



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CIVIL SUIT NO. 520 OF 2007

SAMUEL KIGATHI GACHARA.....PLAINTIFF

VERSUS

CHARLES WANDUTO KIHORO.....1ST DEFENDANT

CHARLES GATHEE MUHORO.....2ND DEFENDANT

THE HON. ATTORNEY GENERAL.....3RD DEFENDANT

JUDGEMENT

1. This dispute relates to the double allocation of the plot known as Jamhuri Phase II plot Number 29 which was subsequently registered as Nairobi/Block 63/597 (“the Suit Property”). Both the Plaintiff and the 1st Defendant claim that the Suit Property was allocated to them by the Nairobi City Council in 1992.

2. In the Further Amended Plaint filed in court on 13/8/2014, the Plaintiff claims that he was allocated the Suit Property vide a letter of allotment dated 14/2/1992 by the defunct Nairobi City Commission. He paid the requisite dues at City Hall and is up to date with the other outgoings. He claims he paid legal fees and other disbursements to the City Council of Nairobi’s appointed advocates in 2002 so that they could process a lease in his name. He claims that he was shown the plot and took vacant possession. He further claims that the Defendants trespassed onto the plot in 8/2/2002 and started erecting structures on it. He avers that the 1st Defendant fraudulently obtained a fictitious letter of allotment which he used to process a lease over the Suit Property which he then transferred to the 2nd Defendant. Some of the facts in relation to the Defendants’ acquisition of the Suit Property which he challenged include that the 1st Defendant obtained a fictitious or forged letter of allotment backdated to 2/4/1992; that the lease was signed and witnessed on 4/2/2002 which was on a Sunday, and that the lease was transferred to the 2nd Defendant on the same day it was issued in a deceitful manner. He averred that the 1st Defendant’s ownership of the Suit Property was tainted with illegality and that the 1st Defendant did not have a title which he could pass to the 2nd Defendant.

3. The Plaintiff seeks a declaration that he is the lawful owner of plot number 29 at Jamhuri Estate Phase II which was subsequently registered as Nairobi/Block 63/597. He seeks a permanent injunction to restrain the Defendants from dealing with the Suit Property and interfering with his enjoyment of the plot. He also seeks an order directing the Chief Land Registrar to rectify the register by cancelling all entries made in the register in relation to the lease registered in the name of the 1st or 2nd Defendants over the Suit Property and seeks an order to have the register rectified and a certificate of lease issued to him.

4. The 1st Defendant did not file a response to the amendments made by the Plaintiff to the plaint. What he has on record is a defence filed on 17/9/2010 entitled “2nd Defendant’s Defence” in which he denied the Plaintiff’s claim and maintained that the Suit Property was duly registered in his name at all material times. He also contended that he was a *bona fide* purchaser for value without notice.

5. The 2nd Defendant filed his amended defence on 6/12/2017 in response to the Plaintiff’s further amended plaint. He stated that he is a stranger to the legality of the Plaintiff’s letter of allotment. He averred that the Suit Property was transferred to him on or about 13/12/2001 and that he has been paying land rates for it from that time. He averred that he took possession of the Suit Property once the sale by the 1st Defendant was complete and that he has legal, beneficial and physical ownership of the Suit Property, which he claims has been continued and uninterrupted from 13/12/2001 to date. He claimed he was the *bona fide* purchaser of the Suit Property for value without any notice of fraud or other impropriety. He further claimed that if there was any fraud as the Plaintiff alleges, he was not a party to it and is protected by the law.

6. The 2nd Defendant denied that the transfer of the Suit Property to him was tainted with illegality. He admitted that Mary Ngethe Ngechi Advocate acted for both the 1st and 2nd Defendants in the sale and transfer of the Suit Property and that he conducted due diligence prior to remitting the purchase price in exchange for the completion documents. The 2nd Defendant argued that he has an indefeasible title to the Suit

Property and is the absolute owner with all the rights and privileges. He also took issue with the Plaintiff's prayers seeking to compel the Chief Land Registrar who is not a party to this suit to take action against the 2nd Defendant's ownership rights. The 3rd Defendant was added to the proceedings after the Plaintiff amended the plaint.

