



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO 471 OF 2010**

**LILIAN WANJERI NJATHA ..... PLAINTIFF**

**VERSUS**

**SABINA WANJIRU KUGURU ..... 1<sup>ST</sup> DEFENDANT**

**THE NATIONAL LAND COMMISSION.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Background**

1. Vide a second Amended Plaintiff dated 4<sup>th</sup> June, 2018, the Plaintiff instituted this suit against the Defendants seeking for the following orders;

- i. A declaration that the Plaintiff is the legitimate owner of parcel of land known as Plot No. 12 Residential, Bahati Annexe.**
- ii. A permanent injunction restraining the Defendant by herself, her servants or agents from entering, remaining in or trespassing onto Plot 12, Residential, Bahati Annexe.**
- iii. An order that the boundary and beacons of Plot No 12 Residential, Bahati Annexe be established.**
- iv. The title issued to Felix Mwangi Kuguru for L.R 209/13403 be and is hereby cancelled and the building erected thereon be demolished.**
- v. Costs and Interests**

2. It is the Plaintiff's case that she is the owner of Plot No 12 situate at Bahati Annexe (*hereinafter the suit property*) measuring 0.02 hectares vide a letter of allotment dated 27<sup>th</sup> October, 1992 from Nairobi City Commission and that on or about the 13<sup>th</sup> November, 1995, the Commissioner of Lands fraudulently issued a letter of allotment to M/S Sky Blue Holdings who in turn sold the suit property to the deceased, Felix M Kuguru.

3. The Plaintiff averred in the Plaintiff that the Commissioner of Lands thereafter proceeded to process a grant in favour of the deceased-Felix M Kuguru with respect to land parcel No. L.R 209/13403; that sometime in 2008, Felix M Kuguru (deceased) entered into a portion of the suit property and erected a permanent structure thereon and that the deceased further purported to annex L.R 209/13403 to Plot 12.

4. Vide the Amended Defence filed on 19<sup>th</sup> February, 2020, the 1<sup>st</sup> Defendant denied all the allegations as set out in the Amended Plaintiff. The 1<sup>st</sup> Defendant averred that her deceased husband was a bona-fide purchaser for value without notice of any alleged irregularity in the administration of the suit property and that the Plaintiff has no locus to maintain the allegations with respect to orders of cancellation of the title issued to the deceased Felix Mwangi Kuguru.

5. It was averred by the 1<sup>st</sup> Defendant that any claim by the Plaintiff ought to have been against the County Government of Nairobi for allocating land that did not exist or was legitimately owned by the 1<sup>st</sup> Defendant; that the 1<sup>st</sup> Defendant has enjoyed continuous and uninterrupted possession and occupation of the suit property for over 30 years; that the 1<sup>st</sup> Defendant has completed the development of the property with the erection of residential apartments without interference by any party; and that all structures within L.R 209/13403 have been erected within the boundaries of the property and have the requisite approvals from the Nairobi County Government.

6. The 2<sup>nd</sup> Defendant did not participate in the suit.

## **HEARING & EVIDENCE**

### **The Plaintiff's case**

7. The matter proceeded for hearing on 3<sup>rd</sup> November, 2020. The Plaintiff, PW1, adopted her witness statement as her evidence in chief and produced into evidence documents as PEXHB 1-6.

8. PW1 informed the court that her husband who died on 14<sup>th</sup> July, 1998, bought the suit plot from one Damaris Aoko Ouko after which the plot was transferred to him; that he was issued with a Letter of Allotment dated 27<sup>th</sup> October, 1992; that on 1<sup>st</sup> July, 2010, she asked the Nairobi City Council to transfer the property to her and after payment of the necessary transfer fees and that the transfer was effected in her favour on 23<sup>rd</sup> July, 2010.

9. PW1 informed the court that she has since been paying rates in her own name; that sometime in 2008, she discovered that one Felix M Kuguru, the owner of plot L.R No 209/13403 had encroached on her property; and that she discovered that the deceased, Felix Kuguru, had been issued with a title by the Commissioner of Lands in respect of the suit property.

10. According to PW1, the issuance of the title deed to Felix Kuguru was illegal as the land belonged to the Nairobi City Council and could not be allocated without authority of the council and that the Commissioner of Lands did not follow the laid down procedure for allocation of public land.

