



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MAKUENI**

**CIVIL SUIT NO. 305 OF 2017**

**FLORENCE MUKUNA.....PLAINTIFF**

**-VERSUS-**

**THE HONOURABLE ATTORNEY GENERAL.....1<sup>ST</sup> DEFENDANT**

**THE NATIONAL LAND COMMISSION..... 2<sup>ND</sup> DEFENDANT**

**MAKUENI COUNTY GOVERNMENT.....3<sup>RD</sup> DEFENDANT**

**ISAAK MUSAU MUSYOKI.....4<sup>TH</sup> DEFENDANT**

**JUDGEMENT**

1. By her amended plaint dated 29<sup>th</sup> November, 2018 and filed in court on even date the Plaintiff prays for judgement against the defendants jointly and severally for: -

**(a) A declaration that the plaintiff is the bonafide allottee of the Land Parcel Number UNS. B.C.R PLOT 45 Wote Town and any other subsequent allotment is null and void.**

**(b) The defendants either by themselves, their agents, servants or in any manner howsoever be restrained from advertising, leasing, selling, dealing with, conveying, subdividing the land parcel described and known as UNS. B.C.R PLOT 45 WOTE TOWN in the allotment letter dated 2<sup>nd</sup> April 1997 (“the plot”) and/or interfering with the plaintiff’s legal, contractual, equitable interests and/or rights of quiet ownership, possession, occupation and enjoyment thereof.**

**(c) Order directing the forthwith issuance of title deed of ownership documents for the land parcel described and known as MAKUENI PLOT NO. MAKUENI UNS. B.C.R. PLOT 45 WOTE TOWN in the allotment letter dated 2<sup>nd</sup> April 1997 (“the plot”) to the plaintiff upon revocation of any other certificate of lease, title deed and/or any proprietorship documents which may have been issued to any other party other than the plaintiff and rectification of the land register and records to reflect the plaintiff as the proprietor of the plot.**

**(d) Costs of and incidental to the suit and interest at court rates.**

**(e) Any other remedy as the Honourable court may deem fit and applicable in the circumstances.**

2. The Plaintiff has averred in paragraphs 6, 7, 8, 9 and 12 of her amended plaint that on or about 3<sup>rd</sup> April, 1997 she was allocated by the Government of Kenya land parcel described and known as Makueni plot No. Makueni UNS. B.C.R Plot 45 Wote Town, that she made payments and fulfilled all the requirements and has been awaiting issuance of proprietorship and ownership documents in her name, that the defendants have jointly and/or severally wrongfully, unlawfully, unprocedurally and fraudulently, conveyed, encroached on, trespassed on, attempted to carry out development, attempted to evict and/or defeat and extinguish her proprietorship interest on the plot, that the defendants may have done a letter of allotment to third parties and the 4<sup>th</sup> defendant in respect of the plot contrary to the plaintiff’s interest thereon and in breach of her constitutional, contractual, statutory, equitable rights and interest and in breach of her fundamental human rights and legitimate expectation to be the sole proprietor of the plot to use, enjoy and develop it and that her claim is for issuance of title deed of the plot to her upon revocation of any other certificate of lease, title deed and/or any proprietorship documents which may have been issued to any party other than herself and rectification of the land register and records to reflect her as the proprietor of the pot.

3. Her claim is denied by the 1<sup>st</sup> Defendant vide his statement of defence dated 30<sup>th</sup> August, 2017 and filed in court on 13<sup>th</sup> September, 2017.

4. Although the 2<sup>nd</sup> Defendant entered appearance on 15<sup>th</sup> November, 2017 through Wahome Murakaru & Co. Advocates, it did not file its

defence. Equally the 3<sup>rd</sup> Defendant did not file its defence despite having entered appearance on 18<sup>th</sup> December, 2018 through Muia V.M. and Company Advocates.

