



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT GARISSA

ELC CASE NO. 65 OF 2017

ALI MOHAMED DAGANE.....PLAINTIFF

(Granted Power of Attorney by Abdullahi Muhumed Dagane,
suing on behalf of the Estate of Mohamed Haji Dagane)

VERSUS

HAKAR ABSHIR.....1ST DEFENDANT

ABDULLAHI IBRAHIM GURE.....2ND DEFENDANT

SHAYE ABDI KUSOW.....3RD DEFENDANT

SAMBUL ALI BULUGHO.....4TH DEFENDANT

JUDGEMENT

Summary of facts

By a Plaint dated 18th March 2016 accompanied by a supporting affidavit, Abdullahi Muhumed Dagane, the former Plaintiff herein sued the Defendants jointly for their unlawful and malicious invasion of one property forming the estate of the deceased, being Plot Garissa 272. The former Plaintiff vide their supporting affidavit averred that the Defendants had begun putting up structures on the suit property without any permission or colour of right. The Plaintiff thus sought the following orders from the court:

- a) That the Defendants are ordered to provide vacant possession of Plot No.272 Garissa Township;***
- b) Defendants are ordered to demolish illegal structures on the said land;***
- c) The OCPD Garissa do enforce the Court Order and provide necessary security to avert invasion of the Plaintiff's land;***
- d) Costs of the suit and interest;***
- e) Such other relief as the Honourable Court may deem fit to grant.***

In support of the deceased's ownership of the Suit property, the Plaintiff produced a copy of an allotment letter dated 7th April 1994 from the Department of Lands-Nairobi, allocating an unsurveyed Residential Plot 272 Garissa to the deceased for a term of 99 years from the date thereof. The former Plaintiff also produced a copy of the Limited Grant of letters of administration *ad litem*, dated 13th May 2015, granted to him for the purpose of prosecuting the present case on behalf of the deceased's estate.

On 2nd October 2017, the former Plaintiff filed a Notice of Motion and accompanying Certificate of Urgency with prayers for the matter to be transferred to Garissa ELC Court from Nairobi ELC, where the matter was listed as ELC Case 270/16. The former Plaintiff averred that in spite of the fact that he had filed an application on 20th June 2016 seeking a permanent injunction restraining the defendants from developing, erecting, assembling, building or constructing any structure on the Suit property, the same was yet to be heard a year later. That despite the pending application, the Defendants had continued construction on the property.

On 3rd October 2017, the ELC Court at Milimani certified the former Plaintiff's application as urgent and ordered for the matter to be transferred to Garissa ELC. The matter was transferred to Garissa under Case No. 65 of 2017.

On 3rd April 2019, a power of attorney was registered by the former Plaintiff herein, appointing Ali Mohamed Dagane, the present Plaintiff as his attorney for the purpose of taking over and carrying out prosecution of the present case.

The 4th Defendant filed their defense on 27th May 2019, denying the ownership of the Suit Property as forming part of the estate of the deceased. He avers that the Suit Property was allotted to him via allotment letter dated 2nd July 1985, making him the legal and beneficial owner of the property. He further avers that he has lived and raised his family on the Suit Property since 1985. He filed a copy of letter from the Office of the County Council of Garissa allocating an unnamed property to him in the Bulla Isadek area in support of his claim. He further filed a letter dated 6th October 1997 from the municipal Council of Garissa certifying that the plot allocated to him on the 2nd of August 1985 was Plot Garissa 272, the Suit Property, which plot was allocated vide council letter No. GCC/LG.5/13/VOL III. In further support of his ownership of the Suit Property, the 4th Defendant filed Land Rate Arrears request from the County Government of Garissa dated 23rd May 2016 and Land Rent payment receipts dated 3rd November 2000(1985- 1995) and 3rd October 2008 (1996-2008). On 26th June 2019, the 4th Defendant filed witness statements of 5 witnesses testifying to the ownership of the Suit Property by the 4th defendant.

The 1st, 2nd and 3rd Defendants filed their defense on 7th June 2019 and also denied the ownership of the Suit Property as the estate of the deceased.

The 1st Defendant's defense was filed by his wife, one Sangabo Yussuf Mohammed, who claimed that the 1st Defendant had passed away 12 years before and that she had inherited the Suit Property from him. No death certificate, or confirmation of grant was tendered in support. On 22nd June 2019, she filed a witness statement with testimonies from three of her neighbors who aver that she is the rightful owner of the Suit Property.

The 2nd and 3rd Defendants aver that they inherited the Suit Property from their mother and have lived on the property with their extended family since 1985. Like with the 1st Defendant, no certificate of grant was filed in support of the claim. On 26th June 2019, the 3rd Defendant also filed a witness statement with the testimony of 5 witnesses, testifying to his occupation of the Suit Property since 1985.