11. On cross-examination, PW1 stated that the transfer of the suit property to her was endorsed on the allotment letter; that she does not have any other form of transfer nor the survey plan; that as at the time she went to pick the survey plan, someone else had built on the suit property and that she has never taken possession of the suit property.

12. On re-examination, PW1 indicated that the survey plan shows her plot and the 1<sup>st</sup> Defendant's plot are in the same area; that she has been paying rates for the land and that she was informed that there was no need for a transfer form as the transfer was endorsed on the allotment letter.

13. PW2 was an employee of Nairobi City County and a surveyor. PW2 produced in evidence his report as PEXHB-7 and a survey plan as PEXHB- 8. It was his evidence that he carried out a survey in respect of Plot No 12, Bahati Annexe, where he located Plot No 12 and L.R 209/13403; that both properties are within Bahati Estate which is owned by the Nairobi City Council and that pursuant to his findings, L.R 209/13403 overlaps and encroaches on Plot No 12.

14. It was the evidence of PW2 that L.R 209/13403 was not allocated by the County Government but Plot 12 was; that the entire scheme is wholly owned by the County Government of Nairobi under L.R No 209/5389; that the survey plan attached to the survey report shows that L.R No 209/13403 was superimposed on Plot 12 and that L.R 209/13403 is bigger than the normal size of the plots in the area.

15. On cross-examination, PW2 stated that he had not annexed on his report the title document with respect of L.R 209/5389 from which he contends that both L.R 209/13403 and the suit plot emanate from; that the said title has been referred to in the survey plan which is registered with the Director of surveys; that the cadastral map that is held by the Nairobi City County is not a registrable document and that he has not annexed evidence of Deed Plans in respect of the suit plots.

16. When referred to the title for L.R 209/13403, PW2 stated that the Deed Plan accompanying the title document was not certified; that the title was issued in 1997; that the allocation of the land to the Defendant did not emanate from the mother title in Nairobi; that the first owner of L.R 209/13403 was Felix Kuguru; that it was the first time he was seeing the approval plans for the buildings on L.R 209/13403 and that the approvals were issued by the City Planning Department.

17. In re-examination, PW2 stated that the survey plans and cadastral map in the Plaintiff's bundle refer to the same area; that the city planning department does not usually bother to determine the legality or otherwise of a property which is the subject of a building approval; that the allocation of the suit property to the Plaintiff was done in 1992 while the 1<sup>st</sup> Defendant's allocation was done in 1995 and that the ownership document of land allocated by the council is an allotment letter.

### **The 1<sup>st</sup> Defendant's case**

18. The 1<sup>st</sup> Defendant, DW1, adopted her witness statement as her evidence in chief and produced in evidence the documents filed on 28<sup>th</sup> January, 2015 as DEXB1-7, except the survey report. DW1 stated that she is the representative of her deceased husband who is the legal and registered proprietor of L.R 209/13403 comprised in Grant I.R 74977.

19. It was deponed by DW1 that she had developed the suit property within the demarcated plot boundaries; that she is a stranger to the alleged existence of Plot no 12 Bahati Annexe and that if the same exists, it is void in as far as its boundaries encroach on L.R 209/13403. It was the evidence of DW1 that she has enjoyed uninterrupted possession of the property since its purchase in 1997.

20. On cross-examination, DW1 stated that her title was signed by the then Commissioner of Lands, Wilson Gachanja, whom she does not know; that her husband purchased an unsurveyed plot within Bahati Estate; that she is unaware whether members of the public were invited to bid for the allocation of the plots within Bahati Estate and that she does not know whether any authority was given to the Commissioner of Lands to allocate her husband the land.

21. On re-examination, DW1 stated that she is not related to the former Commissioner of Lands and neither is her sister Kezia Gachanja; that she does not know whether Bahati Estate is owned by the Nairobi County Government or its successor Nairobi City County; that she does not know anything to do with the sub-division of the land in the area; that the land in dispute was purchased by her late husband and that she has a title to the suit property.

22. DW 2, a land surveyor, adopted his witness statement dated 27<sup>th</sup> January, 2015 and produced in evidence the Survey Report dated 22<sup>nd</sup> December, 2014. It was his evidence that he went to survey of Kenya and purchased the survey map; that he confirmed that all the beacons in respect of L.R No. 209/13403 were in place; that the developments on L.R 209/13403 are within the property's boundaries; that the cadastral map in the Plaintiff's Bundle is for their own use, and is not authenticated and that the Plaintiff's cadastral map does not conform with the survey plan and the same is not registered.

