



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. CASE NO. 2040 OF 1998

FRANCIS KURIA KIMUHUPLAINTIFF

VERSUS

CATHERINE WAMBUI GATAMA..... 1ST DEFENDANT

KAHAWA SUKARI LIMITED.....2ND DEFENDANT

JUDGMENT

This suit was filed by way of a Plaint dated 26th May 1998 in which the Plaintiff prays for judgment to be entered against the Defendants jointly and severally for:-

1. An order for the cancellation of the Certificate of Lease issued to the 1st Defendant in respect of the parcel of land known as Ruiru/KIU Block 3/27 (hereinafter referred to as the “suit premises”),
2. Specific performance of the said allotment agreement and final transfer to the Plaintiff and failing which the Registrar of the High Court of Kenya be empowered to do all such acts and to execute all necessary documents as are necessary to complete the said transaction.
3. Spent.
4. General damages for breach of contract
5. Costs of this suit.

THE PLAINTIFF’S CASE

In his Plaint, the Plaintiff stated that by an allotment advice No. 1533 and an allotment certificate dated 12th April 1989, the Plaintiff was allocated Plot No. 15, now known as Ruiru/KIU Block 3/27 (the “suit premises”) by the 2nd Defendant after payment of Kshs. 50,000/- and that he took possession immediately. He further stated that he commenced developing the suit premises when on or about 22nd April 1998, strangers purporting to be agents of the owner of the suit premises purported to enter the suit premises and to take possession. He further stated that upon making enquiries with the 2nd Defendant, he came to learn that the 1st Defendant had acquired a Certificate of Lease over the suit premises. The Plaintiff averred that having fulfilled his part of the agreement and being the initial allottee of the suit premises, the said Certificate of Lease was obtained irregularly and fraudulently and he went ahead to set

out the particulars of fraud against the 2nd Defendant as follows:

1. Entering into a fresh agreement with the 1st Defendant herein while the first allotment was still subsisting.
2. Ensuring and enabling the 1st Defendant to acquire a Certificate of Lease in respect of the said premises while the Plaintiff was the lawful and initial allottee.
3. Knowingly receiving consideration in respect of the suit premises from the 1st Defendant while the Plaintiff was still in possession.
4. Deliberately declining to facilitate the registration of the suit premises in the Plaintiff's name.

THE DEFENDANT'S CASE

The 1st Defendant filed her Defence dated 2nd July 1998 in which she denied the allegations of fraud and stated that she purchased the suit premises from the owner thereof and not from the 2nd Defendant after paying the full consideration as a bona fide purchaser for value without notice of the Plaintiff's interest. She stated further that upon the purchase, a Certificate of Lease was issued in her name and she is the registered proprietor of the suit premises. She stated further that she took possession of the suit premises immediately until the Plaintiff interfered with her possession leading her to obtain restraining orders in **Thika Chief Magistrates Civil Case No. 647 of 1998.**

The 2nd Defendant filed its Defence dated 9th July 1998 wherein it stated that it was never paid the full purchase price for the suit premises by the Plaintiff and that it had a right to rescind the sale after awaiting payment for several years. They further stated that the 1st Defendant's Certificate of Lease was obtained in a regular manner following all due procedures at the Lands Office. They denied the particulars of fraud. They further stated that they had offered the Plaintiff to refund him of all monies he had paid or allocate him an alternative plot but that the Plaintiff had refused to accept either offer.

EVIDENCE

In his evidence, PW1, the Plaintiff, Francis Kuria Kimuhu testified that he approached the 2nd Defendant wanting to purchase a parcel of land in Kahawa Sukari with the intention of building a residential house for his family. He stated that he chose Plot No. 15 in the front row on a map shown to him by a director of the 2nd Defendant, one Mr. Mbugua. He stated that he completed the plot application form on 3rd April 1989, a copy of which he produced to the court. He testified further that the purchase price for the plot was Kshs. 50,000/- which he paid to the 2nd Defendant by way of a bankers cheque dated 12th April 1989, a copy of which he produced. Upon making payment, he testified to having received an allotment advice issued by the 2nd Defendant showing his name, identity number and Plot No. 15. He produced both the allotment advice and receipt no. 2613 dated 12th April 1989 to the court. He further testified that he was issued with an Allotment Certificate for Plot No. 15 by the 2nd Defendant indicating that he had paid the entire purchase price. He produced the same in court as his evidence. He further testified that he took immediate possession of Plot No. 15 which he fenced, installed water and put up a temporary structure for his caretaker, one Kenneth Mukua. His testimony was that his said caretaker took possession of Plot No. 15 on 1st May 1989. He further testified that he caused a plan of the dwelling house he intended to build on the plot to be drawn which he presented for approval by the 2nd Defendant's architect and Managing Director, as per the rules. He produced the same in evidence. He then stated that his said caretaker was evicted out of the suit premises on 30th May 1998 by the 1st Defendant, a District Officer at Maragua. He further testified that the 1st Defendant then proceeded to destroy the foundation of a house he had constructed on the suit premises and that she proceeded to construct her own temporary structure using his building materials which were on the site. He confirmed having reported the incident to the Officer Commanding Station of Kahawa Sukari who advised him to cease any construction activities on the suit premises until the dispute was resolved. He further testified that he engaged a valuer to carry out a valuation of the suit premises and his building materials which he had been deposited at the suit premises at the time the 1st Defendant invaded the suit premises. He further testified that he reported the invasion