The Plaintiff filed his list of documents and 2 witness statements on 03rd July 2019. From the witness statements, it came out that the prior to the death of the deceased, he had filed a civil suit against the same defendants in the present suit in the Principal Magistrate's Court at Garissa and had obtained judgement against them on 21st July 2005 under Civil Suit 18 of 2005. The Judgement had found that the lawful proprietor of plot no. 272 Garissa was the deceased. That the Defendants had jointly and severally been ordered to give vacant possession of the Suit Property to the deceased and to demolish all the structures erected on the Suit Property. That following the judgement, it appears the Defendants did not comply with the said orders, hence causing the deceased to file **Criminal Case 693 of 2007 (R V Hakar Abshir & Shaye Abdi Kusow)** for the charge of forcible detention of the Suit Property. The two accused persons, in the present suit, the 1st and 3rd Defendants, were convicted and sentenced to serve 1year probation. That permanent beacons were placed on the property and a beacon certificate issued in favour of the deceased on 15th December 2005.

The 1st, 2nd, 3rd and 4th Defendants dispute the existence of any eviction order. The court instructed the Plaintiff and Defendants to file submissions but none have been filed as yet.

Issues for determination

In order for the court to make a decision on whether the prayers sought by the Plaintiff in his plaint ought to be granted, the main question is whether the Plaintiff has satisfied the court as to his ownership of the Suit Property.

The orders sought by the Plaintiff from this court are as follows:

- a) That the Defendants are ordered to provide vacant possession of Plot No.272 Garissa Township;**
- b) Defendants are ordered to demolish illegal structures on the said land;**
- c) The OCPD Garissa do enforce the Court Order and provide necessary security to avert invasion of the Plaintiff's land;**
- d) Costs of the suit and interest;**
- e) Such other relief as the Honourable Court may deem fit to grant.**

The orders sought are premised on the Plaintiff's assertion that he is the rightful owner of the Suit Property, being Plot No.272 Garissa Township.

It is trite law that whoever asserts the existence of a legal right or liability is encumbered with the burden of proving the existence of that right or liability asserted.

Section 107 of the Evidence Act (Cap 80 Laws of Kenya) succinctly states:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

And **Section 108 of Evidence Act (Cap 80 Laws of Kenya)** further states thus:

“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

The Plaintiff’s asserted ownership of the Suit Property is founded upon an allotment letter issued to the deceased, one Mohamed Haji Dagane. The defendants have attacked the letter of allotment held by the Plaintiff on the grounds that while the same was issued in 1994, they have been the persons in actual ownership of the Suit Property since 1985. Once the Defendants attacked the allotment letter, the question of the process of acquisition of the allotment letter came into play. The question of acquisition behoves the court to trace the legal prescriptions for the issuance of an allotment letter and to adjudge the Plaintiff’s acquisition from the light of the law.

This court in the case of **Mako Abdi Dolal v Ali Duane & 2 others [2019] eKLR** noted that prior to the promulgation of the 2010 Constitution and the 2012 amendments to the body of Land Laws in Kenya, disposition of government land was governed by the **Government Lands Act (Repealed)**. Section 4 of the Act provided as follows:

“All conveyances, leases and licenses of or for the occupation of Government Lands, and all proceedings, notices and documents neither this Act, made, taken, issued or drawn, shall serve as otherwise provided, be deemed to be made, taken, issued or drawn under and subject to the provisions of this Act.”

Power to dispose of public land was vested in two entities: The President and the Commissioner of Lands, under Sections 3 and 9 respectively. The process of the disposition of government land followed the following procedure: First, the respective municipal council in which the land to be disposed was situate had the mandate of advising the Commissioner of Lands on which portions of land could be disposed. This step would have required the responsible council to visit the area or to carry out a fact-finding mission to satisfy itself that the land was first of all government land and second that it was indeed available for disposition. See **Harison Mwangi Nyota v Naivasha Municipal Council & 20 others [2019] eKLR**

“...The question that the plaintiff seemed to raise is what role the Municipal Council of Naivasha had in the issuance of allotment letters to the defendants in 1992. According to DW1, an employee of the 1st defendant, the local authority (1st defendant) has to recommend that the land is available for allocation before an allotment letter can issue. DW13 also told the court that the Council oversees all developments in its jurisdiction and allocates land on advisory basis for the Commissioner. It seems that even if the 1st defendant issued the letters dated 1/12/1992, it was mere advisory to the Commissioner of Lands. The allotment of the land had to be ratified by the Commissioner for Lands. It is obvious even from the communication between the Municipal Council and the Office of the Commissioner of Lands that the Council played an important role in identifying what land was available for purposes of alienation.”

