



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KITALE**

**LAND CASE NO. 73 OF 2013**

**JAYESH AUTOSPARES LTD.....PLAINTIFF**

**VERSUS**

**KAPTERIT RAPID CO. LTD.....1<sup>ST</sup> DEFENDANT**

**JOHN WEPUKHUKU WALIAULA....2<sup>ND</sup> DEFENDANT**

**THE ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

1. Vide a further amended plaint dated 11/2/2015 and filed in court on the same date the plaintiff sought the following orders:

- a. An order that the registration of the 1<sup>st</sup> defendant as proprietor of Plot No. Kitale Municipality Block 11/52 was acquired fraudulently.
- b. An order directing the subsequent (sic) transfer to the 2<sup>nd</sup> defendant was also fraudulent and meant to defeat the course of justice.
- c. An order directing the District Land Registrar to cancel the said registration and issue a title deed in favour of the plaintiff.
- d. Costs of the suit.
- e. Any other relief the court may deem just and fit to grant.
- f. General and exemplary damages from the 3<sup>rd</sup> defendant.

**PLEADINGS**

**The Plaintiff**

2. According to the plaint the plaintiff is the owner of a plot formerly known as **Kitale Municipality UNS plot No. XVID** measuring **0.045 Ha**. It is alleged that that plot is now registered as **Kitale Municipality Block II/52**. The plaintiff alleges that he paid all the requisite fees to the Commissioner of Land as well as yearly land rates to the municipality on a regular basis; however on 17/5/2013 the plaintiff learnt that the plot had been registered in the defendants' names, which registration it asserts it was fraudulent. The particulars of fraud levelled against the 1<sup>st</sup> defendant are set out in **paragraph 7** and **7(C)** of the plaint. It is also averred that during the pendency of this suit the 1<sup>st</sup> defendant fraudulently transferred the suit land to the 2<sup>nd</sup> defendant. The plaintiff maintains that the 3<sup>rd</sup> defendant acted negligently in issuing another letter of allotment to the 1<sup>st</sup> defendant without cancelling the plaintiff's letter of allotment and prior notice to the plaintiff hence the claim for general and exemplary damages against him.

**The Defence of the 1<sup>st</sup> Defendant**

3. The 1<sup>st</sup> defendant retained its statement of defence filed on **10/7/2013** after amendments were effected on the plaint.

4. In its defence it denied the plaintiff's claim and averred that it was allocated plot No. **Kitale Municipality Block II/152** vide a letter of allotment dated **4/2/1997**. It asserts that after issuance of a letter of allotment it undertook all the requisite steps which led to issuance of a certificate of lease over the suit land in its name on **24/10/2012** and that it has been in continuous possession of the suit land since **1997**.

### The 2<sup>nd</sup> Defendant's Defence

5. The 2<sup>nd</sup> defendant filed a statement of defence on **11/5/2017** denying the claim. He avers that he is an innocent purchaser for value of **Kitale Municipality Block II/152**, having purchased the same from the 1<sup>st</sup> defendant on **5/1/2007** and that he has been utilizing the land since **2007** to date. He maintains that the plaintiff's letter of allotment refers to a different plot and not **Kitale Municipality Block II/152**. He stated that he has also paid rates regularly for the suit land. He denies fraud and alleges that the plaintiff forged documents in order to lay claim to the suit land.

6. After the further amendment of the plaint, the 3<sup>rd</sup> defendant filed a memorandum of appearance on **11/3/2015** through one K. Onyiso, Principal Litigation Counsel.

### The Plaintiff's Reply to Defence

7. In his reply to the 1<sup>st</sup> and 3<sup>rd</sup> defendants' defence the plaintiff reiterates the averments in the plaint and denies the allegations in the defendants' statement of defence.

## THE EVIDENCE OF THE PARTIES

### The Plaintiff's Evidence

**8. PW1, Priteshkumar Jayantilal Patel, the Operations Manager** of the plaintiff, testified on **11/7/2018** and on **12/7/2018**. His evidence is that the plaintiff was issued with letter of allotment on **20/12/1985** in respect of unsurveyed plot and that the original of the letter was forwarded to the Lands Office for processing of title; that he paid **Kshs.9,460/=** on **6/1/1987** and took up possession of the suit land which he has retained to date and he has paid rates to the local authority. **PW1** conducted a search in respect of the suit property in **2013** whereupon he discovered that title had been issued in favour of the 1<sup>st</sup> defendant and thereafter this case was filed. While this suit was pending the suit land was transferred to the 2<sup>nd</sup> defendant and the 2<sup>nd</sup> defendant was therefore enjoined as a party. **PW1** asserted that the defendants' documents were acquired fraudulently since the land was allocated as far back as **1995**. According to him when he conducted a check in the Municipality records on **25/1/2012** those records reflected that the suit land was still owned by the plaintiff and that the plaintiff had paid rates from **1986** to **2011**. The local government also confirmed that the plaintiff had been issued with a letter of allotment.

