



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 124 OF 2019

(FORMERLY NRB CIVIL SUIT 88 OF 2015)

SALOME WANGARI WAMUNYU.....PLAINTIFF

VERSUS

IRENE JANE NJAMBI.....1ST DEFENDANT

PETER MOCHANA ONKWARE.....2ND DEFENDANT

THE HON. ATTORNEY GENERAL.....3RD DEFENDANT

JUDGMENT

By an Amended Plaint dated 11th July 2018, the Plaintiff filed this suit against the Defendants and ought for orders that;

- a) A Declaration that the Plaintiff is the legal and bonafide owner of all that parcel of land formerly known as unsurveyed Plot No. A now registered in the Plaintiff's name as L.R No. xxx/xxx Thika Municipality.
- b) A Declaration that the title held by the 1st Defendant over the suit land L.R No. xxx/xxx Thika Municipality is illegal and was procured by means of fraud and corrupt scheme.
- c) An order compelling the 3rd Defendant acting through the Registrar of Titles and /or Chief Land Registrar to rectify such Register of the suit in land in the 1st Defendant's name by cancelling registration of the 1st Defendant and the proprietor of parcel No. L.R No. xxx/xxx, Thika Municipality and close such register.
- d) IN THE ALTERNATIVE, an order compelling the Registrar of Titles and/or Chief Land Registrar to rectify such register of the suit land in the 1st Defendant's name by cancelling registration of the 1st Defendant as the proprietor of parcel No. L.R No. xxx/xxx, Thika Municipality and close such register.
- e) An order compelling the 1st Defendant to surrender the illegal Certificate of Title in respect of the suit land L.R No. xxx/xxx Thika Municipality in er possession to the Chief Land Registrar for cancellation.
- f) A Permanent injunction restraining the 1st Defendant by herself, her employees, servants and/or agents from in any way entering onto the Plaintiff's suit and/or taking possession thereof, subdividing, selling or in any other manner dealing and or alienating the Plaintiff's land L.R No. xxx/xxx Thika Municipality at to interfere with the Plaintiffs ownership, possession and quiet enjoyment of the said land.
- g) A Permanent Injunction restraining the 2nd Defendant by himself, his employees, servants and or agents from subdividing, selling or in any other manner dealing and or alienating and or asserting ownership of or remaining in possession of the portion measuring 40 by 80 feet of the Plaintiffs land L.R No. xxx/xxx Thika Municipality she occupies at the filing of this suit s to interfere with the Plaintiff's ownership, possession and quiet enjoyment of the said land.
- h) An order compelling the 1st Defendant to remove semi permanent illegal structures erected on the suit land and bury a pit latrine excavated on the suit property on the suit land at her own cost.
- i) An order compelling the 1st Defendant to remove semi permanent illegal structures erected on the suit land and bury a pit latrine excavated on the suit land at her own costs.

j) An order compelling the 2nd Defendant to tender vacant possession to the Plaintiff of the portion of the suit land L.R No. xxxx/xxxx Thika Municipality measuring 40 by 80 ft and/or such portion as he illegally occupies thereof failing which orders of forcible eviction of the 2nd Defendant from the said portion be granted the Plaintiff be permitted to forcibly evict the 2nd Defendant therefrom

k) Costs of this suit and interest thereon at Court's rate.

l) Any other or further relief that this Honorable Court may deem just and fit to grant.

