



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

ELCC NO. 334 OF 2012

LESSAN HARDWARE LTDPLAINTIFF

VERSUS

SETTLEMENT FUND TRUSTEE..... 1ST DEFENDANT

ALICE CHELAGAT TOO..... 2ND DEFENDANT

ROBERT KIPKOECH KORIR..... 3RD DEFENDANT

JUDGMENT

1. Proceedings herein commenced through plaint filed on 25th April 2012, as HCCC No. 138 of 2012. The matter was later reassigned the present case number. The plaintiff stated in the plaint that on 18th January 1999, it was allocated parcels of land initially known as ADC Sirikwa plot numbers 514, 515, 516, 517, 518, 519, 520, 528 and 529 by the Agricultural Development Corporation. The plaintiff further averred that it purchased the said plots at a consideration of KShs 15,000 per portion measuring 5 acres thereby making a total of KShs 750,000 which it paid in full. It added that it immediately took possession of the said plots, fenced them and started growing crops and rearing cattle.

2. The plaintiff further averred that on or about 9th April 2012, its director was summoned to Sirikwa Police post where on arrival she learnt that the 2nd and 3rd defendants were claiming that they were the owners of land parcels numbers 520 and 521 and had produced title deeds. The plaintiff added that 1st defendant fraudulently caused title deeds to be issued to the 2nd and 3rd defendants in respect of ADC Sirikwa Plot numbers 520 and 521. The plaintiff therefore prayed for judgment against the defendants for:

(a) A declaration that the plaintiff is the owner of all those parcel (sic) of land known as ADC Sirikwa Plot numbers 520 and 521 now known as Nakuru/Sirikwa/520 and Nakuru/Sirikwa/521.

(b) An order of injunction restraining the defendants by themselves, agents, servants and or employees from in any way interfering with the plaintiff's land known as ADC Sirikwa Plots numbers 520 and 521 now known as Nakuru/Sirikwa/520 and Nakuru/Sirikwa/521.

(c) Declaration that title deeds over land parcels numbers Nakuru/Sirikwa/520 and Nakuru/Sirikwa/521 were fraudulently issued to the 2nd and 3rd defendants.

(d) An order of directing the registrar of lands to cancel the said title deeds.

(e) Costs of this suit and interest.

3. The 1st defendant filed a statement of defence through the office of the Honourable Attorney General in which it denied the allegations in the plaint and urged the court to dismiss the suit with costs.

4. The 2nd and 3rd defendants filed a joint statement of defence through the firm of M/s Mirugi Kariuki & Company Advocates. They admitted that they had made a report to the police in which they claimed to be the owners of the suit plots. They denied the other allegations in the plaint save for the court's jurisdiction. Just like the 1st defendant, they too urged the court to dismiss the suit with costs.

5. At the hearing, the plaintiff's director one Jane Cherotich Chepkwony testified as the sole plaintiff's witness. She adopted her witness

statement and stated that the plaintiff was incorporated in 1994. That at incorporation it had two directors, herself and Wilson Kiprono Chepkwony who was her late husband. She remained as the sole director after her husband's demise in the year 1999 and the company remained operational. That she instructed the firm of Ikua Mwangi & Co. Advocates to file this case.

6. Mrs Chepkwony further testified that the parcels of land known as ADC Sirikwa Plot numbers 520 and 521 and now known as Nakuru/Sirikwa/520 and Nakuru/Sirikwa/521 were allocated to the plaintiff in January 1999 by Agricultural Development Corporation at a purchase price of KShs 15,000 per acre. The plaintiff acquired 50 acres for a total of KShs 750,000 which it paid in full and receipts as well as a list of allottees were issued to it. That the plaintiff took possession of the land immediately and used it to rear cattle, grow some potatoes, planted blue gum trees and later fenced it. That sometime in 2006 there was some encroachment and the plaintiff instructed an advocate who issued a demand letter and ADC replied confirming that it had allocated to the plaintiff plots numbers 514 to 521, 528 and 529.