9. While under cross-examination by Mr. Teti **PW1** averred that he is not a director of the plaintiff and neither did he have authority of the plaintiff's directors by way of resolution to give evidence in the suit. He admitted that no deed plan was attached to **P. Exhibit 1**, that is, the letter of allotment. He also admitted that he did not have evidence of the acceptance of the conditions of allotment set out in **P. Exhibit 1** yet the **30** day period within which payment set out in **P. Exhibit 1** was long gone by the date of the alleged payment reflected in his receipt **P. Exhibit 2**, that is, **6/1/1987**. Under further cross-examination by Mr. Teti he admitted that the plot reflected in the letter of allotment he produced is not the same as **Kitale Municipality Block 2/152** registered in the name of the 1<sup>st</sup> defendant now registered in the name of the 2<sup>nd</sup> defendant and that he has no proof by way of surveyor's report that plot No. "**D**" reflected on **P. Exhibit 1** had mutated into plot No. **Kitale Municipality Block II/152** or a ground report. He also admitted that there is no signature of the Commissioner of Lands affixed to **P. Exhibit 1**. Upon further cross-examination **PW1** admitted that the size of the plaintiff's plot and that of the 2<sup>nd</sup> defendant's plot differed. However he maintained that he has been on the suit land and he has been growing maize thereof in total contravention of terms and conditions of the purported letter of allotment **P. Exhibit 1**.

10. Under cross-examination by Mr. Wabwire, Learned Senior State Counsel, he reiterated that he does not have authority from the plaintiff's company to appear in court and that no resolution had been given to the plaintiff's advocate to file the suit. He did not know whether the plaintiff company applied for allocation of the suit land since he joined the plaintiff's company in **1991** after the letter of allotment **P. Exhibit 1** had purportedly been issued. He was not also sure that plot No. "**D**" and plot No. **Kitale Municipality Block II/152** were one and the same. When referred to **PMFI- No. 8** dated **29/11/2012** he admitted that it reflects that plot No. "**D**" was yet to be surveyed as at that date.

### Evidence for the Defence Case

**11. DW1, the Land Registrar, Nelson Otieno Odhiambo** testified on **19/9/2019**. His evidence is that his official records reflects that parcel No. **Kitale Municipality Block II/152** measuring **0.0538 Ha** was first registered in the name of the 1<sup>st</sup> defendant and a certificate of lease issued. He admitted a caution was lodged in favour of the 2<sup>nd</sup> defendant which was later withdrawn and that the current owner is the 2<sup>nd</sup> defendant. According to **DW1** the lease over the suit land was forwarded to his office for registration vide a letter dated **18/10/2012**. The lease was executed on **24/10/2012**. Subsequently a transfer of lease to the 2<sup>nd</sup> defendant was registered; consent for that transfer was issued on **23/7/2013**, all relevant payments were made. Stamp duty was paid on **23/7/2013**; rent clearance certificate was issued on **28/6/2013**; registration fees were paid on **23/7/2013**. He produced certified copies of documents in evidence of those payments. He stated that he issued a certificate of lease to the 2<sup>nd</sup> defendant on **31/7/2013**. According to him no complaint has ever been received from any other person regarding the registration of the suit land or the transfer to the 2<sup>nd</sup> defendant and only the 2<sup>nd</sup> defendant has ever registered a restriction on the suit land; all relevant requisite steps were followed in registering the 2<sup>nd</sup> defendant as a proprietor of plot No. **Kitale Municipality Block II/152**. In his cross-examination by Mr. Teti he stated that plot No. **Kitale Municipality Block II/52** is not the same as plot No. **Kitale**

**Municipality Block II/152.** He also stated that he did not find any fraud in the transactions relating to plot No. **Kitale Municipality Block II/152** and added that the plaintiff's claim is unfounded. When cross-examined by Ms. Arunga he was not sure that by **20/12/1995** survey had been done in Kitale Municipality. However he maintained that before survey is done a parcel number cannot be issued. Asked for an explanation for why **D. Exhibit 3** (lease) and **D. Exhibit 4** (transfer) were signed by different persons, his answer was that a company can have different directors and that he never concerned himself with confirmation from the Registrar of Companies as to who the Directors of the 1<sup>st</sup> defendant were. While under cross-examination by Mr. Wabwire on this point he indicated that no complaint as to the identity of the signatories to those documents had been raised by any persons. According to him plot No. **Kitale Municipality Block II/152** is surveyed and it cannot be the same as plot No. "**D**" claimed by the plaintiff.

