



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO. 1885 OF 1992**

**MWANGI STEPHEN MURIITHI.....PLAINTIFF**

**VERSUS**

**CITY COUNCIL OF NAIROBI.....DEFENDANT**

**JUDGMENT**

By a re-amended plaint dated **8<sup>th</sup> December 2011**, the plaintiff made a claim that the defendant under the hand of the Town Clerk allocated to the Plaintiff two (2) hectares residential plot in **Jamhuri Estate Phase II** upon conditions, inter alia, that the plaintiff would pay the sum of **Ksh 580,910/=** comprising of Stand Premium, **Ksh 197,680/= Rent, Ksh 32,950/=** and development costs of **Ksh 350,280/=** by bankers cheque within 30 days of the date of issuance of the allotment letter. He paid **Ksh 580,910/=** and was issued with a receipt. It was after the payment that the defendant was to survey the said land and thereafter issue the relevant title documents to the plaintiff which was never done. He later learnt that the defendant had given out the said parcel to other persons with the object of defeating the plaintiff's right to this land. He avers that despite being restrained by an Injunction issued by the court, the defendant has dealt with the said land in a manner inconsistent with the interest and rights of the plaintiff and to the prejudice of his rights by selling and transferring to other persons who have now developed the land and for this reason the he has been deprived of the suit property and has suffered loss and damage. The allegations of the loss are as follows:-

- a. ***Ksh 580,910/=the amount paid by the plaintiff to the defendant on 29<sup>th</sup> October 1979 plus interest at 18% till payment in full.***
- b. ***Loss of opportunity to develop already designed 72 housing units that the plaintiff intended to build on the suit land in 1979 with each housing unit being sold at Ksh 600,000/=in mid 1980 thereby earning the plaintiff a profit sum of Ksh 330,779/= per unit and a total profit loss to Ksh 23,816,088/=as at October 1980 when the housing units would have been sold out.***
- c. ***Loss of opportunity to earn interest of Ksh 23,816,088/= from 1<sup>st</sup> October 1980 until the date of payment in full at a rate of 18% from 1<sup>st</sup> October 1980.***

He further averred that he was entitled to be put by the defendant in the same position as he would have been if the defendant had not breached its legal obligations and properly proceeded to cause the title deed to be issued to the plaintiff who would have proceeded with the already planned development on the suit land. He claims a total loss of **Ksh 4,702,959,644.87** plus interest at 18% from June 2011 until payment in full. He also incurred expenses on payment made to expert witnesses who prepared reports for use in the suit.

- a. *Architect's expenses*.....Ksh 598,560.00
- b. *Quantity Surveyor's expenses*.....Ksh 378,624.00
- c. *Professional Valuer's expenses*.....Ksh 68,200.00

**Total .....Ksh**

**1,045,384.00**

He stated that the plaintiff is entitled to a refund payment by the defendant of the expenses he incurred plus interest of 18% thereon. He claims general and exemplary damages from the defendant for blatant breach of contract and for breach of court orders. He prays for judgment against the defendant for:

- a. ***A declaration that the defendant holds the piece of land comprising Jamhuri Estate Phase II as delineated on the sketch plan upon trust for the plaintiff.***
- b. ***Payment of the above stated sums by the defendant to the plaintiff***
- c. ***General damages for breach of contract***
- d. ***Exemplary damages***
- e. ***Interest on (d) and (e) at court rates***
- f. ***Costs of this suit together with interest at court rates***
- g. ***Such further or other order or relief as this court may deem fit to make or grant in the interest of justice.***

In a further amended defence filed in this court on **21<sup>st</sup> December 2011**, the defendant denied the contents alleged in the plaintiff's re-amended plaint and put the plaintiff to strict proof. The defendant stated that the alleged allocation to J.S Muriithi on **27<sup>th</sup> September 1979**, was subject to the provisions of the Local Government Act, and particularly the approval of the said allocation by the Minister and there is no cause of action against the defendant as the alleged allotment did not amount to a contract. It further stated that the plaintiff never took possession of the suit property and the suit is statutory barred by limitation, the same having been filed 14 years after the cause of action arose, and therefore the prayers sought have been overtaken by events. That the plaintiff's reliefs cannot be enforced as the plaintiff failed to pay survey fees and legal costs in order to ascertain the actual area of allocation if any. That the alleged contract giving rise to the alleged loss and damage was not made under the seal of the defendant and is not binding on the defendant and that the alleged loss and damage are based on designs made 18 years after the plaintiff had knowledge of the non availability of the suit land.

