



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 302 OF 2017

ABDIRAHMAN MOHAMED ELMI T/A ELMI TRADERS.....PLAINTIFF

VERSUS

MARY NYAMBEKI.....1ST DEFENDANT

FRANCIS KIMANI NGUGI T/A ALFED AGENCIES.....2ND DEFENDANT

THE CHIEF LANDS REGISTRAR.....3RD DEFENDANT

JUDGEMENT

1. The Plaintiff claims that by a letter of allotment dated 15/4/1996, he was allotted plot number D measuring 0.6069 hectares for 99 years subject to payment of Kshs. 422,110/=, which is now known as land reference number (L.R. No.) 21936. Further, that vide the letter of allotment dated 10/4/1997, he was also allocated residential plot number XVI in Nairobi measuring 0.407 hectares subject to payment of Kshs. 275,230/=. This plot is now known as L.R. No. 21926. He averred that before he could make payment of the sums required under the two letters of allotment, the 3rd Defendant caused the deed plans to disappear and he could not therefore make payment within the 30 days stipulated in the letters of allotment.

2. He claimed that the deed plans were found in 2013 and he was notified in 2014 that he could proceed to make payment. He made payment vide a cheque dated 12/3/2014 and was given an official receipt dated 27/3/2017. He later discovered that the two parcels of land had been allocated to the 1st and 2nd Defendants, who had gone ahead to process titles over the two parcels of land. He contended that the titles issued to the 1st and 2nd Defendants were unlawfully issued.

3. The Plaintiff claimed that he engaged the 1st and 2nd Defendants in discussion over the ownership of the Suit Property and a deed of settlement was arrived at on 13/6/2016 under which the Plaintiff was to abandon any claim to the two pieces of land in consideration of the Plaintiff being paid Kshs. 53,000,000/= by the 1st and 2nd Defendants. The Plaintiff claims that the 1st and 2nd Defendants failed to make payment of the agreed sum within 30 days as agreed.

4. The Plaintiff seeks orders directing the 3rd Defendant to revoke and cancel grant numbers I.R. 159431 issued in favour of the 1st Defendant in respect of L.R. No. 21926 and grant number I.R. 159491 issued in favour of the 2nd Defendant over L.R. No. 21936. Further, the Plaintiff seeks an order to compel the 3rd Defendant to issue titles over L.R. Numbers 21926 and 21936 to him. Alternatively, the Plaintiff seeks the sum of Kshs. 53,000,000/= together with interest and costs.

5. The 1st and 2nd Defendants did not enter appearance. The Plaintiffs were granted leave on 18/3/2019 to serve the 1st and 2nd Defendants by substituted means in the *Daily Nation* on a weekday. The 1st and 2nd Plaintiffs were served through the *Daily Nation* of 29/3/2019. The 3rd Defendant filed its defence on 28/3/2019 denying the Plaintiff's claim. The 3rd Defendant averred that the deed plans were issued and registered in the names of the 1st and 2nd Defendants based on documents presented before the 3rd Defendant's officers, who exercised due diligence and believed that the documents were genuine before registering them.

6. The Plaintiff gave evidence when this matter was heard on 25/4/2019. He produced copies of the letters of allotment dated 15/4/1996 and 10/4/1997. He also produced a copy of a memo dated 3/7/2002 which showed that the University land being L.R. No. 11976 next to Wilson Airport was subdivided into 27 subplots when the University of Nairobi failed to apply for extension of the lease. The Letter showed that plot numbers XVI, D & E were allocated to Abdirahman M. Elmi (the Plaintiff in this case) and Elmi Traders. He attached a copy of survey plan F/R No. 300/9 showing the location of the plots. He also produced a copy of the letter dated 17/11/2015 mentioning the fraudulent release of some deed plans together with the letter dated 23/9/2015 stating that the deed plans which went missing were actually issued to unknown persons.

7. The copy of the internal memo from the National Land Commission (NLC) dated 11/3/2014 authorised the cashier of lands to receive

payment from the Plaintiff and other persons as indicated in the letters of allotment. The Plaintiff also produced a copy of the banker's cheque dated 12/3/2014 for Kshs. 275, 230/= payable to the Commissioner of Lands and the receipt issued on 27/3/2014. The second cheque was also drawn in favour of the Commissioner of Lands and was for Kshs. 422,110/=, and the receipt was issued on 27/3/2014. He also produced copies of the titles issued to the 1st and 2nd Defendants in November 2012. A caveat was registered against the two parcels of land on 10/12/2015 by the Registrar of Titles claiming an interest under Section 65 (1) (F) of the Registration of Titles Act, repealed under Section 76 of the Land Registration Act. He produced a copy of the deed of settlement dated 13/6/2016 through which the 1st and 2nd Defendants agreed to pay Kshs. 53,000,000/= to the Plaintiff within 30 days. The Plaintiff's advocates, M/s Ahmednassir, Abdikadir and Company Advocates wrote to the 1st and 2nd Defendants through Kipkenda and Company Advocates on 3/5/2017 demanding payment of the sum of Kshs. 53,000,000/=.

