JAMES P. MAINA MURIUKI.....PLAINTIFF

VERSUS

MOSES MAINA NGUGI.....1ST DEFENDANT

KAHAWA SUKARI LIMITED.....2ND DEFENDANT

JUDGMENT OF THE COURT

The Plaintiff brought a suit against the Defendants by way of Plaint dated 14th February 1997, as amended in 19th June 2007 and further amended in the Amended Plaint dated 17th November 2008. The Plaintiff is seeking the following substantive orders in the said Plaint:

1. A permanent injunction restraining the two Defendants by themselves, servants and or agents, from constructing, alienating or in any way interfering with the Plaintiff's plot No. 3421 situated in Kahawa Sukari (hereinafter referred to as the suit plot).

2. A Mandatory injunction to compel the 1st Defendant to vacate and remove his building materials from the suit plot or in the alternative both Defendants to be compelled to compensate the Plaintiff for his plot at the current market value of Kshs.12.5 million.

3. An order compelling both Defendants to restore the said plot back to the Plaintiff.

The Plaintiff's claim is that at all material times he was the owner of the suit plot, having bought the same from the 2nd Defendant on 20th January, 1995, who issued him with an allotment certificate for plot number 3421 of Kahawa Sukari Limited upon payment of Kshs.200,000/=. Further, that on 4th December 2006 when he went to inspect the said plot, he found a building being constructed on it by the 1st Defendant. The Plaintiff alleges that despite written notice by himself and the 2nd Defendant to desist from alienating the said plot, the 1st Defendant persists in constructing in it.

The 1st Defendant filed a Defence on 27th February 2007, which was later amended in the Amended Defence dated 28th November 2008 and filed on the same date. The 2nd Defendant was served with the summons and Amended Plaint according to the affidavit of service on the court record sworn on 13th January 2009 by Jared Andale, a process server of the High Court. The 2nd Defendant entered appearance 0n 1st March 2007 but did not file a defence, and interlocutory judgment was entered against it on 23rd March 2009.

The 1st Defendant in his Amended Defence denied the Plaintiff's claim and averred that he was and still is the owner and has been legally in occupation of the suit plot, having bought the same from its original owner Charles Magero. Further, that the said transfer was accepted and registered by the 2nd Defendant

who issued him with an allotment certificate for plot No. 3421, and he took possession of the plot and commenced developments on it.

The hearing of the Plaintiff's suit proceeded on 6th December 2012 and 13th February 2012, and the Plaintiff testified on his own behalf. The Plaintiff averred that he bought the suit plot from the 2nd Defendant and produced in evidence a bundle of receipts issued by the 2nd Defendant between 1st October 2004 and 5th August 1995 totalling to Kshs 200,000 as his exhibit No. 1. He also produced an allotment certificate with respect to the suit plot issued to him on 30th September 1994 as his exhibit No. 2 and evidence of payment for a title deed as exhibit 3, namely a receipt no 15037 dated 13th July 2006 for Ksh 36000/=.

The Plaintiffs produced various correspondence to show his entitlement, starting with an undated letter purporting to allow him to take possession, a letter dated 20th September 2006 by his lawyers to the 1st Defendant asking him to stop possessing the suit plot, a reply from the 1st Defendant's lawyers dated 4th October 2006, and letters dated 5th December 2006 to the Plaintiff and 1st Defendant to wherein the 2nd Defendant admit to have mistakenly offered the same plot twice and offer the 1st Defendant an alternative plot. The Plaintiff further stated that despite these letters and court orders the 1st Defendant had refused to vacate the plot and had continued with construction thereon.

Upon cross-examination on the alterations made to the receipts and allotment certificate he produced in evidence, the Plaintiff denied making the said alterations. He also denied knowing that the court orders he referred to required him to pay a deposit to court.

The 1st Defendant testified on his own behalf, and averred that he bought the suit plot from the original allottee one Charles Magero, after seeing an advertisement for its sale in the *Daily Nation* newspaper in January 2006. The said transaction was conducted through the 2nd Defendant who had allocated the said Charles Magero the said plot, and the 1st Defendant produced a bundle of documents evidencing the said transaction as his exhibit No.1. The 1st Defendant referred the court to the bundle particularly the allotment certificate issued to him by the 2nd Defendant dated 8th March 2006, and the cheque dated 8th March 2006 for Kshs 1,000,000/= being the purchase price paid to the said Charles Magero.

