



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 930 OF 2013

LUCY NCHEBEERE.....PLAINTIFF

VERSUS

ROSE NDULULU MUSEE.....1ST DEFENDANT

CHIEF LAND REGISTRAR.....2ND DEFENDANT

JUDGEMENT

1. By a plaint dated 30th July 2013, the plaintiff has filed this suit seeking judgment against the defendant for orders:-

(a) That a declaration do issue that the plaintiff is the rightful allottee/owner of the parcel of land known as Residential Plot No. 90 Athi River registered as LR NO. 20480.

(b) An order directing that title acquired by the Defendant herein be and is hereby cancelled by the registrar of titles.

(c) An order directing the Commissioner of Lands be compelled to issue the plaintiff with the documents for title for the residential Plot No. 90 Athi River registered as LR No. 20480.

(d) That the Registrar of Titles be ordered to make all necessary entries to this effect.

(e) Costs of this suit.

2. Upon being served with copies of plaint and summons to enter appearance, the defendant entered appearance on 7th October 2013 through the firm of Gikera & Vadgama Advocates. She also filed a defence and counterclaim dated 30th September 2013. She denied each and every allegation in the plaint. In her counterclaim she states that she is the legal beneficial owner of LR Number 20480 having obtained a grant Number IR 126026 from the 1st December 1997 which term is still valid and unexpired. She prays for:-

(a) A declaration that the plaintiff is the lawful and beneficial owner of LR No 20480.

(b) An order directing the 2nd defendant to lift the caveat placed by the plaintiff.

(c) A permanent injunction do issue to restrain the 1st and 2nd defendant it's employees, agents and servants from interfering with the plaintiff quiet and peaceful possession of the suit property.

(d) Cost of the counter-claim

(e) Any other appropriate remedy the court thinks fit to grant.

3. It is the plaintiff's case that she was allotted a residential Plot Number 90 in Mavoko vide allotment letter dated 3rd December 1994. The title was to be issued under the Registration of Titles Act for a consideration of Kshs.45,317/-. The plaintiff's claim against the defendants is for an order compelling the Registrar of Titles to issue title to the suit property known as Plot Number 90 Athi River registered as LR No 20480 to the plaintiff. She also seeks revocation of the title of the said property that was fraudulently issued to the defendant.

4. In paragraph 8 of the Plaint the particulars of fraud by the defendant, or her agent are given as:-

- (a) Allocating herself the suit premises when the same had been allocated to the plaintiff.*
- (b) Processing the title in her name when the allotment letter bears the names of the plaintiff.*
- (c) Colluding with her workmates to defraud the plaintiff.*
- (d) Blocking the accessibility of the file herein at the registrar's office Nairobi.*
- (e) Threatening to dispose or and develop the suit premises when there are serious complaints at the lands office.*

5. It is the defendants' case that the LR No 20480 was allocated to her by the Commissioner of Lands vide a letter of allotment letter dated 26th November 1997. That upon allotment she paid the standard premium and other charges as demanded. She paid Kshs.104,080/- being the land rent accrued from 1997 to 2010 for which she was issued with receipts. She was issued with a grant and the same title has never been challenged.

Evidence

6. PW1 Lucy Kiriro Nchebeere, the plaintiff herein adopted her witness statement dated 30th July 2013. She told the court that she and her late sister Mary Maringu Ngove applied for the plot. They were issued with an allotment letter which was kept by her late sister together with other documents. That later her sister became unwell and passed on. She produced the death certificate as an exhibit in this case. She stated that she went to the Ministry of Lands to follow up on the allotment but was informed the plot had been allocated to someone else.

7. They had not paid the necessary premium. She was issued with another letter of allotment dated 4th October 2010 as the records in respect of the said plot could not be traced on the Lands Registry. It was discovered that Rose Ndululu Musee had processed a title for the said plot.

8. The said Rose was summoned by the CID where she admitted and promised to surrender the title documents to the Lands Registry. She did not surrender the said documents. She further stated that she did not know the defendant before. She said she filed this suit so that the defendant can be compelled to surrender the title. She further stated that they had constructed a structure on the plot but it was demolished.

9. In support of her case the plaintiff relied on the documents in the list of documents dated 30th July 2013, the documents were produced as exhibits P1 to P20 respectively.

