



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO. 227 OF 2016**

**PAUL KIAMBA MUTUKU.....PLAINTIFF**

**VERSUS**

**MWIKALI MWANGANGI.....DEFENDANT**

**JUDGMENT**

1. By a plaint dated 17<sup>th</sup> August 2016 and filed on even date, the plaintiff instituted this suit against the Defendant seeking the following orders:

- a. A declaration to issue declaring the plaintiff as the rightful owner of plot no.1242 Taveta Phase 1 Settlement Scheme.
- b. An order to issue revoking and removing the Defendant name from Title to Plot No.1242 Taveta Phase 1 Settlement Scheme.
- c. An order to issue directing the Land Registrar Wundanyi to register the plaintiff as the owner and issue him with a title deed.
- d. The court to be pleased to grant any other relief it thinks fit to grant.
- e. The court to award costs and interest of this suit.

2. The plaintiff's case as pleaded is that on 25<sup>th</sup> May 2012 he was allotted Plot No.1242 after an exercise of picking rightful occupiers of the land after it became a settlement scheme. The plaintiff avers that the plot which later on became Plot No.1242 Taveta Phase 1 Settlement Scheme was bought for him by his father Amos Mutungi from Mr. Basil Criticos who had initially sold some portions to different people. The plaintiff further avers that it was agreed that the persons who were in occupation after having bought from Mr. Basil Criticos would be allotted their portions and all were confirmed and issued with Letters of Allotment, the plaintiff included.

3. The Plaintiff avers that he subsequently paid for the plot and waited for issuance of a title deed. The plaintiff states that without his knowledge and authority the Defendant in collusion with other people obtained a title deed for the suit plot. It is the plaintiff's contention that this was done without his authority and permission and that the same was done fraudulently with the assistance of two District Adjudication and Settlement Officers in Taveta, a Mr. Ngugi and a Mr. Kamau. The Plaintiff avers that the Defendant did not have a right to own the said land or at all. The Plaintiff has given particulars of fraud on the part of the Defendant, namely, getting registered as the owner of Plot No.1242 Taveta Phase 1 fraudulently; taking the plaintiff's land while knowing well that it does not belong to her; and procuring registration by way of misrepresentation. The plaintiff avers that the Defendant has no good title to the suit plot having obtained it by fraud and demands that the same be revoked and canceled. The plaintiff avers that he is the rightful owner of the suit property and should be issued with title. That despite several demands that the Defendant hand over vacant possession, the Defendant has refused and ignored to comply, hence the filing of this suit.

4. The Defendant in opposing the suit filed statement of defence dated 21<sup>st</sup> September 2016 in which she denies the plaintiff's averments in the plaint and put the plaintiff to strict proof thereof. The Defendant avers that on 25<sup>th</sup> May, 2012 she was validly and lawfully issued with a letter of offer after the suit plot was allocated to her. The Defendant further avers that the plaintiff's father who the plaintiff named in paragraph 4 of the plaint was involved in illegal and fraudulent activities and forging of documents which resulted in being charged in Criminal Case No.488 of 2013 with offence of making a document without lawful authority contrary to Section 357A of the Penal Code at the Principal Magistrate's Court at Taveta which case was still pending. The Defendant therefore avers and maintains that it is the plaintiff who obtained a letter of offer fraudulently or otherwise forged the letter of offer he is purporting to rely on in this suit. The Defendant further avers that the plaintiff has omitted and failed to also sue the persons named in the plaint because his allegations are not true. The Defendant

has denied each and all the particulars of fraud in the plaint and avers that she is the lawful, rightful and legal owner and entitled to possession of the suit plot, adding that the plaintiff's suit is without merit and an abuse of the court process. The Defendant further avers that the issues raised by the plaintiff in this suit are subsequently and directly in issue in Constitutional Petition No.325 of 2011 as the High Court in Nairobi. The Defendant avers that the suit plot was allotted and offered and subsequently registered in her favour by the relevant departments following the law and due process. The Defendant urged the court to dismiss the plaintiff's suit with costs.