The defendant further averred that there was no agreement that the sum of **Ksh 580,910/=** would earn interest. That the plaintiff's claim is misconceived, bad in law and further that the plaintiff's loss of opportunity to develop land was ill conceived as the plaintiff had not acquired any legal rights over the said piece of land therefore the plaintiff had no capacity to develop the alleged housing units and if any developments were designed, the same was an afterthought for purposes of this claim since the plaintiff had not designed any houses prior to filing this suit. That further the designed houses were subject to approval in accordance with the Building Code Adoptive by Laws Order 1968 and that the approval was sought and granted. The defendant further averred that the plaintiff's letter of offer and allocation were as a result of abuse of office as there was no approval of the Council through its various committees to offer and allocate the same land to the Plaintiff. That the Plaintiff did not comply with the conditions that the design of the house type was to be discussed and agreed, he failed to undertake that the selling price of the completed houses will be fixed jointly with the defendant and to offer proof of development finances and to identify a mortgage company that mortgage funds will be available for the project. That the plaintiff is not entitled to any general and exemplary damages as the alleged contract became impossible to perform and was frustrated without fault on the part of the defendant and pray that the plaintiff's suit be dismissed with costs.

The parties filed their witness statements which were adopted in their evidence in court during the hearing. The plaintiff had three expert witnesses and the defendant had one witness.

**PW1- Mwangi Stephen Muriithi**, adopted his witness statement as part of his evidence and added that he applied for allocation of a plot vide a letter dated **8<sup>th</sup> May 1978** from the City Council of Nairobi and was allocated a residential plot at **Jamhuri Estate**. He paid **Ksh 580,910/=** vide a bankers cheque to the City Council for the construction. He wrote several letters to the Respondent and the Commissioner of Lands seeking to have the title to the suit property. He further stated that he came across a letter that was not dated addressed to all plot allottees and his plot indicated to have been allotted to other people. Sensing that his plot would be allocated to someone else he did a demand letter through his advocate to the Respondent. He received a letter from the respondent after he had filed this suit which offered that the matter be negotiated and by then an Order of injunction had already been granted. He further stated that the Respondent sent him a letter dated 26<sup>th</sup> October 1992, offering him an alternative piece of land to settle but he declined the offer because the land offered was inferior in terms of location and value. That the offered land was supposed to be at Kariobangi South.

That while the case was still pending in court the Plaintiff came to realized that their entire land had been given to some other people wherein he was forced to instruct his advocate to amend his plaint and sought for compensation for the loss incurred since the entire land had been given away. He stated that it was necessary to engage professionals such as Valuers to give the value and amount of what she incurred. He engaged an Architect who prepared a report and paid the Architect and tendered a fee note of **Ksh 598,560/=**.

He also got the services of the quality surveyor wherein it showed how much it would have cost him to put up the building in the building plans and he got an invoice of **Ksh 378,624/=** which he settled. He engaged the services of a valuer and paid him **Ksh 68,200/=** He now wants a refund of the money adding that he would have constructed 72 housing units and sold them at **Ksh 600,000/=** He calculated his total loss of profit as **Ksh 23,816,088/=**. He has also made a claim of **Ksh 4,702,959/=** against the Defendants and special damages of **Ksh 1,045,384/=** On cross examination he confirmed that in 1979, the plots were allocated to him and by then he was Deputy Director of Special Branch, a service post in government. He also confirmed that he received a letter dated 17<sup>th</sup> November 1978, that gave him conditions to meet in designing and constructing the houses and that the selling price would be fixed by the Chief Valuer of City Council. He also stated that he filed this suit in 1992 which was 13 years after he had been allocated after all avenues for redress had failed. He added that the plans could not be completed without a title deed.