In her statement of claim, the Plaintiff averred that vide an allotment letter dated **6th March 1996**, reference **No.xxxx/XL/xxx**, she was allotted an unsurveyed residential **Plot A Plan TKA/x/xx/xx**. That on **12th February 2013**, the Plaintiff had the plot surveyed, survey plan registered and Deed Plan prepared around **August 2013**, and the plot allocated land reference **No. xxxx/xxxx**, situate in Thika Municipality. That the 1st Defendant has been illegally staking ownership to her land, resulting to her forwarding the dispute to several offices. That the **National Land Commission**, vide its letter dated **21st June 2013**, confirmed that the suit property belonged to the Plaintiff. Further that in **August 2013**, the 1st Defendant trespassed onto the Plaintiff's land and removed beacons that had been erected by her surveyor. In **January 2015**, the 1st Defendant re erected beacons in an apparent preparation of illegally entering onto the land. That the 2nd Defendant has trespassed on a portion of the Plaintiff's land and claims to have purchased it from another person. That upon further inquiry, the 2nd Defendant disclosed to the Plaintiff that there was another Court case in which the 1st Defendant was asserting ownership to wit **ELC 1349 of 2013**, which suit was consolidated with the instant suit.

That subsequent to filing the suit, the Plaintiff was issued with a title deed registered on **31st March 2015**, and she is therefore the absolute proprietor. That the 1st Defendant has pleaded that she is in possession of a subsequent title over the suit property and that the same was procured fraudulently.

The Plaintiff particularized fraud by the 1st Defendant as engaging in a corrupt scheme and obtaining an illegal and fraudulent allotment letter, fraudulently procuring title to the suit property without paying any standard premium, procuring a double registration of the suit property, illegally procured an illegal title during the pendency of the suit, misusing her position as a Land Registrar / and or former Land Registrar to procure issuance of a fraudulent land title.

She further particularized fraud by the Registrar of Titles as, while engaged in a corrupt scheme opened a new edition of register to the suit property contrary to the law with knowledge that there was an existing register, issuing and illegal subsequent Certificate of Title and procuring an illegal subsequent registration in favour of the 1st Defendant who was not possessed of a legal allotment.

That the 1st Defendant has erected illegal temporary structures on the suit property and dug a pit latrine contrary to the Court orders issued on maintaining the status quo. That in **June 2017**, the 1st Defendant attempted to illegally subdivide the suit property on the strength of an illegal title deed.

The suit was contested and the 1st Defendant filed her Amended Defence and Counter Claim dated **26th January 2018** and denied all the allegations contained in the Plaint and averred that the Plaintiff's land was not properly surveyed and the purported Deed Plan was consequently cancelled by the Director of Survey. That the allotment to both parties was done by the Commissioner of Lands, who confirmed that the 1st Defendant was the proper allottee of the subject land and the purported confirmation by the NLC on behalf of the Plaintiff is inadmissible.

In her Counter Claim, the 1st Defendant sought for orders that;

a) A Declaration that the 1st Defendant is the legal and bonafide owner/ proprietor of all that parcel of land known as Thika Municipality L.R No. xxxx/xxxx.

b) An order for perpetual Injunction restraining the Plaintiff by herself, her servants, agents and /or any other person howsoever claiming for and/or on her behalf from howsoever entering into and /or dealing with the parcel of land known and described as Thika Municipality L.R No. xxxx/xxxx.

c) Costs of this suit and Interest thereon at Court's rates

d) Any other and/or further relief that this esteemed Court may deem just and expedient.

The 1st Defendant averred that she engaged services of a surveyor upon encroachment of her land whereby the Director of Survey confirmed to her that the Plaintiff had sought for and obtained a Deed Plan and survey map which was however cancelled. Further that the surveyor established that the **Part Development Plan (PDP)** of the Plaintiff is different from hers. That the District Surveyor, Thika, visited the suit property and confirmed through a letter dated **5th December 2013**, that the survey done by the Plaintiff was in her location and the register **(F/R) xxx/xxx** was cancelled. Further, that it was also confirmed that **F/R xxx/xxx** and **F/R xxx/xxx** are the correct portion for unsurveyed Plot No. A.

The 3rd Defendant filed its Statement of Defence dated **29th August 2018**, and denied all the allegations made in the Plaint and averred that demand and Notice of intention to sue has not been issued to the 3rd Defendant.