10. DW1, Rose Ndululu Musee, the defendant adopted her witness statement dated 26th April 2017 and the list of documents dated 15th May 2017. She told the court that she is the registered owner of a parcel of land known as LR NO 20480. She produced a title deed as an exhibit in this case. The same was issued on 23rd August 2010. She told the court that her plot is different from what the plaintiff is claiming. She told the court that she acquired the plot vide a letter of allotment dated 26th November 1997. That in 2018 all civil servants were asked to take back their letters of allotment for verification by the Ministry of Lands. She was told to go ahead and pay the fees for processing of title. She said she paid the requisite fees and was issued with a title deed.

11. That in 2010, she was summoned by the CID to present her title deed. She did. She has not been charged with any offence in respect of the said title.

12. She further stated that she joined the Chief Land Registrar to these proceedings because a caveat has been placed on her title. She prays that the same be removed. She also prays that she be declared the registered owner of LR No 20480.

13. The 2nd defendant in the counterclaim, the Chief Land Registrar did not call any witnesses but tendered written submissions.

14. At the close of the oral testimonies, the parties tendered written submissions.

The Plaintiff's submissions

15. They are dated 6th November 2019. They raise four issues for determination:

- (i) Whether the plaintiff is the legal proprietor of the suit land.*
- (ii) Whether there was fraud in the allocation the suit property to the plaintiff.*
- (iii) Whether the 1st defendant has trespassed on the suit land.*
- (iv) Whether the 1st defendant should be evicted for trespassing on the suit property.*

16. The plaintiff has a proper and legally acquired allotment letter to the suit parcel of land. The 1st defendant on the other hand is trespassing on the suit property as she illegally acquired documentation for the land. The Commissioner of Lands vide a letter dated 23rd June 2010 in response to the plaintiff's complaint, recommended that the plaintiff be issued with a fresh allotment letter dated 4th October 2010. The 1st defendant has no interest on the suit property. The plaintiff met all the conditions for the issuance of a title of Residential Plot

No 90 Athi River. The plaintiff having been the first allottee, their allotment should prevail. She has put forward the case of **Kamau James Njendu vs Serah Wanjiru & Another [2017] eKLR**, where the court stated that where there is double allocation of land, the first allotment should prevail.

17. The 1st defendant was an employee of the Ministry of Lands at the typing pool. She and her colleagues took part in drafting of the allotment letter to the plaintiff hence she had knowledge that that the parcel of land had already been allotted to the plaintiff. Later the file disappeared. This is a clear proof of fraud and the defendant cannot claim under section 26(1) of the Land Registration Act 2012. The 1st defendant ought to be removed from the suit land and the plaintiff left to enjoy quiet possession of her property.

18. She has put forward the case of **Redgrave vs Hurd [1881]**. The 1st defendant claims to have acquired an allotment letter procedurally and legally from the 2nd defendant, however, she does not produce any evidence to show how she acquired the title documents. She has put forward the case of **Abdia Dabasa vs Sangab Kalicha Huka [2019] eKLR**. The 1st defendant has not produced documentary evidence in favour of payment receipts from the Ministry of Lands as she fraudulently obtained the same neither has she shown any letter where she applied to be allocated that parcel of land.

19. The dispute was thoroughly investigated by the Commissioner of Lands, one Mr. Otieno who directed the 1st defendant to surrender the title immediately. She has also put forward the cases of **Peter Oloishorua Nkuraiya & 3 Others vs Peter Kamau Ng'ang'a & 2 Others [2019] eKLR; Trust Bank Ltd vs Paramount Universal Bank Ltd & 2 Others [2009] eKLR**. By dint of Section 26(1)(b) of the Land Registration Act, 2012, the 1st defendant cannot claim the suit property or protection. The registration of the suit Land in the name of the 1st defendant was unprocedural and in contravention of the statute and is therefore a nullity in law. This position was fortified by the recent pronouncement by the Court of Appeal in **Chemey Investment Limited vs AG & 2 Others [2018] eKLR**.

20. The 1st defendant cannot claim to be the indefeasible owner of the title to the suit land and is a trespasser herein. She ought to be permanently restrained from trespassing on the suit property. The 1st defendant is dishonest to this court. Her claim to the suit property is absurd and a waste of this honourable court's time.

21. The 1st defendant is in possession of the suit property illegally and unlawfully as she has not proved ownership. She has put forward the case of **Govas Holdings Ltd vs Tom Mayani Omami & 2 Others [2004] eKLR**. The 1st defendant ought to be evicted from the suit land. She prays that the prayers in the plaint be granted.

