



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELC NO.1627 OF 2007

BEATRICE MBULI.....PLAINTIFF

=VERSUS=

RISPA N.ODUWO.....1ST DEFENDANT

THE COMMISSIONER OF LANDS

THE PERMANENT SECRETARY.....2ND DEFENDANT

MINISTRY OF LANDS AND HOUSING.....3RD DEFENDANT

THE ATTORNEY GENERAL.....4TH DEFENDANT

JUDGEMENT

The Plaintiff herein *Beatrice Mbuli* vide a *Plaint* dated *31st August 2005* and filed on *5th September 2005* sought for the following prayers against the defendant;

- 1. Eviction of the Defendant forthwith.***
- 2. Mesne profits for the time the Defendant has been in illegal possession of the property.***
- 3. General damages.***
- 4. Costs of the suit.***
- 5. Interest on the above (b) and (c)***
- 6. Any other relief that the Honourable Court may deem fit to grant.***

The 1st defendant filed her cross claim and counter claim dated on *14th October 2005* which was Amended on *16th November 2006* against the plaintiff, 2nd, 3rd and 4th defendants.

The suit commenced on and the plaintiff gave evidence and stated that she was allocated a house in Kileleshwa in 1999 by the Government of Kenya. She further stated that she was given an allotment letter dated *19th May 1999*, and that she was supposed to pay kshs. 575,341/= which she paid vide cheque no. 062585 and issued with receipt number F306123. The plaintiff stated that after she met the conditions in the letter of allotment she was further issued with a lease document and was finally issued with Title deed dated *23rd December 2002*, becoming the owner of house no. *HG 699A* on parcel of *Land LR.No.Nairobi/Block 21/312*. She further claimed that she followed the right procedure and that she has

not yet occupied her house which is being occupied by somebody else and that she is losing income since her title has not been cancelled by the Government. On her part DW1 Rispah Nyarozo Oduwo stated that she was a civil servant from the year 1978 to 2012. Her last assignment was Chief Secretary with National Council for Science and Technology with the Ministry of Hehe Education. She testified that she started staying in the suit premises in March 2003 as a tenant as evident from a letter of allotment Exhibit 1(a) later she purchased the said House when the government advertised strategic Government Houses in the year 2004. Her payslips showed that she was being deducted Kshs.26,000 as market rate House Rent and later repayment of loan of Kshs.31,599/= per month. She produced various documents to show that she indeed applied for the suit premises and was allocated the same. She cleared payment of the loan in the year 2009. She is still in occupation of the House.

However, in the year 2005, the Plaintiff sued her who claimed ownership of the house. She testified that the Ministry of Lands through Mr Nzwili clarified that she is the owner of the house through purchase. The said letter was exhibit no. 11. DW2 and DW3 were witnesses from the lands office who testified that the records from their office who testified that the records from their office showed that the 1st Defendant was the owner of the house. There was no record available showing that the Plaintiff was the owner of the suit premises.

Thereafter parties filed their written submissions. The Law Firm of ***Odero-Olonde & Company Advocates*** for the plaintiff filed the written submission on ***29th February 2016*** and urged the court to dismiss with costs the statements of defence by ***1st, 2nd, 3rd and 4th*** defendants together with the Counter and Cross Claims and instead enter judgment as prayed in the Plaintiff together with the costs of the suit and interest. Plaintiff relied on ***Section 3(a) of Government Land Act (cap 280) (repealed)*** which ***vested the President and the Commissioner for Lands to make grants and dispositions of estates, interest or rights or over unalienated Government land;***

It was also submitted that ***Section 24*** of now applicable ***Land Registration Act*** states that;

“the Registration of a person as proprietor of land vests in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

They also relied on the case of ***Sammex Kenya Limited versus Hawo Bisharo Omar & 6 others Hccc No. ELC 548 of 2013***, where the court held that;

“the registered owner of Land has absolute ownership of the Land together with all rights and privileges.”