**PW2:- Charles Gichohi Gachucha**, an Architect by profession stated that he prepared an expert opinion in this matter. He adopted his written statement as part of his evidence. He stated that in his report the land would have taken 72 houses of 4 bedrooms and one servant quarters. On cross examination he stated that he was given instructions to prepare a visibility study in 2010 on a two acre piece of land that was not demarcated. He stated that he was given the Deed plan and the allotment letter and would not tell where the land was and whether the plaintiff was the owner of allotment letter. That the plaintiff supplied him with architectural plans on the said areas and he was taken to the property and he prepared the report based on the information he was given. He also stated that he consulted the town planner on the design but did not get approval from the City Council.

**PW3:- Philip Muchungu**, a quantity surveyor and a project manager also adopted his written statement as part of his evidence. He stated that he was given instructions in 2010 to prepare a report. He was given architectural designs and he proceeded to do the costing for 72 units and got a total of **Ksh 19,383,940/=** and a detailed Bills of Quantities providing full details of the costings. He submitted his fee note and was paid. On cross examination he stated that he used joint building indexes and not comparative analysis. He further stated that he used the price indexes of 1980 and analyzed the bill of quantities for a period of 34 years.

**PW4 Didacus Nyaga Nkonge**, a registered Valuer also adopted his written statement as part of his evidence and stated that he prepared a valuation report on maisonettes that the plaintiff intended to build.

He was shown an allotment letter and architectural visibility report. He was also given a cost analysis report on the basis of the said documents. He also did a valuation of what the houses would have sold once they were built. He added that the price was for houses that would have been sold in 1980 which would have been **Ksh 600,000/=** the market's valuation at that time. He was paid for the work done. On cross examination, he stated that the property development was anticipated in 1980 but did not come to materialize.

At the close of the plaintiff's case the defendant through its only witness testified as follows.

**DW1 Joseph Cheruiyot Ghovel**, stated that he was a principal Valuer by profession at Nairobi City Council and added that his duties were to administer the Rating Act for rating purposes. He adopted his written statement as part of his evidence. He added that when an allotment letter is issued the land has to be identified, minutes prepared by the town planning committee and land is allowed to be allotted. The minutes are taken by the general purpose committee who give power to the town clerk to seek approval from the minister to allocate land. After the minister's approval allotment letters are prepared and sketch plans prepared to show the said areas. He further testified that when the plaintiff was allotted the allotment letter in 1979, he did not comply with the conditions and the non satisfaction is recorded in the file. That the property cannot be identified as **Jamhuri Phase II** as the plaintiff did not pay the survey fees and that had he paid the surveyor would have drawn the PDP and shown the approving area and the boundary. When referred to a letter dated **27<sup>th</sup> September 1979** he stated that the town clerk did not have the authority to issue the allotment letter and the said letter did not have a seal of Nairobi City Council which is mandatory. He added that there were no minutes deliberating on the allotment of the parcel of land since the plaintiff failed to comply with the condition as required in the allotment letter and when the period within which to comply lapsed; the property could not be transferred to the plaintiff.

On cross examination, he stated that the actions of the Town Clerk were not binding. He confirmed that the plaintiff accepted the allocation of the suit property and paid the consideration by a cheque. He further stated that the land had to be identified and since the plaintiff did not pay survey fees he could not get the land. He stated that the letter of allotment was not proper because it did not have a seal and did not quote any minutes of the Nairobi City Council and concluded that the council cannot be held responsible by the actions of the Town Clerk who did not follow the proper procedure in allocating the letter of allotment. He also stated that the town clerk did not seek the approval of the Minister for local Authority as is required by the Local Government before he allotted the plot to the plaintiff, therefore he superseded his powers by skipping the mandatory role of the Minister for the Local Government.

