



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

**Civil Suit 2 of 2004**

**DR. C.O. OKERE .....PLAINTIFF**

**VERSUS**

**ESTHER NDUTA KIIYUKIA .....1<sup>ST</sup> DEFENDANT**

**ESTHER MUTHONI .....2<sup>ND</sup> DEFENDANT**

**CITY COUNCIL OF NAIROBI .....3<sup>RD</sup> DEFENDANT**

**J U D G M E N T**

In this suit the Plaintiff under his further Amended Plaintiff dated 19<sup>th</sup> July 2005, seeks prayers of (1) permanent injunction restraining the 3 Defendants from remaining on, trespassing upon, wasting, constructing, selling, alienating, fencing or interfering and/or dealing in any manner whatsoever with land title Nairobi/Block/63/305 originally plot No. 281 Jamhuri Phase II and removal of the structures therein at the Defendant's costs; (2) general damages; (3) costs and (4) a declaration that he is the owner of the aforesaid property (herein after referred as "*the suit property*"), as well as order of cancellation of the title of the suit property in favour of the 1<sup>st</sup> Defendant.

He alleges that he has been at all material time the owner of the suit property and that the City Council of Nairobi (3<sup>rd</sup> Defendant) unlawfully, wrongfully and fraudulently sold the same to 2<sup>nd</sup> Defendant who in turn sold the same to the 1<sup>st</sup> Defendant.

The particulars of negligence, collusion or fraud of the Defendants have been particularized in paragraph 5 of the further amended plaintiff.

It is also alleged that 3<sup>rd</sup> Defendant had no interest to pass a good title to the 2<sup>nd</sup> Defendant and 2<sup>nd</sup> Defendant did not have any title to pass on to the 1<sup>st</sup> Defendant. Thus the said two transactions are null and void.

The three Defendants filed their respective amended Defences and denied all averments made in the further amended Plaintiff.

3<sup>rd</sup> Defendant averred that it transacted over the subject property with statutory proprietary rights and within legally justifiable parameters. 2<sup>nd</sup> Defendant averred that she was an innocent purchaser for value and the 1<sup>st</sup> Defendant also raised similar defence.

The statement of Agreed issues was filed on 23<sup>rd</sup> November 2004.

Thereafter the trial commenced before me on 12<sup>th</sup> February, 2007.

The Plaintiff testified that around the year 1992, while he was an employee of Nairobi City Council (3<sup>rd</sup> Defendant), he applied for an allotment of a plot. He received a letter of allotment dated 10<sup>th</sup> February 1992. The plot allocated was Plot No. 281 of Jamhuri Estate Phase II. The letter was produced as an exhibit (P Ex1). It required him to pay a stand premium of Shs.9,000/= and annual rent of Shs.1,800/=. He paid Shs.10,800/= on 13<sup>th</sup> February 1992 receipt whereof was produced (P Ex 2). In pursuance to further letter from the 3<sup>rd</sup> Defendant, he paid Shs.2,000/= being payment of a plan and survey fees of Shs.5,700/= {P Exs 3, 3(a) and (b)}.

After the payment of Shs.5,700/= towards survey fees on 25<sup>th</sup> May 1992, he accompanied a surveyor who surveyed the plot and placed beacons on the plot. Although he testified that he was given the plan, he did not produce it in evidence. He started looking for funds to construct on the plot. According to him the 3<sup>rd</sup> Defendant was supposed to be organizing for the title deed from the Registrar of Lands.

He revisited the plot around December 2003 and found someone constructing thereon. Thereupon he instructed his Advocate to write a letter to Nairobi City Council to furnish details of the first allottee of the plot. It was responded by the Director of City Planning of 3<sup>rd</sup> Defendant on 29<sup>th</sup> April, 2004. It confirmed that the Plaintiff was the original allottee. (P Ex.5 & 6). He also addressed a letter dated 2<sup>nd</sup> April 2004 to the Town Clerk of 3<sup>rd</sup> Defendant asking him to confirm to the Commissioner of Lands that he was the original allottee (P.Ex 7). His advocate applied for a certified copy of the original title. The same as well as certificate of official search dated 2<sup>nd</sup> January 2004 were also produced {CP Ex 5 & 8 (a), (b) and 9}.

A photograph showing the construction on the plot also was produced. (P Ex 10).

He denied that he was informed about the cancellation of the said allotment from the 3<sup>rd</sup> Defendant.

He averred that the land which was so allotted to him was thereafter wrongfully and unlawfully transferred to 2<sup>nd</sup> Defendant who then similarly transferred to 1<sup>st</sup> Defendant.

I may note here that apart from P Ex 8(a), (b) and 9, the other exhibits produced by the plaintiff referred to plot No.281. P Ex. 8(a), 8(b) and 9 are in respect of plot No.305.