The 1st Defendant's Submissions

22. They are dated 8th January 2020. They raise six issues for determination: -

- (a) *Whether the plaintiff has a justifiable claim over the suit property?*
- (b) *Whether the letter of allotment suffice as proof of ownership?*
- (c) *Whether the letter of allotment confers any rights to the suit premises to the plaintiff?*
- (d) *Who has the title to the suit?*
- (e) *Whether the plaintiff is guilty of ordinate delay in instituting this suit?*
- (f) *Whether the defendant is entitled to the prayers set out in the counterclaim?*

23. The plaintiff's claim is grounded upon possession of a letter of allotment. She has put forward the cases of **John Mukora Wachichi & Others vs Minister of Lands & Others HC Pet No 82 of 2010; Joseph Arap Ng'ok vs Justice Moijo Ole Keiwua [1997] eKLR**. The plaintiff cannot assert any claim on the suit property on account of a letter of allotment. The plaintiff possesses two letters of allotment dated 3rd December 1994 and 4th October 2010. It has not been explained how the plaintiff ended up with two letters of allotment.

24. A letter of allotment cannot supersede a grant of title. Section 26 of the Land Registration Act provides that a certificate of title is the conclusive proof of ownership. She has put forward the case of **Shadrack KKurua Kimani vs Stephen Gitau Nganga & another [2017] eKLR**. The letter of allotment does not confer any rights to the plaintiff.

25. On the issue of fraud a party is bound by its pleadings. The plaintiff has pleaded allegations of fraud on the part of the defendant, such allegations must be strictly proven and the standard of proof is slightly higher. She has put forward the case of **Benson Wandera Okuku vs Israel Were Wakho [2020] eKLR**. No proper evidence has been adduced to support the allegations of fraud. The 1st defendant had no capacity to issue letters of allotment. She could therefore not have allotted herself. No witness from the Ministry of Lands was called to testify on any lapses in procedure. The records held by the Ministry of Lands cannot be said to be fraudulent.

26. The first letter of allotment by the plaintiff dated 3rd December 1994 was not complied with. The second letter of allotment dated 4th October 2010 was issued after the defendant had already been issued with a title. The collusion between the 1st defendant and her workmates has not been proved. The said workmates should have been enjoined to this suit. No witness from the office of the Chief Land Registrar was called to confirm that the file was missing from the Lands Registry or was not accessible. The 1st defendant being a registered proprietor of the land has not been barred from using or disposing the same.

27. The 1st defendant is the registered proprietor of the land known as LR No 20480. Section 26 of the Land Registration Act provides that a title document is conclusive proof of ownership of the suit property. She has put forward the case of **Magdaline Wambui Mbugua Muhia & 2 Others vs Charles King Kigwe & 3 Others [2019] eKLR**. The caveat was placed by the plaintiff herein. She has no feasible claim against the defendant. Article 40 of the Constitution provides for protection of property rights. It is in the interest of justice that the caveat placed by the plaintiff ought to be lifted so that the defendant can enjoy her property. The defendant's counterclaim ought to be allowed.

The Hon. Attorney General's Submissions

28. They are dated 18th December 2020. They raises three issues for determination:-

- (i) ***Whether any of the parties is the rightful owner of the suit property.***
- (ii) ***Whether the caveat was rightfully placed by the land registrar.***
- (iii) ***Whether any of the parties is the rightful owner of the suit property.***

29. The plaintiff was issued with a letter of allotment dated 3rd December 1994. There is no evidence that she complied with the conditions. She admitted that her sister did not pay the fee required within 30 days. He has put forward the case of **Joseph N K Arap Ng'ok vs Moiwo Ole Keiwua & 4 Others [1997] eKLR**. The plaintiff's interest was extinguished when she and her sister failed to comply with the conditions stated in the letter of allotment. The 1st defendant, on the other hand ought to demonstrate the root of her title. He has put over the case of **Munyu Maina vs Hiram Gathiha Maina [2013] eKLR**. It is unclear whether any party should be declared as the rightful owner of the suit property.

30. The caveat was lawfully registered by the Land Registrar under Section 57 of the Registered Title Act (Repealed). The caveat was properly registered.