**12. DW2, Isaac Macharia,** testified on **19/9/2019**. His evidence is that he is the **Director** of **1<sup>st</sup> defendant**; that the 1<sup>st</sup> defendant was allocated **Plot No. Kitale Municipality Block II/152** in **1997** whereupon the company paid all the dues required and was issued with a certificate of lease; that the company had occupied the said land since **1987** and no adverse claim had been raised against it. His further evidence was that the land was later on transferred to the **2<sup>nd</sup> defendant** on **5/1/2007**. He denied having acquired the plot fraudulently and maintained that he had applied for allocation of the land. Upon cross-examination by Ms. Arunga he stated that he and Samuel Mwaura Mukora were directors of the 1<sup>st</sup> defendant and Patricia Waithera was the company secretary.

**13. DW3, John Wepukhulu Waliaula** testified on **19/9/2019**. His evidence is that he purchased **Kitale Municipality Block II/152** vide an agreement dated **5/1/2007** and took possession of the same in the same month. He maintained that no other person has ever claimed the plot. He denied that he is in occupation of **Kitale Municipality Block II/152**.

## **SUBMISSIONS**

14. Submissions were filed on behalf of the plaintiff on **28/10/2019**. The **3<sup>rd</sup> defendant** filed its on **12/11/2019** while the **1<sup>st</sup>** and **2<sup>nd</sup>** defendants filed theirs on **26/11/2019**. I have considered the pleadings, the evidence and the filed submissions.

## **DETERMINATION**

### **Issues for Determination**

15. The main issues for determination in this matter are identified as follows:

- a. Whether the registration of the 1<sup>st</sup> defendant as the proprietor of the plot No. Kitale Municipality Block II /152 was procured fraudulently.**
- b. Whether the transfer of the suit land to the 2<sup>nd</sup> defendant was fraudulent.**
- c. Whether the registration should be cancelled and a title issued in the name of the plaintiff.**
- d. Who should bear the costs of the suit?**

16. The issues are discussed as hereunder.

### **(a) Whether the registration of the 1<sup>st</sup> defendant as the proprietor of the plot No. Kitale Municipality Block II/152 was procured fraudulently**

17. The greatest hurdle the plaintiff faces in the instant suit is the proof of fraud in respect of the acquisition of title on the part of the 1<sup>st</sup> defendant and the perceived fraud in respect of the transfer *pendent lite* of the suit land to the 2<sup>nd</sup> defendant.

18. The legal burden of proof lies on a party who wishes the court to find in its favour in an issue. This is in accordance with the provisions of **Section 107** of the **Evidence Act**.

**19. Section 107(1) of the Evidence Act (Chapter 80 of the Laws of Kenya),** provides as follows:

**107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**

20. In the case of **Civil Appeal No 297 Of 2015 Mbuthia Macharia v Annah Mutua Ndwiga & Another [2017] eKLR** the Court of Appeal (**Visram, Karanja & Koome, JJ.A**) stated as follows:

**"This is known as the legal burden and we need not repeat, save to emphasize the same principle of law is amplified by the learned authors of the leading Text Book;- The Halsbury's Laws of England, 4th Edition, Volume 17, at paras 13 and 14: describes it thus:**

**"The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.**

The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”

**[16] The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal...**

21. It therefore follows that the plaintiff must establish fraud and particularly against the 1<sup>st</sup> and 2<sup>nd</sup> defendants. I would borrow from the case of **Abiero -vs- Thabiti Finance Company Ltd & Another [2001] eKLR** in which Mulwa J stated as follows:

**“Fraud can clearly be inferred from the defendant’ acts. (In) *Black’s Law Dictionary*, fraud is defined as:**

**“A generic term, embracing all multifarious means which human urgently and devise, and which are resorted to by one individual to get advantage over another by false suggestions, or by suppression of truth, and includes all surprise, trick, winning, dissembling and any unfair way by which another is cleared.”**

22. The sole evidence of PW1 was relied on by the plaintiff. However PW1’s evidence was not satisfactory. Notably PW1 admitted he does not have the authority of the plaintiff to appear in court and testify an issue that was raised by defence in cross-examination. Apart from failing to establish authority to represent the plaintiff, he failed to demonstrate by way of expert evidence from a surveyor that the unsurveyed plot referred to in the plaintiff’s letter of allotment (**P. Exhibit 1**) was the same as plot No. **Kitale Municipality Block II/152** now owned by the 2<sup>nd</sup> defendant. In my view that evidence was the most crucial part of the plaintiff’s case and without it the plaintiff’s claim cannot succeed.

