



**Odhiambo v Omar & 2 others (Environment & Land Case
212 of 2017) [2023] KEELC 17090 (KLR) (3 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17090 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 212 OF 2017**

DO OHUNGO, J

MAY 3, 2023

BETWEEN

TOBIAS MIRON ODHIAMBO PLAINTIFF

AND

ABDI HASSAN OMAR 1ST DEFENDANT

FABIAN LUCINDE 2ND DEFENDANT

MR. OMULLA 3RD DEFENDANT

JUDGMENT

1. The plaintiff moved the court through plaint dated 28th June 2017 wherein he averred that by an agreement dated 25th April 2006, the first defendant sold to him plot number Kakamega Municipality/ Kambi Somali/20 (suit property) at a consideration of KShs 340,000 which he paid in full, and an allotment letter issued in his name. That the suit property was vacant at the time of purchase and that the plaintiff erected workers house thereon. The plaintiff further averred that the second defendant claimed that the first defendant sold a portion of the suit property to the second defendant and the second defendant therefore hived off a portion of the suit property which the second defendant leased to the third defendant who carried out garage business thereon and damaged building materials on the suit property.
2. The plaintiff averred that the sale to the second defendant was unlawful and void ab initio. The plaintiff therefore prayed for judgment against the defendants jointly and severally for:
 - a. That an eviction order do issue against the second and third defendants, their agents and or servants from the portion of plot No. Kakamega Municipality/Kambi Somali/20.



- b. A declaration that the plaintiff is the bona fide owner of plot No. Kakamega Municipality/Kambi Somali/20 and any subsequent agreement of sale of a portion thereof to be declared null and void.
 - c. General damages.
 - d. Costs of this suit.
 - e. Interest on 'c' above at the court rates.
 - f. Any other alternative relief that this Honourable court might wish to grant.
3. Hearing of the matter initially proceeded by way of formal proof and judgment delivered in favour of the plaintiff on 12th October 2017. The judgment was however set aside by consent on 14th May 2018.
4. The claim against the first defendant was later withdrawn with no order as to costs on 14th December 2021.
5. The second and the third defendants filed their joint defence and counter claim dated 15th May 2018 and averred that title to the suit property never passed to the plaintiff since the plaintiff never paid the full purchase price thereby frustrating the contract as a result of which the first defendant sold the suit property to the second defendant who took possession and had been utilising it up to the date of the defence. They further averred that if any title in the plaintiff's possession was fraudulently procured and that the plaintiff's claim is barred by limitation of actions.
6. The second and third defendants therefore prayed in their counter claim for:
 - a. A declaration that the premises (sic) the 2nd defendant is the owner of plot number Kakamega Municipality/Kambi Somali/20.
 - b. Payment of loss of rent at the rate of 20,000/= per month till payment (sic).
 - c. Dismissal of the plaintiff's case and issuance of an eviction order to issue (sic) against the plaintiff, his agents and employees from plot number Kakamega Municipality/Kambi Somali/20.
 - d. Costs of the suit.
7. At the hearing, the plaintiff testified as PW1 and adopted his witness statement as his evidence in chief. He reiterated that he purchased the suit property from the first defendant through a sale agreement dated 25th April 2006 and that he paid the purchase price of KShs 340,000 partly by giving the first defendant a motor vehicle worth KShs 200,000. That the plot was vacant and that he was issued with an allotment letter and built a worker's house on it. That when he visited the suit property he found that a portion of it had been curved out by the second defendant and leased to the third defendant. He added that his building materials had been destroyed and that the second defendant claims to have purchased the suit property.
8. Under cross examination and re-examination, he stated that the suit property was a subject of a criminal in which he was the complainant and that although he purchased the suit property in 2006, his allotment letter was backdated to 1997.
9. Patrick Ongaya Khamusali testified as PW2 and adopted his witness statement dated 13th March 2020 as his evidence in chief. He stated that he is an employee of National Land Commission working as the County Lands Administration Officer in charge of Kakamega and Nyamira Counties and that he is the custodian of all public land under lease. That sometime in the year 2016, two police officers went to his



