



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MILIMANI**

**ELC CASE NO. 519 OF 2013**

**PETER KIMANI.....PLAINTIFF**

**=VERSUS=**

**JOSEPH ORINA.....1<sup>ST</sup> DEFENDANT**

**CITY COUNCIL OF NAIROBI.....2<sup>ND</sup> DEFENDANT**

**FINOLA ALIVIDZA MOINDI.....3<sup>RD</sup> DEFENDANT**

**JUDGEMENT**

1. By an amended Plaint dated 13<sup>th</sup> June 2018, the Plaintiff prayed for the following reliefs against the Defendants:-

***a) (i) A declaration that the reallocation of plot No. 40 Kayole Shopping Centre Nairobi to the 3<sup>rd</sup> Defendant was unlawful and void ab initio.***

***b) A permanent injunction restraining the 1<sup>st</sup> and 3<sup>rd</sup> Defendants from constructing or interfering with lot No.40 Kayole Shopping Centre Nairobi.***

***b (i)A declaration that plot no. 40 Kayole Shopping Centre is the property of the Plaintiffs***

***c) The Costs of the suit***

***d) Any other relief which the court may deem fit to grant.***

2. The suit was originally filed by two Plaintiffs. The 1<sup>st</sup> Plaintiff who was the mother of the 2<sup>nd</sup> Plaintiff died on 17<sup>th</sup> June 2017. The 3<sup>rd</sup> Defendant in the suit was Isaac Moindi Nyabera (Deceased) who died on 21<sup>st</sup> March 2017 and was replaced by his wife who is the 3<sup>rd</sup> Defendant. During the hearing of the suit, it is the Plaintiff, the 1<sup>st</sup> and 3<sup>rd</sup> Defendants who testified. The 2<sup>nd</sup> Defendant did not call any evidence.

3. The Plaintiff testified that in 1993, he together with his mother applied for allocation of a commercial plot within Kayole Shopping Centre. The application was successful and they were given a letter of allotment dated 22<sup>nd</sup> November 1993. They were required to pay Kshs.14,400/= being stand premiums and rent. They proceeded to pay the required amount and on 10<sup>th</sup> May 2000 the 2<sup>nd</sup> Defendant wrote to them confirming that they had cleared paying the amount which was required of them.

4. As the Plaintiffs prepared to start developing the suit property, the 1<sup>st</sup> Plaintiff who has since passed on became sick. When she became better, the surviving Plaintiff visited the suit property in 2013 and found the 1<sup>st</sup> Defendant who was constructing. The 1<sup>st</sup> Defendant told him that he was undertaking the construction on behalf of the deceased.

5. The Plaintiff went to the Department of Housing Dandora where he raised the issue of occupation of the suit property but he was told that his complaint was going to be looked into at a later time. It is after this that he came and filed this suit.

6. The Plaintiff testified that he had intended to sell the suit property to Nemesys Warugongo who had paid Kshs.370,000/= but he had to refund the amount as Mr Warugongo did not want to purchase a property which had a dispute . In the meantime the deceased was arrested

and charged in Kiambu Chief Magistrate Criminal Case No. 1136 of 2014 for among other offences forgery of an allotment letter. The deceased however died before the case could be concluded.

7. The Plaintiff reported the invasion of the suit property to the 2<sup>nd</sup> Defendant who issued an enforcement Notice asking the deceased to stop construction but the deceased went on to construct . There are now tenants on the suit property who are paying rent to the 3<sup>rd</sup> Defendant.

8. On her part, the 3<sup>rd</sup> defendant who testified on her behalf and on behalf of the 1<sup>st</sup> Defendant stated that the deceased applied to the 2<sup>nd</sup> Defendant for allocation of a commercial plot at Kayole. The application was successful and he was given a letter of allotment dated 27<sup>th</sup> September 2002. The deceased paid rent and stand premiums of 14,400/=. The deceased took possession.

9. The deceased later applied for approval of building plans which were duly approved by the 2<sup>nd</sup> Defendant. The deceased then proceeded to construct two shops and six rooms which he rented out to tenants. It is the 3<sup>rd</sup> defendant's case that the suit property was re allocated to the deceased after the Plaintiff failed to meet the conditions in the letter of allotment. The 3<sup>rd</sup> Defendant states that they have spent over Kshs.10,000,000/= to develop the suit property.