At the close of the hearing in court, parties filed their written submissions. The Plaintiff filed his submissions on 20<sup>th</sup> June 2014. In his submissions he stated that he had proved his case beyond the legally required standard of balance of probabilities and therefore entitled to the reliefs sought. The defendant filed its submissions on 1<sup>st</sup> July 2014 wherein it reiterated the contents of its pleadings and the evidence in court. It added that the town clerk was supposed to seek a Ministerial approval to allocate the property having been given power to do so from the general purpose committee and that the uncontroverted evidence of the defendant's witness is that this power to seek approval was not granted or sought therefore without the power from the General Purpose Committee therefore the validity of the allotment letter was questionable and the fact that it did not have a seal as required, therefore the council cannot be held responsible for the failure of the town clerk. Counsel further submitted that the consistent breach by the town clerk to abide by the laid down statute, he lacked the mandatory legal capacity to offer the suit property for allotment. The Defendant further submitted that prior to the letter of the allotment being issued; a letter dated 17<sup>th</sup> November 1978, was issued and the said letter contained specific conditions which had to be complied with. These conditions were that:-

- a. ***Allocation will be made upon proof of development finance and also indication by mortgage finance company that mortgage will be available for the housing project.***
- b. ***Design of the house type to be discussed and agreed with the Town Clerk.***
- c. ***An undertaking that the selling price of the completed housing units will be fixed jointly with***

*the council chief valuer.*

That there was no evidence tendered in Court by the plaintiff that he complied with the said conditions. It would have not been possible for the plaintiff to construct an unapproved development plan as per its quantity surveyor report. The defendant therefore contends that having failed to comply with the said express terms the plaintiff was not entitled to the ownership of the suit property. It relied on the case of **Wreck Motors Enterprises –vs- The Commissioner of Lands & 3 Others, Nairobi Civil Appeal No 71 of 1997** where the Court of Appeal held that,

***“Title to landed property comes into existence after issuance of a letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of title documents pursuant to provisions in the Act under which the property is held”***

On the claim of special damages, the defendant submitted that for the plaintiff to make this claim he has to prove loss of opportunity to develop and prove that he was entitled to the suit property. Further the plaintiff could not make an assumption that his architectural designs would be ratified by the defendant. The defendant further submitted that the designs were not undertaken at the time the allocation was done elucidating that the same was done 18 years after the fact and that he need to have brought in an actuarial scientist who would have assisted the court to determine the probability that 18 years ago all the property units would have been sold and the plaintiff would have secured the alleged profit. The defendant further stated that the plaintiff’s witnesses did not tender any evidence showing that they were paid for the work done and added that the fee note exhibited was not evidence that the said monies were paid.

From the pleadings, the evidence in court and the written submissions the court finds that the issue for determination is whether the plaintiff actually acquired any interest in the two (2) hectares of land that he had requested pursuant to his letter dated 8<sup>th</sup> May 1978. If the court’s findings would be to the affirmative the court would then determine whether he is entitled to the reliefs sought in his plaint.

I have looked at the plaintiff’s bundle of documents and note that the plaintiff made an application by way of a letter dated **8<sup>th</sup> May 1978** to the Town Clerk, City Council of Nairobi for allocation of **LR No 3734/384** which was idle. He in the said letter intimated that he had the necessary funds for the development of the land if allotted. In a letter dated **12<sup>th</sup> June 1978**, the Town Clerk one, S.J Getonga replied to the plaintiff explaining to him why they could not allocate him that plot for the reasons that the Council had reserved the parcel of land as open space but would give him one for development once investigations were completed. By a letter dated **17<sup>th</sup> November 1978**, the Town Clerk brought to the attention of the plaintiff the availability of **“site for mortgage housing scheme Jamhuri Estate Phase II”** The conditions stated in the said letter were that:-

- i. ***The plaintiff had to show proof of development finances and also indication by a mortgage finance company that mortgage funds will be available for the housing project.***
- ii. ***The land is to be developed at a density between 25 and 35 houses per hectare.***
- iii. ***Design of the house type to be discussed and agreed with the town clerk.***
- iv. ***Undertaking that the developer would consult with the council at all stages of advertising and selection of successful applications for purchase of the completed house units.***