The second step would be for the part development plan to be drawn up and approved by the Commissioner of Lands. See **Nelson Kazungu Chai & 9 Others vs. Pwani University College (2014) eKLR**

“It is trite law that under the repealed Government Lands Act, a Part Development Plan must be drawn and approved by the Commissioner of Lands or the Minister of Lands before any unalienated Government land could be allocated. After a Part Development Plan (PDP) has been drawn, a letter of allotment based on the approved Part Development Plan is then issued to the allottee.”

The third step involved the determination of certain matters by the Commissioner of lands which matters are listed under **Section 11 of the Government Lands Act (Repealed)**. The matters to be determined include the upset price at which the lease of the plot would be sold, the conditions to be inserted into the lease; the determination of any attaching special covenants and the period into which the term is to be divided and the annual rent payable in respect of each period.

The fourth step would be for the gazettelement of the plots to be sold, at least four weeks prior to the sale of the plots by auction under **Section 13 of the Government Lands Act (Repealed)**. The notice was required to indicate the number of plots situate in an area; the upset price in respect of every plot; the term of the lease and rent payable, building conditions and any attaching special covenants.

The fifth step would be for the sale of the plots by public auction to the highest bidder. **Section 15 of the Government Lands Act (Repealed)**.

The sixth step would be for the issuance of an allotment letter to the allottee. An allotment letter has been held not to be capable of conferring an interest in land, being nothing more than an offer, awaiting the fulfilment of the conditions stipulated therein by the offeree. See the decisions in: **Gladys Wanjiru Ngacha v Teresa Chepsaat & 4 others 182/1992 (Nyeri)**; and in **Dr. Joseph N.K. Arap Ng’ok v Justice Moijo Ole Keiyua & 4 others C.A.60/1997** where the Court of Appeal held as follows:

“It has been held severally that a letter of allotment per se is nothing but invitation to treat. It does not constitute a contract between the offerer and the offeree and does not confer interest in land at all. It cannot thus be used to defeat a title of a person who is the registered proprietor of the said parcel of land.”

In order for an allotment letter to become operative, the allottee was required to comply with the conditions set out therein including the payment of stand premium and ground rent within the prescribed period. See the decision in: **Mbau Saw Mills Ltd v Attorney General for and on behalf of the Commissioner of Lands) & 2 others [2014] eKLR**

“I have considered the evidence on record and the submission of the parties and do find that a letter of allotment was issued to Mr. Joseph K. Mugambi on 21/10/1971 with a condition to accept the offer within 30 days. He did not do so and thereafter the offer lapsed 30 days after it was made in accordance with the allotment letter. Having failed to accept the offer as stipulated in the letter of allotment Mr. J.K. Mugambi did not acquire interest in the unsurveyed lorry depot and therefore had no interest to transfer to the plaintiff. This court holds that a letter of allotment does not confer any property rights to a person unless there is acceptance and payment of the stand premium and ground rent. In the letter dated 17/6/1988 which was written about 17 years after the allotment letter was issued, the Commissioner of Lands confirmed that the plot was allocated to Joseph M. Mugambi in 1971 for lorry depot. However, the plot had neither been paid for nor an acceptance of the offer in the allotment letter made. The implication of this letter was that the allottee had not complied with the terms of the allotment letter and therefore the offer had lapsed. The offer having lapsed, the allottee Mr. Joseph M. Mugambi did not have any interest to transfer to the plaintiff and therefore all transactions between the allottee and the plaintiff were a nullity in law.”

The allotment letter also must have attached to it a part development plan (PDP). See the decision in **African Line Transport Co. Ltd Vs The Hon .AG, Mombasa HCCC No.276 of 2013** where Njagi J held as follows:

“...Secondly, all the defence witnesses were unanimous that in the normal course of events, planning comes first, then surveying follows. A letter of allotment is invariably accompanied by a PDP with a definite number.”

And again, in **Nelson Kazungu Chai & 9 Others vs. Pwani University College (2014) eKLR**

“Worth noting as well is that no Part Development Plan was produced to back the Appellants’ claim that due process had been followed as alleged.”

The seventh step, which comes after the allottee has complied with the conditions set out in the allotment letter is the cadastral survey, its authentication and approval by the Director of Surveys and the issuance of a beacon certificate. The survey process precipitates the issuance of land reference numbers and finally the issuance of a certificate of lease. **Nelson Kazungu Chai & 9 Others vs. Pwani University College (2014) eKLR** the court held as follows:

‘It is only after the issuance of the letter of allotment, and the compliance of the terms therein, that a cadastral survey can be conducted for the purpose of issuance of a Certificate of Lease. This procedural survey was confirmed by the Surveyor, PW3. The process was also reinstated in the case of African Line Transport Co. Ltd Vs The Hon .AG, Mombasa HCCC No.276 of 2013 where Njagi J held as follows:

“Secondly, all the defence witnesses were unanimous that in the normal course of events, planning comes first, then surveying follows. A letter of allotment is invariably accompanied by a PDP with a definite number. These are then taken to the department of survey, who undertake the surveying. Once the surveying is complete, it is then referred to the Director of Surveys for authentication and approval. Thereafter, a land reference number is issued in respect of the plot.”