The Law Firm of ***Mukele Ngacho & Co. Advocates*** for the 1st defendant filed their written submissions on ***26th May 2016*** and urged the court to uphold the 1st defendant's Counter Claim against the plaintiff must succeed and plaintiff's suit must fail since she could not prove ownership of the suit property to the required standard.

The ***2nd, 3rd and 4th*** defendants through the Attorney General filed their written submissions on ***7th April 2016*** and urged the court to dismiss with costs the plaintiff's suit and the purported Title held in the plaintiff's name declared illegal and Chief Land Registrar be directed to recall and cancel the plaintiff's Title in respect of ***Nairobi/Block 21/312***.

The Court has now carefully considered the available evidence and the exhibits thereto. The court has also considered the written submissions, the cited authorities and the relevant provisions of the law and the court makes the following findings;

There is no doubt that the plaintiff herein ***Beatrice Mbuli*** is in possession of Certificate of Lease and registered lease. The certificate of lease was issued on the ***23rd December 2002 for Nairobi/Block 21/312 for a term of 99 years from 1st June 1999***. It is also evident that the plaintiff is in possession of a few receipts of payment of various charges to the Department of Lands. Of importance is one dated ***6th November 2002*** for ***Kshs. 577314/=*** which was allegedly for ***House No. HG699A Kileleshwa***. It is also

not in doubt that the plaintiff herein was not a civil servant and was not in occupation of the suit premises.

There is no doubt that the suit premises was Government House which fell under the **Government Lands Act Cap 280 Laws of Kenya** (repealed)

It is also evident that the 1st defendant herein **Rispa N.Oduwo** was a civil servant having joined the civil service in the year **1982**. It is also not in doubt that she is in occupation of the suit premises having taken possession of the same as Government tenant vide an Allocation of Government Quota advice note dated **27th March 2003** and it is evident from various pay slips for the 1st defendant that she was being deducted her salary at Market Rate House rent of **Kshs.26000/=** in the year **2004**.

There is also no doubt that in the year **2004** the Ministry of Lands and Housing announced the Government decision to sell non-strategic Government owned houses as a way of encouraging civil servants to own houses in their places of work. Among the houses to be sold were **206 units** in Kileleshwa and House **no.HG 699A** in **Block 21/312 Kileleshwa**(suit property) was one of them. In the year **2004**, the 1st defendant was the occupant of the suit property. This is evident from various copies of her payslips which indicate that the 1st defendant used to pay Market Rate House Rent of **Kshs .26000/=**

It is also evident that following the decision to sell the non strategic Government owned houses, the 1st defendant applied for allocation of House **no.HG 699A** on **LR NO.Block 21/312 Kileleshwa** and vide a letter of offer dated **6th December 2004**, the Ministry of Lands and Housing offered her the said **House HG 699A Kileleshwa**. Thereafter vide a letter dated **28th December 2004**, the 1st defendant accepted the offer as evident from Exhibit **No.D6**.

The purchase price as per the letter of offer was **Kshs.3040,000/=** and the 1st defendant was required to pay a deposit **10% deposit** of **Kshs. 3040,000/=** and the balance of **Kshs.2736,000/=** was to be paid within a period of **8 years** at Monthly instalments of **Kshs. 31,599/=**

It is also evident that the 1st defendant accepted the said letter of offer vide acceptance dated **28th December 2004** and also agreed to be deducted **Kshs.31,599/=** monthly from her salary to offset the balance of the purchase price. Under a letter dated **28th December 2004**, the 1st defendant advised her parent Ministry via the Permanent Secretary to effect the said deduction towards repayment for Tenant Purchase Scheme as evident from Exhibit **no.8**.