to the 2nd Defendant where the Managing Director referred him to a director, one Mr. Kajabi who checked his ownership documents and confirmed that he was the owner of the suit premises. He testified further that the 1st Defendant filed suit against him in **Thika CMCC No. 647 of 1998** wherein an injunction order was issued restraining him from interfering with the 1st Defendant's occupation of the suit premises. He confirmed that the Thika case was subsequently consolidated with this suit by consent of the parties. He testified further that he came to learn that the 1st Defendant held a Certificate of Lease in respect of the suit premises. He specified his complaint against the 2nd Defendant was that they wrongfully entered into another agreement with the 1st Defendant to sell to her the suit premises while he remained the lawful owner thereof all the while refusing to transfer the suit premises to him. He further confirmed that he had carried out a search on the suit premises, now identified as Ruiru/Kiu Block 3/27, wherein the search results revealed that the suit premises was registered in the name of the 1st Defendant on 25th March 1998. He produced a copy of the green card as his evidence. He further produced another Valuation Report dated 15th November 2004 showing the value of the suit premises at the time as being Kshs. 1.1 million. During cross examination, the Plaintiff confessed that until he met the 1st Defendant, he was only aware of his own allocation of the suit premises and had not heard of any other allocation of the suit premises to any other person. He confirmed that he was not aware of the circumstances in which the 1st Defendant came to own the suit premises. He confirmed that he did not know of anyone called Lewis B. Ndirangu Kibui until the 2nd Defendant informed him that the said person had paid a deposit for the suit premises. He further confirmed that he did not know of anyone by the name Isaac Githuthu from whom the 1st Defendant is purported to have bought the suit premises. He confirmed that the reason why he had not constructed on the suit premises was that he was waiting to obtain the title deed for the purpose of borrowing a loan to get finances for construction. He concluded by requesting the court to cancel the 1st Defendant's Certificate of Lease for the suit premises as it was obtained fraudulently. He however confirmed that he did not set out any particulars of fraud in the Plaintiff in respect of the 1st Defendant. He further confirmed that there is a caution registered against the title held by the 1st Defendant in his favour.

PW2, Simon Mugo Warui, testified that he was a property valuer working with GIMCO Limited. He confirmed that he knew the suit premises because of some instructions he had received from the Plaintiff to conduct an open market valuation of the suit premises as well as the building materials and developments on the site as at 15th May 1998. He testified that they obtained a map from Survey of Kenya and proceeded to Bungoma Road, Kahawa Sukari where the suit premises is located. He confirmed that upon inspection of the same, they found a temporary structure, a fence of cedar posts and barbed wire, building stones, ballast and sand, each two lorries as well as an excavation for a foundation. He confirmed having submitted their report giving a value of the plot at Kshs. 750,000/- and Kshs. 117,000/- for the building materials. He produced the report in court as his evidence. He further testified that the Plaintiff later instructed them to carry out a further valuation to establish the current market value of the suit premises on 15th November 2004 which he carried out and returned a value of Kshs. 1.1 million. He produced the report in evidence.

PW3, Kenneth Mukua Aboki, testified that he was a mason. He confirmed that he knew the Plaintiff whom he met in May 1989 when he employed him to construct a semi-permanent structure on the suit premises. He confirmed having built the semi-permanent structure and having been employed by the Plaintiff as a caretaker. He confirmed that in March 1998, a stranger came to the suit premises claiming to be the owner thereof. He stated that the stranger was the 1st Defendant. He further testified that on 28th March 1998, the 1st Defendant deposited building stones at the suit premises while he was still in occupation. He confirmed having alerted the Plaintiff of these goings on. He further testified that the Plaintiff then came to the suit premises in May 1998 and instructed him to build a foundation. He confirmed that they moved the 1st Defendant's building stones aside and the Plaintiff deposited his own building stones, ballast and sand but that as they commenced to dig the foundation, policemen from Kahawa Sukari Police Post came and stopped them. He further testified that on 30th May 1998, the 1st Defendant came to the suit premises accompanied by Administration Police and about 30 other people who buried the foundation, removed the fence, destroyed the semi-permanent structure, evicted him, put

up her own semi-permanent structure on the opposite side and replaced him with her own caretaker. During cross-examination, he confirmed that the Plaintiff deposited his building materials and dug up his foundation after the 1st Defendant had already laid a claim over the suit premises.

