



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

**Civil Case 304 of 2004**

**DICKSON NDEGWA MBUGUA ..... PLAINTIFF**

**VERSUS**

**CITY COUNCIL OF NAIROBI AND THREE OTHERS ..... DEFENDANT**

**JUDGMENT**

The Plaintiff herein claims that he was allotted a plot No.235 situate at Jamhuri Phase II in City of Nairobi on 13<sup>th</sup> February, 1992.

Then he came to learn that on or about 13<sup>th</sup> November, 2001 the 3<sup>rd</sup> and 4<sup>th</sup> Defendants had been issued with a Certificate of Lease as proprietors in common of a parcel of land known as Nairobi/Block/63/498 and that the said plot number been inserted by altering No.322 illegally and fraudulently, in the undated Lease Agreement between the City Council and Henry Andande the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein.

The particulars of fraud, illegality, unlawfulness and unreasonableness mention mostly the fraudulent actions of the City Council except clauses 13(a) and (h) thereof.

The Plaintiff's prayers against the Defendants jointly and severally are:

- (a) "An order for temporary injunction barring the Defendants from dealing, interfering, partitioning, alienating that parcel of land known as Nairobi/Block 63/498 while pending the hearing and determination of this suit.
- (b) A permanent injunction to issue restraining the Defendants, their agents, servants or any person duly authorized by them to act on their behalf from selling, transferring,, alienating, disposing, partitioning or dealing in any way with that parcel of land known as Nairobi/Block 63/498.
- (c) An Order directed to the Land Registrar for rectification of the Register and Certificate of Lease to substitute the names of th3e 3<sup>rd</sup> and 4<sup>th</sup> Defendants with the Plaintiff's name AND/PR in alternative, the 1<sup>st</sup> Defendant do compensate the Plaintiff for the value of the land at the current market rate and refund the standard premium and rent received, the quantum thereof to be determined by this court.
- (d) A declaration that the Plaintiff is the lawful owner of that parcel of land known as Plot No.235 Jamhuri Phase II now known as Nairobi/Block 63/498.

(e) Costs and interest of this suit.

(f) Any other relief that this Honourable Court may deem fit and just to grant.”

In the Defence, the 1<sup>st</sup> Defendant denies any acts of fraud committed as alleged, and in paragraph 6 of its defence, it averred inter alia that it was a victim of criminal fraud respecting the properties and generally called “Jamhuri allocations” which fraud was orchestrated by third parties such as the 2<sup>nd</sup> Defendant apparently in cahoots with certain elements within its employment.

I have advisedly specified this paragraph in the Defence of the 1<sup>st</sup> Defendant as the Plaintiff contended in the submissions made by his learned counsel that this averments were an admission by the 1<sup>st</sup> Defendant of acts of fraud committed by the 2<sup>nd</sup> Defendant. I may also state that the 1<sup>st</sup> Defendant did not adduce any evidence to support the averments made and specifically imputing the criminal fraud committed by 2<sup>nd</sup> Defendant who has failed to appear and there is an interlocutory judgment entered against him on 23<sup>rd</sup> November, 2004 pending formal proof.

In response to the said defence by the 1<sup>st</sup> Defendant the plaintiff relied on paragraphs 11 and 12 of the plaint.

In their Defence the 3<sup>rd</sup> and 4<sup>th</sup> Defendants denied allegations of fraud and averred that they are bona fide purchasers of the suit premises in good faith and for value without notice.

With these pleadings before the court, the apparent issues to be determined can be as follows:

1. Whether the Plaintiff is a lawful owner of the land known as plot NO.235, Jamhuri phase now known as Nairobi/Block/63/498 (referred to as “the suit land”).
2. Whether the defendants have or any of the Defendants has committed acts of fraud and or illegality as averred in plaint to entitle the plaintiff to ask for rectification of Register and Certificate of Lease showing the 3<sup>rd</sup> and 4<sup>th</sup> Defendants as proprietors of the suit land as tenants in common.
3. Whether the 3<sup>rd</sup> and 4<sup>th</sup> Defendants were bonafide purchasers of the suit land without notice.
4. Who prays the costs of the suit.

