



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC SUIT NO. 410 OF 2007**

**(FORMERLY HCCC NO. 1441 OF 2001)**

**KIBUNGEI ARAP KOGO.....PLAINTIFF**

**-VERSUS-**

**MARY NJERI GITIBA.....DEFENDANT**

**JUDGMENT**

1. The plaintiff brought this suit on 24<sup>th</sup> August, 2001 through a plaint of the same date. The suit that was filed in the High Court and was later transferred to this court in 2007 and assigned the current case number. The plaint was amended with leave of the court that was granted on 14<sup>th</sup> November, 2003. In the amended plaint dated 15<sup>th</sup> September, 2003, the plaintiff sought the following reliefs against the defendant;

i. An injunction restraining the defendant by herself or her servants, agents, employees or otherwise howsoever from selling, alienating or otherwise disposing of L.R No. 25180, unsurveyed Plot No.225 Pumwani Estate Nairobi.

ii. A declaration that the second allotment to the defendant of unsurveyed Plot No.225 Pumwani Estate Nairobi and subsequent issuance of certificate of title No. 25180 is null and void.

iii. An order that the commissioner of lands do cancel any allotment and or subsequent registration of the defendant as lessee or proprietor of unsurveyed Plot No.225, L.R.25180 Pumwani Estate Nairobi (hereinafter referred to only as “the suit property” where the context so permits) and that the Plaintiff be registered and confirmed as the rightful allottee thereof.

iv. Cost and interest.

2. The plaintiff averred that he was allocated the suit property through a letter of allotment dated 23<sup>rd</sup> December, 1997. The plaintiff averred that in accordance with the terms of the said letter of allotment, he paid Kshs. 16,150/= that was required and a further sum of Kshs. 6,550/= for processing a certificate of lease.

3. The plaintiff averred that the defendant was his tenant and that he had given her the responsibility of managing the suit property on his behalf. The plaintiff averred that using privileged information provided to her, the defendant fraudulently caused the suit property be allotted to her and for her to be issued with a title in respect thereof.

4. At the trial, the plaintiff called six witnesses in support of his case. The plaintiff who testified as PW1 told the court that one, Martha Kipchoge, deceased (hereinafter referred to only as “the deceased”) was her aunt. He stated that the deceased owned the suit property until her death in 1985. The suit property was initially known as Plot No. 206. The plot number was later changed to 225. After the death of the deceased, the deceased’s niece, Mary Chepkemboi and he followed up on the issue of the suit property and were issued with a letter of allotment in respect thereof. He produced the letter of allotment dated 23<sup>rd</sup> December, 1997 as exhibit. He told the court that he did not know the defendant. PW1 also adopted his witness statement dated 29<sup>th</sup> October, 2015 as part of his evidence in chief.

5. On cross examination PW1 stated that he acquired the suit property from the deceased who was his aunt. He stated that he paid the stand premium and other related charges for the suit property but the receipts got lost. He stated further that he did not know how the defendant obtained a grant in respect of the suit property. PW1 stated that he never filed a petition for grant of letters of administration in respect of the estate of the deceased.

6. PW2 Mary Chepkemboi Birir adopted her witness statement dated 26<sup>th</sup> October, 2015 as part of her evidence in chief. PW2 was PW1’s

niece and a distant relative to the deceased. PW2 stated that she came to Nairobi in 1995 and that she was residing on the suit property. She stated that the defendant was a wife of Godfrey Gitiba who was a tenant of the deceased for several years in the suit property. She stated that when she came to Nairobi she found the defendant and her husband living on the suit property. At the time, the deceased had already died. She stated that she was not aware of how the defendant acquired the property that belonged to the deceased. She stated that she was surprised when she was asked by the defendant to pay rent in 2001.

7. PW2 stated that the tenants on the suit property were all along paying rent to the children of the deceased and that after the death of the last child of the deceased, the plaintiff took charge of the suit property. She stated that the plaintiff was subsequently issued with a letter of allotment in respect of the property in 1997 when the residents of Majengo Pumwani were being allocated the houses that they were occupying by the Government.

8. In cross-examination, PW2 told the court that the succession proceedings that were instituted by the defendant at Kiambu Law Court in respect of the estate of the deceased (Kiambu SPMC Succession Cause No. 125 of 1996) were irregular since the defendant had no right to institute the same. She admitted however that she had not taken steps to challenge the grant that was issued in the said proceedings.