He agreed that as per his evidence, the first registered proprietor of the plot No.305 was 2<sup>nd</sup> Defendant and that he had no proof that 1<sup>st</sup> Defendant had colluded with any of the other two Defendants or that she committed any fraudulent acts to get the land.

He also agreed that he did not write any acceptance letter as required in last condition of letter of allotment. He only paid the money required. He also testified that he did not have any proof to show that plot No.281 allotted to him was changed to read plot No. 305. He also did not write any letter to the 3<sup>rd</sup> Defendant to inquire about his plot for the period from 1992 to 2003. He also did not communicate to the Registrar or Commissioner of Lands. He also conceded that when the plot was surveyed he did not fence the same as there was garbage around. He had to agree that in the Register of the plot, his interest has not been mentioned at all. He agreed that contrary to what he stated in paragraph 6 of the further amend plaintiff, he did not serve any letter of demand to 2<sup>nd</sup> Defendant. He insisted that there was fraud committed, as all these transactions were undertaken behind his back. He also agreed that as per the letter of 3<sup>rd</sup> defendant he is confirmed to be the original allottee in respect of plot No. 281.

The Defence of the 1<sup>st</sup> Defendant was led by her husband who was holder of her power of attorney. (Ex. D1 A).

He knows the Plaintiff from the day he visited their site in 2003.

The couple was looking for a plot along Jamhuri Estate and identified the plot in question (suit property). He was shown the title deed through an agent which showed 2<sup>nd</sup> Defendant as proprietor of the suit property. On checking with the office of the Registrar of Lands, the title deed was found to be valid (Ex. D1B).

He produced the sale agreement executed between the 2<sup>nd</sup> and 1<sup>st</sup> Defendants (Ex. D1c).

He paid the stamp duty of Shs.24,010/= on the purchase price of Shs.600,000/=. He further paid transfer fee of Shs.250/=. (Ex D1 D and E). Thereafter the title deed was transferred in the name of the 1<sup>st</sup> Defendant (Ex D1 F).

Thereafter 1<sup>st</sup> Defendant took over the possession and they started construction. They did not involve 3<sup>rd</sup> Defendant when entering into the transfer transaction.

He denied that he was aware of any claim or interest of the Plaintiff over the suit property.

In cross examination he stated that he was personally involved in the process of transfer transaction and insisted that the 1<sup>st</sup> Defendant is rightfully the 2<sup>nd</sup> proprietor of the suit property.

He agreed that 2<sup>nd</sup> Defendant had the title deed and obtained official search for the title. When the suit property was purchased it was an open plot. His family occupies the ground floor of the constructed structure and denied having any claim against the 2<sup>nd</sup> Defendant.

He reiterated that the sale agreement between his wife and 2<sup>nd</sup> Defendant was entered after getting confirmation on the title and thus it was not necessary to involve the 3<sup>rd</sup> Defendant, i.e. City Council of Nairobi.

This was the evidence before the court as 2<sup>nd</sup> or 3<sup>rd</sup> Defendants did not offer any evidence.

It is not in doubt that the Plaintiff was an original allottee of Plot No. 281 Nairobi/Block 63 along Jamhuri Estate, Phase II. Similarly it is also undisputed that the 2<sup>nd</sup> Defendant was the first registered owner of Nairobi/Block 63/305 and after the initial registration in her name, she sold the same to the 1<sup>st</sup> Defendant at a purchase price of Shs.600,000/= and her name has been registered as a proprietor of the suit property on 11<sup>th</sup> June 2002.

With these undisputable facts, it is contended by the learned counsel of the Plaintiff, that as it is not clear as to how the 2<sup>nd</sup> Defendant acquired the suit property and as there is no evidence from either 2<sup>nd</sup> Defendant or 3<sup>rd</sup> Defendant that the allotment in favour of the Plaintiff of the plot No.281, was cancelled or revoked, the suit land, therefore, was not available for allocation or transfer to the 2<sup>nd</sup> Defendant and purported issuance of the lease in her favour and her transfer of the suit land to the 1<sup>st</sup> Defendant were therefore null and void.

The Plaintiff relied on condition on 2<sup>nd</sup> page of the letter of allotment, to wit:-

**“In addition the allottee shall be responsible for payment of development costs, conveyancing, registration and survey fees and any other charges or costs incidental to this transaction and the same shall be payable on demand.”**

Accordingly, it was further contended, that as no demand was made by the 3<sup>rd</sup> Defendant for registration, the 3<sup>rd</sup> Defendant had no right over the property. It is on record that he paid planning fees and survey fees.

The element of fraud was sought to be presumed from the aforesaid facts of purporting to lease the suit property to the 2<sup>nd</sup> Defendant knowing that the same was already leased to the Plaintiff.

