

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MOMBASA
ELCC NO. 38 OF 2014

NICODEMUS NYAGAKA MARANGA
PLAINTIFF

VERSUS

GRACE GATHONI MWANGI 1ST
DEFENDANT

JAMES KAMAU WACHIRA 2ND
DEFENDANT

LEAH MUTHONI KANUGO 3RD
DEFENDANT

AND

COUNTERCLAIM

JAMS KAMAU WACHIRA 1ST
PLAINTIFF

LEAH MUTHONI KANUGO 2ND
PLAINTIFF

VERSUS

NICODEMUS NYAGAKA MARANGA 1ST
DEFENDANT

GRACE GATHONI MWANGI 2ND
DEFENDANT

JUDGEMENT

1. The plaintiff commenced this suit through the plaint dated 24st February 2014, amended on 26th January 2016, and

further amended on 21st February 2022, averring inter alia that he owned Mombasa/Block 1/1172, suit property, formerly known as Plot 565 Mikindani World Bank Scheme, jointly with the 1st defendant; that though he is the one who bought the suit property, he allowed it to be registered in the name of 1st defendant, who was his girlfriend, on the understanding that she would take care of the suit property on behalf of the children, as he was working abroad; that he later found out through his friend that the 1st defendant had sold the suit property to the 2nd & 3rd defendants, even though she had no authority to do so, without his consent; that the 2nd & 3rd defendants changed the plot number from Plot 565 Mikindani to Mombasa/Block 1/1172 and registered it in their own names; that even though the 2nd & and 3rd defendants knew he was the principal owner of the said property they allowed to have a stranger sign the sale agreement on his behalf; that he wrote a protest letter to the defunct Municipal Council of Mombasa which replied that they would not allow any transfer on the suit property until the ownership of the suit property is resolved. The plaintiff set out the particulars of fraud on the defendants part at

paragraph 12 of the amended plaint, and prayed for the following orders against the defendants jointly or severally:

- a. *A declaration that the sale agreement purportedly signed by the 1st defendant alone disposing Plot 565 Mikindani, now Plot No. Mombasa/Block 1/1172, is null and void.*
- b. *An order cancelling the 2nd and 3rd defendant title to Plot No. Mombasa/Block 1/1172, formerly Plot 565 Mikindani, and any other transfer which might have been done as a result of the illegal ownership of the 2nd and 3rd defendants.*
- c. *General damages.*
- d. *Any other relief this Honourable court may deem fit to grant.*
- e. *Costs of this suit at court rates.*
- f. *Interest on this suit at court rates."*

2. The 1st defendant opposed the plaintiff's claim through her statement of defence dated 1st March 2022, inter alia averring that she was she was married to the plaintiff but had issues; that she was the one who bought the suit property, while the plaintiff was out of the country and

added the plaintiff's name in the title as an act of love, as he did not contribute towards the purchase price; that the plaintiff was at all material times aware of the sale of the suit property to the 2nd & 3rd defendants, and had consented to the same; that this suit is an attempt by the plaintiff to extend his marital dispute with the 1st to the suit property's sale; that there were similar proceedings in the lower court being CMCC No. 526 OF 2007; Nicodemus Nyagaka Maranga versus Grace Gathoni Mwangi, Leah Muthoni Mwangi and James Kamau Wachira, which was dismissed with costs. she prayed for this suit should be dismissed with costs to the 2nd & 3rd defendants; that a declaration be issued that the 2nd & 3rd defendant are the lawful owners of the suit property; that she should be granted costs of the suit and counterclaim. However, the court has noted the 1st defendant's statement of defence does not contain a counterclaim and none was paid for as receipt No. FSED-0069349 shows only Kshs.500 was paid as filing fees for defence.

3. The suit is opposed by the 2nd & 3rd defendants through their statement of defence and counterclaim dated 15th October 2021 inter alia averring that the 1st defendant sold them an

unfinished home on plot 565 Mikindani World Bank Scheme, which later changed to Mombasa/Block 1/1172; that at all material times, the plaintiff and the 1st defendant presented themselves as husband and wife, and that the plaintiff had given the 1st defendant a special power of attorney over the former plot 565 Mikindani, which enabled them purchase the suit property as purchasers for value without notice, at a consideration of Kshs.1,500,000; that the suit property had an abandoned half-built house which they destroyed and built a block with 28 bedsitters; they pleaded the particulars of fraud and or conspiracy on the plaintiff's part that he allowed the 1st defendant to present herself as the owner of the suit property and received Kshs.1,500,000, and then turn around to try to get their title cancelled; that there was another similar proceedings before the lower court and this suit is therefore an abuse of the court process. In the counterclaim, the 2nd & 3rd defendants averred that the plaintiff is estopped from denying that the 1st defendant had authority to act on his behalf as he presented her as a spouse and not as a stranger, and the sale transaction was conducted by the plaintiff's and 1st defendant's own