7. The Plaintiff gave evidence. He stated that he was allocated the Suit Property which was then known as Jamhuri Estate Phase II by the Nairobi City Commission in 1992. He met the conditions set out in the letter of allotment a copy of which he produced dated 14/2/1992. It required him to pay Kshs. 10,800/= on account of stand premium and rent. He produced a copy of his letter dated 24/2/1992 vide which he accepted the offer of the plot. He also produced a copy of the receipt the Nairobi City Commission issued to him on 24/2/1992 on payment of Kshs. 10,800/=. He claimed that around 2002 he went to City Hall to request to have the plot transferred to him. He was referred to the advocates who had been appointed by the Nairobi City Council to prepare the lease having been shown the plot and taken vacant possession. It was his evidence that the Defendant encroached onto the suit land and started constructing on it around 2002.

8. He claimed that the 1st Defendant used a fictitious letter of allotment to obtain a lease which he purported to transfer to the 2nd Defendant. He stated that it was rather unusual for the 1st Defendant to have transferred the lease to the 2nd Defendant the very same day that he obtained it. He took issue with the fact that the lease was witnessed on 4/2/2001 by Mary Ng'ethe who was the City Council Advocate yet he knew being a former Council employee, that Council offices were not open on Sundays. He explained that logically it should have taken at least one week to have a lease issued by the City Council registered and thereafter transferred.

9. He maintained that the City Council records still reflect his name as the owner of the Suit Property including the main register at the cash office and the records held by the Director of Planning. He produced a copy of the receipt issued by Mbesa and Kitur on 14/1/2002 on payment of legal fees and disbursements for plot number 29, Jamhuri Phase II together with a copy of the letter from this firm of advocates dated 13/2/2002 confirming they had prepared the lease in respect of his plot number 29 (Nairobi Block 63/579) in Jamhuri Phase II and forwarded it to Nairobi City Council for execution. He also produced a copy of the letter dated 20/2/2002 addressed to M. N. Ngethe Advocates by his advocates informing them that there was a dispute in court over the Suit Property. The letter stated that the Plaintiff was the true owner of the Suit Property and had paid all the dues to City Hall, and that the advocates had information that M. N. Ngethe was in the process of transferring the Suit Property from Charles W. Kihoro to a Mr. Muhoro. The letter went further to state as follows "let him not be heard later claiming to be a purchaser without notice."

10. The Plaintiff also produced copies of receipts showing that he paid rates for plot number 29 Jamhuri Phase II to the City Council of Nairobi on 19/3/2010. He produced a copy of the demand from the Nairobi City Council addressed to him notifying him that he was in arrears of Kshs. 1800 per annum on account of ground rent from 1996 to 2001. He produced copies of the receipts confirming he had paid Kshs. 7200/= to the Nairobi City Council on 16/5/2001 and Kshs. 3600/= on 18/1/2002 on account of ground rent. He also paid Kshs. 1800 on 8/2/2002.

11. The Plaintiff also relied on the affidavit of Zipporah M. Wandera sworn and filed in **HCCC No. 239 of 2002 in which she** deponed that she worked for the Nairobi City Council for a long time as Town Clerk and was the Secretary when it was a Commission. She stated that in 1992 the Nairobi City Council existed as Nairobi City Commission and letters of allotment issued then bore the letterhead of Nairobi City Commission. She stated that she had been shown the letter allotment dated 2/4/1992 purportedly issued to 1st Defendant and purportedly signed by her. She denied that the signature appearing on that letter was hers and also denied signing the letter. She went further to state that in 1992 she had not been awarded the Silver Star Medal and she could not have included the letters S. S against her name while signing the letter. She denied that the letter emanated from her office when she was the Town Clerk and Secretary to the Commission.

12. The Plaintiff stated that he could not get a lease registered in his name since a title had already been issued to the 1st Defendant even though the documents at the City Council were still reflecting his name as the allottee of the Suit Property. When he did a search it showed that the 2nd Defendant had been registered as the owner of the Suit Property from 13/12/2001. He stated that when he initially filed this suit he was granted an injunction and was not aware that it had been quashed. A different advocate represented him at that time. He placed a caution against the Suit Property on 18/2/2002.

13. He urged the court to grant the orders sought in the suit arguing that the documents the Defendants relied on showed that the 1st Defendant made payment 10 years after being issued with a letter of allotment. He also took issue with the fact the 1st Defendant's lease was registered on 13/12/2001 yet payment of the stamp duty was made on 8/2/2002. Ms. M. Ngethe who signed the lease was an employee of the Nairobi City Council. He also took issue with the receipt issued by the Nairobi City Council to the 1st Defendant dated 8/2/2002 which was filled by hand and had the date 4/8/2001 inserted by hand at the bottom of the receipt acknowledging payment of Kshs. 10,800/=. The payment is indicated as being for stand premium and annual rent in the sums of Kshs. 9,000/- and 1,800/= respectively. This payment was made pursuant to the undated letter from Nairobi City Council, Town Clerk's Department authorising the Chief Revenue Officer to accept payment from the 1st Defendant of Kshs. 10,800 for plot number 29 Jamhuri Estate pursuant to the letter of allotment reference number CPXARCH 000903 dated 10/2/1992. The Plaintiff stated that the plot number in the receipt issued to the 1st Defendant had been altered to read number 29. He reiterated that transfers would usually be registered when there was a rates clearance certificate yet the Defendants had not produced any rates clearance certificate.

