



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 276 OF 2017

WILSON MASILA MUEMA.....PLAINTIFF

VERSUS

THE COUNTY GOVERNMENT OF MACHAKOS....DEFENDANT

JUDGMENT

Introduction

1. In the Plaint dated 20th June, 2017, the Plaintiff has averred that he is the registered owner of land known as Machakos Municipality Block 1/756 (*the suit property*); that he was issued with a Certificate of Lease for the said land on 14th September, 2012 and he has been paying the requisite land rates to the Defendant for the said land.
2. According to the Plaintiff, his efforts to develop the suit property have been frustrated by the Defendant; that the Defendant has declined to approve his development plans; that the refusal by the Defendant to approve his development plans amounts to a breach of his constitutional rights to own and enjoy property and that an order of mandatory injunction compelling the Defendant to approve his development plans to enable him develop the suit property in line with the existing regulations should issue.
3. The Defendant filed a Defence and Counter-claim in which it averred that the Plaintiff is not the registered owner of the suit property; that the suit property was previously held by the Machakos Municipal Council as public land; that the allocation of the suit land to the Plaintiff is tainted with fraud and that if any rates were received by the Defendant, then the said rates were received by mistake.
4. In the Counter-claim, the Defendant averred that the Plaintiff colluded with the officers of the defunct Machakos Municipal Council to have public land allocated to him; that the Plaintiff failed to adhere to the provisions of Section 144 (3) of the Local Government Act (*repealed*) in dealing with the suit property and that a declaration should issue that the Title Deed held by the Plaintiff over the suit property was fraudulently obtained.
5. The matter proceeded for hearing on 14th November, 2019, on which date it is only the Plaintiff who testified. The Defendant's counsel informed the court that the Defence will not be tendering any evidence in the matter.
6. The Plaintiff, PW1, informed the court that he was issued with a letter of allotment in respect to the suit property on 24th June, 1999; that the allocation of the said plot was ratified by then Municipal Council of Machakos and that he was issued with a Certificate of Lease for parcel of land known as Machakos Municipality Block 1/756 on 14th September, 2007.
7. According to the Plaintiff, having paid to the Defendant all the requisite land rates, he applied to have his development plan approved by the Defendant on 15th February, 2012; that despite the many reminders that he did, the Defendant declined to approve the development plan and that the court directed the Defendant to communicate its decision to the Plaintiff in the Judgment that was delivered on 15th February, 2017 in Machakos ELC Misc. Application No. 43 of 2014.
8. According to PW1, the Defendant, through its officials, has taken the position of frustrating him into not developing the suit property and that a mandatory injunction should issue. The Plaintiff produced in evidence several documents, including the letter of allotment dated 24th June, 1999; the Lease for Machakos Municipality Block 1/756 and the Certificate of Lease.

Submissions

9. The Plaintiff's counsel submitted that the Defendant did not call any witnesses to testify; that from the evidence adduced by the Plaintiff,

the Plaintiff is the registered proprietor of the suit property and that the Letter of Allotment emanated from the Defendant's predecessor in law. Counsel relied on the case of *Nelson Kazungu Chai & 9 others vs. Pwani University (2014) eKLR*, where this court laid down the procedure that should be followed in the alienation and allocation of public land.

10. Counsel submitted that allegations of fraud should be specifically pleaded and proved. While relying on the Court of Appeal decision in the case of *Bruce Joseph Bockle vs. Coquero Limited (2014) eKLR*, it was submitted that a general allegation of fraud was not sufficient to infer liability on the part of those who are said to have committed it.

11. The Plaintiff's counsel submitted that the Defendant having failed to lead evidence, the Plaintiff's evidence remains unshaken; that the Defendant in this matter was receiving rates from the Plaintiff and that the Defendant has unreasonably and unlawfully withheld the approval of the Plaintiff's development of the suit property.

12. By denying the Plaintiff the permission to develop the suit property, it was submitted, the Defendant has denied the Plaintiff the opportunity to benefit from the same; that the Plaintiff is entitled to general damages and that an award of Kshs. 8,000,000 as general damages will suffice.