31. The two parties claiming interest to the suit property must both make an effort to prove their claim by production of evidence. He has put forward the case of **Sheikh Ali Taib vs Headmaster, Mtwapa Primary School & Another [2013] eKLR**. Since the Registrar could not establish who the rightful registered owner was, the next best cause of action was to lodge a caveat so as to protect the suit property since it could potentially be government property.

32. There are allegations of fraud in relation to the manner in which the 1st defendant came to be registered as the proprietor of the suit property. **In KCB Ltd vs Registrar of Titles & 2 Others [2012] eKLR**. It was held that the Registrar can lodge a caveat to prevent fraud. He has also put forward the case of **Kenya Medical Supplies Agency (KEMSA) vs Mavji Kanyi Haruni & 8 Others [2013] eKLR**. The absence of proof by the 1st defendant that she paid the premium amount shows that the root of her title to the suit property cannot be verified. He prays that the suit property be surrendered back to the government since none of the parties can, on a balance of probability prove their title to the suit property.

33. I have considered the pleadings, and the evidence on record, I have also considered the written submissions filed on behalf of the respective parties. It is not in dispute that the plaintiff and her late sister were issued with a letter of allotment dated 3rd December 1994. It was for unsurveyed Residential plot number 90 Athi River. It appears they were issued with another letter of allotment dated 4th October 2010. The same is in respect of unsurveyed Residential Plot NO. 90 Athi River. It is also not in dispute that the defendant Rose Musee Ndululu was issued with a letter of allotment dated 26th November 1997 for Residential Plot LR No 20480 Athi River Township. Neither the plaintiff nor the defendant have exhibited a letter of application for a plot or a letter of acceptance of offer.

34. The issues for determination are:-

- (i) ***Who is the legal and registered proprietor of the suit property?***
- (ii) ***Is the plaintiff entitled to the reliefs sought?***
- (iii) ***Whether the defendant is entitled to the reliefs sought in the counterclaim.***
- (iv) ***Who should bear costs of the suit?***

35. It is the plaintiff's case that she and her late sister did not comply with the conditions set out in the letter of allotment dated 3rd December 1994. Her explanation is that she was under the impression that her late sister had paid the stand premium. The letter of allotment required them to pay stand premium of Kshs.40,000 and annual rent of Kshs.8000. These amounts were to be paid within thirty (30) days. In addition, they were to write a letter of acceptance with the conditions attached within thirty (30) days. The plaintiff has confirmed that they did not take any of the above steps.

36. It was only after her sister's demise that she followed up on the said plot. She visited the land registry and was informed that the plot had been allotted to someone else. They were given another letter of allotment dated 4th October 2010. She paid a total of Kshs.45,317/- on 14th October 2010. She was issued with a receipt for the said amount, serial No 2034854. She thereafter wrote several letters to the Commissioner of Lands requesting to be issued with a title deed for unsurveyed Residential Plot No 90 Athi River.

37. Upon her persistent requests for title, one W. Otieno for Commissioner of Lands wrote the following letter to Rose Ndululu Musee the

defendant.

“Ref: 259539/16

Rose Ndululu Musee

P. O. Box 207-00515

NAIROBI

RE: LR 20480-MAVOKO MUNICIPALITY

The above subject refers

You are hereby advised to submit the original title together with duly executed surrender documents.

The plot has a case of double allocation.

W. OTIENO

FOR: COMMISSIONER OF LANDS

Copy To

File:164577 TC”

38. The said officer wrote another letter dated 21st May 2012 conveying the same message. It appears the defendant did not surrender the said title hence this suit. The plaintiff also applied for a caveat to be registered against the said title held by the defendant.

39. As things stand the plaintiff relies on the letters of allotment dated 3rd December 1994 and 4th October 2010 in a bid to lay claim on the suit property.

40. The defendant on the other hand relies on the letter of allotment dated 26th November 1997. She also has a certificate of lease for LR No 20480 grant IR No. 126026 issued on 28th July 2010. It should be noted that by the time the 2nd letter of allotment was issued to the plaintiff on 4th October 2010 the defendant had already been issued a title.

41. As things stand the plaintiff relies on a letter of allotment while the defendant has a title for LR NO. 20840. **Section 26 (1)** of the Land Registration Act 2012 provides that:-

“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.”

In the case of **Joseph Arap Ng’ok vs Justice Moiwo Ole Keiwua [1997] eKLR** the Court of Appeal stated thus:

“It is trite law that such title to landed property can only come into existence after issuance of the letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of the title document pursuant to the provisions of the Act under which the property is held”.