The Plaintiff testified and did not call any witness. He stated that on 13<sup>th</sup> February, 1992, he was allocated plot No.235 at Jamhuri Phase II from the City Council. He claimed that the said plot is now known as Nairobi Block/63/498, though did not give any explanation for his claim or did not produce any document. Be that as it may, he produced receipts to show that he paid Shs.10,800 as required in the said Letter of Allotment. Although I do note that the payment was made on 10<sup>th</sup> September, 1992. He also produced a receipt in the sum of Shs.3,600 dated 23<sup>rd</sup> February, 1994 for the annual rent for plot No.235.

Thereafter in 1995 he went out of country due to his posting by Ministry of Trade and Industries, and returned to Kenya in January, 2003. On his return he found his plot fenced which created doubt in his mind. On conducting search, he was surprised to learn that the plot was registered in the names of 3<sup>rd</sup> and 4<sup>th</sup> Defendants.

According to his knowledge, as what he testified, City Council had not affected any transaction in respect of the plot. He relied on the paragraph in the Defence of 1<sup>st</sup> Defendant, which I have specified hereinbefore, and claimed that its contents support his claim. He averred that he has paid Land rent upto previous dates, his date of testimony (which was 12<sup>th</sup> February, 2007) and relied on the two Bundles of Documents dated 11<sup>th</sup> May, 2005 and 15<sup>th</sup> June, 2005 in support of his evidence, (P.Ex.1 & PEx.2). I have stated hereinbefore that the only receipt which he produced and is in PEx.1 – and that is of the year

1994. I do not have any supporting evidence as regards his claim that he has paid the Land rent upto 2006.

He simply stated that as per his investigation the plot given to 2<sup>nd</sup> Defendant was Block63/322 and relied on the Lease Agreement on page 6 of P Ex.2 wherein it is clear that the typed number 322 was amended to read 498. He stressed that the said alteration proves that the plot No.322 was the plot given to the 2<sup>nd</sup> Defendant as per undated Lease and as the amendment is not counter signed it is not a genuine document and that plot 498 has not been transferred to any one by the City Council.

He emphasized that after the Lease, within only one month 2<sup>nd</sup> Defendant transferred the plot to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants.

Thus he claimed that with letter of allotment and the payment of premium etc., the plot is his property. It is also stated by him that Commissioner of Land heard the application of removal of his caution put on the plot and that the same is still on place, but I must note that none of the documents produced by the Plaintiff showed that there is any encumbrance. I refer, in that context, to the extract of the proprietor section of Certificate of Lease and the Certificate of search in respect of the plot.

I shall not wish to specify the plaintiff's interpretation on the statement of Defence filed by the 1<sup>st</sup> Defendant.

In his testimony he prayed for the rectification of the register kept at the Land Registry.

In cross-examination, he simply stated that it is apparent that the plot No.235, after survey, was known as Nairobi/Block 63/498. He agreed that he has not applied for beacon certificate as he had to leave the country, and that Lease was supposed to be given to him on his application which he was to make after his return. Once again there is nothing to support this contention either by any document or by any provisions of Law.

He also agreed that all the Letters to the City Council and Lands Registry as regards his claim on Nairobi/Block 63/498 were not responded. The letters are produced in PEx.1. He also agreed that in the Certificate of Lease his claim or interest is not mentioned. He also agreed that the Lease Agreement between 1<sup>st</sup> and 2<sup>nd</sup> Defendants was in the record of the Lands Registry and he obtained a copy from the said record. He agreed that it is dated 17<sup>th</sup> October, 2001 which was the date of registration.

He stressed that as the said Lease Agreement is not genuine, the 3<sup>rd</sup> and 4<sup>th</sup> Defendants cannot get legal title over the plot and that is his claim against them. He agreed that he has not sued any officials of the Land Registry. He also conceded that apart from the transfer in favour of 3<sup>rd</sup> and 4<sup>th</sup> Defendants within short time, he has no other suspicion on them.

This was evidence led by the Plaintiff.

The 3<sup>rd</sup> Defendant testified in opposition to the Plaintiff's claim against him and the 4<sup>th</sup> Defendant.

In short he testified that he and 4<sup>th</sup> Defendant, who is his friend, purchased the plot from the 2<sup>nd</sup> Defendant. He told the court that he met the 2<sup>nd</sup> Defendant in a fund raising function and who was introduced to him as a contractor. 2<sup>nd</sup> Defendant told him then that he had a plot to sell along Jamhuri.

