



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 1595 of 2002

SAMUEL MBUGUA GACHUHI..... PLAINTIFF

VERSUS

CITY COUNCIL OF NAIROBI..... 1ST DEFENDANT

THE CHIEF REGISTRAR OF LANDS 2ND DEFENDANT

CHRISTOPHER KINYANJUI..... 3RD
DEFENDANT

JUDGMENT

1. Background Case

1. The City Council of Nairobi, the 1st defendant herein had began a housing scheme project in the Nairobi area known a Jamhuri Estate Phase II. A person would apply for a plot then once land is allocated to that person, they are to construct residential house in accordance with the City Commission (as City Council of Nairobi was then known) as approved type plan.
2. The plaintiff herein, Samuel Mbugua Gachuhi was allocated plot 188 and was issued with a letter of allotment on the 17th January, 1992. He duly paid his stand premiums and rent on 12th March, 1992. A lease was issued to him on the 19th March, 1998.
3. The plaintiff went to visit his site and found construction had commenced. He conducted a search and discovered the defendant No.3 had taken possession of the property. Christopher Kinjanjui (the defendant No. 3 herein) came to court and stated in evidence that he had been allocated plot No.188 that was allocated to him in 1992. He paid stand premiums sometimes in 1995 or 1996. He was then issued with a certificate of lease title on 24th September 2001. His defence was simply that as he now has a certificate of lease under the Registered Lands Act Cap 300, he is the absolute registered owner of the property.
4. “A notice to produce” the title of allotment, the lease he was issued prior to being issued the title, was given to the defendant No. 3. At the trial he was unable to produce the original document and a certified copies of the documents, if any.
5. During cross examination, the defendant No.3 admitted that at the time he is said to have been allocated

plot 188 he was in school and was a minor.

6. The Commission of lands (2nd defendant herein) and the Attorney General (4th defendant herein) have been sued as having issued a lease certificate title on an invalid allotment letter and there being no lease agreement between the parties before issuing a title.

7. The issue before this court is one of double allocation of land by the City Council of Nairobi whether such allocation was irregular or not? Whom of the two is the correct allocatee?

III: Opinion

8. The property in contention is plot No.188 Jamhuri Phase II measuring approximately 0.03 hectares as per the letter of allotment of 17th February 1992. This is the same property as Nairobi /Block 63/521 approximately 0.0270 ha according to the lease title issued to the 3rd defendant. It is not disputed that the property is one and the same.

9. It is also not disputed that the plaintiff was first issued with a letter of allotment on 17 February 1992 and paid his premiums as required. He also held a lease agreement between himself and the City Council of Nairobi of 19 March, 1998.

10. The allotment of Plot 188 Jamhuri Phase II was accordingly issued to the plaintiff has been established through the evidence before court. The allotment to the plaintiff was proper and was not irregular.

11. The allotment on the other hand to the defendant, was issued after that of the plaintiff allotment. The defendant alleges he was issued with an allotment letter in 1992 but actually paid the stand premiums in 1995 and 1996 As stated earlier in this judgement, the defendant was issued with a notice under order XII r 3 Civil procedural Rule to produce (17.7.07) admit document but was unable to produce his original letter of allotment and or lease with the 1st defendant.

12. Both the plaintiff and defendant now allege that they are each the rightful proprietor of the suit property. The 3rd defendant more so as he holds a certificate of title that is indivisible under the Registered Lands Act.

13. The advocate for the plaintiff brought to my attention the case law of:

M'Ikiara M' Rinkanya and Another

V

Gilbert Kabeere M'Mbijiwe

(1982 – 1988) IKAR 196.

(Potter , Kneller JJA & Chesoni Ag JA.)

Where a similar situation as in this case arose, there was a double allocation to a plot issued by the Council of the area. The court had noted that the said first allotted letter to the original plaintiff had never been cancelled. That the Council had no power to allocate the same property again without following the laid down procedure of reallocating the property.

14. On relying further on the case law of:-

Kariuki v Kariuki (1982 – 88) KAR CA 26/79

Madan , Law Potter JJA

and **Seii v Cheserek** 2003 KLR 328 Nambuye J; **Otieno and Matsanza** (2003) KLR 310 Nambuye J.

There was a need to note that the issue of consent from the Minister not being obtained did not negate the allotment of the plot and agreement between the parties. That the list registration of title does not arise as the City Council of Nairobi holding trust land where the lessor and subsequently the first registered owner. The case law used dealt with the settlement scheme but the principle is the same, as the letter of the plaintiff had never been withdrawn, the rights should therefore stand that the plaintiff is still the owner.

15. The state had brought up the issue of the ministerial consent under section 144(6) of the Act as being compulsory but the plaintiff stated that section 144(8) did not negate this .

16. The allocation of the property plot to the defendant No. 3 was irregular. The first aspect is that the defendant was a minor at the time the property was allocated to him. A minor can only hold property through a guardian. It is trite law that a minor has no locus to enter into a contract. In this case the 3rd defendant was required to enter into a contract of lease which he was unable to do on his own right.

17. The Commission of Lands was not diligent to ensure that before a title is issued the correct documents are before him or her. This meant that no letter of allotment and lease agreement may have been presented to the commissioner before title was issued.

18. I would therefore find that the defendants being allocated and issued with a certificate of lease was irregular and or fraudulent. I hold that plaintiff is the correct rightful and lawful proprietor of Nairobi /Block 63/521.

19.1. The plaintiff is entitled to the relief sought. I declare that the allotment of the suit property to 3rd defendant and subsequent registration of him as proprietor was illegal, null and void.

19.2. The title of 3rd defendant be and is hereby revoked.

19.3. I further order that the 3rd defendant, his gents servant and or employee are restrained from further constructing any building and or structure on the suit property.

19.4. That I hereby order the building structures so erected be demolished and the 3rd defendant be evicted from the said suit premises.

19.5 The plaintiff is the rightful allottee to the suit property.

19.6. I would award General Damages to the defendant to be paid by the 1st and 3rd defendant jointly and severally of Ksh.500,000/- with interest at court rate from the date of this judgement.

19.7. That the 1st, 2nd and 4th defendant do issue the plaintiff with a certificate of lease.

20. I award the costs of this suit to the plaintiff to be paid by the defendant 1, 2, 3 & 4 jointly and severally

DATED THIS 28TH DAY OF JULY 2008 AT NAIROBI

M.A. ANG'AWA

JUDGE

C.W. Githaara instructed by Kamau Karanja & Co. Advocates for the plaintiff/applicant – present

E. Kaka instructed by Kagia & Co. Advocates for the 1st defendant/respondent

C.N. Menge instructed by A. Sitima for Attorney General for 2nd defendant – present

K.K. Nyakundi instructed by Nyakundi K.K. & Co. Advocates for the 3rd defendant – present