REPUBLIC OF KENYA

High Court at Machakos

Civil Case 40 of 2005

PATRICK MUTHUI MAILU…….....1ST PLAINTIFF

JOHN MUTUNGA NZAU……...……2ND PLAINTIFF

PIUS M. MWAKA…….……3RD PLAINTFF

FREDRICK SYULU MUSIVA…….....4TH PLAINTIFF

DAVID NYAMU MUTISYA …….....……5TH PLAINITFF

VERSUS

THE COUNTY COUNCIL OF KITUI…….....…..DEFENDANT

JUDGMENT

By an amended plaint dated 30th April , 2010 and filed in court on 6th June, 2010, the plaintiffs have jointly and severally sued the defendant for:-

"a) Specific performance

b) Declaration that;-

i) The allotment of the subject parcels of land are irrevocable

ii) The defendant has no authority to re-allotting the subject parcels of land to other persons.

c. A temporary injunction to restrain the defendant from re-allocating the subject parcels to other persons or otherwise revoking the allotments made to the plaintiff

d. Refund of sums paid as allotment fees as pleaded in paragraph 9 together with interest from date of payment until payment in full.

e. General damages

f. Aggravated damages

g. Costs of this suit and interest therein"

The suit is informed by the following uncontested facts; the plaintiffs filed the suit in a representative capacity on their own behalf and on behalf of the other allotees of plots in the Mwakini and Nduiyu Trust

Land and who are members of the Mwakini /Nduiyu Plot Owners Self Help Group. At all material times the parcels of land in Mwakini and Nduiyu areas were vested in the defendant by virtue of the Constitution of Kenya. On divers dates between 14th May, 1997 and 18th July, 1997 the defendants issued letters of allotment to the plaintiffs in respect of the said parcels of land on condition that the plaintiffs would pay certain sums of money as consideration within specified period of time, thereafter the defendant would then procure title deeds in the names of the respective plaintiffs and that the said allotments were irrevocable. The plaintiffs met their part of the bargain but the defendant in breach of the terms and conditions of the agreement aforesaid have failed to procure the title deeds to the respective parcels of land in favour of the plaintiffs, failed to put the plaintiffs in possession and had infact re-allotted the parcels of land to other allottes. The defendant had otherwise revoked the allotment letter thereby subjecting the plaintiffs to loss and damage, hence the suit.

In its defence, the defendant admitted that it issued the allotment letter as alleged by the plaintiffs but such allotment were subject to the determination of several civil suits touching on the said parcels of land that had been filed against it by other claimants and in particular;-

- Mks HCCC No. 263/96 Catholic Diocese of Kitui vs Kitui County Council
- Nairobi Court of Appeal Civil Appeal No. 38 of 1997 – The Catholic Diocese of Kitui vs.Kitui County Council
- NBI HCCC No. 5106 of 1993 Mwakini Ranching (D.A.) Company Limited vs the County Council of Kitui

The defendant further averred that since the suits referred to above had not been concluded, the plaintiffs' instant suit was premature. The defendant also contended that it had powers under the Local Government Act to revoke any allotment. Finally, the defendant questioned the validity of the entire suit which it alleged was filed in contravention of order 1 of the Civil Procedure rules. It would appear that the defendant did not amend its defence even after being served with an amended plaint.

On 4th July, 2012, the hearing of the case commenced before me. The 3rd plaintiff testified on his own behalf and on behalf of the other plaintiffs, and members of Mwakini/Nduiyu plots Owners Self Help Group. He testified that between 14th May, and 18th July, 1997 when he was a councilor with the defendant, the defendant allotted to them land in Mwakini and Nduiyu areas which was Trust land. Each allottee was to pay Kshs. 400/= per acre and the minimum acreage was to be 5 acres. 1130 out of their membership were allocated land in Mwakini Council land whereas 370 were allocated Nduiya. The defendant thereafter undertook to take them to their respective parcels of land. This was not done. It was then that they decided to come to come to court. He denied that they had been told by the defendant that they could only acquire their respective parcels of land once cases filed against it were concluded.

Cross-examined by **Mr. Kalili,** learned counsel for the defendant, he conceded that the allotment letters had conditions attached to them. Condition one was to the effect that the provisional letters of allotment were subject to finalization and determination of all pending civil cases against the defendant touching on the parcels of land in the law courts and any other cases which may be filed in future touching on those parcels of land. He also conceded that condition 4 of the letters of allotment barred them from demanding possession of the parcels of land until all court cases aforesaid were determined in favour of the defendant. He denied that as a councillor at the time, he was aware that there were 3 cases against the defendant pending in court as he had not been told. Lastly, he conceded that he did not know whether all the cases had been concluded in favour of the defendant. That marked the close of the plaintiff's case.

