



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 49 OF 2018

JOSEPH KUNGU MBUTHIA.....PLAINTIFF

VERSUS

BERNADETTE ELIZABETH MUMBURA .....1<sup>ST</sup> DEFENDANT

THE CHIEF LAND REGISTRAR .....2<sup>ND</sup> DEFENDANT

JUDGMENT

By an Amended Plaint dated 15<sup>th</sup> September 2016, the Plaintiff filed this suit against the Defendant and sought for orders that;

- a. A Declaration that the allotment to Patrick M. Babu by a letter dated 16<sup>th</sup> November 1994, is the first allotment and superseded any subsequential allotment in respect of L.R No.4953/2954, formerly known as Residential Plot No. C Thika Municipality.
- b. A Declaration that the sale and transfer of L.R No. 4953/2954 formerly known as Residential Plot No. C Thika Municipality, by Patrick M. Babu to the Plaintiff is valid and entitles the Plaintiff of title for L.R.No. 4953 /2954.
- c. An order directing the Chief Land Registrar to cancel the 1<sup>st</sup> Defendants title/grant and to amend the register to reflect the Plaintiff as the registered proprietor of L.R No. 4953/2954. A cancellation of the entries on the records maintained by the 2<sup>nd</sup> Defendant on disposition or transfer to the 1<sup>st</sup> Defendant and consequently a revocation of title issued in respect of L.R No. 4953/2954 IR No. 85633 situate within Thika Municipality due to fraud.
- d. A permanent injunction restraining the 1<sup>st</sup> Defendant either directly or through her agents, servants or any persons claiming through her from transferring, selling, leasing, charging alienating or in any other manner dealing with L.R No. 4953/2954 and interfering with the Plaintiffs ownership and possession of the said property.
- e. Costs of the suit and Interests at Court rate until payment in full.

In his statement of Claim, the Plaintiff averred that he is the beneficial owner and transferee from the 1<sup>st</sup> allottee one **Patrick M. Babu**, of the suit property. That he purchased the suit property from **Patrick M. Babu**, on **19<sup>th</sup> February 1999**, for **Kshs. 600,000/=** and at or before the execution of the sale agreement, the vendor handed to him a letter of allotment dated **16<sup>th</sup> November 1994**, issued to him by the Department of Lands/ and/or Commissioner of Lands, and a plan for the residential from the Ministry of Lands and Settlement and Physical Planning Department, Thika dated **18<sup>th</sup> July 1994**, and the suit property was clearly marked. That after the purchase, the Plaintiff caused the suit property to be transferred to himself and by a letter dated **10<sup>th</sup> August 1999**, the Commissioner of Lands informed the Town Clerk to amend its records accordingly.

Further that on **25<sup>th</sup> November 1999**, the Plaintiff through its agents applied for change of user from residential to business cum residential plot and submitted building plans for approval by the Municipal Council of Thika. That by a letter dated **8<sup>th</sup> March 2000**, the Municipal Engineer communicated the approval to the Plaintiff, pending submission of structural engineers drawings. That by a suit filed in the High Court of Kenya at Nairobi to wit **J.R Misc Application No. 371 of 2014**, by the 1<sup>st</sup> Defendant against the Registrar, the Plaintiff became aware of the 1<sup>st</sup> Defendant's claim to the suit property vide Grant No. **856333**, dated **11<sup>th</sup> December 2000**, and registered on **13<sup>th</sup> March 2001**.

It was contended that the grant of the suit property to the 1<sup>st</sup> Defendant was as a result of mistake or fraud committed by either or both

Defendants, which mistake renders the grant illegal, null and void and of no legal effect. He particularized mistake as; double allocation of the suit property and subsequent allocation of the suit property when it was not available for allocation and transfer to the 1<sup>st</sup> Defendant or any other party.

He further particularized fraud as; subsequent allocation and registration of the suit property in favour of the 1<sup>st</sup> Defendant without cancellation of the allotment letter to the Plaintiff; secretly re-allocating the suit property to the 1<sup>st</sup> Defendant without notice to the Plaintiff, absence of any justification to vest title to the 1<sup>st</sup> Defendant, while the Plaintiff's title had been confirmed; failing to follow the right procedure to disposes the Plaintiff.

That the Plaintiff is still in possession and will suffer loss and damage, unless the 1<sup>st</sup> Defendant grant/ title to the property is cancelled and the register is rectified. He particularized loss and damage as; of use of the suit property and alternative loss of anticipated rental income; loss of value of the land at market and current value, loss in terms of expense and disbursement so far paid in respect of the property.

The Plaintiff contended that he has not received any communication from the Defendants or any other authority regarding cancellation of the his allocation or terminating his right to ownership and he continues to be in possession of the suit property and making appropriate payments.

Despite being duly served with Summons to Enter Appearance, the 1<sup>st</sup> Defendant did not Enter Appearance and the matter proceeded without her participation. The 2<sup>nd</sup> Defendant Entered Appearance, but did not file any Defence nor participate during the hearing. The matter proceeded for Formal Proof, wherein the Plaintiff testified for himself and closed his case.

### **PLAINTIFF'S CASE**

**PW1 Joseph Kungu Mbutia**, adopted his witness statement dated **29<sup>th</sup> January 2016**, as his evidence. He further produced his list of documents as Exhibit 1. That he bought the suit property from **Patrick Maraki Babu**, in **1999** for **Kshs. 600,000/=** and it was not developed. . That he developed the plot by constructing on it and he is in possession of the same. Further, that he commenced the case against the 1<sup>st</sup> Defendant, as she sued him and the suit was dismissed . That she has a title in her name, but the same was acquired fraudulently, as he has the allotment letter. Further that he tried to procure the title but the file is missing at the lands office.