advocate; they set out the particulars of fraud or conspiracy at paragraph 18 of the defence and counterclaim and averred that they are the lawfully registered owners of the suit property which they have vastly developed, and prayed for the following orders:

- a. The plaintiff's suit in the plaint be dismissed with costs to the 2nd and 3rd defendants in the plaint.*
- b. A declaration that the 2nd and 3rd defendants in the plaint and or plaintiffs in the counterclaim are the lawful owners of Mombasa/ MN/ Block1/1172 situated in Mombasa County.*
- c. Costs of the suit and the counterclaim.*

4. The plaintiff opposed the counterclaim through his reply to the 2nd & 3rd defendants' defence and counterclaim dated 4th November 2021, inter alia denying that he had signed the sale agreement dated 14th July 2006. He averred that the lower court suit was dismissed for reasons that the court lacked jurisdiction. He denied receiving the purchase price of Kshs.1,500,000 and added that the incomplete structure on the suit property was worth Kshs.5,000,000.

5. During the pendency of this suit, the parties had a partial settlement agreement in terms of the Mediation Report signed by the parties and their advocates on 29th May 2023 and forwarded by the Mediator to the Deputy Registrar through the report dated 5th June 2023, in which they agreed that;

- a. A valuation be done for the plot and initial incomplete structure from the ground floor to the 1st floor, before sale, and the 1st defendant to give the plaintiff half the value.*
- b. That the County Government of Mombasa to refund to the plaintiff the amount paid as rates in respect of former plot 565 Mikindani with interest.*

The parties also agreed the following to be the issues not agreed upon:

- i. Whether the plaintiff should get a proportionate share of the prospective income generated by the structure upto ground floor and its 1st floor if any.*
- ii. Whether the plaintiff is entitled to costs.*

The court takes the above agreed terms to be what the parties herein agreed as partial settlement in respect of the

plaintiff' suit and the 2nd & 3rd defendants' counterclaim. That as the two issues not agreed upon related to the plaintiff's claim, it follows the counterclaim is to be taken as fully settled except on the issue of costs.

6. During the hearing, the plaintiff testified as PW1, and adopted the contents of his statement dated 24th February 2014 as his evidence in chief. He produced the documents in his list of documents dated 24th February 2014 and 26th January 2016. He admitted that the 1st defendant was his wife but when he went abroad the marriage did not work out. He clarified that they were not legally married when they acquired the suit property. That he had a development on the suit property up to the 2nd floor put up through the money he used to send money to the 1st defendant for that purpose. That as he was not travelling home frequently, it was only later that he realised the property had been sold, without his involvement, and that he did not receive the purchase price. He claimed that he wrote a letter of objection to the sale to the defunct Mombasa Municipal Council but it did not work out. He added that he had been paying rates for the suit property up to 2022. He denied ever

giving the 1st defendant any power of attorney to sell the suit property and transfer it on his behalf. He also relied on approved plans for development and a valuation report as at 2013 that showed the suit property was valued Kshs.2,000,000 and the development at Kshs.20,000,000. On cross-examination, he stated that he purchased the suit property sometime in 2003 or 2004 while in U.K where he had gone to sometime in October 2001. He admitted that the 1st defendant identified the suit property and conducted all the transactions including execution of the contract with the previous owners. He further agreed that he was not involved during the drawing of the development plans that was presented to the defunct Mombasa Municipal Council for approval. He agreed that he cohabited with the 1st defendant, sired a child together and that people around them knew them as husband and wife, but denied giving her consent to sell the suit property. He acknowledged the agreement in the mediation report and stated that he wants half of the income made in the suit property over the years, though he agreed he had no valuation to show how much. He insisted that to him, the 1st defendant had sold of her half

share of the suit property. He conceded that he did not have documentary evidence to show that he used Kshs.5,000,000 to develop the suit property. He admitted that he neither reported to the police that his signature had been forged in the aforementioned sale agreement nor that a transfer was made to the 2nd & 3rd defendants without his consent. PW1 clarified that the 1st defendant and himself did not have title deed for the suit property. That what they had was a letter of allotment, a sale agreement and letter from the defunct Mombasa Municipal Council confirming them as the owners.