Also in the bundle were the receipts of payments made by the said Charles Magelo to the 2nd Defendant with respect to the said plot between 13th October 2004 and 9th January 2006. The 1st Defendant further testified that he had paid for and received planning permission from the 2nd Defendant and Ruiru Municipal Council to commence the construction on the suit plot and produced evidence of the payments made and approved plans. Further, that he had already completed construction of a residential house on the said plot.

Upon cross-examination the 1st Defendant clarified that he first knew of the Plaintiff's claim on 2oth September 2006 upon receiving the demand letter from Plaintiff's lawyer. Further, that the 2nd Defendant never resolved the issue of the double allocation of the suit plot and did not give him any other allocation. The 1st Defendant also confirmed receiving injunction orders, and stated that at the time of receipt he stopped constructing on the suit plot, and was advised to continue with the construction by his lawyer on the ground that the Plaintiff's application was dismissed by the Court.

The Parties were given leave to file written submissions, and the Plaintiff in submissions dated 27th February 2012 argued that the 1st Defendant's defence should be dismissed in view of the letter from 2nd Defendant advising him that plot No. 3421 belongs to the Plaintiff and offering him an alternative plot. The Plaintiff stated that they were praying for general damages for trespass and mesne profits from the date of the Plaintiff's letter to 1st Defendant of 20th September 2006, plus costs and interest thereof.

The Plaintiff further submitted that the 2nd Defendant had admitted liability in their letter dated 5th

December, 2006 to the Plaintiff in which it apologized for the mistake made, and the Plaintiff is entitled to all prayers sought in his plaint as against both Defendants jointly and severally. The Plaintiff relied on the authority of **Gitwany Investment Limited Vs. Tajmal Limited & 3 others, HCCC 1114 of 2002** andnoted that in the present suit there are no titles and therefore 2nd Defendant remains the authority to offer and withdraw.

The 1st Defendant in written submissions dated 26th March 2012 argued that at the time he purchased and took possession of the suit plot there was no claim on it, neither was there any encumbrance on the property. He is therefore an innocent purchaser for value without notice, and the Plaintiff cannot purport to deprive him of his title to the property. Further, that there is no evidence to show that the Plaintiff was in possession of the suit premises nor is there any evidence to show that when the 1st Defendant purchased the property he was aware that the same had also been allocated to the Plaintiff. There was also no lawful order in force to stop the 1st Defendant from construction as the temporary order that was given was vacated.

The 1st Defendant also submitted that the alleged mistake by the 2nd Defendant is unilateral and the same cannot be visited on the innocent 1st Defendant and relied on the authority of **Sheikh Brothers Limited vs Arnold Julius Ochsner and Another (1957) E. A 86 in this regard**. In the circumstances it was stated that the Plaintiff can only seek his remedies against 2nd Defendant.

Lastly, the 1st Defendant submitted that there is interlocutory judgment against the 2nd Defendant obtained by the Plaintiff, and its effect under order 10 rule 4(2) of the Civil Procedure Rules is that the Plaintiff has been awarded a sum of Kshs.12.5 million in prayer b of the Amended Plaint as a liquidated claim, and since this was an alternative prayer all the other prayers in the Amended Plaint must fail. Further, that the Plaintiff is at liberty to pursue the 2nd Defendant under order 10 rule 5 for payment of the sum of Kshs.12.5 million.

I have carefully read and considered the pleadings and evidence and arguments by the parties. There are three main issues for consideration. The first is whether there was a valid allocation to the Plaintiff and 1st Defendant of the suit plot by the 2nd Defendant. The second issue is if the allocations are valid, what is their legal effect, and thirdly whether the Plaintiff has established by a balance of probability that he is entitled to the remedies sought.

On the first issue, The Court of Appeal in **Dr. Joseph N.K. arap Ngok v Justice Moijo ole Keiwa and 4 others, Civil Application No.NAI 60 of 1997** stated as follows with regard to allotment:

"Title to landed property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter of allotment and actual issuance thereafter of title document pursuant to provisions held."

Therefore so long as parties meet the conditions of an allocation, then that allocation is valid. Both the Plaintiff and 1st Defendant have brought evidence to show payments made and allocation of the suit plot by the 2nd Defendant. The Plaintiff's certificate of allocation was issued by the 2nd Defendant on 30th September 1994, while that of the 1st Defendant was issued on 8th March 2006. It is therefore the finding of this Court that this was a case of double allocation and both allocations were valid.