13. The Defendant's counsel submitted that the prevailing law at the material time relating to acquisition of land owned by a Municipal Council was the repealed Section 144 of the Local Government Act which provided as follows: -

“144 (3) Any land belonging to a local authority and not required for the purpose for which it was acquired may, with the approval of the Minister and subject to such conditions as he may think fit to impose, be appropriated for any other purpose for which the local authority is authorized to acquire land: Provided that the appropriation of land by a local authority shall be subject to any covenant or restriction affecting the used of the land in its hands.

144 (5) A local authority may let, or grant to any person a licence to occupy, any land which it may possess— (a) with the consent of the Minister for any term; (b) without the consent of the Minister, unless such consent is required by section 177 or by any other written law, for a term not exceeding seven years, and may, in respect thereof, charge rents, stand premium or fees.”

14. The Defendant's advocate submitted that in the present case, no evidence was tendered by the Plaintiff to show that he indeed followed the laid down procedure to acquire the suit property; that the Plaintiff failed to comply with the conditions set out in the purported allotment letter and that the Plaintiff used an irregular process to obtain title documents of the suit property.

15. The Defendant's counsel submitted that an irregular process cannot confer upon the Plaintiff the right to seek legal protection. Counsel relied on the case of *MaCfoy vs. United Africa Company Limited [1967] 3 ALL ER 1169* in which Lord Denning held that if an act is void, then it is in law a nullity; and that such an act is not only bad but also incurably bad.

16. Counsel submitted that the allocation of the suit land to the Plaintiff was illegal and that the court cannot be used to enforce illegalities through the back door. Counsel relied on the case of *Standard Chartered Bank Kenya vs. Intercom Services Limited, Civil Appeal No. 37 of 2003* in which the Court of Appeal quoted the case of *Holman vs. Johnson [1775-1802] ALL ER* where Lord Mansfield, CJ stated as follows:

“The principle of public policy is the *Ex dolomalo no oritar action*. No court will lend its aid to a man who found his cause of action on an immoral or illegal act. If from the plaintiffs own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of the Country, there the court goes not for the sake of the defendant but because they will not lend their aid to such plaintiff.

17. Counsel submitted that no court ought to enforce illegal contracts or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if duly brought to the notice of the court.

18. It was submitted by the Defence counsel that the court should take cognizance of the fact that the suit property is public land set aside for council's residential housing and consider the public interest. Counsel relied on the case of *East African Cables Limited vs. The Public Procurement Complaints, Review & Appeals Board and Another [2007] eKLR* in which the Court of Appeal indicated situations where public interest should take precedence in the following words:

“We think that in the particular circumstances of this case, if we allowed the application the consequences of our orders would harm the greatest number of people. In this instance we would recall that advocates of Utilitarianism, like the famous philosopher John Stuart Mill, contend that in evaluating the rightness or wrongness of an action we should be primarily concerned with the consequences of our action and if we are comparing the ethical quality of two ways of acting, then we should choose the alternative which tends to produce the greatest happiness for the greatest number of people and produces the most goods. Though we are not dealing with ethical issues, this doctrine in our view is aptly applicable.”

19. It was submitted that the Plaintiff having fraudulently acquired title to the suit property, this court should order for the revocation of the Certificate of Lease over title number Machakos Municipality Block 1/756 and order the land to revert back to the original owner and further direct rectification of the register to reflect the cancellation.

Analysis and findings

20. The evidence produced in this court by the Plaintiff shows that the Plaintiff was issued with a letter of allotment dated 24th June, 1999 together with an approved development plan and accepted the offer vide a letter dated 10th January, 2011.

