



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 19 OF 2014

CHARLES NDWIGA IRERI.....PLAINTIFF

VERSUS

THE HON THE ATTORNEY GENERAL.....1ST DEFENDANT

EMBU COUNTY GOVERNMENT.....2ND DEFENDANT

FRANCIS KARANJA MAINA.....3RD DEFENDANT

JACOB NGEI NTHINI.....4TH DEFENDANT

HELLEN WAIYUGO NJUE.....5TH DEFENDANT

HARRISON NJUE NJERU.....6TH DEFENDANT

JUDGEMENT

1. By a plaint dated 6th July 2012 and amended on 5th February 2015 the Plaintiff sought the following reliefs against the Defendants;

a. That the Defendants by themselves, their servants/or agents be restrained by temporary order of this honourable court from alienating, allotting, allocating, trespassing, charging, sub-dividing, approving plans for development or developing or allowing occupation or development or developing or interfering in any manner with title or land LR 1112/1511 and LR 1112/1512 till this case is heard and disposed of.

b. This honourable court do declare title or any dealing, transfer, charge, mortgage, alienation and development of title No. LR 1112/1206, LR 1112/1511 and LR 1112/1512 Embu Municipality void ab initio.

c. The honourable court do declare the 3rd to 6th Defendants are holding suit land LR 1112/1511 and 1112/1512 in trust for the Plaintiff.

d. That the Defendants by themselves, their servants and/or agents be compelled by mandatory order of this court to transfer parcel No. 1112/1512 and LR 1112/1511 Embu Municipality to Plaintiff failure of which the Deputy Registrar of this honourable court be mandated by this court to transfer suit land LR 1112/1511 and LR 1112/1512 to Plaintiff. In the alternative the Defendants jointly and severally do pay to the Plaintiff Kshs 50 million compensation.

e. General damages.

f. Interest on (d) above.

g. Any other or further order this honourable court may deem fit to issue.

h. Cost of this suit be provided for.

2. The Plaintiff's case was that sometime in 1977 he applied for allocation of a plot to the 2nd Defendant in consequence of which he was allocated plot No. 1112/359 Embu (hereinafter *Plot No. 359*). He further pleaded that he was issued with a letter of allotment by the then Commissioner of Lands but the allotment could not be actualized and the lease processed because the 2nd Defendant allegedly refused to accept payment of the applicable fee.