14. He pointed out that the lease in favour of the 1st Defendant was registered at the Lands Office on 13/12/2001. The transfer to the 2nd Defendant was also registered on the same day and a certificate of lease issued to the 2nd Defendant on 13/12/2001. The Plaintiff explained that plots were located to senior Council officers and that at that time the Jamhuri area was not developed. The Council took sometime before doing the sewerage system and building roads in that area which explains why he took long to process the lease over his plot. He stated that he continued to pay land rates up to May 2017 but did not have the receipts in court. The property is reflected as number 29 Jamhuri Phase II at the Council's cash office while in the office of the Director of City Planning it appears as Nairobi Block 63/597.

15. The Plaintiff called Peter Ndungu Wanyoike, a surveyor with the Nairobi City County to give evidence. Peter who had worked for the Nairobi City Council from 1992, stated that the Suit Property was allotted by the Nairobi City Commission in 1992 when the City Council was not functional. He stated that according to the register held at the City Council, plot number 29 Jamhuri Phase II was allocated to the

Plaintiff. He stated that the original register was taken by the Kenya Anti-Corruption Authority and had not been returned to the City Council. He took the court through the process followed in allocation of plots up to the point when a plot is given a land reference number, which in this case was Nairobi Block 63/597.

16. He stated that when a party wished to transfer a plot, he was required to pay rates and obtain a rates clearance certificate from the Council. If a title had not been issued, then the person was required to pay ground rent. He confirmed that the City Council would issue a voucher reflecting the amount to be paid as ground rent which is run through a machine by the receiving officer when payment is made and reflects the date of payment. He stated that once a party is allocated land, he has to comply with the conditions of the allocation by paying the fees stated in the letter of allotment after which a survey would be done and the land given a parcel number. That is what City Council would use to prepare leases to be registered in the Lands Office. He confirmed that there was a delay in people occupying the plots in Jamhuri because the plots were not serviced. He also stated that where there was double allocation of a plot, the register ought to have reflected that the plot was allocated to two people. He stated that he had looked at the list of allottees of plots in Jamhuri in the Council's revenue office where payments for ground rent were made as well as the register and they both confirmed that the suit plot was allocated to the Plaintiff.

17. The 1st Defendant gave evidence. He stated that he was issued a letter of allotment by the Nairobi City Council for Plot number 29 Jamhuri Phase II on 2/4/1992 and a lease over the same land on 13/12/2001 after he had paid the necessary fees and rates. He pursued the certificate of lease at the Lands Office when he found a buyer who needed a formal transfer at the Lands Office. The transfer of lease was prepared and lodged on the same day it was executed, and a certificate of lease issued to the 2nd Defendant on the same day. He was aware that the 2nd Defendant whom he had given possession had been in occupation of the Suit Property for eighteen years and had erected apartments for rent. On the concerns and reservations expressed about his letter of allotment, transfer documents and the certificate of lease, he argued that those issues should be taken up with the concerned independent authorities since he had no knowledge of the manner in which their letterheads or documentation was prepared. He maintained that being a first registration, his title could not be impeached for any reason. He stated that he processed the certificate of lease after paying the requisite fees and charges at City Hall and Lands Office. He maintained that he had properly transferred the suit land to the 2nd Defendant who had been issued a certificate of lease. He contended that the averments made by Z. Wandera in her affidavit cannot be verified since she is now deceased and in any event there was conflict of interest since she had issued the letter of allotment to the Plaintiff and also acted as the Plaintiff's advocate for purposes of preparing the conveyance documents in favour of the Plaintiff.

18. On cross examination, he conceded that he paid the money stated in the letter of allotment on 4/8/2001 and that the bottom of the receipt showed that payment was received on 8/2/2002. He stated that he was given 30 days to accept the offer of the allocation of the plot and that he had accepted the offer by paying the dues to the Council, which would be ten years later. He further stated that the Council did not notify him that the allotment had lapsed. He was not aware that offers for allotment lapsed. On the transfer being dated 13/12/2001, he stated that he was seeing this for the first time and that he had signed a transfer of lease. He stated that at the time he sold the Suit Property to the 2nd Defendant, the lawyers obtained all necessary documents and that he signed a sale agreement. He maintained that he sold a clean property to the 2nd Defendant and his lawyer did everything to confirm the sale was above board. He did not produce a copy of the sale agreement.