That he has a letter from the Ministry of lands to show that the suit property is his and the plot was unsurveyed. He urged the Court to cancel the fraudulently acquired title by the 1<sup>st</sup> Defendant and he be issued with the title deed. That he pays the water bill and other amenities and he has the change of user. The Court was also urged to grant him costs of the suit.

After close of viva voce evidence, the Plaintiff filed written submissions which the Court has carefully read and considered. The Court has also read and considered, the pleadings, the evidence adduced and the provisions of law and finds that the issue for determination is ***whether the Plaintiff is entitled to the orders sought.***

As the 1<sup>st</sup> Defendant did not enter Appearance nor file any defence, the **Plaintiff's evidence remain uncontroverted and unchallenged.** However, the Plaintiff is still required to prove his case on the required standard of balance of probability as uncontroverted evidence is not automatic evidence. The Plaintiff has a duty to discharge the burden of proof. See the case of ***Kenya Power & Lighting Company Limited ...Vs... Nathan Karanja Gachoka & Another [2016] eKLR***, where the Court stated:-

**“I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence is unchallenged or not.”**

Further, in the case of ***Gichinga Kibutha...Vs...Caroline Nduku (2018) eKLR***, the Court held that:-

**“It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”**

The Plaintiff is laying claim to the suit property. It is his contention that he is the owner of the suit property having bought the same from the original allottee, one **Patrick Babu**. He further contends that the grant given to the 1<sup>st</sup> Defendant must have been given either by mistake or fraud as the suit property had already been allotted to the said **Patrick Babu**, and could not be allotted again. He has therefore called for the cancellation of the title held by the 1<sup>st</sup> Defendant.

As already noted by the Court, the Plaintiff's evidence remains an uncontroverted. However, the Court must determine whether the evidence adduced by the Plaintiff is sufficient to enable it grant the prayers sought. The Plaintiff has produced in evidence a letter of allotment to **Patrick M. Babu**, dated **16<sup>th</sup> November 1994**. The Plaintiff has also produced in evidence a sale Agreement that is dated **19<sup>th</sup> day of 1999**, that shows that he bought the suit property from the said **Patrick M. Babu**, receipts of payment and an acknowledgment of payment. The Plaintiff has also produced a form of transfer of the suit property to him and consent to transfers dated **10<sup>th</sup> August 1999**, from the Commissioner of Lands, granting them consent to transfer the suit property. The Plaintiff has also produced an Application for change of user and other documents seeking building approvals over the suit property. Evidently, the Defendants having not entered any appearance, no material has been placed before this Court to contradict the evidence that has been adduced by the Plaintiff and in the absence of any rebuttal, the Court finds and holds that the Plaintiff has satisfied the Court that he is the owner of the said property and therefore entitled to all the rights and privileges appertained to it.

The Plaintiff has further produced in evidence a grant issued in the name of the 1<sup>st</sup> Defendant. When a person's title is called into question, it becomes incumbent upon that party to show the root of the title. Though duly served with the suit papers, the 1<sup>st</sup> Defendant has failed to show the root of her title. **Section 26 of the Land Registration Act** 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.***

Though the 1<sup>st</sup> Defendant holds a Certificate of title, the Plaintiff has produced evidence to show that he is the owner of the suit property, having bought it from the original allottee. The 1<sup>st</sup> Defendant has failed to show the root of her title and it is only fair that the Court concludes that the same was acquired irregularly.

**Section 80 of the Land Registration Act**, gives this Court the power to cancel title to land and order for the rectification of the Register the Court, if it finds that the same was acquired unprocedurally or through fraud. In the instant suit, an allotment letter had already been issued and therefore no any other could be issued.

This Court having found that while the Plaintiff has shown the root of his title, the 1<sup>st</sup> Defendant has failed to do so, and further found and held that the Plaintiff is the rightful owner of the suit property, it only follows that the grant/title held by the 1<sup>st</sup> Defendant must then be cancelled so that the Plaintiff can enjoy all the rights and interest that appertains to the suit property.

The Plaintiff has sought for various prayers, the Court having held that he has shown the root of his title and he is thus the rightful owner of the said property, it is the Court's considered view that the prayers sought by the Plaintiff are merited and he is entitled grant of the same.

The Upshot of the above is that the Plaintiff has proved his case on the required standard of balance of probabilities and consequently, the Court enters judgment for the Plaintiff against the Defendants herein jointly and severally as prayed in the Plaint dated **15<sup>th</sup> September 2016**, in terms of **prayers No. (a), (b), (c), (d) and (e).**

**It is so ordered**

**DATED, SIGNED AND DELIVERED AT THIKA THIS 15<sup>TH</sup> DAY OF JULY 2021**

**L. GACHERU**

**JUDGE**

**15/7/2021**

**Court Assistant – Lucy**

**ORDER**

In view of the declaration of measures restricting Court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15<sup>th</sup> March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

**With Consent of and virtual appearance via video conference – Microsoft Teams Platform**

**Mr. Mabachi holding brief for Mr. Mathenge for the Plaintiff**

**No appearance for the 1<sup>st</sup> Defendant**

**No appearance for the 2<sup>nd</sup> Defendant**

**L. GACHERU**

**JUDGE**

**15/7/2021**