5. The 4<sup>th</sup> Defendant neither entered appearance nor did he file his defence.

6. As against the defendants who failed to file their defence, the matter proceeded as undefended suit.

7. Hearing of the Plaintiff's case took place on the 07<sup>th</sup> May, 2019 when she adopted her statement recorded on 04<sup>th</sup> July, 2017 as her evidence. She went on to produce a copy of allotment letter, payment records and demand letter in her list of documents dated 04<sup>th</sup> July, 2017 as P.Exhibit Nos.1, 2 and 3 respectively. She further produced two documents in her supplementary list of documents dated 29<sup>th</sup> November, 2018 as P.Exhibit Nos.4 and 5 respectively.

8. Her evidence in chief was that she filed an application to Makueni County Council and she was issued with a plot. That when she went to pay rates for the plot that was allocated to her, she was informed by the officials of the said County Council that the plot in question belongs to one Isaac Musau, the 4<sup>th</sup> Defendant herein. It was her evidence that prior to the said information, she had paid some fees to the County Council and had been issued with receipts. She went on to say that before she came to learn that the plot belongs to Musau (4<sup>th</sup> defendant), the plot file kept by the County Council had gone missing for a long time after which it resurfaced with the development that it belonged to the 4<sup>th</sup> Defendant. She pointed out that the County Council did not refund the fees that she paid for the plot which was allocated to her in 1997. She revealed that she knows where the plot is situated and that no one has ever built on it.

9. Her evidence in cross-examination by Ms. Kerubo for the 1<sup>st</sup> Defendant was that she did not produce a copy of the letter that she wrote to the County Council when she applied to be allocated the plot. She admitted that even though she complied with the conditions set out in the letter of allotment, she did not produce the letter in question. She said that she was not able to pay for the fees within the 30 days due to the missing file. She said that she saw the disclaimer which indicated that the government would not be held liable in case the plot was allocated to someone else and added that she has sued the Attorney General so that he can assist her to have the plot reinstated to her.

10. Her evidence in re-examination was that the letter marked as P.Exhibit No.5 shows that she was allocated the plot in question. She went on to say that she paid fees for the plot on 30<sup>th</sup> May, 1997 through a bankers cheque and was issued with a receipt (P.Exhibit No.3).

11. Even though the 1<sup>st</sup> Defendant had indicated that he would call one witness, he ended up resting his case without adducing evidence.

12. In their written submissions, the Plaintiff's Counsel framed three (3) issues for determination. These were: -

***(a) Whether or not the plaintiff was duly allocated the subject parcel of land and if so whether she is the bonafide allottee of the subject parcel of land;***

***(b) Whether or not any subsequent allotment of the subject parcel of land to other parties and/or to the 4<sup>th</sup> defendant is null;***

***(c) Whether or not the plaintiff is entitled to the orders sought herein.***

13. Equally, the Counsel for the 1<sup>st</sup> Defendant framed three (3) issues for determination as follows: -

***(a) Whether there is any claim against the 1<sup>st</sup> Defendant;***

***(b) Whether the Plaintiff complied with the conditions set out in the letter of allotment;***

***(c) Whether the Plaintiff should be awarded costs of the suit.***

14. In my judgement, I shall deal with the issues raised by the Plaintiff and the 1<sup>st</sup> Defendant together.

15. Regarding the Plaintiff's first issue, her Counsel submitted that the letter of allotment (P.Exhibit No.1) shows that she was allocated the plot in question and that she fulfilled the conditions set out in the letter of allotment as can be seen from the receipts marked as P.Exhibit No.2, 4 and bankers cheque marked as P.Exhibit No.5. The Counsel went on to submit that before the enactment of the Constitution of Kenya, 2010, the legal regime classified land as Government Land, Trust Land and Private Land. The Counsel added that government land was regulated by the Government Land Act, Cap 280 of the Laws of Kenya (now repealed) which at Section 3 gave the President the power to alienate government land and that the power was delegated to the Commissioner of Lands. The Counsel pointed out that the Commissioner allocated the suit property to the Plaintiff who accepted the offer by paying the requisite fees and as such, she is the bonafide allottee of the said subject land.

