



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
ENVIRONMENTAL & LAND CASE 442 OF 2011
MAGUTU ELECTRICAL SERVICES
LIMITED.....PLAINTIFF

- **VERSUS** -

HAKI IMETIMIZWA COMPANY LIMITED.....1ST
DEFENDANT

JOSEPH NDURANU.....2ND DEFENDANT

MIRIAM NYAWIRA NGURE.....3RD DEFENDANT

THE COMMISSIONER OF LANDS.....4TH DEFENDANT

RULING

1. This is the plaintiff’s notice of motion dated 17th November 2011. The plaintiff prays for injunction to restrain the defendants from entering or interfering with the plaintiff’s quiet possession of an unsurveyed plot number “**G**” Thika Municipality. The plot is variously described as Ref 4953/1792 or Thika Municipality Block 14/96. The motion is expressed to be brought under order 40 rules 1 and 2 of the Civil Procedure Rules 2010.

2. The primary grounds are deponed to in the affidavit of Johnson Githaiga, a director of the plaintiff, sworn on 17th November 2011. There is also a supplementary affidavit of the same deponent sworn on 1st March 2012. The plaintiff avers that was the original allottee of an industrial plot LR 4953/445, Thika. On 12th February 1987, the plaintiff applied to be reinstated as the allottee. That application was rejected. The commissioner of lands instead allocated the plaintiff an alternative plot number “**G**” or 4953/1792 in Thika, the suit land. This is shown in the annexed survey plan marked “**B**”. The plaintiff avers that it took up possession and deposited some building materials there. The plaintiff’s case is that the 3rd defendant was irregularly allocated the same plot. The 3rd defendant in turn has sold the plot to the 1st defendant. On 17th November 2010, the local authority approved construction by the 1st defendant of a boundary wall. Construction by the 1st or 2nd defendant is going on. The plaintiff challenges the validity of title by the 3rd defendant. It avers that it is the lawful owner and should be protected by an order of injunction.

3. The motion is contested. The 3rd defendant has sworn a replying affidavit dated 8th February 2012. Her case is simple. By a letter of allotment dated 29th May 1989, the Commissioner of Lands, the 4th defendant, allotted her an unsurveyed plot number 3 Thika municipality measuring 0.5773 ha and she took possession. On 27th March 1997 she paid Kshs 196,534 to the 4th defendant as stand premium, land rent, stamp duty, survey fees and related charges. The receipt is attached. On 17th December 2002, she was issued with a lease dated 27th November 2002 annexed to her affidavit. In the year 2010, she sold the property to the 1st defendant. She thus denies the plaintiff's claims or allegations of double allotment. She avers she was the first allottee on 29th May 1989 and that the subsequent allotment to the plaintiff on 9th June 1989 was irregular and void. As the plaintiff alleges that it paid only Kshs 20,000, the 3rd defendant avers that the plaintiff did not comply with the terms of the letter of allotment. It is the 3rd defendant's case that the plaintiff would only be entitled to a refund of that sum. She prays that the application be dismissed with costs.

4. The 2nd defendant has also filed a replying affidavit sworn on 21st November 2011. He avers that he was privy to the transfer of the suit land from the 3rd defendant to the 1st defendant. He avers that the plaintiff has not exhibited any document to prove ownership of the suit land. It is also deponed that the plaintiff did not pay the sum of Kshs 163,140 required by the letter of allotment and that the plot the plaintiff claims is only shown on an "undated, unstamped draft" survey plan. The 2nd defendant's case is that the plot claimed by the plaintiff is different from that of the 3rd defendant that she sold to the 1st defendant. The 2nd defendant also avers that the plaintiff has been indolent by failing to process a title for over 21 years. The 2nd defendant admits that he was contracted by the 1st defendant to develop the suit land. He denies that the plaintiff is in possession or has deposited building materials there.

5. The 1st defendant asserts its right to title by virtue of the certificate of lease marked "ODO 1" to the replying affidavit of Oginga Odongo. A copy of the sale agreement between it and the 3rd defendant for consideration of Kshs 6,000,000 is also attached. The 1st defendant's case is that its title is indefeasible under sections 27 and 28 of the Registered Land Act (now repealed). It is submitted that the plaintiff's letter of allotment refers to a different property; is not backed by full consideration; and, cannot override the plaintiff's certificate of lease.

6. I have heard the rival arguments. The plaintiff's claim is built upon the foundation of a letter of allotment dated 9th June 1989. From the evidence before me, that letter was issued subsequent to the 3rd defendant's letter of allotment dated 29th May 1989. The latter was thus first in time. The plaintiff was required to pay the sum of Kshs 163,140 to the Commissioner of lands as consideration. In the supplementary affidavit, the plaintiff concedes paying only Kshs 20,000. No evidence has been provided besides the receipt marked "JMG 1" for Kshs 20,000, to show that the full consideration of the letter of allotment was met. That letter of allotment was issued nearly 21 years ago. The plaintiff never progressed it logically to grant of a lease or to be registered as the owner. I then juxtapose that against the claim by the 3rd defendant. The 3rd defendant's letter of allotment was first in time. She paid the full consideration of Kshs 196,534 and was issued with a certificate of lease under the Registered Land Act dated 27th November 2002. She sold the property to the 1st defendant. The 1st defendant has been registered as the current owner by virtue of a certificate of lease dated 7th December 2002. The 1st defendant bought the suit land for Kshs 6,000,000 and is now in possession.