8. The 3rd Defendant did not call any evidence. Parties filed and exchanged written submissions. The issues for determination are whether the 1st and 2nd Defendants obtained the titles over the suit land fraudulently or illegally and whether the orders the Plaintiff seek should be granted.

9. The Plaintiff relied on Section 26 of Land Registration Act in urging that the titles held by the 1st and 2nd Defendants can be impeached if they were obtained through fraud or misrepresentation to which they are proved to have been parties. The Plaintiff contended that fraud was demonstrated by the loss of the deed plans before he could make payment of the sums stated in the two letters of allotment, which deed plans later reappeared and were released to unknown persons. He also challenged the fact that the Defendants did not defend this suit yet it is expected that an innocent title holder would go to great lengths to protect his property when it is under challenge. The Plaintiff urged the court to revoke the titles held by the 1st and 2nd Defendants under Section 80 of the Land Registration Act, for having been procured through fraud.

10. The 3rd Defendant submitted that the Plaintiff should have sued the NLC which is the successor in title of the Commissioner of Lands. The 3rd Defendant urged that it is only responsible for registration and issuance of leases and that it is the NLC which deals with the allocation of land and which can authenticate the Plaintiff's claim and the payments he claims he made.

11. Further, that the letters of allotment were issued in 1996 and 1997 and payment was made in 2014 yet the letters of allotment indicated that the offer would lapse at the expiry of 30 days. The 3rd Defendant further submitted that the banker's cheques drawn by the Plaintiff were payable to the Commissioner of Lands yet in 2014 when the payments were made, the office of Commissioner of Lands had ceased to exist. The 3rd Defendant argued that this was evidence of fraud.

12. On the issue of the deed of settlement, the 3rd Defendant argued that it was not a party to the deed of settlement and was therefore not bound by it. In addition, the 3rd Defendant submitted that the deed of settlement did not confirm that the Plaintiff was the genuine owner of the two parcels of land and that the Plaintiff did not adduce any evidence to show that the 1st and 2nd Defendants unlawfully obtained registration of the grants over the two parcels of land in their names. The 3rd Defendant urged the court to dismiss the case and grant it costs.

13. The court has considered the evidence adduced and the submissions of the parties. The Plaintiff claimed that he was allocated plot numbers D and XVI on 15/4/1996 and 10/4/1997 respectively, and that these plots were later registered as L.R. No. 21926 and 21936. He stated that the deed plans went missing before he could process titles and was informed in 2014 that the deed plans had reappeared. The Plaintiff did not lead any evidence on the survey process undertaken on the two plots after the letters of allotment were issued to him, which resulted in the new numbers given for the plots. He did not lead evidence to show how the deed plans that he claimed went missing were prepared and by whom. The letters of allotment issued to the Plaintiff were valid for 30 days and if an allottee failed to comply with the requirements set out in the letter of allotment within the time frame given, then the offer would be deemed to have lapsed at the expiry of 30 days from the date of the letter of allotment.

14. He produced a copy of the internal memo from the National Land Commission (NLC) dated 11/3/2014 authorising the cashier of lands to receive payments from him. The court agrees with the 3rd Defendant's submission that the Plaintiff ought to have joined the NLC which allowed him to make payment for the plots in 2014 and not the Chief Land Registrar who did not have power to allocate him the land. The office of Commissioner of Lands ceased to exist once the NLC was established in 2013. By 2014 when the Plaintiff made the payments in respect of the allotment of the two plots, there was no Commissioner of Lands and the payment could not have been made to a non-existent office, it should have been made to the NLC which had authorised the Plaintiff to make payment.

15. The Plaintiff failed to establish that the 1st and 2nd Defendants obtained their titles over the two parcels of land irregularly. The Plaintiff had to effect service on the 1st and 2nd Defendants through substituted means yet he claimed that he had engaged in negotiations with the 1st and 2nd Defendants that resulted in the deed of settlement dated 13/6/2016 in which he was to be paid Kshs. 53,000,000/= to abandon his claim to the two parcels of land. There was no other evidence adduced to confirm the negotiations which took place between the Plaintiff and the 1st and 2nd Defendants other than the deed of settlement and the demand letters from the Plaintiff's advocates to Kipkenda and Company Advocates. The deed of settlement does not bind the 3rd Defendant who was not a party to it.

16. The upshot of this is that the Plaintiff failed to prove his case on a balance of probabilities, it is dismissed with costs to the 3rd Defendant.

Dated and delivered at Nairobi this 1st day of July 2019

K. BOR

JUDGE

In the presence of:-

Mr. A. Busaidy for the Plaintiff

Mr. V. Owuor- Court Assistant

No appearance for the Defendants