Having evaluated in detail the necessary steps to be followed, it is emergent that a litigant basing their interest in land on the foundation of an allotment letter must provide the following proof: First, the allotment letter from the Commissioner of Lands; Secondly, and attached to the allotment letter, a part development plan; Thirdly, proof that they complied with the conditions set out in the allotment letter, primarily that the stand premium and ground rent were paid, within the specified timeline. It would also help a litigant’s case, although this may not be mandatory based on the stage of the transaction, to have a certified beacon certificate.

Now, in the present case, the court confirms that the Plaintiff did indeed file a letter of allotment dated 7th April 1994 and Referenced 111303/VIII. The allotment letter was issued by the Commissioner of lands as it bears his signature. The problem though is that the allotment letter was issued to one Mohamed Shagana and not the deceased Mohamed Haji Dagane. The Plaintiff has however provided an affidavit sworn by the said Mohamed Haji Dagane on 18th April 2008 averring that his name had been misspelt in the allotment letter and that he had already written to the Commissioner of Lands for a rectification of the same. The court would have no reason to disprove the Plaintiff’s averment, save that the problem seems to rear its head again. The same is discussed later.

The filed allotment letter does indeed have a part development plan attached, satisfying the second condition.

On the third condition however, a letter drawn by the deceased, Mohamed Haji Dagane on 19th November 2008 and received on the following day, 20th November 2008 throws a spanner into the works. In the letter, the deceased admits that he did not comply with the conditions set out in the allotment letter, specifically that he did not pay the stand premium and ground rent on account of his ill health. Now, the allotment letter referred to, the one issued 7th April 1994 required the payment of a stand premium of Four Thousand Six Hundred (Ksh. 4,600) and other payments amounting to Two Thousand Nine Hundred and Fifty (Ksh. 2,950) all in total amounting to Seven Thousand, Five Hundred and Fifty Shillings (Ksh.7,550). Clause 2 of the allotment letter required the payment of the amount via banker’s cheque within 30 days. Thus, the offer was only open up to 30 days after 7th April 1994, meaning sometimes in early May 1994. Clearly, when the deceased was unable to pay the requisite fees by that day, the offer lapsed. See **Rukaya Ali Mohamed –vs- David Gikonyo Nambachia & another Kisumu HCCA.9/2004** where Warsame J held that:

“...once allotment letter is issued and the allottee meets the conditions therein, the land in question is no longer available for allotment since a letter of allotment confers absolute right of ownership or proprietorship unless it is challenged by the allotting authority or is acquired through fraud, mistake or misrepresentation or that the allotment was out rightly illegal or

it was against public interest”.

In the present case, upon lapse of the offer contained in the allotment letter, the land was free to be allotted to someone else. It appears that this is what happened because the letter drawn by the deceased, dated **19th November 2008** was **one requesting the Commissioner of Lands to re-allocate the Suit Property to the deceased. Note that in this letter, the deceased signs off as Mohamed Shagana. This little fact makes the court question the earlier affidavit supposedly to the effect that Mohamed Shagana, to whom the allotment letter was issued, is one and the same person as the deceased, Mohamed Haji Dagane. Why would the deceased, who vide the affidavit of 18th April 2008 averred that he had already written to the Commissioner of Lands to rectify his misspelt name on the allotment letter, in November 2008 sign off as Mohamed Shagana?**

Be that as it may, the Commissioner of Lands did reply to the letter drawn by Mohammed Shagana, curiously on the very next day, being 20th November 2008 acknowledging receipt of the request and promising to communicate on the issue at a later date. It would appear that that date never came, and no allotment letter was issued to the deceased in 2008 or thereafter. As demonstrated, by this time, Mohammed Shagana did not hold interest in the Suit Property, the offer having lapsed in May of 1994.

On the premises, the beacon certificate issued to the deceased on 15th December 2005 is a sham and was issued illegally. On the whole, the Plaintiff has failed to satisfy the Court that the Suit Property forms part of the estate of the deceased and as such, the orders sought by the Plaintiff cannot be granted.

Consequently, this suit fails and the same is hereby dismissed on the issue of costs.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 19TH DAY OF APRIL, 2021.

.....

HON. E. C. CHERONO

ELC JUDGE

In the presence of:

1. Plaintiff – present
2. 1st Defendant – present
3. 2nd Defendant - present
4. 3rd Defendant – present
5. 4th Defendant - present