23. On cross-examination, DW2 testified that his mandate was only to confirm whether the building was on L.R 209/13403; that he did not involve the Plaintiff while undertaking the work; that most of the plots in that area are the same size except the 1<sup>st</sup> Defendant's Plot; that all the plot numbers are in sequence except the 1<sup>st</sup> Defendant's plot; that the survey of the 1<sup>st</sup> Defendant's plot must have been done at a different time and that he was unable to establish one beacon as there was a fence made of iron sheets on the property.

### **Submissions**

24. The Plaintiff, through her counsel, filed submissions on the 18<sup>th</sup> October, 2021 where it was submitted that the Plaintiff's evidence that she is the owner of Plot No 12 Residential Bahati Annexe is not challenged; that the Plaintiff's evidence is supported by her witness who is a surveyor with the Nairobi City Council who testified that the council subdivided the land and allocated Plot No 12 to Stephen Maina, and that L.R No 209/13403 claimed by the 1<sup>st</sup> Defendant falls within L.R 209/5389 belonging to the council and was not allocated by the council and that L.R 209/13403 has encroached on Plot 12.

25. It was submitted that the 1<sup>st</sup> Defendant did not have a letter of allotment for L.R 209/13403 and did not know how the suit property was acquired and that DW2's information was limited to establishing beacons and in doing so, he relied on the survey map from Survey of Kenya

26. The 1<sup>st</sup> Defendant, through her counsel submitted that the Plaintiff's suit is fatally defective *ab initio*; that the Plaintiff in alleging that the Commissioner of Lands illegally allocated land belonging to the defunct county government ought to have enjoined the Commissioner of Lands to respond to such serious allegations; that no evidence was led to establish that the suit property was owned by the defunct Nairobi City Council and that the city council should have been joined in these proceedings to enable the court establish whether there was an ownership dispute between the council and the government.

27. It was submitted that the Plaintiff has no locus to litigate, assert or enforce the proprietary rights of the council if any; that as the Plaintiff has not alleged fraud in the acquisition of the title by the 1<sup>st</sup> Defendant or her deceased husband, no cause of action accrued to her and that the Plaintiff has further not sought any remedies against the 2<sup>nd</sup> Defendant.

28. The 1<sup>st</sup> Defendant's counsel submitted that the 1<sup>st</sup> Defendant's husband duly acquired the suit property as a bonafide purchaser for value without notice of any alleged irregularities as defined by the Court in *Kazungu Fondo Shutu & another vs Japhet Noti Charo & another [2021] eKLR* in which the court relied on the definition of a bona fide purchaser as set out in *Katende vs Haridar & Company Limited*.

29. Counsel submitted that the 1<sup>st</sup> Defendant's title is indefeasible under the provisions of **Section 23(1)** of the **Registration of Titles Act** as well as **Section 24, 25 and 26** of the **Land Registration Act**; that the letter of allotment relied on by the Plaintiffs is not registered under the Act and is incapable of passing any interest in the property and that the title held by the Defendant is in any event superior to the title by the Plaintiff. Reliance was placed on the cases of *Shadrack Kuria Kimani vs Stephen Gitau Nganga & anor [2017] eKLR* and *Stephen Mburu & 4 ors vs Comat Merchants Ltd Vs Anor [2012] eKLR*.

### **Analysis & Determination**

30. The Plaintiff instituted this suit seeking *inter-alia*, a declaration that she is the legitimate owner of Residential Plot No 12, Bahati Annexe, permanent injunctive orders against the Defendant preventing her from trespassing onto Plot 12 aforesaid, and an order for the cancellation of the title L.R 209/13403 issued to Felix Mwangi Kuguru.

31. It is the Plaintiff's case that her deceased husband is the legitimate proprietor of Plot 12, Bahati Annexe measuring 0.02 hectares; that he was duly issued with a letter of allotment dated 27<sup>th</sup> October, 1992; that sometime in 2008, she discovered that the owner of L.R No 209/13403 had encroached onto her plot 12 and constructed permanent structures thereon and that the said L.R 209/13403 was irregularly and fraudulently allocated to the deceased without authority of the Nairobi City Council who owns the property.