He went to see the caretaker called Mr. Ngure (whose phone number also was given by him, during cross-examination), and was shown the plot. He contacted his Advocate Mr. Cheriyaiki who confirmed that the plot was registered in the name of the 2<sup>nd</sup> Defendant.

As he could not raise the whole purchase price of Shs.600,000, he asked 4<sup>th</sup> Defendant, who agreed to purchase the same in their names. The sale agreement (DEx.1) was prepared by another Advocate M/s

Cherono and Co. proposed by the 4<sup>th</sup> Defendant. After initial payment of Shs.300,000 by 4<sup>th</sup> Defendant, the 2<sup>nd</sup> Defendant was to undertake process of the transfer. According to him he paid the balance of purchase price around December, 2002. He said although that the Certificate of Lease (D.Ex.2) was dated 13<sup>th</sup> November, 2001. He stated that the Certificate of Lease was released to them after the full payments were made. It is noted that the mode of payment was proposed in clause 1 of the sale agreement, and the last payment was on or before 30<sup>th</sup> December, 2002. I would thus not comment on questions asked to him in cross-examination as regards the payments.

It was stressed during cross-examination that the sale agreement (DEx.1) does only show the Block 63 without the other numbers and the witness maintained that the same was drawn by the Advocate named hereinbefore. I also note that the same advocate has witnessed the signatures of the party and thus inclusion of that Advocate in different font of typing may not be that relevant. In short, the witness said he never had any intention to defraud anyone. He was guided by the Advocates in confirmation of the registration of the 2<sup>nd</sup> Defendant as a proprietor and executed a Sale Agreement before the transfer was made. Their names were registered as proprietors in common in the Certificate of Lease issued in the name of the 2<sup>nd</sup> Defendant. He obviously could not comment on the Lease executed between 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

I further note that the Lease is duly registered and duly executed by 2<sup>nd</sup> Defendant and signed and sealed by Mayor and the Town Clerk. The Lease is typed and the names of 2<sup>nd</sup> Defendant is specifically mentioned. I shall have to thus deal with the alteration in the number of the plot which I would endeavour to do later in this judgment.

Submissions were made on the evidence led as observed hereinbefore.

In submissions Mr. Machira, the Learned Counsel for the Plaintiff relied on letter of allotment and receipts of payments.

He stressed that the absence of testimony by 4<sup>th</sup> Defendant is a proof on evidence of fraud as he did not come to say how he paid. But I do not agree with that contention because the 3<sup>rd</sup> Defendant specifically said that the 4<sup>th</sup> Defendant had cash money for his share, i.e. Shs.300,000 and the same was paid as a deposit. This fact is corroborated by the Sale agreement (D.Ex.1)

Then he contended that evidence of fraud on the part of 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants is failure by the 1<sup>st</sup> Defendant to give evidence although the defence was filed by it, and added that that defence is an admission of the plaintiff's claim as it had washed its hands. I have already made my observation by specifically mentioning the contents of paragraph 6 of the Defence of 1<sup>st</sup> Defendant. It did not prove its allegation even though it mentions that the fraudster such as 2<sup>nd</sup> Defendant, have been defrauding. I do not agree that by that averment which was general and did not mention any other names except to include ready made name of the 2<sup>nd</sup> Defendant can be the proof of any involvement by 3<sup>rd</sup> and 4<sup>th</sup> Defendants. The failure to appear by the 2<sup>nd</sup> Defendant and failure to substantiate its averments by 1<sup>st</sup> Defendant cannot be imputed as a conspiracy with or committal of any fraud by 3<sup>rd</sup> and 4<sup>th</sup> Defendants. Moreover, I do note that 1<sup>st</sup> Defendant had also admitted generally the hands of some of its employees in general in averment of wrong doing in "Jamhuri allocations". That averment which is in general terms cannot per se, be taken as a proof that all the allotments made at Jamhuri were fraudulent. This interpretation, if taken, can have very dangerously far reaching implications.

What the plaintiff, in law has to prove that his allotted plot was fraudulently acquired by 2<sup>nd</sup> Defendant in cahoots with the 1<sup>st</sup> Defendant and 3<sup>rd</sup> and 4<sup>th</sup> Defendants had or ought to have a notice of such fraudulent action.