3. The Plaintiff further pleaded that the Commissioner of Lands and 2nd Defendant later on sub-divided plot No. 359 into 4 portions two of which were allocated to a former mayor, Peter Muriithi Nyaga (hereinafter *Peter*) and his wife, Nancy Wairimu Muriithi (hereinafter *Nancy*). It was pleaded that Peter was allocated plot No. 1112/1205 (hereinafter *parcel No. 1205*) whereas Nancy was allocated plot No. 1112/1206 (hereinafter *parcel No. 1206*). The other two plots were apparently allocated to third parties who were not joined in the proceedings.
4. The Plaintiff contended that he lost the said plot No. 359 as a result of fraud and impunity on the part of the Commissioner of Lands and the 2nd Defendant. He pleaded and enumerated nine (9) particulars of alleged fraud and impunity against them in paragraph 22 of the amended plaint.
5. The Plaintiff also contended that he had obtained a decree or order in his favour in *Embu High Court Civil Case No. 148 of 2010 (O.S)* requiring the Commissioner of Lands to register plot No. 1206 in his name but the Commissioner of Lands allegedly refused to comply since that parcel had already been sub-divided and the relevant register closed.
6. It was the Plaintiff's further case that parcel No. 1206 was sub-divided by Nancy into parcel Nos. 1112/1511 (hereinafter *parcel No. 1511*) and parcel No. 1112/1512 (hereinafter *parcel No. 1512*). According to him, parcel No. 1511 was ultimately sold and transferred to the 3rd and 4th Defendants whereas parcel No. 1512 was sold to the 5th and 6th Defendants.
7. The 1st Defendant filed a statement of defence dated 27th July 2012 in which he made a general denial of all the allegations contained in the plaint and put the Plaintiff to strict proof thereof. The only positive defence was to the effect that the suit offended the provisions of the **Government Proceedings Act (Cap 40)**.
8. The 2nd Defendant similarly denied the Plaintiff's claim in its entirety. It was denied that parcel No. 1206 was ever grabbed. It was further denied that the Plaintiff was ever allocated plot No. 359. It was contended that the Plaintiff's request for allocation was actually turned down vide committee minute No. 96/1977.
9. The 3rd and 4th Defendants denied the Plaintiff's claim in its entirety. They denied having bought parcel No. 1511 from Nancy. They pleaded that they bought it from Mugwe Self Help Group. They pleaded that they were *bona-fide* purchasers for value and that the instant suit was bought in bad faith.
10. The 5th and 6th Defendants also denied the Plaintiff's suit in its entirety. They pleaded in their defence dated 27th September 2012 that they were *bona-fide* purchasers for value of parcel No. 1512 without notice of any adverse claims against it. They further pleaded that the Plaintiff's suit was statute-barred. They also stated that they were not aware of the alleged allotment of plot No. 359 to the Plaintiff and that they were not holding parcel No. 1512 in trust for the Plaintiff.
11. The 5th and 6th Defendants contended that they were never served with court process in *Embu High Court Civil Case No. 148 of 2010 (OS)* which concerned parcel No. 1206 hence they had no opportunity to respond to the allegations in that suit.
12. At the trial hereof, the Plaintiff called two witnesses and closed his case. The Plaintiff testified as PW 1 and reiterated his case as stated in the amended plaint. He adopted his witness statement dated 7th July 2012 and his further witness statement dated 3rd April 2017 as his sworn testimony. During cross-examination by Mr. Momanyi the advocate for the 3rd and 4th Defendants, the Plaintiff conceded that he was a councillor at the defunct Municipal Council of Embu at the time of allocation. He also stated that he did not comply with the conditions contained in the letter of allotment dated 5th January 1997 since the 2nd Defendant had refused to accept payment.
13. The Plaintiff's second witness was Polly Gitimu who testified as PW 2. She introduced herself as a Senior Deputy Director of Surveys. She produced a copy of a Registry Index Map (RIM) which indicated the initial location of plot 359. She conceded that the copy she produced was not from her office or Survey of Kenya but that she obtained it from Mr. P.N. Mugo the advocate on record for the Plaintiff. She sought to demonstrate that plot No. 359 was sub-divided into parcel Nos. 1203 – 1206 around 1995.
14. The 1st Defendant called Lucy Gitari, the Land Registrar Embu, who testified as DW 1. She stated that according to their records parcel No. 1206 was allocated to Nancy and that it was not derived from parcel No. 359. It was her case that the title document for parcel 1206 was surrendered for the purpose of sub-division only and not absolutely.
15. The 3rd and 4th Defendants testified on their own behalf. They adopted their witness statements dated 3rd December 2014 and 1st December 2014 respectively as their sworn testimony. It was their evidence that they bought parcel No. 1511 from Mugwe Self Help Group for a consideration of Kshs 9 million. There was no encumbrance registered against the parcel at the time of purchase.
16. The 6th Defendant testified on his own behalf and on behalf of the 5th Defendant who was his wife and co-proprietor of parcel No. 1512. He testified that the said property was bought from Nancy at a consideration of Kshs 400,000/-. He stated that he purchased the suit property after conducting a search on ownership and ascertaining that the title was clean and without any encumbrances. It was denied that the 5th and 6th Defendants were holding the suit property in trust for the Plaintiff.
17. The 2nd Defendant did not adduce any evidence at the trial. Mr. Njagi who was representing them, informed the court that his witnesses were not present. He, therefore, sought to rely on the affidavits filed earlier on behalf of the 2nd Defendant during the hearing of an interlocutory application for injunction.
18. Upon conclusion of the hearing, the Plaintiff was directed to file and serve his written submissions within 30 days whereas the

Defendants were granted 30 days upon service to file and serve their respective submissions. The record shows that the Plaintiff filed his submissions on 24th August 2018 whereas the 3rd and 4th Defendants filed theirs on 14th November 2018. The 2nd Defendant filed its submissions on 8th January 2019. There is no indication of the 1st, 5th and 6th Defendants having filed any submissions.