- Kakamega office and requested him to help in an investigation over a complaint lodged by the plaintiff concerning the suit property whereby PW2 was asked to verify and confirm authenticity documents concerning the suit property. That he confirmed that the plaintiff's allotment letter was genuine and that it was normal in those days for allotment letters to be backdated if a property had changed hands through different allottees. He added that he confirmed that the plaintiff complied with the allotment by submitting a letter of acceptance and paying through a banker's cheque dated 18th August 2011. He added that the process of issuance of certificate of lease was under way and that the Kambi Somali Scheme had experienced several disputes including the one in this case. In his opinion, the plaintiff had followed the right procedure to obtain his allotment letter and is the rightful owner of the suit property.
10. Under cross examination and re-examination, PW2 stated that he was based at the Kakamega National Land Commission when the police approached him and that although the documents concerning the suit property were kept at the Ministry of Land headquarters in Nairobi, he did not visit the headquarters while compiling his report. He added that he did not see any receipt in respect of the copy of banker's cheque that the plaintiff showed him and that he did not see anything showing that the first defendant transferred his allotment letter to the plaintiff. He further stated that he visited the suit property, and the plaintiff was in occupation and even had workers therein.
 11. The plaintiff's case was then closed.
 12. During defence hearing, the second defendant testified as DW1 and adopted his witness statement dated 15th May 2018. He stated that the third defendant is his former tenant and that he purchased the suit property from the first defendant on 6th March 2009 at a purchase price of KShs 400,000 out of which he immediately paid KShs 300,000 and paid the balance of KShs 100,000 by 27th March 2009 upon which the first defendant released the original allotment letter and payment receipts to him. That the first defendant informed him that he had tried to sell the suit property to the plaintiff through sale agreements dated 25th April 2006 and 26th October 2006 and that the plaintiff failed to pay the agreed purchase price as a result of which the first defendant wrote to the plaintiff a letter dated 13th March 2009 from D.S.G Mango Advocates communicating to the plaintiff that the agreements had been cancelled. That the first defendant further swore an affidavit dated 27th March 2009 confirming that the plaintiff's did not have an interest in the suit property.
 13. DW1 went on to state that he was thereafter granted possession of the suit property sometime in 2009, fenced it and started using it and even leased it out to the third defendant sometime in 2015 with the plaintiff's knowledge. That sometime around November 2016, he was arrested together with the third defendant and charged with forcible detainer in Kakamega Criminal Case No. 1996 of 2016 and that both were acquitted. That during pendency of the criminal case, the plaintiff filed this suit, obtained judgment against them on the basis of a false affidavit of service and evicted them thereby causing them loss and damage. He added that the third defendant was paying him monthly rent of KShs 20,000, an amount which he has not been able to earn since 26th February 2018.
 14. Under cross examination and re-examination, DW1 stated that he did due diligence while purchasing the land, that he does not have an allotment letter in his name and that the first defendant gave him the original allotment letter.
 15. James Andati Omullah, the third defendant, testified as DW2. He stated that he approached the second defendant in the year 2005 and leased the suit property from him at a monthly rent of KShs 20,000 for his motor vehicle repair business. That he peacefully conducted the said business until sometime in 2016 when he was arrested and arraigned at Kakamega law courts in Criminal Case No. 1996 of 2016 and was later acquitted. He added that the plaintiff evicted him from the suit property on 26th February 2018.



16. Lastly, Robert Juma Simiyu testified as DW3. He stated that he is an Assistant Director, Land Administration, based at Ardhi House, Nairobi. He had in his possession file number 205863 in respect of the suit property and stated that there was in the file a letter of allotment dated 17th November 1997 in favour of Hassan A. Omar. He further stated that there is no other letter of allotment in the file and that his office doesn't change names of allottees even if there is a sale. When shown the allotment letter in the plaintiff's name, he stated that it is not possible that two allotment letters be issued in respect of the same plot and added that although his office received a letter from the plaintiff forwarding a cheque of Kshs 7,480 sometime in 2011, they did not issue any receipt for it because the plaintiff was paying for a non-existent plot.
17. Defence case was then closed. Parties thereafter filed and exchanged written submissions.
18. The plaintiff argued that he was the first purchaser of the suit property having bought it in 2006 while the second defendant alleged to have purchased it in the year 2009 and that he processed the allotment letter in his name, yet the second defendant has no allotment letter in his possession. The plaintiff further that the sale transaction between him and the first defendant was never cancelled, and that the first defendant did not return to him the motor vehicle which was used as part payment. The plaintiff therefore argued that he had proven his case and urged the court to allow his claim and dismiss the counter claim with costs.
19. The second and third defendants argued that the plaintiff presented two situations by which he got ownership of the suit property: by purchase and by allotment. That despite alleging that he bought the suit property from the first defendant, the plaintiff also alleged that he got allotted the land by the government by the allotment letter dated 17th November 1997. That the plaintiff therefore had no interest in purchasing land allotted to him. They further argued that as per the sale agreement dated 26th October 2006 which superseded the agreement dated 25th May 2006, the balance of the purchase price was to be paid by the exchange of a motor vehicle which was valued at KShs 200,000 which payment was to be done by 15th January 2007 by the plaintiff facilitating the transfer of the said vehicle to the vendor. That the plaintiff never proved that he transferred the vehicle to the first defendant or that upon full payment of the purchase price, the original letter of allotment was handed to him.
20. I have considered the pleadings, the evidence, and the submissions. The issues that arise for determination are whether the plaintiff or the second defendant have established purchasing the suit property from the first defendant and whether the reliefs sought should issue.
21. There is no dispute, as between the parties, that a letter of allotment in respect of the suit property was issued to the first defendant on 17th November 1997. It must however be remembered that a letter of allotment is not title to land. The allottee needs to follow it up, comply with all the conditions of the offer before he gets issued with a title document. In *Wreck Motor Enterprises v Commissioner of Lands & 3 others* [1997] eKLR, the Court of Appeal stated:

In our view, the endorsement or the appending of his signature by H.E. the President on the applications to the Commissioner of Lands for the suit plot or for that matter any other unalienated Government Land is not sufficient to grant title over any land to anyone. H.E. the President only approves the application for consideration by the Commissioner of Lands for allocation of any such property. It does not amount to the applicants obtaining title to such lands. Title to landed property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of title document pursuant to provisions held.



22. The plaintiff's case is that he purchased the suit property from the first defendant on 25th April 2006 at a consideration of KShs 340,000 which sum he paid partly in cash and partly through handing over to the first defendant a motor vehicle valued at KShs 200,000. According to Memorandum of Understanding dated 26th October 2006, the plaintiff was by that date owing the first defendant KShs 39,000 and was also to transfer the motor vehicle to the first defendant upon which the original of the letter of allotment was to be handed over to him by the first defendant. The plaintiff has neither demonstrated payment of the KShs 39,000 nor transfer of the motor vehicle to the first defendant. Worse still, the plaintiff withdrew his case against the first defendant, thereby forestalling any opportunity to pursue the issue any further. Any entitlement to the suit property by the plaintiff was expressly conditional on his successfully purchasing it from the first defendant. I find that the plaintiff has failed to establish that he successfully purchased the suit property from the first defendant. It follows that he is not entitled to the reliefs that he seeks.
23. The second defendant's case is that title to the suit property never passed to the plaintiff owing to non-payment of the full purchase price and that the first defendant cancelled his transaction with the plaintiff and later sold the suit property to the second defendant through sale agreement dated 6th March 2009. I am persuaded that the second defendant's version of events is the more credible one. I say so since the second defendant produced an affidavit sworn by the first defendant on 27th March 2009 in which the first defendant stated that he cancelled the agreement with the plaintiff and sold the suit property to the second defendant. I further note that the second defendant produced an acknowledgment dated 27th March 2009 in which the first defendant not only acknowledged full payment by the second defendant, but also confirmed release of the originals of the allotment letter and payment receipt to the second defendant.
24. I further analysed the evidence of Patrick Ongaya Khamusali (PW2) who stated that he is an employee of National Land Commission working as the County Lands Administration Officer in charge of Kakamega and Nyamira Counties against that of Robert Juma Simiyu (DW3) who stated that he is an Assistant Director, Land Administration, based at Ardhi House, Nairobi. I note that PW2's testimony was based on his alleged analysis of the documents that were presented to him by the police and the plaintiff. He did not have any authoritative record upon which to base his statements. On the other hand, DW3 had with him the file in respect of the suit property. DW3 stated expressly that the only allotment letter in the file was that in favour of the first defendant and that he did not see any allotment letter in the name of the plaintiff.
25. In view of the foregoing, I am persuaded that the second defendant has established that he purchased the suit property from the first defendant. As between the plaintiff and the second defendant, I am persuaded that the second defendant has a better claim to the suit property.
26. The second defendant has sought judgment against the plaintiff for a declaration he is the owner of the suit property, damages for loss of rent at the rate of KShs 20,000 per month and eviction of the plaintiff, his agents, and employees from the suit property.
27. As noted earlier, a letter of allotment is not title to land. It is but an offer and a basic step towards issuance of lease and ultimately a title document. In between, the allottee must comply with the terms of the offer. Even where the allottee fully complies with the terms of the offer, a title does not exist until it has actually been issued.
28. The second defendant has not demonstrated that any lease or title has been issued to him. I cannot therefore issue a declaration that he is the owner of the suit property. Such a declaration would be inaccurate and even misleading to the second defendant and to third parties. As I say so, I bear in mind



that the litigation herein is not about validity of the allotment to the first defendant but about the sale transactions between the first defendant, the plaintiff and the second defendant. In the absence of proof of title, it follows that the second defendant's claim for damages for loss of rent at the rate of KShs 20,000 per month does not lie.

29. The court is keen that its judgment is not used to force or induce other entities that are not party to this case to issue title. If parties wish to get to the bottom of the dispute on ownership of the suit property, they should take the requisite steps to translate any valid allotment in their favour into a title document.
30. In the result, I make the following orders:
- a. The plaintiff's case is dismissed.
 - b. The second and third defendant's counterclaim is dismissed.
 - c. Each party to bear own costs.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 3RD DAY OF MAY 2023.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Mr Mango for the plaintiff

Mr Elungata holding brief for Mr Manyoni for the defendants

Court Assistant: E. Juma