The defendant opted not to call any evidence holding that in view of the evidence which had come out in cross-examination of the plaintiff, it was unnecessary to call any evidence in support of the defence. At that juncture, it closed its case.

Parties thereafter agreed to file and exchange written submissions. This was subsequently done. I

have carefully read and considered them.

The plaintiff's cause of action is set out in paragraph 8 of the amended plaint and is to the effect that the defendant had failed to issue title deeds to them; put them to actual physical possession of the allotted parcels of land and that the defendant had instead re-allotted them to other persons. The issue then for determination is whether the plaintiffs are entitled to the title deeds and therefore possession thereof the respective parcels of land allotted to them.

In his evidence, the 3rd plaintiff confirmed that he was a former councillor of the defendant. The plaintiffs relied on provisional letters of allotment in claiming ownership of the parcels of land.

The said letters of allotment by their very description were provisional, meaning that they were of a temporary nature. Besides they were conditional. Conditions 1, 4, and 6 of the provisional letters of allotment aforesaid are pertinent. Condition 1 was to the effect that the provisional letters of allotment were subject to the finalization and determination of all pending suits touching on the parcels of land in the law courts and any other case that may be filed in future touching on those lands against the defendant.

Condition 4 was to the effect that the plaintiffs shall not demand possession of the lands until all the court cases shall have been determined in favour of the defendant and,

Condition 6 provided that in case of refund of the money paid in accordance with the provisional letters of allotment, no interest shall be paid.

From the bundle of documents filed by the defendant, it is self evident that there are still pending before courts the following 3 cases.

- Machakos HCCC No. 263 of 1996 – Catholic Diocese of Kitui vs The County Council of Kitui
- Nairobi Court of Appeal Civil Appeal No. 38 of 1997, the Catholic Diocese of Kitui vs the County Council of Kitui and
- Nairobi HCCC No. 5106 of 1993 Mwakini Ranching (D.A.) Company vs the County Council of Kitui

The condition precedent of the agreement between the defendant and Plaintiffs as contained in the Provisional Letters of Allotment was the determination of several civil cases touching on the parcels of land that had been filed against the defendant by the claimants. All the above cases touch on the parcels of land now being claimed by the plaintiffs. When the question of the suits was put to the plaintiff, he stated that he was not made aware. However, that answer does not advance their case. That was the primary condition. It was in the provisional letters of allotment. The assumption must be that the plaintiffs read and were aware of the condition. A prudent and a diligent man would have attempted to find out whether there were any cases and if they were their status. I do not belief the testimony of the plaintiff that as a councillor at the time he did not know of the existence of these cases. When a resolution of the council was made to give the plaintiffs the land, the 3rd Plaintiff was present and the resolution was passed subject to the cases being finalized in favour of the defendant. I do not think that the 3rd plaintiff was candid with the court in his testimony.

The plaintiffs having been aware of the condition precedent, it behooved them to bring evidence to show that there were no suit pending against the defendant touching on the land and or if there were any, they had been resolved in favour of the defendant. No such evidence was led. With regard to the 3 cases above, the 3rd plaintiff could not tell whether they had been concluded and if so whether they were so concluded in favour of the defendant. That being the case, I would agree with the position taken by the defendant that plaintiffs' suit was in the premises premature, misconceived and incompetent.

In meeting this challenge, the plaintiffs have further submitted that since the condition precedent on the allotment letter were ambiguous; they should only be interpreted against the defendant since it was the sole author of the same. This submission does not hold any water. There is no ambiguity on those terms at all.

The prayers in the plaint to my mind are contradictory. They are not even sought in the alternative. How can the plaintiffs ask for specific performance as well as a refund of the allotment fees paid? The plaintiffs cannot pray for specific performance when they have not adduced evidence of the defendant's breach of the agreement. Nor have they demonstrated that the cases against the defendant have been finalized in its favour. Further condition 4 bars them from demanding possession during the pendency of the suits. Yet this is the essence of specific performance.

It is trite law that letters of allotment do not signify having a registrative interest in land. It only signifies an intention by whoever is issuing to allocate land. It is not title. Therefore a letter of allotment cannot be used to defeat title of a person who has been registered as the proprietors of land.

In essence, what I am saying is that it is doubtful that the plaintiffs can obtain against the defendant an order of specific performance on the basis of a provisional letters of allotment.

On the whole, the plaintiffs have not proved their case to the standard required. They are therefore not entitled to any of the reliefs sought in the plaint. The suit is accordingly dismissed with costs to the defendant.

DATED at **MACHAKOS** this **22ND** day of **NOVEMBER, 2012.**

ASIKE-MAKHANDIA
JUDGE

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **14TH** day of **DECEMBER, 2012.**

GEORGE DULU
JUDGE