23. Though the PW1 indicated that he had the rates clearance certificate from the local authority as well as rates demand notices, a perusal of **P. Exhibit 3** (rates demand notice dated **22/2/2012**) and **P. Exhibit 4** (rates clearance certificate dated **24/1/2012**) shows that the same were issued in respect of properties whose numbers are different from **Kitale Municipality Block II/152**; these plots are **2116/XV1** (also referred to as **UNS D**) and **2116/UNS D** respectively. This court never found any expert evidence from the plaintiff to suggest that these plots were the same as **Kitale Municipality Block II/152**.

24. I have also examined the defendants’ evidence in this matter, DW1 the Land Registrar Trans Nzoia County confirmed that of the land parcels referred to in this suit, the only records he has are in respect of **Kitale Municipality Block II/152**. He produced a copy of the register opened on **24/10/2012** showing that the first registered proprietor was the 1<sup>st</sup> defendant and that subsequently the title was transferred to the 2<sup>nd</sup> defendant on **31/7/2013**. He confirmed that the letter forwarding the lease in respect of the suit land **Kitale Municipality Block II/152** was received in his office and the lease was executed on **24/10/2012**.

25. When cross-examined by Mr. Teti for the plaintiff, he stated that the acreage of **0.45 Ha** in **P. Exhibit 1** (plaintiff’s letter of allotment) differs with the acreage of **0.053 Ha** which is the size of the suit land as registered in favour of the 2<sup>nd</sup> defendant. According to him there is nothing to suggest there was any fraud in the transactions that gave registration to the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

26. The burden of proving fraud in respect of a registration of title lies on the allegor who in this case is the plaintiff. Fraud can only be established by way of evidence which the plaintiff has failed to adduce. I therefore find that the plaintiff’s claim of fraud is baseless.

**(b) Whether the transfer of the suit land to the 2<sup>nd</sup> defendant was fraudulent; and:**

**(c) Whether the registration should be cancelled and a title issued in the name of the plaintiff**

28. It is fit that the two issues above be dealt with together as they are intricately intertwined. This court has already found that the plaintiff never established that the 1<sup>st</sup> defendant obtained registration fraudulently.

28. Evidence of fraud on the 1<sup>st</sup> and 2<sup>nd</sup> defendant’s part, independent of the fact of transfer of the suit land while this suit was still pending, is required if the plaintiff is to be deemed as successful in this claim.

29. DW1 testified that a formal transfer of lease, effectively transferring the suit land from the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant was registered. In his evidence he confirmed that all relevant payments, that is, stamp duty, rent, registration fees, and transfer fees were paid. He also stated that the consent for transfer (**D. Exhibit 5**) and rent clearance certificate (**D. Exhibit 7**) were procured before the transfer and he issued a certificate of lease to the 2<sup>nd</sup> defendant on **31/7/2013** after all the formalities were concluded. He also confirmed that a copy of certificate of incorporation (**D. Exhibit 10**) of the 1<sup>st</sup> defendant was availed to his office. According to him no complaints have ever been received in his office from any person regarding the said registration.

30. Evidence from the **DW1** as analysed above is crucial in establishing whether the transfer of the suit land was fraudulent. The plaintiff’s claim is that the suit land was fraudulently transferred from the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant during the pendency of this suit.

31. The *lis pendens* doctrine is still applicable in our law today. It is the correct position that parties and third parties should await the determination of a suit before dealing with any property that is the subject thereof.

32. However at the end of the litigation, the *lis pendens* doctrine only adversely affects the parties whose rights have been negated by the findings of a court of law in the suit. Mere transfer *pendent lite per se* though a great risk for the transferee, is not proof of fraud.

33. In the current suit the court has found there was no fraud in the registration of the suit land in favour of the 1<sup>st</sup> defendant. This court therefore find no good grounds to order the cancellation of the 2<sup>nd</sup> defendant's title or its registration in the name of the plaintiff for the mere reason that the transfer was effected while the suit was still pending.

**d. Who should bear the costs of the suit?**

34. This suit was brought by the plaintiff and he has failed to established his claim of fraud against the defendants he shall therefore bear the costs of the suit.

35. In the final analysis I find that the plaintiff has not established his claim against all the defendants on a balance of probabilities and I hereby dismiss his claim and enter judgment in favour of the defendants. The plaintiff shall bear the costs of the suit.

**Dated, signed and delivered at Kitale on this 3<sup>rd</sup> day of March, 2020.**

**MWANGI NJOROGE**

**JUDGE**

**3/3/2020**

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Ms. Temba holding brief for Arunga for plaintiff

Mr. Teti for defendant

**COURT**

Judgment read in open court.

**MWANGI NJOROGE**

**JUDGE**

**3/3/2020**