9. PW3 to PW6 were tenants on the suit property. They corroborated the evidence of PW1 and PW2 regarding the ownership of the property. PW3 told the court that she had lived on the suit property for several years and that the deceased left the suit property to her two daughters upon her death. PW4 told the court that the relationship between the deceased and the defendant was that of a tenant and a landlord and nothing more.

10. In his submission, the plaintiff reiterated that the grant of letters of administration that was obtained by the defendant at Kiambu Law Court was irregular. The plaintiff submitted that the defendant petitioned for grant of letters of administration intestate despite the chief's letter that the defendant had relied on stating that the deceased left a written will. The plaintiff submitted further that the defendant failed to list beneficiaries of the estate of the deceased in the affidavit in support of the petition.

11. The plaintiff further submitted that although the defendant alleged to have been bequeathed the suit property by the deceased, she presented the petition for grant of letters of administration in her capacity as a purchaser and used unconfirmed grant of letters of administration to procure registration of the suit property in her name.

12. The plaintiff cited Alice Chemutai Too v Nickson Kipkurui Korir & 2 others [2015] eKLR in support of his prayer for the cancellation of the defendant's title.

13. The defendant filed a statement of defence dated 21<sup>st</sup> March, 2002 on 26<sup>th</sup> April, 2002. The defendant averred that the plaintiff's purported letter of allotment dated 23<sup>rd</sup> December, 1997 was a forgery and that the same was cancelled and the cancellation communicated to the plaintiff by a letter dated 5<sup>th</sup> October, 1999.

14. The defendant contended that the suit property was lawfully allocated and registered in her name. The defendant denied that she was at any time a tenant of the plaintiff on the suit property.

15. At the trial, the defendant gave evidence and called two witnesses in support of her case. The defendant who gave evidence as DW1 adopted her witness statement dated 9<sup>th</sup> August, 2016 as part of her evidence in chief. The defendant told the court that she was the administratrix of the estate of the deceased and that the suit property was transferred to her by the Nairobi City Council from the name of the deceased. She stated that she filed a petition for grant of letters of administration in respect of the estate of the deceased in Kiambu because she was residing there. The defendant stated that she was the registered owner of the suit property. She stated that the grant of letters of administration that she obtained in respect of the estate of the deceased had not been challenged. She produced her bundle of documents dated 9<sup>th</sup> August, 2016 as exhibit.

16. In cross-examination, the defendant stated that she had a mother-daughter relationship with the deceased although the deceased was not related to her. She stated that the deceased was survived by two daughters who had no children namely, Mary Chemeli and Amina Chebunge. The defendant stated that she did not purchase the suit property. She stated that the property was left to her by the deceased. The defendant stated that the deceased bequeathed the suit property to her two daughters who subsequently died.

17. The defendant stated that it was the deceased's daughter who died last, Amina Chebunge who left the property to her in her will. The defendant stated that the grant that she applied for was in respect of the estate of the deceased and not that of Amina Chebunge. The defendant stated that the grant of letters of administration that she obtained at Kiambu Law Court conferred title of the suit property upon her.

18. Mohamed Haji Abdulahi(DW2) adopted his witness statement filed in court on 12<sup>th</sup> July, 2017 as his evidence in chief. DW2 stated that he knew the deceased and the defendant together with their families and that he had known them for a long time since he owned a parcel of land adjacent to the suit property. He corroborated the evidence of the defendant. In cross-examination, DW2 stated that he did not know how the defendant acquired the suit property.

19. The defendant's last witness was Ebrahim Kisundi Macharia(DW3). DW3 corroborated the evidence of the defendant. He told the court that the defendant lived on the suit property with the deceased and her two daughters and that he had never seen the plaintiff on the suit property. On cross-examination, he stated that the defendant occupied the suit property as a tenant with other tenants.

20. In her submissions dated 16<sup>th</sup> February, 2021, the defendant framed 4 issues for determination by the court namely; whether the suit property was allocated to the plaintiff and if so, whether the allocation lapsed, whether the allocation of the suit property to the defendant and the subsequent issuance of a certificate of title to her in respect thereof was illegal and fraudulent, whether the plaintiff is entitled to the

reliefs sought, and who should bear the costs of the suit.