The letter dated **27<sup>th</sup> September 1979**, by the Town Clerk stated that the plaintiff had been allocated 2 hectares residential plot in Jamhuri Estate Phase II. That the principle terms and conditions of allocation as follows:-

1. The purchase price of the plot is as follows:-

***Stand premium of Ksh 197,680.00/=Annual ground Rent Ksh 39,540/=Development costs Ksh***

**350,000/= all totaling Ksh 580,910/=**

This required an acceptance of the offer and payment of a sum of **Ksh 580,910/=** within 30 days of the offer. It appears that this payment was made vide a cheque **No 0084089** dated **25<sup>th</sup> October 1979** and Plaintiff was issued with a receipt. After the said payment by the plaintiff, there seems to have been no action between the two parties herein prompting the plaintiff to write letters to the defendant but the said letters did not elicit any response from the defendant. This particular parcel of land that the plaintiff had been offered was later allotted to a third party and was subsequently developed.

However the plaintiff has not shown by way of evidence that the conditions contained in the letters dated **17<sup>th</sup> November 1978** and **27<sup>th</sup> November 1979** were met as required. The defendant in his evidence in court testified that for the plaintiff to acquire the said parcel of land, he had to pay survey and legal fees and as a result no transfer could have taken place without a surveyor to identify the actual location and size of the land. He stated that the Town Clerk did not seek the approval of the Local Government Minister as required by law before allotting the allotment letters therefore the town clerk exceeded his mandate by allotting the plaintiff the allotment letter. He also stated that letters of allotment had to be sealed before issuance and he noted that the plaintiff's letter of allotment was not sealed as required.

Did the plaintiff therefore have any rights to the parcel of land allotted in the allotment letter for him to make a claim on it? The Court in the case of **John Mukora Wachihi & Others –vs- Minister For Lands & Others, High Court Petition No. 82 of 2010**, observed that a letter of allotment is not proof of title as it is only a step in the process of allocation of land. The Court relied on the position enunciated by the Court of Appeal in the case of **Wreck Motors Enterprises –vs- The Commissioner of Lands and 3 Others Nairobi Civil Appeal No. 71 of 1997 (Unreported)**, where it stated as follows,

***‘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.’***

Similarly in **Joseph Arap Ng'ok –vs- Justice Moiwo Ole Keiwua NAI Civil Application No. 60 of 1997** the Court of Appeal observed that,

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

It is therefore my finding that the plaintiff did not have title to the property in question for the reasons that he did not fulfill the conditions required of him by the above named two letters addressed to him. He could not claim any proprietary ownership of the said property.

Based on the above finding, this court will now look at the plaintiff's reliefs as sought in his plaint. He has sought for a declaration that the defendant was holding the parcel of land in trust for the plaintiff. Equity recognizes various trusts. In this case the ideal trust created is the resulting trust. This is because the plaintiff has shown by proving that he paid the defendant **Ksh 598,560/=** towards the acquisition of this parcel of land and this arises at the time of the acquisition of the property. The requirements for a constructive trust to arise are explained in more detail in **Halsbury's Laws of England, 4<sup>th</sup> Edition, Volume 48** at paragraph 690 which state thus:

***“A constructive trust will arise in connection with the legal title to property whenever one party has so conducted himself that it would be inequitable to allow him to deny to the other party a beneficial interest in the property acquired. This will be so where: (1) there was a common intention that both parties should have a beneficial interest; and (2) the claimant has acted to his detriment in the belief that by so acting he was acquiring a beneficial interest. The relevant intention of each party is the intention reasonably understood by the other party to be manifested by that party's words or conduct notwithstanding that he did not consciously formulate that intention or even acted with some different intention which he did not communicate.***

*The first question is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the property, there has at any time prior to acquisition, or exceptionally at some later date, been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially. Such an agreement will be conclusive.*