The learned counsel for the 3<sup>rd</sup> and 4<sup>th</sup> Defendants, Mr. Nyaga, contended rightfully that the Plaintiff has only shown that he was issued with a letter of allotment and that he paid certain sum, though belatedly, as

required by the City Council. The allotment was for plot No.235 at Jamhuri phase II. He returned to the plot after lapse of many years and found it fenced. As against that the 2<sup>nd</sup> Defendant has been given Certificate of Lease who has in turn transferred the same to 3<sup>rd</sup> and 4<sup>th</sup> Defendants who are now registered as proprietors in common.

He relied on the often cited Court of Appeal case between Wreck Motor Enterprises and the Commissioner of Lands and 3 others (C.A. No.71 of 1997).

It is stated by the Court of Appeal on page 6 thereof namely:

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

I also agree with the contentions raised by Mr. Nyaga that the Plaintiff has failed to show how the said plot No.235 was renumbered as Nairobi/Block 63/498. What is in evidence of the Plaintiff, is a plain assertion by him that, that is so. He has also averred without any substantiation (except the alteration of number in the Agreement for Lease) that the 2<sup>nd</sup> Defendant was allotted Plot No.322 and that Plot No.498 was his. No court can or should rely on this kind of evidence to oust someone from his proprietary rights, and I decline to do so.

On the other hand, Certificate of Lease is issued in the name of the 2<sup>nd</sup> Defendant who is the first proprietor and 3<sup>rd</sup> and 4<sup>th</sup> Defendants became the proprietors in common upon transfer or transmission by the proprietor thereof, i.e. 2<sup>nd</sup> Defendant.

Section 27 of Registered Land Act stipulates that, registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land. Section 28 further stipulates that the rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration shall not be liable to be defeated except as provided in this Act.

I shall also like to note the provisions of Section 39(1) of the said Act, which stipulates inter alia that no person dealing or proposing to deal for valuable consideration with a proprietor shall be required or in any way concerned, to inquire or ascertain the circumstances in or consideration for which that proprietor or any previous proprietor was registered.

I pause here and observe that it was a clear testimony of the 3<sup>rd</sup> Defendant, that his Advocate carried on a search and confirmed to him that the suit plot was registered in the name of the 2<sup>nd</sup> Defendant.

The valiant effort to connect the fact of alteration in the Agreement of Lease between the City Council and 2<sup>nd</sup> Defendant thus cannot be accepted in view of the aforesaid provisions and the evidence before the court.

The issues raised on the Agreement of Sale have been dealt with by me and I do not find that they had any effect on the issue of validity or otherwise of the actual transfer made in the names of the 3<sup>rd</sup> and 4<sup>th</sup> Defendants.

I also intend to agree with Mr. Nyaga that there is no particular act of fraud pleaded or shown by the plaintiff, which is alleged to have been committed by either 3<sup>rd</sup> or 4<sup>th</sup> Defendants. I may add that from readings of the particulars of fraud, though averred against all the Defendants, it clearly show that most of the allegations are aimed at 1<sup>st</sup> Defendant and 2<sup>nd</sup> Defendant and in clause (g) thereof, it is just mentioned that 1<sup>st</sup> Defendant, knowingly and in total disregard of the Plaintiff's interest allocated the plot to 2<sup>nd</sup> Defendant who in turn sold the same to 3<sup>rd</sup> and 4<sup>th</sup> Defendants.

These averments do not amount, in my considered view, an act of fraud.

I have relied on the case of Mutsonga Vs. Nyati (1984) KLR 425 in my earlier decisions and I quote a passage at page 439 thereof.

“Charges of fraud shall not be lightly made or considered. They must be strictly proved and although may not be so heavy as to require beyond reasonable doubt, something more than a mere balance of probability is required, in fact high degree of probability is required..... it is very much a question for the trial judge to answer.”

I may also add that the Plaintiff has not shown sufficient proprietary or legal interest or right over the property to challenge the validity of the registration of the plot in the names of 2<sup>nd</sup> and/or 3<sup>rd</sup> as well as 4<sup>th</sup> Defendants.

Unfortunately, the City Council did not assist the court as is its usual practice. I think its participation would have been very valuable to the court. But that was not to be.

The upshot of all the aforesaid is that I do not find that the Plaintiff has proved his case as per required standards and I dismiss the same with costs to 3<sup>rd</sup> and 4<sup>th</sup> Defendants.

**K.H. RAWAL**

**JUDGE**

**18.7.08**