



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Suuit 573 of 2000

MUNIR MOHAMED MZRUI1ST PLAINTIFF

HUDA MAAMUM MAZRUI.....2ND PLAINTIFF

VERSUS

THE COMMISSIONER OF LANDS.....DEFENDANT

SAMUEL ODHIAMBO OGUK.....INTERESTED PARTY

JUDGMENT

The Plaintiffs are husband and wife. They claim in their amended plaint that by a letter of allotment Reference No. 31500/XVIII/174C dated 22nd August 1990, the Defendant offered to the first Plaintiff Plot No.1 situate at Nyali in Mombasa comprising of 0.21 of a hectare or thereabouts. Vide his letter dated 23rd September 1990, the first Plaintiff forwarded to the Defendant a bankers cheque for Kshs.23,345/- being the stand premium, stamp duty and survey fees.

By an agreement in writing dated 2nd June 1994, the first Plaintiff, for love and affection and with the consent of the Defendant transferred his interest in the suit piece of land to his wife the second Plaintiff. Thereafter the second Plaintiff paid the other outgoing charges in respect of the suit piece of land amounting to Kshs.167,111/-. Despite all these payments the Plaintiffs claim that the Defendant has failed to issue the second Defendant with a title deed and has, instead, allocated the suit piece of land to the Interested Party who has developed it. They therefore claim a declaration that they are the official owners of Plot No. MN/1/6633, Nyali, Mombasa; an order of specific performance directing the Defendant to issue to the second Plaintiff a title deed for the suit piece of land; or in the alternative an order directing the Defendant to either allocate the second Plaintiff with an alternative piece of land or refund to her the said sum of Kshs.167,111/-; general damages plus costs and interest.

The Defendant filed a short general defence in which he denied virtually everything pleaded in the plaint. Later, Samuel Odhiambo Oguk, applied and was enjoined in this suit as an Interested Party. In his defence the Interested Party avers that he is the allottee of LR No. MN/1/6633 formerly known as unsurveyed residential plot No.1 Nyali, Mombasa comprising 0.202 of a hectare or thereabouts. He says the piece of land was allocated to him in January 1986 and after paying all the required charges he was on 19th February 1996 issued with a Grant under the **Registration of Titles Act**. He took possession of the land and constructed a residential house on it in which he lives with his family. In the circumstances he prays that the Plaintiffs' suit should be dismissed with costs.

At the hearing the Plaintiffs testified and called two witnesses. The Interested Party also testified but

never called any witnesses. The Defendant never called any evidence. In his testimony the first Plaintiff stated that following an advertisement in the local dailies in 1986 that there were plots near Mamba Village in Mombasa for allocation he applied for one by paying the application fees of Kshs.1,000/-. After balloting he received an allotment letter dated 22nd August 1990 allocating to him unsurveyed Plot No. 1 Nyali. He accepted the offer by paying the stand premium, rent, conveyance, registration and survey fees as well as stamp duty. In 1994, with the consent of the Defendant he transferred his interest in the land to his wife the second Plaintiff. In spite of several visits to Ardhi House in Nairobi they have not been issued with title. He therefore prayed for vacant possession of that plot or alternatively that they be allocated another piece of land or refunded the amount they paid totaling to Kshs.190,456/-. He also prays for damages and costs.

In cross examination, the first Plaintiff stated that he does not know whether the piece of land was transferred to his wife. Although he realized in 1996/1997 that the Interested Party had been allocated the suit piece of land and was developing it, on the advise of his lawyer that it could be futile to sue the Interested Party who was then a High Court Judge as he would thwart his efforts, he did not take any legal action to restrain him.

Other than producing a copy of an unsigned and undated Grant which she said their lawyer obtained from the land's office that was supposed to be issued to her, the second Plaintiff gave more or less the same evidence as that of the first Plaintiff.

As I have said the plaintiffs called two witnesses. The District Physical Planning Officer, PW3, testified that the suit piece of land which is in Phase III Nyali was allocated to the first Plaintiff and that the Interested Party was allocated Plot No. 1 in Phase IV Nyali. Martin Odhiambo Odunga, PW4, a Valuer in the Municipal Council of Mombasa was not sure if the suit piece of land is in Phase III or Phase IV.