*Where the evidence is that the matter was not discussed at all, the court may infer a common intention that the property was to be shared beneficially from the conduct of the parties. In this situation direct contributions to the purchase price by the party who is not the legal owner, whether initially, or by way of mortgage installment, will readily justify the inference necessary to the creation of a constructive trust.*

*Exceptionally the agreement, arrangement or understanding may be arrived at after the date of the original acquisition. Once common intention has been established, whether by direct evidence of common agreement or by inference from conduct, the claimant must show that he acted to his detriment in reliance on the agreement.*

*The final question to determine is the extent of the respective beneficial interests. If the parties have reached agreement, this is conclusive. Where there is no agreement as to the extent of the interest, each is entitled to the share the court considers fair having regard to the whole course of dealing between the parties in relation to the property.”*

In as much as the plaintiff would want this court to make a declaration that the defendant was holding the said parcel of land in trust for him, this court finds that he had not met the required conditions as stipulated in the two letters dated **17<sup>th</sup> November 1978** and **27<sup>th</sup> November 1979**. He may have paid the **Ksh 598,560/=** but the failure on his part in fulfilling the conditions as stipulated in the two letters could therefore not give him the right to claim proprietary rights on the said parcel of land. I therefore find that this court cannot make a declaration that the defendant held the parcel of land in trust for the plaintiff.

The plaintiff also sought payments of the monies he paid in procuring the services of the expert witnesses who are the architect, valuer and surveyor. The defendant testified that the plaintiff was required to pay survey fees to the City Council of Nairobi after it had accepted the letter of offer but the plaintiff failed to do so. The failure to do so meant that the plaintiff at the end of the day did not know exactly where his portion of land lay. The said expert witnesses confirmed in court that they did not physically see the said land but were given the allotment letter. The Architect testified that he was told to draw designs for a land that was not demarcated. He was also given a Deed plan, the letter of allotment and architectural plans of the areas around the parcel of land. The Quantity Surveyor was given architectural designs wherein he proceeded to do the costing of the 72 housing units. The Valuer was given the allotment letter and Architect's visibility report and a cost analysis report. The defendant made a submission that for the plaintiff to make this claim he has to prove loss of opportunity to develop and prove that he was entitled to the suit property. The defendant further stated that the plaintiff could not make an assumption that his architectural designs would be ratified by the defendant as stated in the letter dated **17<sup>th</sup> November 1978** and that the designs were not undertaken at the time the allocation was done. I am inclined to agree with the defendant's submissions and add that the plaintiff having not been granted any proprietary rights on the said parcel of land, he could not have procured the services before ascertaining the exact land he would construct the said houses. I also note that there was no evidence of payments of monies to the expert witnesses tendered in court. A fee note cannot be taken as evidence of payment of instruction fees. The only monies that the plaintiff is entitled to be refunded is the **Ksh 580,910/=** that he paid vide cheque number **0084089** on **25<sup>th</sup> October 1979**, perhaps with interest.

The Plaintiff has a letter of allotment, but has no title to the land. He does not have an indefeasible title to the land because there was no Valid Contract between the plaintiff and the defendant. , therefore he has not rights on the parcel of land and therefore he cannot get the reliefs he has sought in his plaint.

The upshot of the foregoing is that the Plaintiff has failed to prove his case on the balance of probability . Consequently, the Court dismisses the Plaintiff's claim as stated in the Plaint save for refund of **Kshs.580,910/=** with interest at Court's rate from the date of filing the amended Plaint on **1st July 2004** .

Further, the Defendant is entitled to cost of the suit.

It is so ordered.

28 days Right of Appeal.

Dated, Signed and delivered this **8th of April, 2015**

**L. GACHERU**

**JUDGE**

**Court:**

8/4/2015

Judgement read in open Court in the Presence of:-

Mr Mwiti for the Plaintiff

Mr Kariuki holding brief for Mrs Oyaro for the Defendant.

Hilda: Court Clerk

**L. GACHERU**

**JUDGE**