Upon the close of the Plaintiff's case, the Defence called its first witness who was the 1st Defendant, Catherine Wangui Gatama. She testified that she has known the Plaintiff since March 1998 when she laid claim over the suit premises. She confirmed having acquired the suit premises in February 1998 from a Mr. Isaac Githuthu for a sum of Kshs. 300,000/-. She further testified that the transfer of the suit premises to her was done through the 2nd Defendant upon payment of a transfer fee of Kshs. 35,000/-.

After giving this brief testimony, an issue arose as to the production of any documents by the defence as none had been served or filed previously. The court ruled that the defence would not be allowed to produce any documents prompting the adjournment of this hearing. When the hearing of the suit resumed, the court was informed that the 1st Defendant had passed on and had been substituted with her younger brother, Kenneth Gatiba Mwangi. It had also been agreed between the parties that the defence could produce their documents in evidence.

DW2, Kenneth Gatiba Mwangi, testified that the 1st Defendant was his elder sister who passed on in the year 2006 and that he had obtained letters of administration allowing him to continue in this suit in **Succession Cause No. 742 of 2007**. He confirmed that his late sister was issued with a Certificate of Lease over the suit premises. He produced an Allotment Certificate for the suit premises which was transferred from one Mr. Isaac Githuthu to his late sister. He confirmed that the first entry thereon was dated 26th October 1983 and bore Receipt No. 23 for Kshs. 10,000/-. He stated further that the second entry was dated 19th June 1990 and bore Receipt No. 4749 for Kshs. 20,000/- while the third entry was transfer Receipt No. 11722. He produced these receipts to the court in evidence. He testified that while the Plaintiff's claim arose in the year 1989, his late sister's claim arose even earlier being the year 1983. He further testified that his late sister's Certificate of Lease was issued on 25th March 1998 which was prior to the date when the Plaintiff alleges to have been evicted out of the suit premises. He further testified that though the Plaintiff alleges that his materials were destroyed by his late sister, no inventory or OB number was produced to show the property destroyed. He further testified that the Plaintiff did not move the court to obtain injunctive orders against his late sister and that it was in fact his late sister who did so in **CMCC No. 647 of 1998**. He stated further that he accompanied his late sister to the suit premises in early 1998 and that it was vacant at that time. He further testified that when his late sister brought building materials to the suit premises, the Plaintiff accosted her, claiming ownership thereof on the basis of some documents. He further stated that when his late sister bought the suit premises, there was no restriction, caveat or encumbrance on the suit premises. He stated further that though the Plaintiff alleges that his late sister obtained her Certificate of Lease through fraud, he did not particularize the fraud that she was guilty of in the Plaintiff. He added that there are no special damages claimed in the Plaintiff either. He further testified that at the time of her death, his late sister has developed the suit premises substantially with two structures, one a complete 3 bedroomed house in which her children reside and another house which stalled after she died. He further added that the 2nd Defendant offered to refund the Plaintiff the monies he had paid to it or offer him an alternative plot. During cross-examination, he confirmed that his late sister purchased the suit premises from one Isaac Samson Githuthu who in turn purchased it from one Lewis Ndirangu Kibue. He stated further that the said Lewis Ndirangu Kibue bought the suit premises on 25th October 1983 by payment of a deposit of Kshs. 10,000/- at which time the purchase price of the suit premises was Kshs. 35,000/-. He stated further that the balance of Kshs. 25,000/- was paid by the said Lewis Ndirangu Kibue on 19th June 1990 after which an Allotment Advice was issued to him. He further confirmed that according to the documents produced by the Plaintiff, by Allotment Advice dated 12th April 1989, the Plaintiff had been allotted the suit premises upon payment of the entire purchase price of Kshs. 50,000/- and that by this date, the said Lewis Ndirangu Kibue had not paid the balance of Kshs. 25,000/- for the suit premises. He confirmed that he had not produced any Allotment Certificate for the said Lewis Ndirangu Kibue and Isaac Samson Githuthu.