7. She further stated that there was another encroachment sometime in 2012 and she went to the police station where she was informed that the 2nd and 3rd defendants had lodged a complaint which led to her being summoned by the police. While at the police station, she was informed that another encroachment was going on. She went back to the farm and found hired people who took off after seeing her, leaving her trees which they had been destroying. She reported the matter to OCPD Olenguruone who referred her to the Provincial Police Officer Nakuru who she then reported to. She added that the Provincial CID Officer wrote a letter to the District Land Registrar Nakuru asking to restrict transactions on the said plots. She produced a copy of each of the following documents as exhibits: certificate of incorporation of the plaintiff dated 22nd February 1994, letter dated 18th January 1999 from Agricultural Development Corporation to the plaintiff, 4 receipts issued by Land Limited, page 19 of list of ADC Sirikwa allocations, letter dated 22nd June 2006 from Agricultural Development Corporation to Ochieng Gai & Company Advocates, 7 black and white photographs, title deed dated 13th September 2011 in respect of Nakuru/Sirikwa/520 in the name of the 2nd defendant, title deed dated 1st February 2012 in respect of Nakuru/Sirikwa/521 in the name of the 3rd defendant, order issued on 21st December 2006 in Molo PM Land Dispute Tribunal No. 37 of 2006, order issued on 19th June 2006 in Nakuru HCCC No. 124 of 2006, letter dated 10th April 2012 from Provincial CID Officer Nakuru to the District Land Registrar Nakuru and letter dated 10th April 2012 from Ikua, Mwangi & Company Advocates to the Deputy OCPD Kuresoi.

8. Under cross-examination and re-examination, she stated that she has never filed in this matter any resolution of the company authorizing filing of this case. She added that there was fraud since despite the plaintiff being the first to be allocated the plots, paying for the land in full and taking possession, title was not issued to it. That the 2nd and 3rd defendants have never been arrested or charged in court in relation to her complaint to the police. She conceded that the plaintiff was allocated 50 acres in total but other allottees got no more than 7.5 acres, that the 1st defendant allocates land to squatters, that the plaintiff is neither a natural person nor a squatter and that apart from plot 520 and 521 the plaintiff has not obtained titles in respect of the remaining 40 acres.

9. With that, the plaintiff's case was closed.

10. When its turn came, the 1st defendant closed its case without calling any witness.

11. The second defendant testified next as DW1. She stated that in the year 2005, after several oral attempts, she visited the District Land Adjudication and Settlement Officer's office in Nakuru together with the third defendant and expressed interest in getting a parcel of land through the assistance of the Government. She wanted land for her family. She kept on visiting the office and in December 2006 the third defendant and her received Letters of Offer dated 8th December 2006. Officers from the District Land Adjudication and Settlement Officer's Nakuru office showed her the parcel of land and its boundaries in the year 2007. She was then instructed to pay the Government through Settlement Fund Trustees. She added that she was unable to raise the money immediately and it was until March 2011 that she managed to clear the payments. Thereafter, the properties were transferred to them and they were subsequently issued with title deeds. She produced copies of the following documents as defence exhibits: title deeds in respect of parcels of land known as Nakuru/Sirikwa/520 and Nakuru/Sirikwa/521, letters of offer dated 8th December 2006 from Director of Land Adjudication and Settlement to the third defendant and her, a bundle of receipts issued by the government, discharges of charge in respect of parcels of land known as Nakuru/Sirikwa/520 and Nakuru/Sirikwa/521, transfers in respect of the two parcels of land from Settlement Fund Trustees to the third defendant and her, stamp duty declaration, assessment and pay in slips and statements from Settlement Fund Trustees.

12. Under cross-examination, she stated that she did not acquire the land fraudulently and that she has never been arrested over any allegations of fraud in connection with the land. She added that upon being allocated the plots, she and the third defendant were shown the plots which were vacant. That by the time she was summoned by Provincial Criminal Investigating Officer (PCIO) Nakuru, she already had her title.

13. Next on the stand was the third defendant Robert Kipkoech Korir who testified as DW2. He also adopted his written witness statement dated 7th September 2020. His evidence was essentially a replica of that of DW1. Under cross-examination, he stated that he paid the first defendant for the plot and that when he visited the plot in the year 2012, he found no one in occupation and that there were no planted trees on it or any farming going on.

14. The second and third defendants' case was then closed at this point. Parties filed and exchanged written submissions. The plaintiff identified the following issues in its submissions: whether lack of a resolution authorizing filing of this suit renders the suit defective, whether the plaintiff is the lawful owner of all those parcels of land known as Nakuru/Sirikwa/520 and Nakuru/Sirikwa/521, whether the 2nd and 3rd defendants were regularly allotted suit properties, whether there is a question of double allocation and if so, what are the consequences, whether the plaintiff is entitled to the orders sought and finally, who is to bear costs of this suit.