Indeed from various payslips produced in court by the 1st defendant, it is clear that the 1st defendant continued to be deducted **Kshs.31,599/=** from her salary to offset the bank loan. Indeed the 1st defendant had entered into a Tenant Purchase Agreement with the Government through the Ministry of Finance for loan of **Kshs. 2,736,000/=** to be paid on monthly instalments of **Kshs.31599/=**. The said **Kshs.2,736,000/=** was used to offset balance of the purchase price for **House no.699A**. The 1st defendant also testified that at the time of her retirement, she had cleared payment of her loan. However she did not obtain a Certificate of Lease due to the existence of the instant case which was still pending in court. It is also not in doubt that in the year **2005**, the 1st defendant vide the letter dated **21st September 2005** had written to the Permanent Secretary, Ministry of Lands and Housing informing them that she had been served with summons by someone who was claiming ownership of the suit premises. The allegation was that the suit premises was owned by one **Beatrice Mbuli** who is the plaintiff herein and the 1st defendant was a trespasser.

However vide a letter dated **22nd September 2005**, **Mr. O.M Nzwili Chief** Building Surveyor, on behalf of Permanent Secretary Ministry of Lands and Housing clarified that the plaintiff has never occupied the suit premises and that she was not a civil servant. Further that the said house had been offered to the current occupant who was the 1st defendant herein. **Mr Nzwili** further stated that from the records, available, the said house (suit premises) is still registered as a Government House. He also stated that under **Section 3 (c) of the Government Lands Act**, only unalienated Government land could be alienated and Grant issued but not land with Government house since that was already alienated. **Mr Nzwili** further clarified that the house was offered and sold to the 1st defendant during the sale of non-

strategic Government houses. The above is the available evidence.

The parties had filed their separate issues for determination but this court is not bound by the said issues. The court will rely on the case of **Gokoldas Tanna Vs Rosemary Muyunza & DAPCB SCCA NO.12 OF 1992 (scu)** where the court held that;

“An agreement on the terms that upon finding issues in the positive Judgment should be entered in favour of the plaintiff and that upon finding the issue in the negative judgement should be entered in favour of the defendant was objectionable on at least two ground;

The first is that by doing so the parties sought to tie in advance the hands of the learned Judge in his Judgment. The parties also appeared to have attempted to oust the functions of the court to fairly decide the dispute between the parties and come out with decisions that appeared just in the opinion of the court. This parties cannot and should not do so. The second objection is that the agreement would have the effect of asking for Judgment in favour of one or other of the parties whether or not such a Judgment was contrary to any legal provisions”

In light of the above findings of the court and based on the pleadings this court will frame the issues for determination. It is evident that the 1st defendant did file a cross-claim and counterclaim where she sought that the title deed held by the plaintiff in the main suit be declared null and void as the same was obtained without due process of law.

The issue now for determination are;

- 1. Was the plaintiff lawfully registered as the proprietor of the suit premises and in alternative is the certificate of lease absolute and indefeasible?***
- 2. Is the 1st defendant in lawful occupation of the suit premises?***
- 3. Who is the lawful proprietor of the suit premise?***
- 4. Is the plaintiff entitled to the prayers sought in the plaint?***
- 5. Is the 1st defendant entitled to the prayers sought in the cross-claim and counter –claim?***
- 6. Who is liable to pay costs?***

The court has considered the available evidence and exhibits produced in court. For the plaintiff's ***exhibit no.4*** there is no doubt that the plaintiff is the registered proprietor of ***Nairobi /Block 21/312*** which Certificate of Lease was issued on ***23rd December 2002*** which was issued under ***Cap 300 Laws of Kenya***. It is also evident that the suit property was initially a Government land with Government house on the suit property. The plaintiff herein was not a civil servant at any given time. Though the title deed was issued under ***Cap 300(now repealed)*** under ***Section 106 Of the Land Registration Act***, the governing registration now is the Land Registration Act. Therefore the plaintiff under ***Section 26(1) of Land Registration Act*** is deemed to be prima facially the absolute and indefeasible proprietor of the suit property. However the said Certificate of title can also be challenged as provided by ***Section 26(1)(a)&(b) of the Land Registration Act 2012 which states;***

“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.”