On the second issue as the legal effect of the allocations, the Court of Appeal **Dr. Joseph N.K. arap Ngok v Justice Moijo ole Keiwa and 4 others, Civil Application No.NAI 60 of 1997** further held that in cases of double allotment, a party who has been issued a good title takes precedence over all other alleged equitable rights to the title. Neither the Plaintiff nor the 1st Defendant has brought any evidence of a title to the suit plot, and their interests in the suit plot therefore remain equitable interests. The case of **Gitwany Investment Limited Vs. Tajmal Limited & 3 others, HCCC 1114 of 2002** is distinguished on this ground, as it involved parties who had titles in their names to the land in question.

The legal effect of the said allocations can only be determined by applying the fundamental priority rules. These rules are that firstly, equitable rights bind the world except the *bona fide* purchaser for value of a legal estate without notice of the equitable right. Secondly, where the *bona fide* purchaser is a purchaser of an equitable interest, the rule is that as between competing equitable interests the first in time prevails, as it is an established principle that equitable interests rank in order of creation.

In the present case I have perused the certificates of allocation issued by the 2nd Defendant to the Plaintiffs and 1st Defendant. Despite the alterations pointed out by the 1st Defendant to the certificate of allocation, I note that the final payment of Kshs 150,000/= for the suit plot was made by the Plaintiff on 6th August 1995. It is my finding that on the said date the Plaintiff's equitable interest on the suit plot was created, and he has established on a balance of probability that his equitable interest therefore ranks first in time to that of the 1st Defendant.

I now need to consider whether the Plaintiff is entitled to the remedies sought, having established his prior equitable interest. On the permanent and mandatory injunction sought, the general principle applies that these remedies will not issue if damages are an adequate remedy. I am also guided by the decision in **Amritlal vs City Council of Nairobi (1982) KLR 75** that in cases of double allocation the appropriate remedy is damages to be paid by the allocating authority, especially in circumstances where they are financially capable .

Some of the injunctions sought are also incapable of being performed by the 1st Defendant as the legal title to the suit plot is with the 2nd Defendant. In addition, the hardship that these remedies will cause to the 1st Defendant given that he was an innocent purchaser for value would not result in a fair result. For these reasons I find that the said injunctions cannot issue as against the 1st Defendant.

The Plaintiff sought an alternative remedy in the Plaint, that both Defendants to be compelled to compensate the Plaintiff for his plot at the current market value. The Plaintiff's Counsel made an oral application before the hearing on 6th December 2012, which application was allowed by this Court to amend the current market value in the said prayer from Kshs 2.5 million to Kshs.12.5 million. The Plaintiff also claimed general damages.

Can the sum of 12.5 million claimed by the Plaintiff be taken to be liquidated damages subject to be paid by the 2nd Defendant upon the entering of the interlocutory judgment against it, as was submitted by the 1st Defendant? My answer to this question is two-fold. Firstly, the fact that the prayer for payment of Kshs 12.5 million was amended and not served on the 2nd Defendant has the effect of discharging any interlocutory judgment that may have been entered with respect to the said prayer.

Secondly, the Court of Appeal in **Gurbaksh Singh & Sons Limited vs Njiri Emporium Ltd, (1985) KLR 695** held that a sum does not become liquidated just because it is claimed, but only if it is agreed or the events on which it is based reveal it can be calculated independently of the sum claimed. If the ascertainment of the sum claimed requires investigation beyond mere calculation, then the sum is not a debt or liquidated demand, but constitutes damages at large.

In the present suit the sum of Kshs.12.5 million claimed in prayer (b) of the Amended Plaint is not agreed upon, neither is there any evidence provided by the Plaintiff as to how the said sum was reached. The sum does not therefore qualify as a liquidated demand, and it can therefore only be claimed as special damages which require be specifically pleading and proving. No such proof has been provided by the Plaintiff of the market value of the suit property, or of the damage suffered by the Plaintiff, and the claim for Kshs 12.5 million and general damages must fail.

Lastly as regards the liability of the 2nd Defendant, I find that the Plaintiff brought evidence to show the said Defendant's admission to having made a mistake in the double allocation of the suit plot to both the Plaintiff and 1st Defendant, and its willingness to allocate an alternative plot to remedy the situation.

Arising from the foregoing reasons and findings, this Court enters judgment for the Plaintiff on the following terms:

a) The 2nd Defendant is hereby ordered to compensate the Plaintiff for his plot by allocating to the Plaintiffa similar plot of equivalent size to Plot 3421 in Kahawa Sukari within 30 days of service of this judgment, failing which the Plaintiff is at liberty to apply for further orders.

b) The 2nd Defendant shall meet the costs of this suit with interest at court rates from the date of this judgment.

Dated, signed and delivered in open court at Nairobi this __30th_ day of _July_, 2012.

P. NYAMWEYA
JUDGE