The plaintiff has admitted that she did not comply with the conditions set out on the letter of allotment dated 3rd December 1994 to crystallize their interest on the suit property.

42. The letter from the Ministry of Lands signed by W. Otieno to the defendant states that the issue was about double allocation. It does not state that the defendant fraudulently acquired the plot.

I am satisfied by the explanation given by the defendant on how she acquired title to the suit property. I find that she is the legal proprietor of the suit property namely LR NO 20480. The office of the Chief Land Registrar was enjoined in this suit by the defendant in her counterclaim. They chose not to call any witnesses to confirm or disprove the claim in the letter dated 14th May 2012 that this was a case of double allocation. No witness from that office was called to confirm the plaintiff’s claim.

43. The plaintiff in paragraph 5 in her plaint set out the particulars of fraud by the defendant. The defendant has admitted that she worked with the Ministry of Lands as a typist from 1971 to 2007. It is trite law that allegations of fraud must be proved. In the case of **Benson Wandera Okuku vs Israel Were Wakho (2020) eKLR** the courts stated as follows:-

“15. And what about the standard of proof? The plaintiff said he has proved the case on a balance of probability. Is that the standard required in law. Certainly NOT. The law has been clear along. In RG Patel vs Lalji Makanji (1957) EA 314 the court expressed itself as follows:-

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require prove beyond reasonable doubt, something more than a mere balance of probabilities is required”.

16. In Jennifer Nyambura Kamau vs Hampherey Nandi (2013) eKLR, the court of appeal sitting at Nyeri emphasized that fraud must be proved as a fact by evidence, and, more importantly that standard of proof is beyond a balance of probabilities. This is the same position found in Koinange & 13 Others vs Nyati (1984) EA 425, Gudka vs Dodhia CA No 21 of 1980 and Richard Ekwesera Onditi vs Kenya Commercial Finance Co. Ltd: CA No 329 of 2009, Nairobi”.

44. The plaintiff did not adduce any evidence in respect of the allegations of fraud levelled against the defendant. I agree with the defendants’ submissions that the fact she worked with the Ministry of Lands is not conclusive proof of fraud. No evidence was led to confirm that the records in respect of the suit land were missing from the Land Registry when the plaintiff went to follow up. He who alleges must prove. Evidence of fraud must be proved beyond a balance of probabilities.

In the case of **Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR** Tunoi JA stated that:-

“It is well established that fraud must be specifically pleaded and that the particulars of fraud must be specifically pleaded and that the particulars alleged must be stated on the face of the pleadings. The acts alleged to be fraudulent must of course be set out and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved and it is not allowable to leave fraud to be inferred from the facts”

I find that the plaintiff has failed to discharge her burden of proving fraud on the part of the defendant. She has also failed to prove collusion between the defendant and her workmates.

45. I find that in the absence of proof of fraud on the part of the defendant, the plaintiff cannot be said to have succeeded in her claim. I find that her right was extinguished when they failed to comply with the conditions set out in the letter of allotment. I find that she has failed to prove her case as against the defendant on a balance of probabilities. She is not entitled to the reliefs sought in the plaint. The suit is dismissed with costs to the defendant.

46. Having found that the plaintiff is not entitled to the reliefs, the caveat lodged on her behalf against the defendant’s title ought to be removed.

47. In essence the defendant’s counterclaim succeeds. I enter judgment on her favour as follows:-

- (a) *That a declaration is hereby issued that the defendant (now plaintiff) is the lawful and beneficial owner of LR NO 20480.*
- (b) *That the 2nd defendant (Chief Land Registrar) is hereby directed to lift the caveat placed by the 1st defendant (Lucy Chebeere).*
- (c) *That a permanent injunction is hereby issued restraining the 1st and 2nd defendants, their employees, agents and servants from interfering with the plaintiff’s quiet and peaceful possession of the suit property.*
- (d) *That each party do bear own costs.*

It is so ordered.

Dated, signed and delivered in Nairobi on this 29th day of April 2021.

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L. KOMINGOI

JUDGE

In the presence of:-

Ms Azangalala for Mr. Mbuvi for the Plaintiff

Ms Aluoch for the 1st Defendant

Mr. Kamau for the 2nd Defendant

Phyllis- Court Assistant