19. The court has noted that the parties herein did not file an agreed statement of issues for determination. The record shows that the Plaintiff filed his own version of seventeen (17) issues whereas the 3rd and 4th Defendants filed a statement of six (6) issues. There is no indication on record of any issues having been filed by the rest of the Defendants. The court shall, therefore, proceed to frame the issues for determination on the basis of **Order 15 Rule 2 of the Civil Procedure Rules**.

20. The court has considered the pleadings, documents and evidence on record in this suit. The court is of the opinion that the following issues arise for determination in this suit;

- a. Whether the Plaintiff was allocated plot No. 359.
- b. Whether the 1st and 2nd Defendants fraudulently deprived the Plaintiff of plot No. 359.
- c. Whether or not the 3rd – 6th Defendants obtained valid titles to parcel Nos 1511 and 1512.
- d. Whether the titles held by the 3rd – 6th Defendants are null and void and liable to be cancelled under the law.
- e. Whether the Plaintiff's suit is statute-barred under the law.
- f. Whether the Plaintiff is entitled to the reliefs sought in the amended plaint.
- g. Who shall bear the costs of the suit.

21. The court has considered the entire evidence on record on the 1st issue. There is contradictory evidence on record on whether or not the Plaintiff's application for allocation of plot No. 359 was actually granted by the 2nd Defendant. The Plaintiff produced a letter of allotment dated 5th January 1997 as exhibit P 4 which purportedly emanated from the Commissioner of Lands. The 3rd and 4th Defendants produced a copy of the minutes of the Town Planning Committee, that is, TPWH 96/77 which indicated that an application by Councillor C.N. Ireri for allocation of plot 359 was declined for the reason that the plot was part of showground land.

22. The Plaintiff also relied upon two letters in support of the allocation. First, he produced a letter dated 16th November 2005 (exhibit P 1) from the Town Clerk of the 2nd Defendant indicating that plot No. 359 was initially allocated to the Plaintiff vide MIN/TPWH/106/76(102) but that a letter of allotment had never been issued to him. The second letter is dated 9th August 1996 from the Provincial Physical Planner, Eastern which stated that the Plaintiff had been allocated plot No. 359 vide Min No. TPWH 96/77 and that no letter of allotment had been issued in respect thereof despite payment of "all fees" the 2nd Defendant had demanded.

23. The contents of those two letters raise serious credibility questions on the Plaintiff's claim. First, why would the first letter claim that the Plaintiff had not been issued with a letter of allotment whereas the Plaintiff had a letter dated 5th January 1997? Second, why would the physical planner claim that the Plaintiff had paid **all** the fees for the allotment whereas it was the Plaintiff's case all along that the 2nd Defendant had refused to accept payment? The court has serious doubts on the credibility of those two letters in support of the Plaintiff's claim of allocation.

24. Although the Plaintiff relied upon Min No. TPWH 96/77 as the basis for his allocation, he did not produce an extract of the said minute. The only version of that minute which was produced by the 3rd and 4th Defendants indicates that the Plaintiff's request for allocation of plot 359 was denied. In those circumstances, the court is not satisfied that the Plaintiff has demonstrated that there was only allocation to him by virtue of that minute.

25. The court has also considered the replying affidavit sworn by Silas K. Mburugu on 18th December 2012 and filed on 19th December 2012. He described himself as a Principal Land Administration Officer at the Ministry of Lands. He expressed serious doubts on the Plaintiff's letter of allotment in paragraph 12 of the affidavit as follows:

“THAT having looked at the Applicant's annexure marked CNI 1 the letter of allotment would not have an earlier reference 3360/III and be issued on 5th January 1997 almost two years later.”

26. Even if the court was inclined to hold that, indeed, the Commissioner of Lands had allocated parcel No. 359 to the Plaintiff vide the letter dated 5th January 1997, that allocation would not stand in view of non-compliance with the conditions of allotment contained therein. The 1st condition required a written acceptance of the offer together with a banker's cheque for the amount of Kshs 28,390/- within 30 days. There is no evidence on record of an acceptance and payment within that period or at all. The excuse for non-payment given by the Plaintiff was not plausible at all. The alleged refusal by the 2nd Defendant to accept payment is not a legitimate excuse because the letter of allotment was issued by the Commissioner of Lands. The letter did not require payment of the allotment fee as Kshs 28,290/- to be made to the local authority. There is no evidence that the Plaintiff ever sought and obtained an extension from the Commissioner of Lands of the time stipulated in the letter of allotment. In the circumstances, the court is of the opinion that the offer lapsed within the meaning of the special condition which provided that;

“If acceptance and payment respectively are not received within the said thirty (30) days from the date hereof, the offer contained herein will be considered to have lapsed.”