7. There is also the matter of discrepancies in description of the suit land or double allotment. The plaintiff's position is explained at paragraph 1 (ii) and (iii) of the supplementary affidavit of Johnson Githaiga as follows;

"(ii) The letter of allotment of 29th May 1989 to the 3rd defendant is suspicious and raises a lot of questions as it is clear the Part Development Plan (PDP) attached to it shows plot numbers in letters, that is, A, B, C, D, E and then '3' which is handwritten. Also plot number C in the said PDP, has another number, '2' which is also handwritten. It is therefore clear that these are inconsistencies. The only

conclusion one gets is that the **PDP** attached to my letter of allotment (annexure 'b' in the supporting affidavit), plot 'G' was later on amended by hand to read '3' and subsequently "allocated" to the 3rd defendant using a backdated letter of allotment.

(iii) Further, in the 3rd defendant's letter of allotment, the area of the plot is indicated as 0.5773 hectares which is the actual area which finally appeared on the certificate of lease. If the plot was allocated as an "unsurveyed" then the specific area would be unknown. Hence the area of 0.6 hectares (approximately) which appears in my company's letter of allotment".

8. I think that is an arguable point that will be fully ventilated at the trial on tested evidence. But at the moment, the plaintiff has not persuaded me that full consideration passed or that its letter of allotment would override a registered interest in the suit land in favour of the plaintiff. I say so because sections 27 and 28 of the Registered Land Act (now repealed) are express on the effect of registration. They provide;

"27. Subject to this Act –

(a) 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 or appurtenant thereto;

(b) The registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.

28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act".

9. I am also alive to the guiding authorities that a letter of allotment does not *ipso facto* confer a good title to a property. In Wreck Motor Enterprises Vs The Commissioner of Lands and others Nairobi, Civil Appeal 71 of 1997, Court of Appeal (unreported) the court delivered itself thus;

"In our view, the endorsement or the appending of his signature by H.E. the President on the applications to the Commissioner of Lands for the suit plot or for that matter any other unalienated Government Land is not sufficient to grant title over any land to anyone. H.E. the President only approves the application for consideration by the Commissioner of Lands for allocation of any such property. It does not amount to the applicants obtaining title to such lands. Title to landed property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of title document pursuant to provisions held. See Dr. Joseph N.K. Arap Ng'ok Vs Justice Moijo ole Keiwa & 4 others, Civil Application No. NAI.60 of 1997 (unreported)".

10 A letter of allotment confers a temporary right that becomes subservient to a registered interest in the land. Jaj Super Power cash & carry Limited Vs Nairobi City Council and others Nairobi, Civil Appeal 111 of 2002, Court of Appeal, (unreported), Harold Gerald Rurigi Vs Joseph Ougo and others HCCC 1441 of 2005 (2008) e KLR. There are allegations of fraud against the defendants. I am well alive to the cardinal precept of the law of evidence that he who alleges must prove it. See Koinange and 13 others Vs Koinange [1986] KLR 23. The standard of proof for fraud is very high approaching but below proof beyond reasonable doubt. See Ratilal Gordhanbhai Patel Vs Lalji Makanji [1957] E A 314, Urmila Mahindra Shah Vs Barclays Bank International and another [1979] KLR 67. It requires proof beyond the usual standard of balance of probabilities in civil cases.

11. The issue of fraud can thus only be fully determined at the trial. On that score, I agree with the plaintiff's citation of John Elias Kirimi Vs Martin Maina Nderitu and others HCCC ELC 320 of 2011 [2012] e KLR. But at the present stage, I am not persuaded that the plaintiff has established a strong case on the grounds of fraud. I do not wish to comment further to avoid prejudicing the trial court. The 3rd defendant had urged me to find that the plaintiffs case is dead fish in the water by virtue of section 143 of

the Registered Land Act (now repealed). As to whether the 3rd defendant's title, as a first registered owner, is indefeasible will be a matter of full evidence at the trial. It is, in view of the allegations of fraud, a mixed basket of law and fact. But I would agree, *prima facie*, that the interests of the 3rd defendant at this stage point to superiority over the claims by the plaintiff. See Hannah Ithebu and another Vs Joel Ngugi and others Civil Appeal 86 1999, High Court [2005] e KLR.

12. When a litigant approaches the court for injunction, he must rise to the threshold for grant of interlocutory relief set clearly in Giella Vs Cassman Brown and Company Limited [1973] E.A 358. Those principles are first, that the applicant must show a *prima facie* case with a probability of success; secondly that he stands to suffer irreparable harm not compensable in damages; and thirdly, if in doubt, the court must assess the balance of convenience. Being a discretionary remedy, there is also ample authority that a party, who has misconducted himself in a manner not acceptable to a court of equity, will be denied the remedy. See Kenya Hotels Limited Vs Kenya Commercial Bank and another [2004] 1 KLR.

13. I am thus unable to say that from the evidence and the law the plaintiff has made out a strong *prima facie* case. And even if I were in doubt, the value of the suit land can be ascertained and damages would be a sufficient remedy. And even on that score, the plaintiff has not shown that it met the full consideration under the terms of the letter of allotment. As the 1st and 3rd defendants had been registered as proprietors under the Registered Land Act, the balance of convenience does not tilt in favour of the plaintiff either.

14. For all the above reasons, the plaintiff's notice of motion dated 17th November 2011 lacks merit. I dismiss it with costs to the defendants.

It is so ordered.

DATED and DELIVERED at NAIROBI this day 21st of June 2012.

G.K. KIMONDO

JUDGE

Ruling read in open court in the presence of

Ms Osoro for Kariuki for the Plaintiff.

Mr. Mbaluto for the 1st Defendant.

Mr. Mbaluto for Mungai for the 2nd Defendant.

Mr. Mburugu for Mureithi for the 3rd Defendant.

No appearance for the 4th Defendant.