ISSUES FOR DETERMINATION

The following are the issues arising herein for my determination:

1. Whether the 1st Defendant's Certificate of Lease over the suit premises should be cancelled on the ground that it was fraudulently obtained.
2. Whether this court should order specific performance of the Allotment Agreement and transfer of the suit premises to the Plaintiff.
3. Whether the Defendants should be restrained from interfering with the suit premises.
4. Whether the Defendants should be condemned to pay the Plaintiff general damages for breach of contract.
5. Who should pay the costs of this suit.

DETERMINATION

1. Whether the 1st Defendant's Certificate of Lease over the suit premises should be cancelled on the ground that it was fraudulently obtained.

The Plaintiff alleges that the 1st Defendant obtained her Certificate of Lease through fraud. The law on this issue is to be found in section 26(1) of the **Land Registration Act** which provides as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer ... 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 , ... 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.”**

It is admitted by all the parties to this suit that the 1st Defendant, the late Catherine Wambui Gatama, was the registered proprietor of the suit premises as she held a Certificate of Lease over the suit premises. The Plaintiff has, however, asserted that the 1st Defendant acquired that Certificate of Lease through fraud. However, the Plaintiff did not plead any particulars of fraud against the 1st Defendant in his Pleint. The Plaintiff only pleaded particulars of fraud against the 2nd Defendant as noted above. It is trite law that a party is precluded from alleging fraud unless he has set out the particulars of fraud in his Pleint. In addition, according to the provision of law cited above, if a party alleges fraud, he must prove that the party against whom he alleges fraud was party to the said fraud. As far as I can tell, even if the 1st Defendant were proved to have obtained the Certificate of Lease by way of fraud, which has not been done, the Plaintiff has not given any evidence whatsoever to show that the 1st Defendant was a party to such fraud. In the circumstances, this court is duty bound to find that the Certificate of Lease held by the 1st Defendant over the suit premises is valid and should not be cancelled at all.

2. Whether this court should order specific performance of the Allotment Agreement and transfer of the suit premises to the Plaintiff.

After careful consideration of this matter, I have noted that the genesis of the dispute over the suit premises between the Plaintiff and the 1st Defendant was a case of double allocation by the 2nd Defendant. The evidence produced in this court points to the fact that the 2nd Defendant allocated the suit premises to one Lewis Ndirangu Kibue way back on 25th October 1983 after receiving a deposit of Kshs. 10,000/- at which time the purchase price of the suit premises was Kshs. 35,000/-. However, even before the said Lewis Ndirangu Kibue completed payment of the balance of the said purchase price, the 2nd Defendant proceeded to allocate the same parcel of land to the Plaintiff on 12th April 1989 after receiving from him Kshs. 50,000/- which was the entire purchase price of the suit premises at that time and then proceeded to receive the balance of Kshs. 25,000/- from the said Lewis Ndirangu Kibue later on 19th June 1990. This double allocation appears to have remained undiscovered and the said Lewis Ndirangu Kibue

transferred the suit premises to one Isaac Samson Githuthu who later transferred it to the 1st Defendant. It has been proved that the 1st Defendant was able to obtain a Certificate of Lease for the suit premises. It is only when the 1st Defendant moved to develop the suit premises that the double allocation of the suit premises became apparent.

Who can be blamed for this double allocation? I would say that the party responsible for this dispute really is the 2nd Defendant and they seem to have conceded to this by offering the Plaintiff a refund all the monies he paid to them or an alternative plot of land in the same area. The Plaintiff did not perfect his claim over the suit property by obtaining a title document. For the purpose of this suit, the 1st Defendant's claim over the suit premises therefore remains superior to that of the Plaintiff for the reason explained earlier which is that she holds a valid Certificate of Lease over the suit premises. In the circumstances, I decline to order specific performance of the arrangement between the Plaintiff and the 2nd Defendant.

3. Whether the Defendants should be restrained from interfering with the suit premises.

In light of my findings above, as the duly registered proprietor of the suit premises, the 1st Defendant is entitled to exercise all the ownership rights over it and one of those rights is the right to possess and occupy the suit premises. It follows therefore, that this court cannot issue an order restraining the personal representatives of the 1st Defendant from using the suit premises.

4. Whether the Defendants should be condemned to pay the Plaintiff general damages for breach of contract.

It is trite law that general damages cannot be awarded for breach of contract.

In light of the foregoing, this suit is hereby dismissed. Each party shall bear their own costs.

DELIVERED AND SIGNED AT NAIROBI THIS 3RD DAY OF JULY 2015.

MARY M. GITUMBI

JUDGE