19. The 2nd Defendant gave evidence. He instructed an agent to source for a plot measuring about a quarter an acre in Jamhuri Estate, Nairobi in 2001. The agent identified two plots, that is Nairobi Block 63/597 and Nairobi Block 63/598. The 1st Defendant owned plot number 29 (Nairobi Block 63/597.) They engaged Ms. Mary Ngethe Ngechi of Ngethe & Company Advocates to handle the transaction. She represented both the 1st and 2nd Defendants in the transaction. He met the 1st Defendant in the advocates office and they agreed on the purchase price of Kshs. 300,000/=. A Sale agreement was drafted pursuant to which the 1st Defendant was to supply the completion documents on payment of the deposit of 10% of the purchase price while the balance was to be paid on completion which was within 90 days. One of the terms of the agreement was that the 1st Defendant warranted to the 2nd Defendant that the property was free of any encumbrances and that there were no irregularities with the letter of allotment or other documents over the property. He stated that he could not trace his copy of the sale agreement and the advocate who represented both parties in the transaction was yet to comply with the request to furnish him with a copy of the sale agreement.

20. Shortly thereafter, the advocate prepared a transfer of lease which was executed by both parties and lodged for valuation of stamp duty. The advocate paid the stamp duty out of the funds he had deposited with her and thereafter lodged the documents at the Nairobi Lands Registry for registration. He received a copy of the title over the Suit Property in late December, 2001. He claimed that he obtained approval from the Nairobi City Council Planning Department and proceeded to build two blocks of flats on the Suit Property and Nairobi Block 63/598. He has been diligently paying land rates and maintained that he had had uninterrupted possession of the Suit Property from the date of the transfer to date.

21. He claimed that being a layman on matters related to land, he engaged an advocate to give him guidance and disagreed with the Plaintiff's assertion that he did not pay stamp duty in respect of the transfer of the Suit Property. He produced photographs showing the developments on the Suit Property and plot 598. He claimed that he constructed the building before he knew about this suit. Going by the Plaintiff's advocates' letter dated 20/2/2002 addressed to the 1st and 2nd Defendants' Advocate, M/s M. N. Ngethe Advocates informing them that there was a dispute in court over the Suit Property, the 2nd Defendant was aware of the Plaintiff's claim to the Suit Property way back in 2002. The 2nd Defendant did not lead evidence on when he constructed the rental apartments on the Suit Property. The Plaintiff lodged a caution against the Suit Property on 18/2/2002 claiming to have been allocated the land. The caution was registered in February 2002.

22. Parties filed submissions which the court has read and considered. The main issue for determination is who between the Plaintiff and the 1st Defendant has a superior claim to the Suit Property. The other issue is whether the 1st Defendant passed a good title to the 2nd Defendant.

23. The letter of allotment that the 1st Defendant produced which would form the legal basis for his title is dated 2/4/1992. It required the 1st Defendant to accept the offer and pay Kshs. 10,800/= being stand premium, ground rent, survey and other fees within 30 days of the date of the offer of allotment of plot number 29 Jamhuri Phase II. The receipt he produced shows that he paid this sum on 08/02/02. The transfer of lease between the 1st and 2nd Defendants is dated 13/12/2001. The lease in favour of the 1st Defendant was registered on 13/12/2001. It is not

feasible that the 1st Defendant could have been issued a lease over the Suit Property before he had paid the stand premium and other sums demanded in the letter of allotment dated 2/4/1992. The payment of stand premium and other outgoings was made almost 10 years from the date of the letter of allotment.

24. The Defendants did not produce evidence of payment of stamp duty on the transfer of the suit land, the 2nd Defendant only submitted that he instructed advocates who did due diligence. M.N. Ngethe who was employed by the Nairobi City Council did the conveyance on behalf of both Defendants. It is doubtful that the 1st Defendant's lease could have been registered on the same day as the transfer of lease to the 2nd Defendant on 13/12/2001. The conveyancing practice in place is that one needs to seek and obtain the consent of the lessor, Nairobi City Council to transfer the land and to have a valid rates clearance certificate. The Council's consent to transfer the lease was not produced by the Defendants. The 2nd defendant would also have had to pay stamp duty on the transfer which would have certainly taken more than a day. Search no. 95/2/2002 dated 12/2/2002 showed the 1st Defendant as the proprietor of the Suit Property and that a certificate of lease was issued to him on 13/12/2001, which contradicts the position taken by the 1st and 2nd Defendants that the transfer from the 1st Defendant to the 2nd Defendant was done on 13/12/2001.