Therefore Certificate of Title can be challenged under the above stated instances. The plaintiff alleged that she applied for allocation of the suit premises and the application was successful and she was later issued with a letter of allotment dated **19th May 1999** produced as **exhibit no.2**. However she did not attach the application letter for the allocation of the said suit premises falling under the Government Land Act (now repealed). The relevant section for allocation of such suit premises was **Section 3 (a)** which states that;

“the president in addition to but without limiting any other right ,power or authority vested in him under this act may-

a. Subject to any other written law makee grant or dispositions of any estates,interests or right in or on unalienated government land”

There is no evidence herein that the President authorised the Commissioner of lands to alienate the suit property herein. Further in the letter dated **22 September, 2005** by **Mr.Nzwilli** for the Permanent Secretary, Ministry of Lands and Housing, he stated that the land herein was not unalienated government land as there was a Government House on it and therefore it was alienated land. In the case of **Henry Muthee Kathurima Vs Commissioner of lands and another(2015)eKLR**, the Court of Appeal held that;

“We have examined the evidence on record,there is nothing on record to show that the President had authorised the Commisioner of Lands to alienate the suit property.We have examined the provisions of Sections 3,7,9 and 12 of the Government Land Act and we are satisfied that the Commissioner of Lands had no power and authority to alienate the suit property and issue the certificate of lease”

Equally in this matter, the plaintiff produced a letter of allotment signed by **S.K.W. Wangila** for Commissioner of Lands. There was no evidence on record that the President had authorised such alienation. Though the plaintiff has a Certificate of Lease the same is challengeable if issued irregularly or by mistake. It is not sufficient to dangle the Certificate of Lease. The history of the root of the title must be proper. In the case of **Munyu Maina Vs Hiram Gathiho Maina Civil Appeal no.239 of 2009** the Court of Appeal held that;

“we have stated that when a registered proprietor root of Title is challenged,it is not sufficient to dangle the instrunment of title as proof of ownership.It is this instrument of Title that is challenged and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title to 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”

In this case ,the plaintiff had a duty to show how the Certificate of lease was acquired and whether due process was followed. From the available evidence,the allocation of the suit premises to the plaintiff was not by the President as provided by **Section 3(a) of the Government Lands Act** and more so ,the Land had Government House on it and it was not unalienated Land. Therefore the allocation of this Land to the plaintiff was irregular and was not legally acquired. Therefore the root of title held by the plaintiff is challenged and she cannot dangle it as proof of ownership.

Even if plaintiff may claim that she is the registered owner of the suit property,**Article 40(6) of the Constitution of Kenya** does not offer protection to property acquired illegally it reads;

“the rights under this Article do not extend to any property that has been found to have been unlawfully acquired”

The plaintiff did not acquire her title legally and therefore she cannot seek protection under **Section 26 of the Land Registration Act and Article 40 of the Constitution**.

Further the witnesses from the Ministry of Lands testified in court and stated that from the records in their office there was no evidence that the plaintiff is the owner of the suit property and no records exists on the ownership of this property by the plaintiff. However there is available evidence that the 1st defendant is the owner of the suit property having purchased it from the Government through the Tenant Purchase Scheme of **2004**. Though the plaintiff alleged that she was allocated the suit property by the Commissioner of Lands it is evident that the Commissioner of Lands had no power to allocate alienated Government Land.

From the above discourse it is evident that the plaintiff herein did not obtain the certificate of lease legally and therefore the certificate of title is not absolute and indefeasible and can be impugned.

The second issue is whether the 1st defendant is in lawful occupation of the suit property.