The learned counsel relied on case of **M'mukanya v/s M'mbiwiwe (1984) KLR 761**. In the said case the issue was of the trespass against the persons who were purported to have been allocated the land which was initially allocated to other person. It was held that even if the first person was considered to be a licensee, the notice of any breach was not given and the possession can be presumed on the payment of rent.

Thus according to the Plaintiff the registrations of 2<sup>nd</sup> and 1<sup>st</sup> Defendants in respect of the suit property are of no legal consequences.

The submissions were made as regard the provisions of section 143 of Registered Lands Act (Cap 300) Laws of Kenya.

It stipulates:-

**“143(1): Subject to sub-section (2), the court may order rectification of the register directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud, or mistake.**

**(2). The register shall not be rectified so as to affect the title of a proprietor which is in possession and acquired the land, lease or charge for valuable consideration unless such proprietor had knowledge of the commission, fraud or mistake in consequences of which the rectification is sought or caused such omission, fraud or mistake or substantially contributed to it by act, neglect or default.”**

It is contended that the rectification sought is against the 1<sup>st</sup> Defendant who is not the first registered proprietor and thus it can be rectified. No explanation, however, was made as regards claim of payment of valuable consideration without notice of omission, mistake or fraud, or other elements of Section 143(2) of the RLA.

Efforts were made to transfer onus of proof of want of fraud or collusion or negligence on the Defendants, by the Learned Counsel of the Plaintiff.

Lastly it was submitted that even if 1<sup>st</sup> Defendant is found to be innocent of any fraud, which was not conceded, the court still has power to rectify and reliance was placed on the case of **Chauhan v Omagwa 1985, (KLR) page 650**.

Court of Appeal found in the said case that:

**“Once the court was satisfied that the registration in favour of the appellant was made by fraud by the vendor, it was authorized by sec.143 to order rectification of the register even if the plaintiff did not disclose a cause of action against the appellant. It was the registration made by the fraud of the vendor which permitted an order for rectification to be made by the court.”**

However, I do note at page 659, the Court of Appeal observed, namely;

**“The transfer of land form shows that the transfers in favour of the appellant was not a first registration; there was a previous registration in favour of the 1<sup>st</sup> Defendant which may or may not have been the first registration. It is only the first registration which may not be attacked even if obtained, made or omitted by fraud.”**

In the said case the transferor had already disposed of his interest to the Respondent as well as to the Appellant and the rectification was allowed to be made unless the appellant could invoke protection of

sub-sec (2) of sec. 143.

In the said case the appellant was not in possession of the land unlike in this case wherein the 1<sup>st</sup> Defendant is in possession of the land and has paid valuable consideration. There is no evidence that he had knowledge of any fraud, omission or mistake as specified in Section 143(2) of RLA.

I do not think the facts of the **High Court Case No. 295 of 1976 Emlsa Mutsonga v Njah 1984, (KLR) 425** are relevant to the facts of this case. I can only note and adopt that the court in that case held that allegations of fraud must be strictly proved.

With these submissions, it was further contended that the Plaintiff be declared as an owner of the suit property and that Shs.100,000/= be paid to him as general damages for his inconvenience by the joint and several acts of fraud, collusion and/or trespass by the three Defendants.

In the alternative it was urged that 2<sup>nd</sup> and 3<sup>rd</sup> Defendants be held liable for fraud and collusion leading to unlawful deprivation of Plaintiff of the suit land and court to give order to assess market value of the suit land by a reputable valuer.

The Plaintiff also prayed for costs and interest.

The learned counsel for the 1<sup>st</sup> Defendant after reiterating the pleadings and evidence, argued that the Plaintiff has failed to prove allegation of fraud, collusion and negligence on the part of the 1<sup>st</sup> Defendant and relied on the passage on page 439 of the case of **Mutsonga vs. Nyati (1984) KLR, 425** wherein the court relied on several British and Kenyan cases to show that:

**“Charges of fraud should 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 probabilities is required in fact high decree of probability is required - - - - - It is very much a question for the trial Judge to answer”**

It was also observed further that

**“Again it would not be right to answer this issue on the impression any witnesses or part made or his demeanours alone. It would have to be tested against documentary evidence and their conduct before and after the event and the probability of the account given by them.”**

She also relied on sections 27, 28 and 143 of the Registered Lands Act (Cap 300 Laws of Kenya) and stressed that the registration of the 1<sup>st</sup> Defendant as a proprietor of the suit land and the same can be rectified, cancelled or amended only where the court is satisfied that any registration (other than the first registration) has been obtained, made or omitted by fraud or mistake.