32. In support of her case, The Plaintiff adduced a letter of allotment dated 27<sup>th</sup> October, 1992 in the name of Stephen M Maina, the Certificate of Death of Stephen M Maina, the letter from the Chief dated 24<sup>th</sup> June, 2010 confirming that she is the widow of Stephen M Maina, receipts for ground rent for the year 2010 and the surveyor's report dated 27<sup>th</sup> September, 2017 which was produced by the surveyor.

33. In response, the 1<sup>st</sup> Defendant, asserts that she is a stranger to the suit property herein; that her husband is the legal and registered proprietor of L.R 209/13403 situate in Nairobi; that in the event Plot No 12 exists, the same is void in as far as its boundaries encroach on the 1<sup>st</sup> Defendants' property; that she has been in continuous uninterrupted possession of the suit property since its purchase in 1997 and that the Plaintiff lacks locus to sustain the allegations made in the 2<sup>nd</sup> Amended Plaintiff.

34. The 1<sup>st</sup> Defendant produced in evidence a sale agreement between Felix Mwangi Kuguru and M/S Skyblue Holding Limited dated 18<sup>th</sup> March, 1997, the Title for L.R 209/13403 in the name of Felix Mwangi Kuguru issued on 1<sup>st</sup> November, 1995, the Grant of probate of written will of Felix Mwangi Kuguru, building approvals from Nairobi City Council, rates payments receipts for the year 2014, the surveyors report and correspondence with the Plaintiff's counsel with respect to the suit property

35. In light of the foregoing, the issues that arise for determination are;

- i. Whether the Plaintiff has *locus* to seek for cancellation of the Defendants title to L.R 209/13403?**
- ii. Whether the Defendant's title to L.R 209/13403 should be cancelled?**
- iii. Whether there has been any double allocation and/or encroachment onto Plot 12 as alleged by the Plaintiff?**
- iv. What are the appropriate orders to issue?**

36. According to the 1<sup>st</sup> Defendant, the Plaintiff lacks the *locus standi* to institute and maintain the prayer seeking for cancellation of his title and demolition of the building thereon; that whereas the Plaintiff claims that L.R 209/13403 belongs to the Nairobi City Council, the Council is not a party to this suit and that the Plaintiff cannot purport to enforce its proprietary rights in the manner she has done.

37. It is the Defendant's case that no allegations of fraud have been made against her or her deceased husband in the acquisition of L.R 209/13403, and that no cause of action lies against her.

38. *Locus standi* was defined by the Court of Appeal in the case of Alfred Njau vs City Council of Nairobi [1983] eKLR as follows:

**“The term means a right to appear in Court and, conversely, as is stated in Jowitt's Dictionary of English Law, to say that a person has no *locus standi* means that he has no right to appear or be heard in such and such a proceeding.”**

39. Similarly, in the case of Law Society of Kenya v Commissioner of Lands & 2 others [2001] eKLR, the court held that;

**“Locus standi signifies a right to be heard. A person must have sufficiency of interest to sustain his standing to sue in court of law.”**

40. In the present matter, the Plaintiff is seeking to impeach the 1<sup>st</sup> Defendant's title on the basis that it was irregularly allocated to the deceased. According to the Plaintiff, the suit property was allocated to the 1<sup>st</sup> Defendant without the authority of the Nairobi City Council, its rightful owner. Whereas the court agrees with counsel's submission that the Nairobi City Council would have been best placed to institute a suit claiming proprietary interest in the property, the court is alive to the fact that the Plaintiff's contention is that her Plot No 12 has been subsumed by and/or encroached on, by L.R 209/13403.

41. Indeed, if, as alleged by the Plaintiff, Plot 12 having been first allocated has been subsumed in L.R 209/13403, it follows that the delineation and subsequent issuance of the title of L.R 209/13403 was irregular or amounted to double allocation of property falling within plot 12. The court therefore finds that the Plaintiff has sufficient *locus* in this regard.

43. The evidence adduced in this court shows that the 1<sup>st</sup> Defendant is the registered proprietor of L.R 209/13403 having being so registered on 1<sup>st</sup> November, 1995. By dint of the provisions of **Section 107** of the **Land Registration Act, 2012**, the law applicable to the title held by the 1<sup>st</sup> Defendant is the Registration of Tiles Act (*now repealed*).

