the allotment letter and only paid the premium in 2013 while the allotment letter was issued in **1992**. The payment was to be made within **30** days. Counsel would like the court to grant the 1st defendant's application dated 28.10.2013.

I have gone through the pleadings herein and the authorities cited by counsels for both parties. The plaintiffs' case is that the 1st plaintiff was duly allocated the land when it was still un-surveyed. The un-

surveyed plot was number **13**. The plot was later surveyed and became plot number **KAKAMEGA TOWN/BLOCK II/291**. The 1st plaintiff complied with the requirements of the allotment and is now in the process of acquiring title deed from the Commissioner of Lands. Counsel for the plaintiffs submitted that the file for the suit land at the Commissioner of Lands in Nairobi is number 145329 and it is still operating. The applicants are in possession of the suit property. The 2nd defendant did not exhibit any allotment letter and obtained the land fraudulently. The plaintiffs will suffer irreparable damage should the orders restraining the defendants from utilizing the suit property fail to be granted.

On his part the 1st defendant maintains that he bought the land from the 2nd defendant for **KShs.800,000/=**. A search was conducted before he bought the land and it showed that the land belonged to the 2nd defendant. All the land rates have been paid. The plaintiffs are not in occupation and only erected some timber polls around the plot.

The pleadings herein show that the 1st plaintiff was allocated the suit land vide an allotment letter dated **24.9.1992**. The 1st defendant annexed some photographs and it is clear to me that there is no building erected on the suit land. There is a title deed that was issued to the 2nd defendant on the **4.7.2002** for the same land. An official search dated **3.4.2009** shows that the suit land is approximately **0.06** Hectares and was owned by the 2nd defendant. The property was sold by the 2nd defendant to the 1st defendant for **KShs.800,000/=** and the 1st defendant was issued with a title deed on the **12.6.2009**. It is clear to me that the Municipal rates were paid by the 2nd defendant and a clearance certificate was issued in **August 2009**. The 1st defendant also exhibited a consent from the Department of Lands Nairobi dated **28.5.2009** issued to the 2nd defendant. The plaintiffs have not exhibited the contents of file number **145329** to enable the court know the status of the ownership as per the records in Nairobi. It is clear that from the consent issued to the 2nd defendant the records in Nairobi also recognize the 2nd defendant as the previous owner of the suit land. At this juncture the plaintiffs are expected to show to the court that they have a prima facie case with a probability of success. They also have to show that they will suffer irreparable damage in the event that an order of injunction is not granted in their favour.

The dispute involves the plaintiffs who are holding an allotment letter that was issued in **1992** and the 1st and 2nd defendants who are holding a title deed. Given the information on record the court cannot at this juncture declare the title deed held by the 1st defendant as null and void. No proof of fraud, corruption or illegality has been provided to the satisfaction of the court. The authorities relied upon by the plaintiffs involved disputes that went for full hearing and judgments were delivered. The case of **GOVAS HOLDINGS LIMITED VS TOM MAYANI OMAMI & 2 OTHERS –Mombasa HCCC No. 182 of 1999** was heard ex-parte and the plaintiff's claim was not opposed. The other authorities by the plaintiffs involved two allotment letters. The current case involves a duly issued title deed and the court cannot uphold the allotment letter against the title deed at this interlocutory stage. The allotment letter given to the 1st plaintiff required him to accept the allotment within **30** days by paying the land rent and other fees totaling **KShs.7,320/=**. The plaintiff paid **KShs.3,210/=** on the **18.4.1994**. This was already out of time. The plaintiff will have to show that he complied with the terms of the allotment letter and that the land was still available as at the time of making the further payments in the year **2010**.

In the end I do find that the plaintiffs have not established a prima facie case against the defendants. **Sections 24 and 25 of the Land Registration Act No. 3 of 2012** protects the right of registered proprietors. **Section 26** states that a certificate of title is conclusive evidence of proprietorship. It is therefore evident that until when the ownership of the 1st defendant of the suit property is proved to have been unlawfully procured, the 1st defendant is entitled to enjoy the rights of a registered proprietor before that is established. The 1st plaintiff slept on his rights and had he processed the title right away in 1992 the dispute could not have arisen. The Commissioner of Lands was free to allocate the land to another party if he found that the 1st plaintiff had not complied with the conditions given in the allotment letter. The plaintiffs' application dated 30.10.2013 is hereby dismissed. The application by the 1st defendant dated 28.10.2013 is granted in terms of prayer (3) three. Costs shall follow the outcome of the main suit.

Delivered, dated and signed at Kakamega this 18th day of September 2014

SAID J. CHITEMBWE

J U D G E