21. The defendant submitted that the plaintiff's claim over the suit property was hinged on the letter of allotment dated 23<sup>rd</sup> December, 1997. The defendant submitted that there was no evidence that the allotment was accepted and the requisite fees paid. The defendant submitted that the acceptance and payment for the said allotment was to be made within 30 days. The defendant submitted that since there was no evidence that the allotment was accepted within 30 days, the same had lapsed and was of no effect.

22. In support of her submissions on this issue, the defendants relied on Bubaki Investment Company Ltd v National Land Commission & 2 Others [2015] eKLR, Francis Obae Machoka v Telecom Kenya Limited [2017]eKLR and Joseph Arap Ng'ok v Justice Moiyo Ole Keiwua NAI. Civil Application No. 60 of 1997.

23. On the second issue, the defendant submitted that her title could not be taken away without due process. The defendant submitted that the plaintiff did not seek to have her title cancelled. The defendant submitted that the plaintiff did not plead any act of fraud against the defendant that could form a basis for the impeachment of the defendant's title to the suit property. In support of this submission, the defendant relied on section 23(1) of the Registration of Titles Act, Chapter 281 Laws of Kenya (now repealed) and R v The Permanent Secretary, Ministry of Lands and Housing Ex-parte James Cheruiyot Boit[2004]eKLR.

24. The defendant submitted that she had demonstrated that she acquired the suit property upon obtaining grant of letters of administration in respect of the estate of the deceased who was in possession of the suit property as at the time of her demise and that she lawfully took possession of the property in 1996. The defendant submitted that this court has no jurisdiction to set aside the succession court proceedings in which the said grant was issued.

25. The defendant submitted that she had demonstrated that she acquired the suit property lawfully and that the plaintiff had failed to prove his case on a balance of probabilities. The defendant urged the court to dismiss the plaintiff's suit with costs.

26. From the pleadings, the following in my view are the issues arising for determination in this suit;

- a) Whether the defendant acquired the suit property fraudulently.
- b) Whether the plaintiff is entitled to the reliefs sought in the amended plaint.
- c) Who is liable for the costs of the suit?

27. Whether the defendant acquired the suit property fraudulently.

In Virani t/a Kisumu Beach Resort v Phoenix of East Africa Assurance Co. Ltd [2004] 2 E.A KLR 269, the Court of Appeal stated that:

**“Fraud is a serious quasi-criminal imputation and it requires more than proof on a balance of probability though not beyond reasonable doubt.”**

28. In Kampala Bottlers Ltd. v Damanico (UG) Ltd. East Africa Law Reports [1990-1994] E. A141(SCU), the Supreme Court of Uganda stated that:

**“To impeach the title of a registered proprietor of land, fraud must be attributable to the transferee either directly or by necessary implication. The transferee must be guilty of some fraudulent act or must have known of some act by somebody else and taken advantage of such act. The burden of proof must be heavier than a balance of probabilities generally applied in civil matters.”**

29. It is not in dispute that the suit property was at all material times owned by Martha Kipchoge(deceased) who had a residential building thereon. The deceased was a tenant of the Nairobi City Council in respect of the property. The deceased died on 18<sup>th</sup> July, 1985. The deceased had two children; Mary Chemeli and Amina Chebunge. Mary Chemeli died on 23<sup>rd</sup> April, 1993 while Amina Chebunge died 2<sup>nd</sup> June, 1995. It is not in dispute that in 1997 there was a Government directive that the residents of Majengo Pumwani be allocated the parcels of land which they occupied and be issued with titles. As of this date, both the deceased and her two children were deceased. With the death of the deceased, her interest in the suit property devolved to her estate.

30. The plaintiff has claimed that as a nephew of the deceased, it was agreed between the family members that he takes over the management of the suit property and that on the strength of that agreement he was issued with a letter of allotment by the Government in respect of the suit property dated 23<sup>rd</sup> December, 1997. The plaintiff has contended that he accepted the allotment and made the necessary payments on 27<sup>th</sup> January, 1999 and 29<sup>th</sup> March, 1999. The plaintiff admitted that he did not apply for a grant of letters of administration in respect of the estate of the deceased. The plaintiff's claim over the suit property is therefore based solely on the said letter of allotment.

