



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA

Civil Appli 64 of 2008

1. VINODBHAI JETHALAL NADGA
2. MAHENDRA KUMAR LAKHAMSHI PLAINTIFFS

V E R S U S

1. THE ATTORNEY GENERAL
2. SETTLEMENT FUND TRUSTEES DEFENDANTS

J U D G M E N T

By an amended plaint dated 6th July, 2006, the plaintiffs allege that the 2nd defendant allotted Plot No. 175 in Diani Settlement Scheme to one Anastasia Wamuyu. The plaintiffs bought Wamuyu's interest in the said plot and the 2nd defendant issued to the plaintiffs a certificate of outright purchase. Subsequently, the plot was renumbered 452.

However, instead of the 2nd defendant issuing to the plaintiffs the title deed for Plot No. 452, which was originally plot No. 175, the 2nd defendant issued to them a title to a plot which, although No. 175, was not the original plot No. 175. For this reason, the plaintiffs pray for judgment against the defendants for-

- (a) *A declaration that the plaintiffs are entitled to be registered as proprietors of the freehold interest in the plot re-numbered 425 (originally No. 175) in Diani Scheme.*
- (b) *Specific performance of the agreement for allocation of the said plot to the plaintiffs.*
- (c) *An injunction restraining the 2nd defendant and their agents, servants and all persons acting by or through them from allotting and/or registering the said plot to any third party.*
- (d) *Further or alternatively damages for breach of agreement.*
- (e) *Interest on damages at court rates.*
- (f) *Any other relief which this Honourable Court may deem necessary.*
- (g) *Costs of and incidental to this action.*

In a nutshell, the defendants' case is that certificates of outright purchase do not indicate the exact acreage of a plot. Consequently, they deny that plot No. 175 initially allotted to Anastasia Wamuyu was

of approximately 5 acres as alleged by the plaintiffs, and further deny that the plaintiffs were issued with a title of a different plot. The defendants therefore pray that the plaintiff's suit be dismissed with costs.

Arising from these pleadings, the parties did not file any agreed issues. However, the plaintiffs filed the following issues for determination-

- (i) *Was Anastasia Wamuyu allotted a plot in the Diani Settlement Scheme?*
- (ii) *If so, what plot was she allocated?*
- (iii) *Did the plaintiffs purchase Anastasia Wamuyu's interest in the plot with the 2nd defendant's consent?*
- (iv) *Was the certificate of title issued to the plaintiffs in respect of the same plot or is it a different plot?*
- (v) *If the certificate of title issued to the plaintiffs is in respect of a different plot, are the plaintiffs entitled to be issued with a certificate of title in respect of the plot undertaken by the second defendant to be transferred to the plaintiffs?*
- (vi) *What should be the order for costs?*

From the evidence of the 1st plaintiff and that of James Waswa, a Settlement Officer who testified for the defendants, the parties are in agreement that the plaintiffs purchased plot No. 175 from one Anastasia Wamuyu to whom the plot had been originally allotted.

It is not clear when Wamuyu transferred her allotment to the plaintiffs, but it is clear that the certificate of outright purchase issued to the plaintiffs by the 2nd defendant was dated 26th February, 1988. That certificate confirmed that the plaintiffs were the allottees of Plot No. 175. According to the evidence of James Waswa (DW 1), the Diani Settlement Scheme started in 1977 and allocations were done in 1978. Plot No. 175 was allocated to Anastasia Wamuyu. The plaintiffs produced as their Exhibit 4 an approved development plan for Diani Settlement Scheme dated 8th September, 1980. That was two years after the allocations were done. It shows that plot No. 175 was between plots Nos. 174 and 176 at the front and back, and on its sides were plot Nos. 159 and 191. All these plots, except No. 174 which measures 2.016 Ha, measure a little more than 1.9Ha. It may reasonably be inferred, therefore, that this was the plot that the plaintiffs purchased from Wamuyu, and the one in respect of which the 2nd defendant issued the certificate of outright purchase to the plaintiffs in 1986.

The 5th document exhibited by the plaintiffs is a Registry Map Sheet No. 2. It contains amendments, probably of the Diani Settlement Scheme, for the period between 1990 and on that map, the plot which was initially No. 175 is renumbered 452, and the new plot No. 175 is tucked in between plots Nos. 393 and 345. This clearly was not and could not have been the plot which, on the ground, Wamuyu sold to the plaintiffs and in respect of which the defendants issued a certificate of outright purchase. The new plot No. 175 was created subsequent to the issue of that certificate, and that certificate related to the present plot No. 452. This is the plot which ought to have been allotted to the plaintiffs as it was the plot which the parties had understood would be so allotted. Whatever reason the 2nd defendant had for changing its mind, the plaintiffs should have been duly notified so that they may decide whether to accept the new plot No. 175 or not. Many allottees would not take kindly to the unilateral manner in which the 2nd defendant acted in this matter. This casts a cloud on their bona fides in the matter. To make it worse, they now advance the reason that the original plot No. 175 had been occupied by one Bakari Juma Mwachaso, a squatter, since 1977. If that were so, and it must have been apparent when the allotment of the plot was transferred from Wamuyu to the plaintiffs, why did the 2nd defendant issue the certificate of outright ownership to the plaintiffs in 1988?

For the above reasons, my findings on the issues filed by the plaintiffs are that Anastasia Wamuyu was

allotted a plot, originally No. 175 but subsequently renumbered 452 at Diani Settlement Scheme. The plaintiffs duly purchased Anastasia Wamuyu's interest in the plot with the 2nd defendant's consent and approval which was evidenced by the certificate of outright purchase issued by the 2nd defendant on 26th February, 1988. The certificate of title issued to the plaintiffs was therefore in respect of a different plot altogether which was non-existent in 1988, and which was not the one which the 2nd defendant undertook would be transferred to the plaintiffs. On the ground, the plot which the 2nd defendant undertook would be transferred to the plaintiffs is the present plot renumbered No. 452. This is the plot which the plaintiffs bought from Wamuyu, and the change in its number does not affect its physical identity.

By reason and wholly on account of the foregoing, the plaintiffs are entitled to a declaration, which is hereby made, that they are entitled to be registered as proprietors of the freehold interest in the plot now renumbered 452 (Originally No. 175) in the Diani Settlement Scheme. The costs of this suit are also awarded to the plaintiffs.

Dated and delivered at Mombasa this 13th day of March, 2009.

L. NJAGI

JUDGE