27. The 2nd issue is whether the 1st and 2nd Defendants fraudulently deprived the Plaintiff of plot No. 359. The court has considered the evidence on record and the respective submissions of the parties. Although the Plaintiff enumerated 9 particulars of alleged fraud and illegality against the Commissioner of Lands and the 2nd Plaintiff, the court is of the view that no fraud was proved against them. As was held in the case of **R.G. Patel Vs Lalji Makanji [1957] EA 314** allegations of fraud are serious allegations. They must be proved on a degree higher than a balance of probabilities but not as high as beyond reasonable doubt.

28. In the case of **Evans Otieno Nyakwana Vs Cleophas Bwana Ongaro [2015] eKLR** Majanja J held, *inter alia*, that;

“In this case, it is the Respondent who filed the defence and counterclaim and alleged that the document relied upon by the Plaintiff was a forgery. It was therefore incumbent upon him to prove this fact by marshalling the necessary evidence to support his case. The burden of proof to prove fraud lay upon the Respondent. As regards the standard of proof, I would do no better than quote Central Bank of Kenya Ltd Vs Trust Bank Ltd and 4 Others Nai Civil Appeal No. 215 of 1996 (UR) where the Court of Appeal, in considering the standard of proof required where fraud is alleged, stated that;

“The Appellant has made vague and very general allegations of fraud against the Respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of *prima facie* proof was much heavier on the Appellant in this case than in an ordinary civil case”.

29. The court is far from satisfied that the Plaintiff has demonstrated any fraud on the part of the Commissioner of Lands and the 2nd Defendant. The alleged fraud was mainly hinged on the Plaintiff’s alleged allocation of plot No. 359. As the court has already held on the 1st issue, the Plaintiff did not demonstrate a valid allocation of plot No. 359.

30. The 3rd issue is whether or not the 3rd – 6th Defendants obtained valid titles to parcel Nos 1511 and 1512. Although the Plaintiff contended and submitted that those titles were null and void *ab initio*, the evidence on record does not support such a view. The evidence on record demonstrates that the 3rd – 6th Defendants were purchasers for value. At the time of purchase, there were no encumbrances against the respective titles to alert any potential buyer of a claim or interest by any other person. There was no evidence tendered at the trial to indicate that the Defendants had either actual or constructive notice of the Plaintiff’s claim. In the circumstances, the court finds that the 3rd – 6th Defendants obtained good title to their respective parcels.

31. The 4th issue is whether or not the titles held by the 3rd – 6th Defendants are liable to be cancelled. This issue is closely intertwined with the 3rd issue but may be decided separately. It was contended by the Plaintiff that the titles were null and void *ab initio* on account of alleged fraud and impunity on the part of the Commissioner of Lands, the 2nd Defendant and Peter. The court notes that Peter and Nancy were not made parties to this suit. Their actions and deeds cannot, therefore, be brought into question in these proceedings without according them an opportunity of being heard.

32. The court has considered the provisions of **section 26 of the Land Registration Act 2012** on the impeachment of title. The section provides as follows;

(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.

33. It is clear that under **section 26 (1) (a)** a registered proprietor must be shown to have been privy to any fraud or misrepresentation in order for his title to be successfully impeached. In fact, no fraud was pleaded against the 3rd – 6th Defendants in the amended plaint at all. The Plaintiff has not demonstrated any illegality, irregularity or corrupt scheme under **section 26 (1) (b) of the said Act** in order to justify cancellation of title. In the circumstances, the court finds no basis for impeaching the respective titles held by the 3rd – 6th Defendants.

34. The 5th issue is whether the Plaintiff’s suit is statute barred on account of the period of limitation. This issue was raised by the 5th – 6th Defendants in their statement of defence. The 3rd and 4th Defendants had earlier on raised it as a preliminary objection but were overruled by the court vide a ruling dated 12th February 2014. The court was of the view that the plea of limitation could not apply to a claim based on trust and that the elements of trust or breach of trust could only be established at the trial of the action. The court did not make a finding with respect to the reliefs sought other than trust.