15. On the question of whether lack of a resolution authorizing filing of this suit renders the suit defective, counsel for the plaintiff argued that the plaintiff is a private company which had PW1 and her late husband as the only shareholders and that in view of the provisions of **Section 33 of Companies Act (Cap 486)** (repealed) the powers of the plaintiff are vested in PW1 as the only surviving director and shareholder. That in the circumstances the suit is not defective since PW1 as the only surviving director and shareholder did not require any

authority to institute the case.

16. On the issue of whether the plaintiff is the lawful owner of the suit properties, counsel for the plaintiff argued while relying on **Joseph N.K. Arap Ng'ok v Moijo Ole Keiwua & 4 others Nairobi Civil Appeal No. 61 of 1997 (unreported)** that ownership of land emanates from allotment, satisfying the conditions of allotment, taking possession and issuance of title. That the plaintiff satisfied the conditions of allotment by paying to Agricultural Development Corporation the demanded sums and took possession of the suit properties and hence it is the lawful owner of the suit properties.

17. As to whether the 2nd and 3rd defendants were regularly allotted suit properties, the plaintiff reiterated that it satisfied the conditions of allotment by paying to Agricultural Development Corporation the demanded sums and took possession of the suit properties. That in comparison, the 2nd and 3rd defendants' letter of offer required them to pay within 12 months yet they paid about 6 years later. It therefore argued that the 2nd and 3rd defendants' titles were illegally, irregularly and fraudulently issued. It relied on the case of **Funzi Island Development Limited & 2 others v County Council of Kwale & 2 others [2014] eKLR** where D.K. Maraga JA (as he then was) stated:

... In the case of allocated land, even if the section is applicable, a registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular. A court of law cannot, on the basis of indefeasibility of title, sanction an illegality or give its seal of approval to an illegal or irregularly obtained title.

18. On the issue of whether there is double allocation, the plaintiff argued that there is double allocation since the suit properties were allocated to it in 1999 only to be allocated later to the 2nd and 3rd defendants. The plaintiff thus argued that when two equities are equal, the first in time shall prevail. It relied on the cases of **Denis Gitonga & another v Manyara Delamare Kiranji [2020] eKLR** and **Ashmi Investment Limited v Riakina Limited & another [2017] eKLR**.

19. On the basis of the foregoing, the plaintiff urged the court to grant it the reliefs sought with costs.

20. The Attorney General, on behalf of the 1st defendant, identified the following three issues for determination: Who between the plaintiff and the 2nd and 3rd defendants is the legal and rightful owner of the suit properties? Whether the defendants committed any fraud in respect to the suit property. Whether the plaintiff is entitled to the reliefs sought.

21. On the first issue, the Attorney General argued that the root of the plaintiff's claim to the suit properties cannot be traced and that the plaintiff has not adduced any evidence of fraud to warrant impeaching the 2nd and 3rd defendants' titles which are protected under **Section 26 of the Land Registration Act**. On the issue of whether the defendants committed any fraud in respect to the suit properties, the Attorney General cited **Section 107 of the Evidence Act** as well as the case of **Joseph N.K. Arap Ng'ok v Moijo Ole Keiwua & 4 others Nairobi Civil Appeal No. 61 of 1997 (unreported)** and argued that the plaintiff's allegations of fraud have not been proven. In the circumstances, the Attorney General urged the court not to disturb the 2nd and 3rd defendants' titles.

22. On their part, the 2nd and 3rd defendants identified the following issues for determination: firstly, whether the suit is defective in the absence of a company resolution authorizing its filing; secondly, whether the Agricultural Development Corporation (ADC) allocates land; thirdly, who is allocated Government land through the Settlement Fund Trustees (SFT); fourthly, whether ADC is the same as SFT and Lands Limited and lastly, whether the 2nd and 3rd defendants committed fraud in acquiring title documents to Nakuru/Sirikwa/520 and Nakuru/Sirikwa/521.

23. On the first issue, the 2nd and 3rd defendants cited **Order 4 Rule 1 (4) of the Civil Procedure Rules** as well as the cases of **Kenya Commercial Bank Limited v Stage Coach Management Ltd [2014] eKLR** and **Directline Assurance Company Limited v Tomson Ondimu [2019] eKLR** and argued that a corporation can only institute a suit through a resolution of its board and that PW1 having admitted that there was no resolution filed herein authorizing her to commence the proceedings, this suit is defective and ought to be dismissed.

