



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENTAL & LAND CASE 353 OF 2007

DOROTHY WACERA MACHARIA and APOFIA WANGUI KINUTHIA
(Suing in the capacity as the administratrices of the estate of the
late JOHN GICHUKI THOGO deceased)1ST PLAINTIFF

JOYCE NINGI MUKUNDI2ND PLAINTIFF

- VERSUS -

THE ATTORNEY GENERAL 1ST DEFENDANT

ZANI NELSON MAMBO2ND DEFENDANT

JUDGMENT

1. The plaintiffs' claims under a plaint dated 19th July 2007 are three pronged: a declaration that the 2nd plaintiff is the legal owner of a property known as L.R. Nairobi/Block 76/96; a declaration that the grant of a lease to the 2nd defendant by the Commissioner of Lands was unlawful; and, an order to the 2nd defendant to reconvey the property to the 2nd plaintiff.

2. The 1st plaintiffs are the joint administratrices of the estate of John Gichuki Thogo (deceased). The deceased was allotted an unsurveyed plot Number 7 Buruburu Estate Nairobi. The plaintiffs assert that the plot is now registered as Nairobi/Block 76/906. The plaintiffs sold the suit land to the 2nd plaintiff for consideration of Kshs 520,000. The plaintiffs' case is that the Commissioner of Lands inadvertently and unlawfully issued a formal lease to the 2nd defendant. The plaintiffs are prejudiced by those actions and have thus brought these proceedings.

3. The 2nd defendant did not enter appearance or defence to the action. On 10th July 2008, the Deputy Registrar of this court entered interlocutory judgment in favour of the plaintiff. The matter against him has thus proceeded for formal proof and a determination of the issue of costs. In my view and considering the nature of declarations sought, this was not a suitable case for entry of interlocutory judgment. Failure by the 2nd defendant to enter appearance did not *ipso facto* entitle the plaintiffs to the declarations sought. The 1st defendant filed a defence dated 16th August 2010. The claim is denied. The 1st defendant contended that the suit is incompetent for want of compliance with section 13A of the Government Proceedings Act. The 1st defendant did not attend the hearing on 4th June 2012. The court, being satisfied of service, proceeded to hear the matter.

4. The plaintiffs called one witness Dorothy Wacera Macharia, the widow of the deceased and an administratrix of the estate. She testified that the deceased died in the year 1998. She did not know of the

suit property until an estate agent enquired whether she was selling the land. It is then that she perused the deceased's documents and found a letter of allotment for plot 7 Buruburu Estate. It was her testimony that the property is now known as LR Nairobi/Block 76/906. She sold it to the 2nd plaintiff. She said she procured consent of the Commissioner of Lands to transfer by way of an "informal transfer" to the 2nd plaintiff. However, after a number of visits to the office of the Commissioner, she discovered that a formal lease had been issued to Zani Nelson Mambo, the 2nd defendant. She testified that by a letter dated 22nd February 2002, the Commissioner of Lands conceded that the lease to the 2nd defendant was issued in error. The 2nd defendant has refused to surrender the lease or to take an alternative property. She testified that she has suffered loss and damage.

5. I have considered the evidence. I am satisfied that a certificate of confirmation of grant to the estate of the deceased was issued on 5th November 1999 in favour of the 1st plaintiff. Under the schedule of assets, the suit land was to be transmitted to Dorothy Wacera Macharia in absolute shares. The plaintiffs have capacity to maintain the suit.

6. I have seen a letter of allotment dated 2nd December 1994 in favour of the deceased. It is for an unsurveyed Plot No 7 Buruburu Nairobi. From the plaintiff's documents at page 8 of the bundle, the property was approved by the Director of Physical Planning, Ministry of Lands and Settlement, on 22nd September 1994. One condition in the letter of allotment was payment of the standard premium and other fees of Kshs 18,670. The sum was only paid on 8th October 1998 and a receipt issued dated 9th October 1998. By that date the deceased had passed on. Doubt is removed because the letter forwarding payment is by D.W. Gichuki on behalf of J.G. Thogo (deceased). Under clause 2 of the letter of allotment, payment was required within 30 days. The deceased was clearly in breach. No effort to progress the matter to a formal lease or title was made until 4 years later. A letter of allotment is a transient right and not a good title to the property. See Wreck Motor Enterprise Vs Commissioner of Lands and others Nairobi, Civil Appeal 71 of 1997 (unreported), Jaj Super Cash & Carry Limited Vs Nairobi City Council and others Nairobi Civil Appeal 111 of 2002, Court of Appeal, unreported, John Ngaruro Mugo Vs Festus Munyao and 3 others Nairobi, High Court ELC 160 of 2012 (unreported).

7. Nevertheless, the 1st plaintiff on 7th January 2000 sought the consent of the Commissioner of Lands to transfer the property to the 2nd plaintiff. By a letter dated 10th April 2000, the Commissioner of Lands granted conditional consent. Some time back and on 1st September 1999, the 1st plaintiff had sold the property to the 2nd plaintiff for the consideration of Kshs 520,000. That is evident from the agreement of sale, document number 7 in the bundle. A form of transfer dated 2nd March 2001 was executed by the 1st plaintiff in favour of the 2nd plaintiff and presented for registration.