The Plaintiff had also filed a Reply to defense and Defence to Counter Claim, wherein she denied all the allegations made in the Plaintiff and reiterated her averments in the Plaintiff.

The matter proceeded by way of Viva Voce evidence, wherein the Plaintiff called one witness, the 1st Defendant called 2 witnesses and the 3rd Defendant did not call any witness. Despite being duly served with Summons to Enter Appearance, the 2nd Defendant did not enter appearance and therefore did not participate in the proceedings.

PLAINTIFF'S CASE

PW1 Salome Wangari Wamuyu, testified that the land is **LR No. xxx/xx/x**. She adopted her witness statement as her evidence in Court. That she was given the allotment letter by the Commissioner of Lands and she paid what was required. She produced the allotment letter as Exhibit 1. Further, that she was shown the Plot being No. A(Unsurveyed Thika Municipality. That she paid the statutory charges and land rent of **Kshs. 423, 280**. She produced the receipts as **Exhibit 2(a) & (b)**. That she surveyed the land and she produced the Survey Plan as exhibit 3 and from the survey plan, the land was given **No. xxxx/xx/x**. She produced the Deed Plan dated **1st August 2013**, as exhibit 4, the Rate Clearance Certificate as exhibit 5 and after paying the said amounts, she was told that the suit property belonged to another person, but she was issued with a title deed.

That the Chairman of Survey wrote a letter seeking clarification of who was the owner of the suit plot. She produced the letter dated **20th May 2013**, as Exhibit 6. The Letter from National Land Commission as Exhibit 7. That she was issued with a title deed dated **31st March 2015**, which she produced as exhibit 8. The letter dated **16th April 2013**, seeking for the Deed Plan as Exhibit No. 9.

That she later learnt that the 1st Defendant claimed the land had been allocated to her vide allotment letter dated **12th September 1996**, and by then, she had her allotment letter and she had planted her beacons. That there is another person who had built on the land and she produced Photographs as Exhibit 10, **Demand letter Exhibit No. 11** and Notice to the Attorney General as Exhibit 12 and urged the Court to cancel the 1st Defendant's title deed.

That she did not know the allotment letter was to lapse after 30 days if she failed to pay. That she paid the statutory dues in the year **2012**, and she made a report to the Police when she found the beacons had been removed and she instructed people to remove the toilet built on the plot. That she was shown the land after allocation by **Charles**, who was an employee of the government. That she does not know how to read. That she paid **Kshs. 100,000/=** at first and that **167,387/=** was the 2nd payment and the conditions were not read to her. That she paid the monies by cash though as per condition 2 of the allotment letter, she was to pay by bankers cheque. That the government issued her with the receipt. That she got the demand for payment of rent through the office of the County Council of Kiambu, and that the Chairman of **NLC** wrote a letter and confirmed that she was the owner of the land.

That the allotment letter is dated **6th March 1996**, and the letter from **NLC** refers to an allotment letter dated **6th March 2013**. That the allotment had no plot Number, but she did not know that as she did not know how to read. That she paid as per the allotment letter and the receipt has serial numbers and **cheque No. 898181**. That the letter by **NLC** was written **31st May 2013**.

DEFENCE CASE

DW1 Irene Jane Njambi Nganga the 1st Defendant herein adopted her witness statement dated **6th November 2018** as her evidence. She produced her list of documents as Exhibit 1. That she was a Land Registrar for 15 years and that she was allotted the land in **1996**. That she was a Land Registrar in Thika since **1996**, and she was housed in the same building as the Physical Planning Directorate, and the people who signed her **PDP** were known to her. That the Plaintiff was allotted the land vide an allotment letter dated **6th March 1996**, and it has a different plot Number. That her Reference Number is different, but it refers to the plot, but it could just be a reference number. That the Plaintiff was allocated the land earlier than hers. Further that the plots are referring to different titles. That she paid Standard Premiums in **October 2012**, and the Plaintiff paid Standard Premiums on **14th August 2012** before her.