In his evidence the Interested Party testified that in 1985, while he was a magistrate in Mombasa, he applied for allocation of a piece of land in Nyali and was allocated the suit piece of land and in December 1990 a Government Surveyor pointed it out to him. He was soon thereafter transferred to Meru and inadvertently failed to accept the offer until 1994 when he pleaded with the Commissioner of Lands who accepted late payment. After paying all the required charges he was issued with title to the suit piece of land. In 1995 he started constructing a residential house on it and until completion after about five years nobody raised a finger against him. He never knew of this suit until 16th June 2005 when he learnt from the Standard News Paper that the Plaintiffs were claiming ownership of the suit piece of land. He thereafter applied and was enjoined as an Interested Party in this suit. He prayed for the dismissal of the Plaintiffs' claim.

After adducing evidence, the parties' counsel filed written submissions. In his submission counsel for the Plaintiff contended that the first Plaintiff was allocated the suit piece of land on 17th January 1986 while the Interested Party was allocated the same piece of land several years later on 28th August 1990 and accepted the offer on 8th April 1994. He doubted if the Interested Party had indeed applied for allocation of the suit piece of land as he did not produce a receipt for the application fee. He cited the High Court decision in **Gitwany Investment Ltd Vs Tajmal Ltd & Others, Nairobi HCCC No. 1114 of 2002** and urged to cancel the title issued to the Interested Party. On his part counsel for the Defendant submitted that the Plaintiffs' claim cannot be granted for three reasons. First that contrary to what is stated in the letter of allotment the first Plaintiff did not take possession of and/or develop the suit piece of land within 6 months as required. Secondly that the Interested Party having been issued with title to the suit piece of land it cannot be given to the Plaintiffs. And lastly that the prayer for specific performance cannot be granted against the Government.

The Interested Party submitted that the Plaintiffs slept on their rights. Having been issued with title and fully developed the suit piece of land the same cannot be given to the Plaintiffs. He prayed for the dismissal of this suit with costs to him.

I have considered these submissions and the evidence on record. First and foremost it is not clear from

the evidence on record that the suit piece of land is the same one that was allocated to the Interested Party. PW3 and PW4 were not in the plot allocation committee that allocated land to the first Plaintiff or the Interested Party. Their oral evidence does not therefore help.

The Plaintiffs are not alleging that the Interested Party fraudulently got himself allocated the suit piece of land and was issued with title thereto. In the absence of fraud the Interested Party's title is therefore, under **Section 23** of the **Registration of Titles Act**, indefeasible. Moreover the first Plaintiff did not, after allocation, seek to be shown the piece of land allocated to him or take possession of and develop it within 6 months as stated in clause 2 in the letter of allotment. I therefore agree with Mr. Maroro that the Defendant's offer to him lapsed. I also agree with the Interested Party that the plaintiffs slept on their rights. They saw the Interested Party take possession and develop the suit piece of land for five years. During that period they never raised a finger. I do not accept their contention that they were advised against taking legal action against the Interested Party. If that is true then they have their lawyer to blame for misleading them. Action can always be taken against judicial officers including High Court Judges.

For these reasons the Plaintiffs' claim for a declaration that they are the official owners of the suit piece of land and for an order of specific performance falls a cropper. In any case specific performance cannot be granted against the Government. The Plaintiffs are however entitled to a refund of the sum of Kshs.190,476/- they paid. I therefore enter judgment for the Plaintiffs in the alternative claim for a refund of the said sum of Kshs.190,476/- together with interest at court rates from the date of filing this suit. The Plaintiffs shall also have the costs of this suit against the Defendant but the Interested Party shall bear his own costs.

DATED this 27th day of October, 2008.

D. K. MARAGA

JUDGE.

DELIVERED this.....day of.....2008 by Hon. Justice Festus Azangalala. In the presence offor the Plaintiffs,
.....for the Defendants and
.....for the Interested Party.