24. Regarding whether the Agricultural Development Corporation (ADC) allocates land, the 2nd and 3rd defendants cited **Sections 3 and 12 (1) of the Agricultural Development Corporation Act** and argued that ADC has no power to allocate government land. As to the question of who is to be allocated land through the Settlement Fund Trustees (SFT), it was argued that the mandate of SFT was mainly to settle squatters and that being a body corporate, the plaintiff was not a squatter and public land could not therefore be allocated to it. On whether ADC is the same as SFT and Lands Limited, it was argued that ADC and SFT are established under separate statutes with different mandates while Lands Limited is a subsidiary of ADC and that consequently, they are different entities with the result that ADC could not allocate land that it had no proprietary interest over.

25. On the issue of whether they committed fraud in acquiring the suit properties, the 2nd and 3rd defendants relied on the definition of "fraud" in **Black's Law Dictionary** as quoted in the case of **Gichinga Kibutha v Caroline Nduku [2018] eKLR**, the standard of proof required in allegations of fraud as restated by the Court of Appeal in the case of **Kinyanjui Kamau v George Kamau Njoroge [2015] eKLR** as well as the provisions of **Sections 107, 108 and 109 of the Evidence Act** and argued that the plaintiff has not proven fraud. They urged the court not to cancel their titles.

26. I have carefully considered the pleadings, the evidence and the submissions in this matter. Three issues arise for determination: whether this suit is defective for want of a resolution authorising its filing, whether fraud has been established and whether the reliefs sought should issue.

27. The plaintiff herein is a corporation. Consequently, the provisions of **Order 4 Rule 1 (4) of the Civil Procedure Rules** which provide that where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so apply to it. A perusal of the record herein shows that the plaint herein was accompanied by a verifying affidavit sworn

by Jane Cherotich Chepkwony who later testified as the sole plaintiff's witness. There is no authority of the company annexed to her verifying affidavit. During her testimony, she stated that at incorporation the plaintiff had only two directors and shareholders being herself and Wilson Kiprono Chepkwony who was her husband and who passed away in the year 1999, prior to the filing of this case. She remains as the sole director and shareholder after her husband's demise. The defendants have not tendered any evidence to challenge the position put forth by the plaintiff. It follows therefore that the provisions of **Section 33 of Companies Act (Cap 486)** (repealed) which were in force as at the date of filing of this suit applied to the plaintiff. The section provided as follows:

If at any time the number of members of a company is reduced, in the case of a private company, below two, or, in the case of any other company, below seven, and it carries on business for more than six months while the number is so reduced, every person who is a member of the company during the time that it so carries on business after those six months and is cognizant of the fact that it is carrying on business with fewer than two members, or seven members, as the case may be, shall be severally liable for the payment of the whole debts of the company contracted during that time, and may be severally sued therefor.

28. The philosophy behind the provisions of **Order 4 Rule 1 (4)** of the **Civil Procedure Rules** is to ensure that any suit filed by a corporation has the approval of the corporation through its board. In this case the plaintiff although a limited liability company, is for all intents and purposes one and the same thing with Jane Cherotich Chepkwony who is its sole shareholder and director and who swore the verifying affidavit. I also take into account that the requirements of **Order 4 Rule 1 (4)** of the **Civil Procedure Rules** are procedural in nature. When dealing with procedural technicalities, this court has a duty under **section 3** of the **Environment and Land Court Act**, Sections **1A** and **1B** of the **Civil Procedure Act** and **Article 159 (2) (d)** of the **Constitution** to see to it that the just, expeditious, proportionate and accessible resolution of disputes is attained and that substantive justice prevails. See **Coast Development Authority v Adam Kazungu Mzamba & 49 others [2016] eKLR**. In the particular context of the circumstances obtaining in this case, I find that this suit is not defective. That disposes of the first issue for determination.

29. The plaintiff's case revolves around the allegation that the 2nd and 3rd defendants' titles were issued fraudulently. There is no dispute that the 2nd and 3rd defendants are the registered proprietors of the suit properties. The plaintiff's witness produced a copy of a title deed dated 13th September 2011 in respect of Nakuru/Sirikwa/520 in the name of the 2nd defendant and a copy of a title deed dated 1st February 2012 in respect of Nakuru/Sirikwa/521 in the name of the 3rd defendant.