16. The Plaintiff's Counsel went on to submit that the Plaintiff contends that even though the 4<sup>th</sup> Defendant may have been subsequently allocated the said parcel of land, it is worth noting that there has never been any revocation of the allocation of the land to the Plaintiff and nor has she ever been refunded the monies she paid to the Commissioner of Lands upon allocation of the land in question to her. The Counsel pointed out that it is trite law that the earlier allotment supersedes any subsequent allocation and therefore any subsequent allotment to any other party including the 4<sup>th</sup> Defendant is null.

17. The Counsel went on to submit that the 1<sup>st</sup> Defendant has been rightfully sued since the orders sought herein on registration and issuance of the title documents can only be executed by the Land Registrar.

18. On the other hand, the Counsel for the 1<sup>st</sup> Defendant submitted that from the Plaintiff's testimony and the documents produced, it is evident that the suit property is unregistered and as such, prayer (c) of the amended plaint cannot be granted at this point.

19. On whether or not the plaintiff complied with the conditions set out in the letter of allotment, the counsel or the 1<sup>st</sup> Defendant submitted that although the Plaintiff has relied on the letter of allotment as evidence of ownership, she did not demonstrate whether she complied with the conditions set out in the said letters. The Counsel cited the case of **Lucy Nchebere vs. Rose Ndululu Musee [2015] eKLR** where the court relied on the case of **Ahamed Obo vs. Kenya Airport Authority in ELC No.141 of 2013**, in which the court stated: -

*“The Plaintiff has not stated if he met the conditions in the letter of allotment dated 24<sup>th</sup> September 1998 which was an offer by the Government for land measuring 13.64 Ha. In the absence of evidence by the Plaintiff that he accepted the offer by paying the amount of money stipulated in the letter of offer, the Plaintiff cannot claim to have any proprietary rights over Plot “A” Manda that can be protected by the Constitution. The Constitution only protects existing rights.”*

20. The Counsel further cited the case of **Joseph Arap Ng'ok vs. Justice Moijo Ole Keiwua in Nai Civil Application No.60 of 1997** where the Court for Appeal stated: -

*“It is trite that such a title to landed property can only come into existence after issuance of the letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of the title document pursuant to the provision of the Act under which the property is held.”*

21. The Counsel went on to cite the case of **Wreck Motor Enterprises vs. The Commissioner of Lands & 3 others in Nairobi Civil Appeal No.71 of 1997 (unreported)** where the Court of Appeal stated thus: -

*“Title to landed property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of a title document pursuant to provisions held.”*

22. Arising from the above, the Counsel submitted that the Plaintiff did not produce any evidence of acceptance and/or making payment within 30 days as required by the letter of allotment. The Counsel added that going by the aforementioned decisions, it is quite clear that the Plaintiff has not demonstrated that she indeed satisfied the conditions laid down in the letter of allotment as a first step towards becoming the registered owner.

23. On the issue for whether the 1<sup>st</sup> Defendant should pay costs, the Counsel submitted that the Plaintiff did not produce any notice of intention to sue the Government. The Counsel added that Section 13A (1) of the Government Proceedings Act, cap 40 of the Laws of Kenya requires a party to issue the mandatory statutory notice of intention to sue the Government. The Section provides as follows: -

*“No proceedings against the Government shall lie or be instituted until after the expiry of a period of thirty days after a notice in writing in the prescribed form have been served on the Government in relation to those proceedings.”*

24. The Counsel went on to submit that a party who fails to serve the mandatory statutory notice of intention to sue Government is not entitled to costs of the suit as was held in **Lawrence Ogaro Onyiego & Another vs. Samuel Minika & Another [2017] eKLR** where Mutungi J, cited with approval the holding of Majanja J in the case of **Kenya Bus Service Ltd & Another vs. Minister for Transport & 2 others [2012] eKLR** where the latter stated;

*“The provisions for demanding prior notice before suing the Government is justified on the basis that the Government is a large organization with extensive activities and fluid staff and it is necessary for it to be given the opportunity to investigate claims laid against it and decide whether to settle or contest liability taking into account the public expense. While the objectives are laudable the effect of mandatory notice provisions cause hardship to ordinary claimants. I am of course aware that pre-litigation protocols, for example Order 3 Rule 2 of the Civil Procedure Rules, require that notice be given before action is commenced but the penalty for non-compliance is not to lose the right to agitate the cause of action but to be denied costs incurred in causing the matter to proceed to action.”*