8. I have then seen a letter dated 22nd February 2002 addressed to Zani Nelson Mambo, the 2nd defendant, by the Commissioner. Apparently, the same property had been allotted to the 2nd defendant who paid for it on 27th April 2001. The Commissioner was then trying to prevail upon him to surrender the suit land and to be granted an alternative property. The letter is material and stated;

Zani Nelson Mambo

P.o. Box 14836

NAIROBI

RE: NAIROBI/BLOCK – 76/906

I refer to letter of allotment ref. 83033/XIV dated 36/2/1998.

Please note that according to records the above plot had previously been allocated elsewhere to a one Mr. J.G. Thogo (now deceased) vide letter of allotment ref. 83033/XIV dated 2/12/1994 as unsurveyed

residential plot No.7 the offer to J.G. Thogo was accepted and paid for on 9/10/1998 whereas you accepted and paid for the plot on 27/4/2001. The government consented to request by the widow of late J.G. Thogo to transfer the same plot to a third party on 2/3/2001 formally.

Inadvertently you have been issued with the lease document for the plot whereas the same should have been processed in favour of the transferee by the widow of late J.G. Thogo.

The government intends to resolve the double allocation amicably. You are hereby requested to surrender the lease issued to you soonest possible to facilitate identification of an alternative plot for re-allocation to you.

Treat the matter as urgent.

P.N. MUTWIWA
FOR: COMMISSIONER OF LANDS

9. Clearly, the blame does not lie with the 2nd defendant. I have already stated that the 1st plaintiff was the author of her misfortune by failing to comply with the terms of the letter of allotment for over 4 years. There is paucity of evidence of the circumstances under which the 2nd defendant was allotted the land. The 2nd defendant now has, admittedly, a formal lease. It has been registered. It ranks in superiority to the 1st plaintiff's letter of allotment for the reasons I mentioned earlier. I would, in those circumstances, have serious difficulties in holding that the 2nd defendant was irregularly or unlawfully granted a lease for the suit land. It would also follow that the declaration that Joyce Nyingi Mukundi, the 2nd plaintiff purchaser has a legal title is on a quick sand. The registration of a lease in favour of the 2nd defendant would in the circumstances be unassailable in view of section 143 of the Registered Land Act (now repealed). I say so in view of the certificate of official search dated 20th April 2005 showing the registered proprietor to be the 2nd defendant from 19th June 2001. I am alive that section 80 of the Land Registration Act 2012 grants this court power to rectify the register in case of fraud or mistake.

10. 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. I thus decline to order a transfer of the suit land from the 2nd defendant to the 2nd plaintiff.

11. That said, I do note that the Commissioner of Lands admits there was double allotment. He is not averse to granting one of the parties alternative property. I think *obiter* that the plaintiffs' remedy may lie conveniently in that direction. But the plaintiffs did not offer evidence of valuable consideration for the allotment. I have held that the deceased in any event did not comply with payment of the stand premium and other costs within the 30 days prescribed in the letter of allotment. The declarations sought in prayers 1 and 2 of the plaint are thus untenable. I also note in passing that on 27th March 2007, the plaintiff's suit in the subordinate court in CMCC 1046 of 2004 against the 1st defendant was struck out. As I stated, the 1st defendant has continued to deny the claim as per its statement of defence. I have seen a formal notice dated 2nd April 2007 to the Attorney General on behalf of the Commissioner of Lands. On the face of it, it seems to have been received by the Attorney General on 2nd April 2007. It is thus not true as pleaded in the defence that no demand was made to the 1st defendant. Under section 13A of the Government Proceedings Act, no action may lie against the government unless a 30 day's notice of intention to sue in the prescribed form has been tendered.

12. There has been considerable delay in bringing these proceedings or the earlier proceedings that were struck out by the subordinate court. The 1st plaintiff says discovery of the suit asset was made by the

administratrices way back in 1998. Suit was only filed in the year 2007. The sale agreement to the 2nd plaintiff was made in 1999. There is no evidence that the plaintiffs or at any rate the 2nd plaintiff is in possession or was in possession. The witness statement of Dorothy Wacera dated 23rd April 2012 and her testimony in court did not state that the plaintiffs are in possession. The 2nd plaintiff did not testify in the suit. The claim of possession only appears in the written submissions. It is not even pleaded in the plaint. Granted those circumstances, even the operative section 143 (2) of the Registered Land Act (now repealed) would not have come to the aid of the plaintiff.

13. For all the above reasons, I find that the plaintiffs have failed to prove their case on a balance of probabilities. I order that the plaintiffs' suit be and is hereby dismissed. As the 1st defendant did not appear at the trial and the 2nd defendant did not enter an appearance or defence, I shall not order any costs.

It is so ordered.

DATED and DELIVERED at NAIROBI this 19th day of September 2012.

G.K. KIMONDO

JUDGE

Judgment read in open court in the presence of

Mrs. Obel for Mr. Gichamba for the Plaintiffs.

No appearance for the 1st Defendant.

No appearance for the 2nd Defendant.