Further that from the allotment letter, the land rent started accruing from **1st September 1996**, before procuring the title and that she paid in one cheque of **Kshs.117, 5777/=** on **30th August 2012**. That she had never seen the Plaintiff's **PDP** and she has annexed a Certificate of title and the map from the survey. That she engaged a Surveyor to survey her land and that her plot is not **xxxx/x**, and that her plot was unsurveyed **Plot A** and she has a title deed after it was surveyed. That the survey plan in possession of the Plaintiff was cancelled and that the survey was delayed because of the cancellation. She denied using her former position to obtain the letter of allotment and Certificate of Title. That the land could be surveyed without having paid stamp duty.

That while her receipts indicate that the same are from the department of lands, the Plaintiff's receipts do not indicate which department. That she paid the Standard Premiums in cheques and she lodged a complaint at the Police on the issue of double allocation,

DW2 Boniface Gitau Mugo, testified that he is a Private Surveyor and that he was given the work to survey the land by **Irene Njambi**. That the survey had earlier been done by **Mungare**. Further, that the plots were **1 acre** each, and they were five. That **Njambi's** plot was **A** and in the **PDP** it was **Plot No. A**. That **PDP** in **A** had been counter signed by the allotting officer, who signed the allotment letter and that the allotment letter ought to be accompanied by the **PDP**. That the Plaintiff's **PDP** was found to be fake, by the Director of Survey and with that, the survey plan was cancelled and it was noticed that it had been hidden at the Directorate of Survey by some unknown people.

That as an expert, the proper documents are the ones by the 1st Defendant. That there is a correct allotment letter and a payment receipt that there is a survey plan which had been authenticated by Directorate of Survey. That there is a verified Deed Plan for preparation of lease and it is certified by Director of Survey. That **Salome's PDP** was not countersigned by the Director of Survey and the paid receipt must be verified.

That he works with **L.K Gitau** who signed his Deed Plan. That he could not recall his registration number. That the PDP is counter signed but it does not show who signed it. That the Plaintiff's PDP was registered at the Directorate of Survey, but it was cancelled. That it was easy to avail the records of cancellation, but he did not avail it and that a Deed Plan was prepared. Further, that before the survey, one needs to be paid up completely. That he procured the survey for the 1st Defendant, but he was not aware that she had not paid up the land rent. That she had accepted the offer and paid the Standard Premium.

Thereafter, the parties filed written submissions which the Court has carefully read and considered. Further the Court has read and considered the pleadings, the evidence adduced and the relevant provisions of law and finds that the issues for determination are;

1. Who, between the Plaintiff and the 1st Defendant, is the lawful owner of the suit property

2. Is the Plaintiff entitled to the orders sought in the Amended Pleint

3. Is the 1st Defendant entitled to the orders sought in the Counter Claim.

4. Who should bear costs of the suit

5. Who, between the Plaintiff and the 1st Defendant, is the lawful owner of the suit property

Both the Plaintiff and the 1st Defendant lay claim to the suit property, which was previously **unsurveyed Residential Plot A** and upon being surveyed became **L.R xxxx/xxxx**. While the 1st Defendant had initially claimed that the properties that the parties were referring to were different, she later admitted that the property is the same. Both parties have since been issued with the title over the same property.

To show the root of her title, the Plaintiff produced in evidence an allotment letter dated **1st March 1996**. The Plaintiff also produced a receipt for payment of the required amount, which payment was made on **14th August 2012**. The Plaintiff also produced in evidence a letter dated **30th May 2013**, from the Director of Survey who was inquiring from the Commissioner of lands on who between the Plaintiff and the 1st Defendant held the authentic letter of allotment. Finally, a letter from the National Land Commission dated **30th May 2013**, referring to the letter from the Director of Survey was produced, which letter indicated that the Plaintiff is the one who was allocated the land.