25. From the evidence on record, it is clear that the Plaintiff was allocated land parcel number Makueni UNS B.C.R Plot number 45 Wote Town vide the allotment letter dated 02<sup>nd</sup> April, 1997 (P.Exhibit No.1). The Plaintiff did explain that the file containing the details of the plot had gone missing for a long time and that when it resurfaced, it showed that the 4<sup>th</sup> Defendant was the owner of the subject plot. She cannot be blamed for the missing file nor can she be accused of accepting the offer outside the 30 days window period. That notwithstanding, there is evidence to show that the Plaintiff did pay for the plot as per the payment records marked as P.Exhibit No.2. Despite the contention by the officials of Makueni County Council that the subject plot belonged to the 4<sup>th</sup> Defendant, there is no evidence of the refund of the money that the Plaintiff paid to the Council. As was correctly submitted by the Plaintiff's Counsel, there is no evidence to show that the allotment letter (P.Exhibit No.1) issued to the Plaintiff was ever revoked before the plot in question could be allocated to the 4<sup>th</sup> Defendant. Unless the allotment letter issued to the Plaintiff was revoked, land parcel number UNS B.C.R plot 45 Wote Town was not available for allotment to anyone else and more particularly the 4<sup>th</sup> defendant. In the case of **Rukaya Ali Mohamed vs. David Gikonyo Nambacha & Another in Kisumu HCCCA No.9 of 2004** (unreported) the court held thus: -

*“...once allotment letter is issued and 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 outrightly illegal or it was against public interest. In other words, where land has been allocated, the same cannot be re-allocated unless the first allocation is validly and lawfully cancelled.”*

26. It follows therefore that the allocation of the subject parcel of land to the 4<sup>th</sup> defendant is null and void. The Plaintiff’s evidence remains uncontroverted. The orders sought by the Plaintiff are available as against the defendants save that in the absence of service of statutory notice upon the 1<sup>st</sup> Defendant as is required under Section 13A (1) of the Government Proceedings Act Chapter 40 of the Laws of Kenya, no orders for cost will be issued against the 1<sup>st</sup> Defendant.

27. The upshot of the foregoing is that I am satisfied that the Plaintiff has on a balance of probabilities a cause of action against the defendants. In the circumstances, I hereby proceed to enter judgement for her and against the defendants jointly and severally as follows: -

**(a) A declaration that the plaintiff is the bonafide allottee of the Land Parcel Number UNS. B.C.R PLOT 45 Wote Town and any other subsequent allotment is null and void.**

**(b) The defendants either by themselves, their agents, servants or in any manner howsoever be restrained from advertising, leasing, selling, dealing with, conveying, subdividing the land parcel described and known as UNS. B.C.R PLOT 45 WOTE TOWN in the allotment letter dated 2<sup>nd</sup> April 1997 (“the plot”) and/or interfering with the plaintiff’s legal, contractual, equitable interests and/or rights of quiet ownership, possession, occupation and enjoyment thereof.**

**(c) Order directing the forthwith issuance of title deed of ownership documents for the land parcel described and known as MAKUENI PLOT NO. MAKUENI UNS. B.C.R. PLOT 45 WOTE TOWN in the allotment letter dated 2<sup>nd</sup> April 1997 (“the plot”) to the plaintiff upon revocation of any other certificate of lease, title deed and/or any proprietorship documents which may have been issued to any other party other than the plaintiff and rectification of the land register and records to reflect the plaintiff as the proprietor of the plot.**

**(d) Costs of and incidental to the suit and interest at court rates to be borne by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants.**

Signed, Dated and Delivered at Makueni this 15<sup>th</sup> day of January, 2020.

**MBOGO C. G.,**

**JUDGE.**

**In the presence of: -**

Mr. Hassan holding brief for Mrs. Nyaata for the Plaintiff

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

Ms. C. Nzioka – Court Assistant

**MBOGO C. G., JUDGE,**

**15/01/2020.**