31. On her part, the defendant gave conflicting information on the root of her title to the suit property. The defendant admitted that she was not related to the deceased. In her evidence, the defendant claimed at one point that the suit property was bequeathed to her by the deceased who treated her like her daughter. The defendant changed that story and claimed that the suit property was bequeathed to her by Amina Chebunge, the deceased's daughter in her will. This is also the version in her witness statement.

32. In the statutory declaration allegedly signed by Amina Chebunge on 18<sup>th</sup> May, 1995 a few days before her death on 2<sup>nd</sup> June, 1995 and the defendants own affidavit sworn on 22<sup>nd</sup> January, 1996 which were both produced in evidence by the defendant, the defendant claimed that the suit property was bequeathed to her then minor son, DKG by the deceased. On the other hand, in her petition for grant of letters of administration in respect of the estate of the deceased filed at Kiambu Law Courts in Succession Cause No. 125 of 1996, the defendant claimed that she purchased the suit property from the deceased.

33. Before her application for a full grant of letters of administration, the defendant had applied for a Limited Grant of Letters of Administration in respect of the estate of the deceased on 5<sup>th</sup> July, 1995 in Kiambu PMC Succession Cause No. 625 of 1995. In her affidavit in support of the application, the defendant claimed that she was the guardian of the deceased before her death. The defendant was issued with a limited grant of letters of administration on 13<sup>th</sup> November, 1995 to enable her continue paying land rates and rent for the suit property to the Nairobi City Council.

34. It has been claimed that the defendant obtained a full grant of letters of administration of the estate of the deceased on 7<sup>th</sup> June, 1996. The said grant was not produced in evidence. It has been claimed further that pursuant to the said full grant, the defendant applied to the Nairobi City Council to transfer the ownership of the suit property to her name which application was approved on 23<sup>rd</sup> June, 1998 and effected thereafter. From the evidence that was placed before the court by the defendant, the said transfer was not effected pursuant to a full grant issued in Kiambu Succession Cause No. 125 of 1996. The minutes of the meeting of Social Services and Housing Committee of the Nairobi City Council held on 23<sup>rd</sup> June, 1998 that was produced in evidence by the defendant shows that the defendant's application for transfer was made pursuant to the Limited Grant of Letters of Administration that was issued in Kiambu Succession Cause No. 625 of 1995 which did not authorize the defendant to distribute the estate of the deceased.

35. Be as it may, the defendant contended that following the transfer of the suit property to her name, the Government allocated the suit property to her through a letter of allotment dated 1<sup>st</sup> July, 1999. It is worth noting that when the suit property was being transferred to the defendant by the Nairobi City Council on 23<sup>rd</sup> June, 1998, the same had already been allocated to the plaintiff. In the letter of allotment in favour of the defendant dated 1<sup>st</sup> July, 1999, there is an endorsement at the bottom that the same cancelled two previous letters of allotment dated 24<sup>th</sup> December, 1997 and 25<sup>th</sup> August, 1998 that had been issued to the plaintiff herein.

36. As I have mentioned earlier, the plaintiff's claim to the suit property is based on the letter of allotment dated 23<sup>rd</sup> December, 1997. There is no evidence that this allotment was cancelled. Even if it is assumed for argument sake that it is the same as the letter of allotment dated 24<sup>th</sup> December, 1997 referred to in the defendant's letter of allotment dated 1<sup>st</sup> July, 1999, I wonder how an allotment in favour of the plaintiff that had been accepted and paid for could have been cancelled by way of another allotment in favour of the defendant. I am in agreement with the decision in Rukaya Ali Mohamed v David Gikonyo Nambacha & another, Kisumu HCCC No. 9 of 2004, where the court stated as follows:

**“... 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 other words, where land has been allocated, the same land cannot be reallocated unless the first allocation is validly and lawfully cancelled.” (emphasis added)**

37. No evidence was placed before the court showing that the Commissioner of Lands communicated to the plaintiff over the purported cancellation of its letter of allotment. The defendant had also contended that the plaintiff's letter of allotment was a forgery. Again, I wonder why the Commissioner of Lands would take the trouble to cancel a letter of allotment that was not issued by his office. There was also an allegation that the terms of the allotment were not accepted and payment made within 30 days. It is correct that the payment was not made within 30 days. However, the same was made and accepted by the Commissioner of Lands and receipts issued accordingly. I have seen copies of the said receipts in the plaintiff's bundle of documents dated 29<sup>th</sup> October, 2015 filed in court on 30<sup>th</sup> October, 2015. The Commissioner of Lands could not lawfully allocate the suit property to the defendant while the allotment in favour of the plaintiff was subsisting.

