



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC NO. 484 OF 2014

EMBAKASI HOUSING COMPANY LIMITED.....PLAINTIFF

- VERSUS -

THE CHIEF REGISTRAR, MINISTRY OF LANDS.....DEFENDANT

JUDGMENT

1. By a plaint dated 22nd April 2014, the plaintiff seeks judgment against the defendant for:-

a. A permanent injunction restraining the defendant from issuing illegal allotment letters to the plaintiff parcel of land Ref No LR 33745/vi/554 and or dealing with the original file No. 85098.

b. An order that all the illegal allotment letters and/or title deeds issued against the suit property be cancelled and/or declared null and void.

c. An order that only the genuine members of the plaintiff should be allocated plots in the suit property hence forth.

d. Any other order that the court may deem fit to give for the preservation of the suit property and the ends of justice to be met.

e. Costs of this suit.

2. Upon being served with copies of plaint and summons to enter appearance the defendant entered appearance through the attorney general. The memorandum of appearance is dated 16th September 2014 and filed in court on 22nd September 2014. He also filed a statement of defence dated 19th September 2014 and filed in court on 22nd September 2014 denying each and every allegation in the plaint.

3. PW1 James Gachanja told the court he is the director of the plaintiff. He also adopted his witness statement dated 22nd April 2014 and the supporting affidavit sworn by Peter Macharia Nyanjathi Chairman of the plaintiff (now deceased) sworn on the 22nd April 2014. He told the court the plaintiff was allocated plot number 3374 5/IV/554 F/NO 85098. He also relied on the documents on the list of documents dated 22nd April 2014 and the supplementary list of documents filed on 12th May 2014 among them;

- A letter dated 17th November 2000 from the commissioner of lands to the town clerk Mavoko Municipality.
- A letter dated 20th September 2000 addressed to the District Officer.
- Part Development plan dated 27th November 1972.
- A letter of allotment dated 9th June 1972.
- Survey map F/NO 85098.
- Deed Plan dated 6th September 1973 Block 37/197-564.
- Judgment in Resident Magistrate's court in Criminal Case No. 1792 of 1990.
- Letters requesting revocation of the titles issued.

He prays for the orders as sought in the plaint.

4. The defendant did not call any witness but tendered written submissions.

5. I have considered the pleadings, the evidence on record and the written submissions made by respective parties. The issues for determination are:-

- i. Whether the plaintiff owns the suit property.
- ii. Whether the plaintiff is entitled to the reliefs sought?
- iii. Who should bear costs?

6. It is the plaintiff's case that it was duly registered to purchase land on behalf of its registered members and thereafter subdivide the same. Further that the commissioner of lands was supposed to issue title deeds only to members who had been recommended. When cross examined by the defendant's counsel PW1 was unable to show the plaintiff's resolution to file this suit. In my view this is fatal to the plaintiff's case. The plaintiff also relied on a copy of letter of allotment as proof of ownership. I have looked at the same. It is not legible. It is not clear who it is addressed to or which property it relates to.

7. The plaintiff did not produce any document of title to prove ownership of the suit land. A letter of allotment is no proof of title. **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.”

8. In the case of **Evans Kafuse Mcharo vs Permanent Secretary, Ministry of Roads Public Works and Housing & Another [2013] eKLR** the court expounded on the legal position of a letter of allotment by stating as follows:-

“In making a distinction between petitioners who held letters of allotment and those who were registered proprietors of the land in question, this court in the case of John Mukera Wachih & others vs Minister for Lands & Others HC Pet No. 82 of 2010 observed that the distinction is based on the fact that the right to property protected under the law and the constitution is afforded to registered owners of land; that a letter of allotment is not proof of title as it is only a step in the process of allocation of land. The court relied on in that regard on the position enumerated by the Court of Appeal in the case of Wreck Motors Enterprises vs The Commissioner of Lands and 3 Others Nairobi Civil Appeal No. 71 of 1997 (unreported) where the Court of Appeal stated as follows:-

“Title to land or 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 a title document pursuant to the provisions held”

I am guided by the above authority in finding that the plaintiff herein is not the registered proprietor of the suit property.

9. It is also the plaintiff's case that he commissioner of lands illegally allocated land belonging to the plaintiff to non-members. PW1 was not able to avail to the court the list of members of the plaintiff to confirm that nonmembers were allocated land. He was also not able to avail the list of illegally allocated members. He also did not produce any certificate of search to confirm which parcel were registered to persons who were non-members. In the case of **East Produce (K) Ltd vs Christopher Astiado Osiro Civil Appeal NO. 43 of 2001**, it was held that:-

“it is trite law that the onus of proof is on he who alleges and in matters where negligence is alleged the position was well laid in the case of Kiema Matuku vs Kenya Cargo Handling Services Ltd [1991] KLR where it was held that “there is as yet no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence”.

I am guided by the above authority. The plaintiff has failed to prove that the suit land has been allocated to non-members by failing to point out which specific parcels are allocated to which persons who are not members of the plaintiff.

10. I also note that the plaintiff claims that certain titles are being held by other people. One of the prayers sought in the plaint is the cancellation of those titles. The said registered owners were not joined in these proceedings. Cancelling of titles properly issued would amount to condemning them unheard. The plaintiff ought to have joined them in these proceedings.

11. All in all I find that the plaintiff has failed to prove his case against the defendant on a balance of probabilities. The plaintiff ought to start by first getting a clear copy of the said letter of allotment. Consequently, I find that the suit cannot stand and the same dismissed with costs to the defendant.

It is so ordered.

Dated, signed and delivered in Nairobi on this 5TH day of MAY 2020.

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L. KOMINGOI

JUDGE

In the presence of:-

.....Advocate for the Plaintiff

.....Advocate for the Defendant

.....Court Assistant