30. As registered proprietors, the 2nd and 3rd defendants are entitled to the privileges and benefits under **Section 24** of the **Land Registration Act**. Further, **Section 26** of the Act obligates the court to accept the certificate of title of such proprietors as conclusive evidence of proprietorship, unless of course the provisos under **Section 26 (1) (a)** or **(b)** are alleged and established. The said sections provide as follows:

24. Interest conferred by registration

Subject to this Act—

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;

26. Certificate of title to be held as conclusive evidence of proprietorship

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. ...

31. Any allegation of fraud is a serious matter which besides being pleaded and particularised, must be strictly proven. See **Kuria Kiarie & 2 others v Sammy Magera [2018] eKLR**. The burden of proof facing a party alleging fraud is higher than the usual one in civil cases of proof on a balance of probabilities but lower than the criminal law standard of proof beyond reasonable doubt. See **John Mbogua Getao v Simon Parkoyiet Mokare & 4 others [2017] eKLR**. Similarly, the Court of Appeal stated in **Kinyanjui Kamau v George Kamau Njoroge [2015] eKLR** as follows:

It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo v Ndolo (2008) 1 KLR (G&F) 742 wherein the Court stated that:

“...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...” ... In cases where fraud is alleged, it is not enough to simply infer fraud from the facts. ...

32. The plaintiff must therefore adduce such evidence as to prove and demonstrate beyond mere balance of probabilities, that there was fraud.

33. The plaintiff's allegations of fraud are pleaded at paragraph 15 of the plaint wherein it is averred that "*the 1st defendant fraudulently caused title deeds to be issued to the 2nd and 3rd defendants ...*". It is immediately manifest that the allegation of fraud is raised against the 1st defendant only. That is an important detail since to impeach the title of a registered proprietor of land on account of fraud, **Section 26 (1) (a) of the Land Registration Act** requires proof that the registered proprietor is party to the fraud. Needless to state, a litigant can only prove that which it has pleaded in the first place since a party is bound by its pleadings. See **James K. Kamau v Nairobi City Council [2018] eKLR**. The plaintiff did not make any specific averment that the 2nd and 3rd defendants as registered proprietors were party to the fraud. Even the particulars of fraud relate to processing and issuing title deeds, statutory functions which are performed by inter alia the land registrar and certainly not the 2nd and 3rd defendants who are private citizens.

34. The plaintiff's claim to the suit properties is based on letter dated 18th January 1999 from Agricultural Development Corporation (ADC) pursuant to which it maintains that ADC allocated to it 50 acres of land at ADC Sirikwa Farm. The plaintiff further contents that it paid the requisite purchase price to Lands Limited on the instructions of ADC. It must be noted that neither ADC nor Lands Limited were joined to this case. It follows therefore that the plaintiff's claim that it was allocated the suit properties by ADC has not been tested and established through evidence.

35. Even assuming that the plaintiff was actually allocated the land by ADC and paid for it, the plaintiff produced a letter dated 22nd June 2006 from ADC to Ochieng Gai & Company Advocates to the effect that the suit properties had been paid for by the plaintiff before handover to the Settlement Fund Trustees (SFT) or the 1st defendant. If that be the case, it is for ADC to explain how it sold land to the plaintiff and then transferred it to SFT. As it is, the plaintiff chose to leave ADC out of this litigation and in the process no nexus has been established between the land that ADC allocated to the plaintiff and the 2nd and 3rd defendants' parcels of land known as Nakuru/Sirikwa/520 and Nakuru/Sirikwa/521. For those reasons, the plaintiff's allegations of double allocation do not arise. The 2nd and 3rd defendants' said titles are pursuant to allocations by SFT. SFT has neither claimed that the 2nd and 3rd defendants did not comply with any terms of the allocation nor sought cancellation of their titles.

36. In view of the foregoing discourse, the plaintiff has failed to establish its allegations of fraud. It has failed to make any case for cancellation of the 2nd and 3rd defendants' titles or indeed for any of the reliefs sought.

37. In the result, I dismiss the plaintiff's case with costs to the defendants.

Dated, signed and delivered at Nakuru this 11th day of February 2021.

D. O. OHUNGO

JUDGE

In the presence of:

Ms Kimoriot for the plaintiff

Mr Ondieki for the 1st defendant

Mr Kipkoech for the 2nd and 3rd defendants

Court Assistants: B. Jelimo & J. Lotkomoi