38. It is a maxim of equity that where there are equal equities, the first in time prevails. In Benja Properties Limited v Syedna Mohammed Burhannudin Sahed & 4 others [2015] eKLR, the Court of Appeal cited with approval the High Court case, Gitwany Investment Limited v Tajmal Limited & 2 others [2006] eKLR where the court stated that:

**“My understanding is therefore that the title given to Gitwany in the first instance and which I have held to be absolute and indefeasible as regards the suit land is the earlier grant and in the words of the Court of Appeal in Wreck Motors Enterprises vs. commissioner of Lands, C.A. No. 71/1997 (unreported) “– is the “grant [that] takes priority. The land is alienated already.” This decision was again upheld in Faraj Maharus vs. J.B. Martin glass Industries and 3 others C.A 130/2003 (unreported). Like equity keeps teaching us, the first in time prevails so that in the event such as this one where, by a mistake that is admitted, the Commissioner of Lands issues two titles in respect of the same parcel for land, then if both are apparently and in the fact to them, issued regularly and procedurally without fraud save for the mistake, then the first in time must prevail. It must prevail because without cancellation of the original title, it retains its sanctity....”**

39. It is my finding arising from the above analysis that the defendant's acquisition of the suit property was marred with several irregularities and illegalities of a magnitude that fraud cannot be ruled out. The defendant had argued that its title was indefeasible and that the plaintiff had no title to the suit property.

40. In Munyu Maina v Hiram Gathiha Maina [2013] eKLR, the Court of Appeal stated that:

**“... when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership.... the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal....”**

41. The same reasoning was adopted in Daudi Kiptugen v Commissioner of Lands & 4 Others [2015] eKLR where the court stated that:

**“...the acquisition of title cannot be construed only in the end result; the process of acquisition is material. It follows that if a document of title was not acquired through a proper process, the title itself cannot be a good title. If this were not the position then all one would need to do is to manufacture a Lease or a Certificate of title at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein.”**

It is my finding from the foregoing that the defendant acquired the suit property illegally and fraudulently.

42. Whether the plaintiff is entitled to the reliefs sought in the amended pleadings.

I have at the beginning of this judgment set out the reliefs sought by the plaintiff. From the findings that I have made above, I am satisfied that the plaintiff has proved his case against the defendant on a balance of probabilities. The plaintiff has proved that he was the first to be allocated the suit property and that he accepted the allotment and paid the requisite charges. The plaintiff has proved further that the Commissioner of Lands had no right to allocate the suit property to the defendant while the allocation of the same property to the plaintiff was subsisting and had not been lawfully cancelled. The plaintiff has also proved that the defendant acquired her title to the suit property illegally and fraudulently through false claims.

#### Conclusion.

In conclusion, I hereby enter judgment for the plaintiff against the defendant as follows;

1. An injunction is issued restraining the defendant by herself or her servants, agents, employees or otherwise however from selling, alienating or otherwise disposing of all that parcel of land known as L.R No. 25180(I.R No. 5940) (formerly unsurveyed Plot No.225) Pumwani Estate Nairobi.
2. It is declared that the second allotment of the formerly unsurveyed Plot No.225 Pumwani Estate Nairobi to the defendant and the subsequent issuance of a certificate of title or Grant in respect of L.R No. 25180(I.R No. 5940) to the defendant is null and void.
3. The National Land Commission which is the successor of the Commissioner of Lands and/or the Chief Land Registrar shall cancel the title held by the defendant in respect of L.R No. 25180(I.R No. 5940) (formerly unsurveyed Plot No.225) Pumwani Estate Nairobi and shall process and issue a new title for the property in favour of the plaintiff subject to the plaintiff paying the requisite charges and meeting the normal conditions for Government Grants.
4. The plaintiff shall have the costs of the suit.

**DELIVERED AND DATED AT NAIROBI THIS 27TH DAY OF SEPTEMBER, 2021.**

**S. O. OKONG’O**

**JUDGE**

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Ndungu for the Plaintiff

Mr. Kinyanjui for the Defendant

Ms. C.Nyokabi-Court Assistant