10. The 3<sup>rd</sup> Defendant contends that the Plaintiffs have no interest in the suit property having sold their interest to Nemesyus Warugongo on 10<sup>th</sup> May 2000. The 3<sup>rd</sup> Defendant contends that the Plaintiffs are not genuine in their claim because the criminal complaint in Kiambu Chief Magistrate's court was filed by Nemesyus Warugongo as owner of the suit property and that this suit is filed by the Plaintiffs who have not demonstrated that they purchased back the suit property which they had sold to Mr Warugongo.

11. I have carefully considered the evidence adduced by the Plaintiff as well as that of the 1<sup>st</sup> and 3<sup>rd</sup> Defendants. I have also considered the submissions by the Defendants herein as well as those of the Plaintiffs. The main issue for determination is on who is the beneficial owner of the suit property. The suit property is yet to be registered. Both the Plaintiffs and the 3<sup>rd</sup> Defendant are claiming ownership of the suit property based on letters of allotment. The other issue for determination is whether the suit property was reallocated to the 3<sup>rd</sup> Defendant upon failure of the Plaintiffs to meet conditions in the allotment letter.

12. There is no contention that the Plaintiffs were allotted the suit property vide letter of allotment dated 22<sup>nd</sup> November 1993. The Plaintiffs made the requisite payments under the letter of allotment. The 2<sup>nd</sup> Defendant which was the allotting authority confirmed vide letter of 10<sup>th</sup> may 2000 that the plaintiffs had fully paid for the suit property.

13. The 3<sup>rd</sup> Defendant claims that the suit property was allotted to the deceased vide allotment dated 27<sup>th</sup> September 2002. The allotment letter is alleged to have been signed by J M Mbugua the then Town Clerk of the 2<sup>nd</sup> Defendant. During the criminal trial of the deceased in Kiambu Chief Magistrates Court, the said Mbugua was called as prosecution witness number 2. This witness denounced the said allotment which he said he did not sign.

14. In the allotment which the deceased claims to have been given, there are writings which indicate that the deceased was supposed to pay within 10 days. Despite this, the deceased did not make any payment until the year 2012 a period of ten (10) years later. There is no evidence that the Plaintiffs had failed to meet the conditions in the allotment letter which they were given in 1993. As early as May 2000, The 2<sup>nd</sup> Defendant had confirmed that the Plaintiffs had cleared paying for the suit property. There is therefore no way the suit property would have been repossessed and reallocated to the deceased.

15. The documents filed by the allotting authority show that on 3<sup>rd</sup> July 2013, the 2<sup>nd</sup> Defendant wrote to the deceased and brought to his attention that the records showed that there was an allocation made over the suit property in 1993. The deceased was asked to stop further construction pending investigations. The letter was clear that the allocation which was made to the deceased was not genuine.

16. Indeed after investigations, the deceased was charged for among other offences forgery of an allotment letter. The 2<sup>nd</sup> Defendant issued an Enforcement Notice dated 3<sup>rd</sup> July 2013 asking the deceased to demolish the construction which had reached first floor.

17. As the letter of allotment which had been issued to the Plaintiff had not been cancelled, the suit property was not available for reallocation. The deceased purported that the suit property was allotted to him after the Plaintiffs failed to meet the conditions. As I have stated hereinabove, there is no evidence that this was the case and in any case it is clear that the allotment letter held by the deceased was obtained through forgery as it was denounced by the person who is alleged to have signed it. The person who is alleged to have signed it even questioned why the deceased who was required to make payment within 10 days made payment several years later. This is a strong indication that there was something wrong.

18. The allotment letter which the deceased had was not obtained in a lawful way. There was no cancellation of the allotment to the Plaintiffs. The 3<sup>rd</sup> Defendant cannot acquire ownership through being in possession when such possession was gained through deceit.

19. From the analysis above, I find that the Plaintiff has proved his case on a balance of probabilities. I enter Judgment for him against the Defendants in terms of prayers a ,a(i) , b, b(i) and c of the Amended Plaint dated 13<sup>th</sup> June 2018 and filed in court on 17<sup>th</sup> September 2018.

**DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 28TH DAY OF OCTOBER 2021**

**E.O.OBAGA**

**JUDGE**

In the Virtual Presence of :-

Mr Anyona for 2<sup>nd</sup> and 3<sup>rd</sup> Defendants

Ms Wangui for Ms Wachira for Plaintiff

Ms Odulu for Mr Nyakoe for 2<sup>nd</sup> Defendant

Court Assistant: Mercy

**E.O. OBAGA**

**JUDGE**