



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC NO. 459 OF 2017

GRIEVES MWAGHOGHO NYOSHA.....PLAINTIFF

VERSUS

THOMAS KIFUSODEFENDANT

JUDGMENT

(Suit by plaintiff seeking to be issued with title to land; title held by the defendant; plaintiff having been issued with an allotment letter to the suit land and duly paid for it; title somehow issued to the defendant; whether defendant could be issued with title after an allotment letter was issued to the plaintiff and the plaintiff complied with the terms thereof; upon the plaintiff being allotted the land and paying for it as required, the land was no longer available for a subsequent allocation and thus title ought to have issued to the plaintiff; defendant not appearing to demonstrate how he acquired title; title of defendant cancelled; order that the plaintiff be registered as proprietor of the suit land)

1. This suit was commenced through a plaint which was filed on 19 December 2017. In the plaint, the plaintiff pleaded that he is the bona fide owner of the land parcel Taita Taveta/Upper Sofia/13 situated in Upper Sofia within Voi Municipality (the suit property). He pleaded that this land was allocated to him in the year 1992 by the then Department of Lands and letter of allotment was issued to him. He pleaded that since then he has been paying land rates to the Municipal Council of Voi and later the County Government of Taveta. He pleaded that he has developed the suit property with a house and he currently lives in it with his family. He sued the defendant because the defendant has title to the suit property. He has pleaded that the defendant unlawfully, wrongfully, fraudulently and without just cause got the property registered in his name while knowing very well that the same belonged to the plaintiff. He has added that he has never sold the property to the defendant. In the suit, he has asked for the following orders :-

- a. A declaration that the plaintiff is the owner of Taita Taveta/Upper Sofia/13.
- b. An order that the Taita-Taveta county land registrar cancels the name of the defendant from Taita Taveta/Upper Sofia/13 and register the plaintiff as the proprietor thereof.
- c. Costs and interest of the suit.
- d. Any other and/or further reliefs that this honourable court deems fit to grant in the interest of justice.

2. The defendant was served with summons but he did not enter appearance and did not file any defence. Neither did he appear at the hearing of the case despite being duly served.

3. The plaintiff testified as the sole witness. He had a statement which he adopted as his evidence and also gave oral evidence. His evidence was that he got an allotment letter to the suit property dated 8 December 1992. He had a copy of the letter which he produced as an exhibit. He stated that he never got an original of it but only a copy. He mentioned that he paid Kshs. 2,290/= for the allotment and he had the receipt which he produced as an exhibit. He also had six receipts being payment of land rents and rates that he also produced as exhibits. He produced a search and copy of title deed which show that the defendant obtained title to the suit property on 24 May 2017. He testified that he built a house on the plot in the year 1995 and this is where he lives.

4. I invited counsel to file written submissions which he did and I have taken these into account before arriving at my decision.

5. I have considered the plaintiff's evidence and his exhibits. I have seen that the plaintiff did make an application to be allotted a plot in Voi Town and he paid Kshs. 1,000/= for this application on 18 June 1987. I have seen that he was issued with an allotment letter on 8 December 1992. The letter of allotment shows that the plaintiff was to be issued with a leasehold title for a period of 99 years from 1 December 1992. I have seen that on 18 October 1993 he paid the sum of Kshs. 18,694/= being survey fees, rent, stand premium, stamp duty, conveyancing and

registration. One would have expected that after the plaintiff has paid these monies, he would be issued with a lease and a certificate of lease for the suit property, but it appears as if none was issued to the plaintiff. I have also seen the several receipts for ground rent and rates which mean that the plaintiff is the recognized rate payer of the suit property. I have perused the title of the defendant to the suit land which appears to me to be a freehold and not a leasehold title. I have doubts as to whether a freehold title can issue given that this is land that is subject to payment of land rent as demonstrated by the payment receipts for land rent that the plaintiff produced in evidence.

6. I am persuaded that it was the intention of the Government to issue the plaintiff with a leasehold title as manifested by the allotment letter and the plaintiff accepted this offer by making the requisite payment. It was now incumbent upon the authorities to issue the plaintiff with a title to the suit property but somehow title has been issued to the defendant. The defendant did not appear to defend his title and he has not demonstrated how the same was acquired. With the wealth of evidence produced by the plaintiff, it was incumbent upon the defendant to appear and demonstrate how he got title to the land and show that his title was acquired above board and is a good title. The defendant has not done so.

7. I am thus of the view that the plaintiff has proved his case on a balance of probabilities and has demonstrated that the defendant's title was at the very least unlawfully acquired. The Land Registration Act, at Section 26, does provide for protection of title but allows for the cancellation of a title that has been improperly acquired. That law is drawn as follows :-

S. 26 Certificate of title to be held as conclusive evidence of proprietorship

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except –

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

8. It will be seen from the above that a title is subject to challenge if it has been acquired through fraud or misrepresentation where the title holder is proved to be a party, or where the title is acquired illegally, unprocedurally, or through a corrupt scheme. I do not see how the defendant could have acquired title to land that had been allocated to the plaintiff and paid for by the plaintiff without there being some element of fraud or misrepresentation on his part. But even if there was no fraud on his part, clearly, the land had already been alienated to the plaintiff and was not available for subsequent alienation to the defendant. It follows that the title of the defendant was thus acquired illegally, unprocedurally or through some sort of corrupt scheme. The defendant's title is thus liable to be cancelled and I do proceed to cancel the same. I hold that it is the plaintiff who is supposed to be issued with title to the suit property.

9. I therefore enter judgment for the plaintiff and now make the following orders :-

i. That it is hereby declared that as between the plaintiff and defendant, it is the plaintiff who is entitled to hold the title to the land parcel Taita Taveta/Upper Sofia/13.

ii. That the title of Thomas Kifuso to the land parcel Taita Taveta/Upper Sofia/13 is hereby cancelled.

iii. That the Land Registrar, Taita Taveta, and/or the National Land Commission, and/or the County Government of Taita Taveta, as the case may be is hereby ordered to issue title to the plaintiff pursuant to the Letter of Allotment of 8 December 1992.

iv. That the plaintiff shall have the costs of this suit and interest at court rates.

10. Judgment accordingly.

DATED, SIGNED and DELIVERED at MOMBASA this 4th day of March, 2020.

MUNYAO SILA

JUDGE.

IN THE PRESENCE OF:

Mr. Asena holding brief for Mrs. Isika for the plaintiff.

Defendant; Absent.

Court Assistant; David Koitamet.