It is evident that initially the 1st defendant was allocated the suit premises as a tenant of the Government and was paying Market Rate House rent of **Kshs.26,000/=** ,The said allocation was done under a letter dated **27th March 2003**. It is also evident that through the sale of Non strategic Government Houses the 1st defendant was offered **House no.HG 699A** to purchase and she accepted the offer and subsequently signed the Tenant Agreement. On her subsequent payslips, it is clear that she was continuously deducted **Kshs.31,599/=** from her salary as Monthly payment of the loan by the Government of the purchase of the suit property. The 1st defendant testified that she cleared payment of the loan from her Pension. Under a letter dated **22nd September 2005 O.M. Nzwilli** clarified that the 1st defendant was the lawful purchaser of the suit property. The plaintiff though in possession of Certificate of Lease issued on **23rd December 2002** was in occupation or possession of the suit premises. The 1st defendant has been in occupation of the suit premises since the year **2003** and she was a civil servant who purchased the same through Tenant Purchase Scheme. There is therefore no doubt that the 1st defendant is in lawful occupation of the suit premises.

The 3rd issue is who is the lawful proprietor of the suit property? The court has found that the plaintiff's Certificate of Lease was acquired irregularly and illegally and is subject of challenge under **Section 26(1) (a) (b) of the Land Registration Act**. The said title can be impugned for having been acquired illegally. However it is evident that the 1st defendant followed due process in purchase of this suit property from the Government which was selling Non Strategic Government Houses. The 1st defendant has now completed payment of the purchase price. The 1st defendant is therefore the lawful proprietor of the suit premises.

The 4th issue is whether the plaintiff is entitled to the prayers sought in the Plaintiff.

Having found that the plaintiff herein is not the lawful proprietor of the suit property and that the Certificate of Lease was acquired irregularly or illegally, the court finds that the plaintiff is not entitled to any of the prayers sought in the Plaintiff.

On the 5th issue of whether the 1st defendant is entitled to the prayers sought in Cross Claim and Counter Claim, the court finds that the plaintiff's title was acquired irregularly and that the 1st defendant is the lawful proprietor of the suit property. The Certificate of title is in the name of the plaintiff and the same having been acquired irregularly should be cancelled and /or revoked

Consequently as provided under **Section 80(1) of the Land Registration Act**, the court directs that the register herein be rectified by cancellation of the Certificate of the Lease issued to the plaintiff and the same should be registered in the name of the 1st defendant.

“Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake”

Consequently the court finds that the 1st defendant is entitled to prayers sought in the Cross Claim and Counter Claim and therefore the court proceeds to grant prayers no. (a) and (b) of the Cross Claim and

prayers no. (a) (b) and (c) of the Counter Claim dated **9th November 2006**.

The **6th issue** is who is liable to pay costs. Orders as to costs follow the event. The 1st defendant herein is successful litigant and therefore she is entitled to costs. Costs of the Suit, Cross Claim and Counter Claim are awarded to the 1st defendant to be borne by the plaintiff. The plaintiff did not have an alternative prayer seeking for indemnity or compensation to be paid by the defendants. The plaintiff can pursue compensation from the Government as provided by **Section 81 of the Land Registration Act**.

Having now carefully considered the available evidence, the court finds that the plaintiff herein has failed to prove her case on balance of probabilities and consequently her claim is dismissed with costs to the 1st defendant.

However the 1st defendant has proved her case on a balance of probability and the court allows prayers no. (a) and (b) of the Cross claim and prayers (a) (b) and (c) of the Counter claim with costs to be borne by the plaintiff herein.

It is so ordered.

Dated, Signed and Delivered at **Nairobi** this **3rd** day of **March 2017**

L.GACHERU

JUDGE

In the presence of:-

None attendance for the Plaintiff though served with the Notice

Mr Mukele for the 1st Defendant

Mr Mukele holding brief for Githinji 2nd 3rd 4th Defendants

Kevin: Court Clerk

Court:

Judgement read in open Court in the presence of the above stated advocate and absence of Advocate for plaintiff though served with Judgement Notice.

L.GACHERU

JUDGE