5. The plaintiff adopted his witness statement dated 17/8/2016 and substantially reiterated the facts in the plaint. He testified that he lives on the suit land together with his family. The plaintiff stated that he was born in the suit land and that during allocation, he was shown the boundaries of the suit plot after the land became a settlement scheme. He produced a copy of the Letter of Offer dated 25<sup>th</sup> May 2012 issued by the Director of Land Adjudication and Settlement and a receipt dated 5<sup>th</sup> April 2013 for Kshs.2,765 as exhibits. The plaintiff stated that he is the rightful owner of the suit plot as he fully complied with the requirements by paying the requisite amount of Kshs.2,765/= as per the Letter of offer which payment was duly acknowledged and he was issued with a receipt. The plaintiff further stated that he was shocked to discover that the plot was registered in the name of the Defendant who was subsequently issued with a title. It was the plaintiff's evidence that the registration of the Defendant as owner of the suit property was fraudulent.

6. Counsel for the Defendant cross-examined the plaintiff who maintained he lived on the land and was later issued with an allotment letter when the land was made a settlement scheme. The case was fixed for defence hearing on 20<sup>th</sup> February 2019 but the same was adjourned to 13<sup>th</sup> May, 2019 because the Defendant and his counsel were not present in court. Again on 13<sup>th</sup> May, 2019, only the plaintiff and his advocate attended. The Defendant's case was therefore closed without any evidence being adduced on her behalf.

7. The court has considered the evidence and submissions on record. In the opinion of the court, the following issues arise for determination in this suit.

**i. Whether the plaintiff is the rightful owner of plot no. 1242 Taveta Phase 1 Settlement Scheme.**

**ii. Whether the registration and issuance of title in the name of the Defendant was fraudulent and should be revoked and/or cancelled.**

**iii. Whether the plaintiff is entitled to the prayers sought in the plaint.**

**iv. Who bears the costs of the suit.**

8. The plaintiff's case is that he was born on the suit property and that when the same was turned into a settlement scheme, he was allocated plot No.1242 and after making the requisite payment of Kshs.2,765/= was shown the boundaries of the plot. That he was awaiting to be issued with a title deed but was surprised to discover that the Defendant was issued with a title deed for the same parcel of land. It is the plaintiff's evidence that the registration and subsequent issuance of title deed in the name of the Defendant was fraudulent. The plaintiff produced the letter of offer and the receipt dated 5/4/13 issued to him.

9. Although in her defence the Defendant states that she was validly and lawfully issued with a letter of offer and allocated the suit plot and that she is the lawful, rightful and legal owner of suit plot, there was no evidence given to support those allegations. The Defendant did not adduce any evidence in this matter to rebut the plaintiff's evidence. In this case, the plaintiff's evidence remains uncontroverted. In circumstances where title to property is challenged, it is not enough for the proprietor to wave the title as proof of ownership, but he/she must go beyond and prove the legality of the said title. This was the finding of the Court of Appeal in the case of **Munyru Maina –v- Hiram Gathiha Maina (2013) eKLR** where the court held:

***“We state 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. It is this instrument of title that is in challenge and 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, formal and free from any encumbrances including any and all interests which would not be noted in the register.”***

10. Whereas it is not disputed that the Defendant holds a title which this court must take as a prima facie evidence of absolute proprietorship, the same is under challenge on allegation of fraud. The plaintiff had explained how he acquired the suit property. The plaintiff stated that he has been in occupation since he was born on the suit property and that the same was allocated to him when the land was made a settlement scheme. He produced the letter of allotment and the receipts for payment. There being no explanation of how the suit property was registered in the Defendant's name and title issued when the same had been allocated to the plaintiff who went ahead and paid for the same as required and is living on the land, the Defendant's title is impeachable. From the material placed before me, I am satisfied that the plaintiff has proved his case on a balance of probabilities. I find the evidence on record sufficient to prove that the plaintiff is entitled to the reliefs sought.

11. In the result, I hereby enter judgment in favour of the plaintiff as against the Defendant as follows:

**a) A declaration is hereby issued that the plaintiff is the rightful owner of plot no.1242 Taveta Phase 1 Settlement Scheme.**

**b) An order be and is hereby issued to revoke and remove the Defendant's name from title to plot No. 1242 Taveta Phase 1 Settlement Scheme.**

**c) An order be and is hereby issued directing the Land Registrar Wundanyi to register the plaintiff as the owner of land issue him with title of the suit plot.**

**d) Costs of the suit to the plaintiff to be borne by the Defendant.**

**It is so ordered.**

**DATED, SIGNED and DELIVERED at MOMBASA this 20<sup>th</sup> day of January 2020.**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Ms. Mwanzia holding brief for Oddiaga for plaintiff

No appearance for Defendant

Yumna Court Assistant

**C.K. YANO**

**JUDGE**