25. The 2nd Defendant filed a notice of indemnity as against the 1st Defendant on 6/12/2017 claiming contribution or indemnity from the 1st Defendant on the ground that he was a *bona fide* purchaser for value of the Suit Property and any fraud in the acquisition of the property as the Plaintiff alleges would fall squarely on the 1st Defendant's shoulders. The 2nd Defendant gave particulars of fraud on the part of the 1st Defendant which include contracting to sell the Suit Property and paying the full purchase price of Kshs. 300,000/=, warranting to the 1st Defendant and its advocate that the Suit Property was free from any encumbrances, failure to inform the 2nd Defendant of irregularities in the issuance of the letter of allotment over the Suit Property, failing to inform the 1st Defendant of any adverse claim to the property or threat of litigation over the plot. The 2nd Defendant claimed that he has incurred heavy expenses in defending himself in the instant suit which has exerted emotional and psychological toll on him by disrupting his business on the Suit Property and creating an air of uncertainty. The 2nd Defendant blamed the 1st Defendant for the current state of affairs.

26. The 1st Defendant filed a defence to the 2nd Defendant's notice of indemnity in which he averred that when he sold the suit land to the 2nd Defendant it was free from all encumbrances and that at the time of the sale he held a valid title to the Suit Property which he passed on to the 2nd Defendant upon the sale. The 1st Defendant averred that the 2nd Defendant cannot claim indemnity because he has had possession of the Suit Property for over 16 years and has benefited substantially from the rental income accruing from the development on the suit property. He further contended that the 2nd Defendant cannot apportion blame to him when the matter has not been determined by the court.

27. A Defendant who desires to claim against another party to the suit that he is entitled to contribution or indemnity, may without leave serve a notice on such person making the claim for contribution or indemnity under Rule 24 of the Civil Procedure Rules. The procedure to be adopted in the determination of the claim for indemnity is that applicable to third party claims under Order 1 of the Civil Procedure Rules. In this case, the 2nd Defendant was required by Rule 22 of Order 1 to apply by summons in chambers for directions on the manner in which its claim for indemnity against the 1st Defendant would be tried. If satisfied that there was a proper question to be tried as to the 2nd Defendant's claim for indemnity against the 1st Defendant, the court would have ordered that the question of indemnity as between the 2nd and 1st Defendant be tried in such manner, at or after the trial of the suit.

28. The 2nd Defendant only filed the notice of indemnity as against the 1st Defendant but did not apply for directions on the hearing of the claim for indemnity as against the 1st Defendant. Indemnity is defined by Black's Law Dictionary, 10th edition, as the duty to make good any loss, damage or liability incurred by another. It is also defined as the right of an injured party to claim reimbursement for its loss, damage or liability from a person who has such a duty.

29. The Plaintiff seeks a declaration that he is the lawful owner of the Suit Property and a permanent injunction to restrain the Defendants from dealing with the Suit Property. He also seeks an order directing the Chief Land Registrar to rectify the register by cancelling all entries made in the register and issuance of certificate of lease issued to him in respect of the Suit Property. The 1st Defendant does not deny selling the Suit Property to the 2nd Defendant.

30. Based on his Notice of Indemnity issued against the 1st Defendant, the court can only award the 2nd Defendant the costs it has incurred in defending this suit and the costs the court may find the 2nd Defendant liable to pay. The court finds that the 2nd Defendant is entitled to full indemnity from the 1st Defendant against the Plaintiff's claim as well as the costs of the suit.

31. The Plaintiff has proved his case on a balance of probabilities and the court grants prayers (a), (b), (c) and (d) of the Further Amended Plaintiff dated 13/8/2014 filed in court on the same day. The Plaintiff is awarded the costs of the suit to be borne by the 1st Defendant.

Dated and delivered at Nairobi this 4th day of March 2019.

K. BOR

JUDGE

In the presence of: -

Ms. G. Serem for the Plaintiff

Mr. R. Mutiso for the 1st Defendant

Mr. A. Kamwami holding brief for Mr. Abuya for the 2nd Defendant

Mr. Motari holding brief for Ms. Kerubo for the 3rd Defendant

Mr. V. Owuor- Court Assistant