35. There is no dispute that the Plaintiff’s claim is based upon an allocation allegedly made in either 1977 or 1997. There is no dispute that parcel Nos. 1205 and 1206 were created and allocated to Peter and Nancy in 1995 or thereabouts. The Plaintiff’s cause of action could, therefore, at the latest have arisen around 1995. It is common ground that the instant suit was filed in 2012 that is, about seventeen (17) years after alienation of parcel Nos 1205 and 1206.

36. The court is of the opinion that the provisions of the **Public Authorities Limitation Act (Cap 39)** applies with respect to the 1st and 2nd Defendants whereas the **Limitation of Actions Act (Cap 22)** applies to the rest of the Defendants. **Section 3 of the Public Authorities Limitation Act** provides that;

“(1) No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued.

(2) No proceedings founded on contract shall be brought against the Government or local authority after the end of three years from the date on which the cause of action accrued.”

37. The court has noted that the Plaintiff’s claim is based on both tort and alleged breach of contract. Either way, the longest period which was available to the Plaintiff was three (3) years from the date of the accrual of the cause of action. The court is satisfied that the suit against the 1st and 2nd Defendants is thus statute-barred.

38. On the other hand, the **Limitation of Actions Act (Cap 22)** stipulates a statutory limitation period of 12 years for an action for recovery of land. The provisions of **section 7** state as follows;

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

39. **Section 4 of the Limitation of Action Act** stipulates limitation periods for various actions as follows;

(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued—

(a) actions founded on contract;

(b) actions to enforce a recognizance;

(c) actions to enforce an award;

(d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;

(e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.

(2) An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:

Provided that an action for libel or slander may not be brought after the end of twelve months from such date.

40. Whether one looks at the Plaintiff’s suit as an action based on contract, tort, equity or an action for recovery of land the suit is clearly statute-barred under the Limitation of Actions Act and was so barred at the commencement of the suit. There is no evidence on record to demonstrate that the Plaintiff was under any disability at all material times before institution of the suit. There is no material on record to demonstrate that the Plaintiff’s claim falls within the exceptions provided for under part III of the Act. The allegation of trust was not proved at the trial either hence it cannot aid the Plaintiff.

41. The 6th issue is whether the Plaintiff is entitled to the reliefs sought in the plaint or any one of them. The court has already found that the Plaintiff has failed to prove his case to the required standard. It would, therefore, follow that the Plaintiff is not entitled to the reliefs sought in the amended plaint or any one of them.

42. The 7th and final issue is on costs of the suit. Although costs of an action are at the discretion of the court, the general rule is that costs shall follow the event. See **section 27 of the Civil Procedure Act (Cap 21)**. As such, a successful litigant should be awarded costs of the suit unless, for good reason, the court directs otherwise. See **Hussein Janmohamed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. There is no good reason why the successful litigants in this suit should not be awarded the costs.

43. The following is the court’s summary of findings on the issues for determination;

a. The Plaintiff has failed to demonstrate that he had a valid allocation of plot No. 359.

b. The Plaintiff has failed to demonstrate that the 1st and 2nd Defendants fraudulently deprived him of plot No. 359.

c. The 3rd – 6th Defendants obtained valid titles to parcel Nos 1511 and 1512 by virtue of being *bona fide* purchasers for value without notice.

d. The Plaintiff has failed to demonstrate any legal grounds to justify cancellation or nullification of the titles held by the 3rd – 6th Defendants.

e. The Plaintiff's suit is, any event, statute-barred under both the **Limitation of Actions Act (Cap 22)** and the **Public Authorities Limitation Act (Cap 39)**.

f. The Plaintiff is not entitled to the reliefs sought in the amended plaint or any one of them.

g. The Plaintiff shall bear the Defendants' costs of the suit.

44. The upshot of the foregoing is that the court finds no merit in the Plaintiff's suit and the same is consequently dismissed with costs to the Defendants.

45. It is so decided.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **31st** day of **JANUARY, 2019**.

In the presence of Mr P.N. Mugo for the Plaintiff and Mr. Momanyi for the 3rd and 4th Defendants and holding brief for Mr. Wagara for the 5th and 6th Defendants and in the absence of the 1st and 2nd Defendants.

Court clerk Mr Muinde.

Y.M. ANGIMA

JUDGE

31.01.19