It was also emphasized that no entry showing interest of the Plaintiff is shown in the certificate of title as required under section 32(1) of the RLA and that it is also not stated by the Plaintiff that the certificate of title in favour of the 2<sup>nd</sup> and 1<sup>st</sup> Defendants was not genuine. The 1<sup>st</sup> Defendant being a purchaser for valuable consideration, was not required in any way to enquire or ascertain the circumstances in which or consideration that proprietor or any other previous proprietor was registered has paid as per provisions of section 39 of the RLA.

It was thus urged that as per the principles laid down in the case of **Geila v Cassman Brown & Co. Ltd. (1973) EACA 358**, the Plaintiff has failed to prove any of the ingredients added to enable the court to give orders sought for and even if it is proved that was the proprietor, then permanent injunction should not be given, damages being an adequate remedy in this case. This was submitted relying on the photograph produced by the Plaintiff (P Ex 10) that 1<sup>st</sup> Defendant has erected a construction and that the Plaintiff has not made any development thereon. The 1<sup>st</sup> Defendant having acquired a title on the land was entitled to the possession and occupation and cannot be treated as a trespasser.

The learned counsel for 2<sup>nd</sup> and 3<sup>rd</sup> Defendants adopted the submissions made by the learned counsel for the 1<sup>st</sup> Defendant.

It was further submitted that the fact of registration cannot be challenged on the basis of the letter of allotment.

It was contended that the title issued to the 2<sup>nd</sup> Defendant was a first registration and is indefeasible and the 1<sup>st</sup> Defendant being a bona fide purchaser for value is also protected under section 143 of the RLA.

The cases of **Ambale v Musolia (1986) KLR 241** and **Obiero vs Opiyo and Others (1972) EA 227** were cited in support of the above contentions.

It was further contended that the letter of allotment is an intention by the Government to allocate land and the same cannot be used to defeat title of a person who is a registered proprietor of the land. The cases of **Wreck Motor Enterprises v Commissioner of Land and Others Nairobi C.A. No. 71 of 1997** and **High Court Case of Lilian Waithera Gachuhi vs. David Shikuku Mzee H.C.C.S No.10/03 (both unreported)** were cited to support the said submissions.

I have carefully considered the submissions made by all the four counsel and respective authorities cited by them.

I would reiterate that the facts as evidenced and stipulated hereinbefore is undisputed. The Plaintiff was an allottee of the plot No. 281. Although it is not raised by any of the parties, there is no evidence before me that the said plot was then renumbered as plot No. 305 which is the suit property and which was first registered in the name of the 2<sup>nd</sup> Defendant and thereafter transferred to the 1<sup>st</sup> Defendant without any encumbrances shown thereon. In short, the title documents do not show any interest claimed by the Plaintiff.

The Plaintiff has specifically alleged that the suit property was unlawfully registered initially in the name of the 2<sup>nd</sup> Defendant and thereafter in the name of the 1<sup>st</sup> Defendant due to fraud, collusion and/or negligence on the part of the three defendants.

I entirely agree with the submissions made by the counsel for the Defendants that the particulars of those allegations have to be strictly proved and the onus to prove it lies on the party alleging the same (see **Koinange & 13 Others vs. Koinange (1986) KLR 23**).

The said principles is trite law of evidence and in this case the burden of proof definitely does not shift to the Defendants.

I respectfully disagree with the Plaintiff's contention that there was fraud or collusion or negligence on the part of any of the Defendants, solely because there is no evidence to even suggest the same.

The 2<sup>nd</sup> Defendant derived a lawful title from the 3<sup>rd</sup> Defendant which is, in any event, indefeasible even on the face of fraud and the 1<sup>st</sup> Defendant was a bona fide purchaser for value without notice and thus obtained a lawful title in respect of the suit property.

The interest of the Plaintiff, even if I do believe the same to be in existence, is an inchoate one and cannot defeat the registered proprietorship of 1<sup>st</sup> and 2<sup>nd</sup> Defendants. Even as per the provisions of section 143 of the RLA both are entitled to the registration of title in their respective names.

Even if I am wrong on the aforesaid findings, which I hope I am not the Plaintiff has only shown that he was allotted a plot bearing L.R. No. Nairobi/Block 63/281 and not the suit property which is LR No.Nairobi/Block/305. I do not have any evidence to find that both these plots are the same.

In the premises I do find that the allocation of the L.R. No. Nairobi/Block 63/281 in the name of the

Plaintiff cannot defeat the registered proprietorship of the 2<sup>nd</sup> Defendant and 1<sup>st</sup> Defendant respectively in respect of L.R. No. Nairobi/Block 305.

The Plaintiff's suit fails and is dismissed with costs.

Dated and Signed at Nairobi this 4<sup>th</sup> day of May, 2007.

**K.H. RAWAL**

**JUDGE**

**4.5.07**