43. The repealed **Section 23 (1)** of the **Registration of Titles Act (RTA)** and the new **Section 26 (1)** of the **Land Registration Act, No. 3 of 2012** provides for the doctrine of indefeasibility of title as envisaged under the Torrens System of registration. **Section 23 (1)** of the **Registration of Titles Act** provides as follows:

**“23 (1) The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive of evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.”**

44. From the foregoing it is clear that pursuant to the provisions of **Section 23(1)** of the **RTA** (repealed), a title to land can only be challenged if obtained by fraud or misrepresentation to which the person is proved to be a party.

45. It is trite that allegations of fraud must be specifically pleaded and proved. This position was reiterated by the Court of Appeal in the case of Moses Parantai & Peris Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) vs Stephen Njoroge Macharia [2020] eKLR, in which the court cited the case of Vijay Morjaria vs Nansingh Madhusingh Darbar & another [2000] eKLR, where 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.”**

46. Having perused the 2<sup>nd</sup> Amended Plaintiff, it is apparent that other than the allegations of trespass by the Plaintiff, no allegation of fraud has been particularized nor indeed pleaded by the Plaintiff as against the 1<sup>st</sup> Defendant with respect to the acquisition of L.R 209/13403. Further, the Plaintiff has not tendered any evidence to show that the Defendant acquired title for L.R 209/13403 from M/S Skyblue holdings fraudulently or she was aware that M/S SkyBlue Holdings was irregularly or fraudulently allocated the suit property.

47. The Plaintiff lays claim over Plot No. 12. The Plaintiff relies on a Letter of Allotment dated 27<sup>th</sup> October, 1992 which allocated her Plot No. 12 –Residential Plot-Bahati Annexe. From that letter, it is not possible to decipher where on the ground the stated plot is located. Indeed, the letter of allotment does not have an approved part development plan.

48. Both parties called surveyors to testify. PW2, a surveyor from Nairobi County Government indicated in his report that the Plaintiff’s Plot No 12 exists within Bahati Annex Scheme which falls under L.R 209/5389; that the plot belongs to the Plaintiff and that the Plaintiff is up to date on the necessary payments. It was his evidence that L.R 209/13403 was not allocated by the county but by the Commissioner of Lands which was an “*erroneous*” double allocation.

49. No evidence was adduced by PW1 and PW2 with respect to the ownership of L.R 209/5389, and the alleged double allocation. All this information would have been within the reach of PW2 who is an employee of the county government of Nairobi.

50. DW 2, a surveyor, authored a report which showed the physical location of L.R 209/13403 which corresponds with the title and the Deed plan. DW2 also produced in evidence a survey plan showing the location of L.R 209/13403. It is crucial to note that whereas both maps adduced by the surveyors confirm the existence of L.R 209/13403, only the cadastral map adduced by PW2 alludes to Plot 12.

51. Further, it would appear that the properties within Bahati Annexe have title numbers. This begs the question as to why the Plaintiffs plot 12 has not been surveyed and issued with a title or a land reference number especially in light of the allegations that it was allocated first.

52. It is trite that a letter of allotment is not capable of conferring an interest in land, being nothing more than an offer, awaiting the fulfilment of the conditions stipulated therein by the offeree. This was affirmed by the Court of Appeal in **Joseph N.K. Arap Ng’ok vs Moijo Ole Keiwua & 4 others [1997] eKLR**

**“It is trite that such title to landed property can only come into existence after issuance of letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of title document pursuant to provisions in the Act under which the property is held.”**

53. In the absence of any evidence confirming that all the conditions in the letter of allotment were met, the allotment letter produced by the Plaintiff remains an intention on the part of the City Commission, which the commission could rescind.

54. On the other hand, none of the reports by the surveyors has contradicted the existence of L.R 209/13403 on the ground. The said reports have also not shown that the Deed Plan annexed on the 1<sup>st</sup> Defendant’s title is a forgery. It therefore follows that in as far as the Plaintiff’s title and boundaries as delineated on the Deed plan remain unimpeached, there cannot be any other plot within the said boundaries.

55. That being the case, it is the finding of this court that the Plaintiff has failed to prove her case against the 1<sup>st</sup> Defendant on a balance of probabilities.

56. For those reasons, the Plaintiff’s suit is dismissed with costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 21<sup>ST</sup> DAY OF APRIL, 2022**

**O. A. ANGOTE**

**JUDGE**

**In the presence of:**

No appearance for the Plaintiff

No appearance for the Defendants

Court Assistant: John Okumu