21. The evidence produced by the Plaintiff further shows that vide a letter dated 21st September, 2007 from the then Town Clerk of the Municipal Council of Machakos, the Town Clerk confirmed the allocation of the suit property by the Defendant's predecessor. It is the said letter, together with the payment of the land rates that caused the Commissioner of Lands to issue to the Plaintiff the Lease dated 17th August, 2012. The Machakos Land Registrar then issued to the Plaintiff the Certificate of Lease in respect of land known as Machakos Municipality Block 1/756 on 14th September, 2012.

22. The process of allocation of government land was stated by this court in the case of *Nelson Kazungu Chai & 9 Others vs. Pwani University College (2014) eKLR*. In the said case, this court held as follows:

“130. It is trite law that under the repealed Government Lands Act, a Part Development Plan must be drawn and approved by the Commissioner of Lands or the Minister of Lands before any unalienated Government land could be allocated. After a Part Development Plan (PDP) has been drawn, a letter of allotment based on the approved Part Development Plan is then issued to the allottee.

131. It is only after the issuance of the letter of allotment, and the compliance of the terms therein, that a cadastral survey can be conducted for the purpose of issuance of a Certificate of Lease. This procedural survey was confirmed by the Surveyor, PW3. The process was also reinstated in the case of *African Line Transport Company Limited vs. The Hon. Attorney General, Mombasa HCCC No. 276 of 2013.*”

23. While dismissing the Appellants' appeal in the case of *Nelson Kazungu Chai & 9 others vs. Pwani University College (2017) eKLR*, the Court of Appeal held as follows:

“Worth noting as well is that no Part Development Plan was produced to back the Appellants' claim that due process had been followed as alleged.”

24. Considering that the Plaintiff in this matter was issued with the Letter of Allotment together with an approved Part Development Plan, it is my finding that due process was followed in the allocation of the said land to the Plaintiff. Indeed, after the said Letter of Allotment was issued, the Commissioner of Lands issued to the Plaintiff the Lease on behalf of the Machakos Municipal Council as per the provisions of the law. The Plaintiff was then issued with a Certificate of Lease.

25. Section 26 (1) of the Land Registration Act provides as follows:

“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.”

26. No evidence was tendered by the Defendant to show that its predecessor, the Municipal Council of Machakos, did not allocate the Plaintiff the suit property, or that the Plaintiff acquired the said Letter of Allotment and the Lease in respect to the suit property fraudulently or by misrepresentation. Indeed, other than alleging that the suit property was reserved for public purpose, and that the Plaintiff acquired the suit property fraudulent, the Defendant did not avail any evidence to support those allegations.

27. It is trite that allegations of fraud have to be pleaded specifically and proved on a standard that is higher the usual standard of balance of convenience in civil cases. In the case of *Bruce Joseph Bockle vs. Coquero Limited (2014) eKLR*, it was held that a general allegation of fraud was not sufficient to infer liability on the part of those who are said to have committed it.

28. Other than not adducing any evidence to show that the Plaintiff acquired the suit property fraudulently or by misrepresentation, the Defendant did not explain to this court why it entered the Plaintiff's name into its valuation roll, and received land rates in respect of the suit property. The receipt of land rates from the Plaintiff is an acknowledgment that the suit property belongs to the Plaintiff.

29. Furthermore, on 27th January, 2017, this court directed the Defendant to communicate its decision on approval or otherwise of the development plan of Machakos Municipality Block 1/756 within 45 days in Machakos Misc. Application (JR) No. 43 of 2014. The Defendant has never complied with the said directive.

30. The evidence before this court shows that the Plaintiff is entitled to an order of mandatory injunction. However, no evidence was led by the Plaintiff on the question of general damages for the loss of use of the suit property. The prayer for an award of general damages is therefore denied.

31. For the reasons I have given above, I allow the Plaintiff's suit as follows:

a. An order of mandatory injunction be and is hereby issued compelling the Defendant to grant to the Plaintiff approvals to

develop land parcel number Machakos Municipality Block 1/756 in line with the existing laws and regulations on development within 30 days from the date of service of the Decree.

b. The Defendant to pay the costs of the suit.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 30TH DAY OF JULY, 2020.

O.A. ANGOTE

JUDGE