On the other hand, the 1st Defendant tried to show the root of her title by producing in evidence an allotment letter dated **12th September 1996**. She further produced in evidence a receipt for payment dated **8th October 2012**. A letter dated **11th February 2013**, by the Director of Survey to the Commissioner of Lands, which letter was responded to and signed in behalf of Commissioner of Lands in a letter dated **12th February 2013**, and indicated that the 1st Defendant was allocated the land vide an allotment letter dated **12th November 1996**.

Having produced their supporting documents to show the root of their titles, this Court must then determine who has been able to satisfactorily show the root of her title. It is very strange that in this case, there are two parties each holding a letter of allotment, that both parties were allotted in the same year. Further, these two parties also have payment receipts for the same, they both hold letter from Government institutions that confirm that they are the parties that were allotted the suit property and finally each party hold a Certificate of title over the said property.

While allegations were made with regards to certain factors, none has been proved before this Court. The 1st Defendant contended that the receipt of payment held by the Plaintiff was not genuine. However, no evidence was produced in Court to challenge the said receipt. The Plaintiff having testified that she got the same from the Government and further the fact that she produced rent payments receipt to confirm that she has been paying for land rates and rents and even has a title deed, this Court therefore cannot find that the said receipts are not genuine in the absence of any evidence. Dw1 and DW2 further testified that the Director of Survey had confirmed that the Survey plan held by the Plaintiff was cancelled, but no evidence was adduced to that effect. Therefore, the same in line with **Section 107 of the evidence Act** does not hold any water.

Further the 1st and 3rd Defendants have alleged that the allotment letter held by the Plaintiff was extinguished when she failed to pay the amounts required in the allotment letter. The Court takes cognizance of the fact that the allotment letter held by the Plaintiff indicated that should she fail to pay the amounts within the 30 days, then the same would lapse. However, the Court also notes that the allotment letter produced in evidence by the 1st Defendant also has the same clause. As the Plaintiff paid the required amount on **14th August 2012**, the 1st Defendant also paid the required amount on **8th October 2012**. So it is clear to the Court that none of the two parties paid the amount within 30 days, and it has not been explained why the 1st Defendant's allotment letter must stand and not the Plaintiff's.

The Court has seen the letters signed on behalf of the Commissioner of Lands produced in evidence by the 1st Defendant, indicating that she was one allocated the letter. The Court has also seen the letter produced in evidence by the Plaintiff in which the National Land Commission responded to the letter when asked who between the two had been allocated the land, and it stated that it was the Plaintiff. While the 1st Defendant has submitted that the **National Land Commission** had no business writing the letter. It is not in doubt that though there are issues surrounding roles as between the Land Ministry and the National Land Commission, the mandate previously exercised by the Commissioner of Lands, in relation to the management, alienation and allocation of public land, now exclusively vests in the **NLC**. The first **NLC** Commissioners came into office on **20th February 2013**, and therefore it cannot be far-fetched that the letter emanated from the **NLC** and or that the **NLC** did not have the powers to write the letter as there was no longer a Commissioner of Lands in office and by the time the letter was written, none existed.

In the case of **Republic vs City Council of Nairobi & 3 Others (2014) eKLR**, Odunga, J. had this to say about land that has already been allotted:

“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 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.”

From the above analysis, it is not in doubt that there is indeed a confirmation by the authority that between the 1st Defendant and the Plaintiff, it is the Plaintiff who was allocated the land. Further, it is not in doubt that the Plaintiff was the first one to be allocated the land and even on the payments, she was the first one to make the necessary payments and finally the first person to be issued with a Certificate of title. Even though the two hold competing titles, the Plaintiff's title was the first in time. See the case of *Gitwany Investment Ltd. Vs. Tajmal Ltd & 3 Others, Nairobi HCC No.1114 of 2002*, where the Court relied in the words of the *Court of Appeal in Wreck Motors Enterprises. Vs. Commissioner of Land C.A No.71/1997* where it was held that:-

“.....like equity keeps teaching us, first in time prevails so that in the event such as this one, unlike by mistake that is admitted, the Commissioner of Lands issues two titles in respect of the same parcel of land, then if both are apparently and on the face of 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”.

No evidence has been produced to show that the allotment letter issued to the Plaintiff was never lawfully and validly cancelled and that the same was re-allocated to the 1st Defendant. In the absence of such evidence, the Court finds and holds that once the Plaintiff was allotted the said land, it could not be reallocated to another person. Therefore, the Plaintiff's allotment letter came first in time and so did her title deed and hence she is the lawful owner of the suit property. See the case of *Ali Gadaffi & another ... Vs... Francis Muhia Mutungu & 2 others [2017] eKLR:-*

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

2. Is the Plaintiff entitled to the orders sought in the Amended Plaintiff

In her Amended Plaintiff, the Plaintiff has sought various orders, amongst them a **declaration that she is the bonafide owner of the suit property**. The Court has already held that she is the bonafide owner and therefore she is entitled to the said orders.

Further the Plaintiff has also sought for a Declaration that the 1st Defendant acquired her Certificate of title through fraud. While the Court does not understand how two parties can each hold a Certificate of title over the same property, there must have been negligence on the part of the institution issuing the same. However fraud must be specifically pleaded and proved. While the Plaintiff pleaded that the 1st Defendant engaged in a corrupt scheme, the same has not been proved and the said order is **not merited**.

The Plaintiff has also sought for the cancellation of the Certificate of title held by the 1st Defendant, an order of injunction and vacant possession of the suit property. This Court having held that the Plaintiff is the owner of the suit property, it then follows that she is the **absolute and indefeasible** owner as provided by **Section 26 (1) of the Land Registration Act**. Then she must be able to enjoy all the right and privileges that appurtenant to it and the same can only be achieved if the 1st Defendant Certificate of title is cancelled.

Section 80 of the Land Registration Act gives the Court powers to issue an order of rectification of the register. The Court having held that the Title held by the 1st Defendant is not valid, the same must therefore be cancelled and permanent injunction orders issued against her. Therefore, this Court finds and holds that the Plaintiff is entitled to the said orders.

3. Is the 1st Defendant entitled to the orders sought in the Counter Claim.

In her Counter Claim the 1st Defendant had sought for orders that she is the lawful owner of the suit property. Further she had also sought for Permanent Injunction orders. As the Court has already held that the Plaintiff is the lawful owner of the suit property, it automatically follows that the 1st Defendant is not entitled to the orders sought, in her counter claim and the said Counter claim is therefore dismissed entirely.

4. Who should bear costs of the suit

Section 27 of the Civil Procedure Act gives the Court the discretion to grant costs. It is trite that costs usually follow the event unless special circumstance are presented before Court to warrant it to exercise its discretion and order otherwise. In this instant, the Plaintiff is the successful party and therefore entitled to the costs of the suit. The Defendants shall therefore bear the costs of the suit.

Therefore, the Court finds and holds that the Plaintiff has proved her case on the required standards of balance of probabilities and is entitled to the orders sought in her amended Plaintiff. However, the 1st Defendant has failed to prove her case on the required standard and is therefore not entitled to the orders as sought in the Counter Claim.

Consequently, having considered the pleadings, exhibits, the evidence adduced and the relevant provisions of law, the Court enters judgement for the Plaintiff against the Defendants herein jointly and severally as prayed in the Plaintiff's amended Plaintiff dated **11th July 2018** in terms of prayers **No. (a), (c), (d), (e), (f), (g), (h), (i), (j) and (k)**.

However, the 1st Defendant's **counter claim** dated **26th January 2018**, is found **not** merited and the same is dismissed entirely with costs to the Plaintiff. The Defendants herein to bear costs of the suit.

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 24TH DAY OF SEPTEMBER, 2021

L. GACHERU

JUDGE

Court Assistant – Lucy