7. The 1st defendant testified as DW1 and adopted the contents of her statement dated 17th February 2022 as her evidence in chief and produced the documents in the list of documents dated 1st March 2022 as exhibits. She stated that the plaintiff was her husband, but added that they did not buy the suit property as husband and wife, even though the letter of allotment bore both their names. That they had bought the suit property from one Mwangi, and relied on the letter of allotment as proof of ownership. She admitted that the sale agreement did not state that she paid for the suit property. She testified that though the special power of

attorney contained both her names and that of the plaintiff, the latter never signed it. She also admitted that she is the one who sold the suit property to the 2nd & 3rd defendants for Kshs.800,000 for part payment and Kshs.700,000 to be paid 30 days, making the total consideration of Kshs.1,500,000. She further admitted that the plaintiff did not give her any written authority to sign the sale agreement and transfer document in favour of 2nd & 3rd defendants, but added that he had told her to continue signing the way she did when buying it. She admitted that she did not share the purchase price with the plaintiff adding that she had paid the one-year arrears school fees and used the rest for her expenses, as the plaintiff had told her that they were not together anymore. She admitted that she had not complied with the terms of the mediation agreement. During cross-examination, DW1 confirmed that she is the one who signed the sale and transfer documents on behalf of the plaintiff as he was abroad, as they had talked and agreed on it. She claimed that when she came from UK in 2004, a certain lady told her that the plaintiff had married her, and in October 2005, the plaintiff told her to sell the suit property and move

on with her life. She told the court that she had bought the suit property at Kshs.320,000 which she paid through banker's cheque. She added that by the time they sold the suit property to the 2nd & 3rd defendants, they had not completed the development of the maisonette that they were building.

8. The 3rd defendant testified as DW2, and relied on her statement filed on 26th November 2021, the list of documents dated 18th November 2021 and further list of documents dated 20th December 2021. She testified that she bought the suit property from 1st defendant, who handed to her the allotment letter which had the name of the plaintiff and the 1st defendant, but she did not meet the plaintiff during the sale transactions or thereafter. She added that the sale agreement was done by an advocate, and it had the names of the plaintiff and the 1st defendant as the vendors, and the 2nd & 3rd defendants as purchasers, but it was signed by only the 1st, 2nd & 3rd defendants. She clarified that the 1st defendant signed on behalf of the plaintiff on the basis of a special power of attorney. She testified that she could not have known that the said special power of attorney was

defective or fraudulently obtained. She testified that Munyithya advocate, who did the sale agreement, told them he had not met the plaintiff when he assisted the 1st defendant to buy the suit property. She explained that the suit property had an incomplete structure with a ground floor and first floor, which the 1st defendant claimed she had built, and she handed over to them the building plans. She relied on December 2021 valuation report showing she was getting Kshs.189,000 per month as rent, and confirmed that she has been paying rates, although she did not have documentary evidence in support. She added that their building plan for their current structure was approved, but she did not file it in court. She denied any collusion to deny the Plaintiff his share of the suit property. She disclosed that they had the title for the suit property prepared and issued in their names after payment of the requisite fees to the County Government. She added that she had requested for the plaintiff to be availed during the signing of the sale agreement, but Munyithya advocate did not deem it necessary, as the plaintiff was never involved in the purchase of the suit property.

9. The 2nd defendant testified as DW3, relying on his statement dated 17th December 2021, and he reiterated that they bought the suit property at Kshs.1,500,000. He admitted that they were satisfied with the letter of allotment given by the 1st defendant as proof of ownership of the suit property, and after conducting a search at the County Government of Mombasa, it was confirmed that the allotment letter was genuine. He stated that the allotment letter had the name of the plaintiff and the 1st defendant. He also testified that the sale agreement had stipulated at paragraph 4 that the 1st defendant would sign on behalf of herself and the plaintiff. He added that the 1st defendant had informed them that she had a power of attorney but it was not captured in the sale agreement. He denied any collusion with 1st defendant to defraud the plaintiff of the suit property. He added that he was not present when the power of attorney was being executed at Munyithya advocate's chambers. He stated that he used the sale agreement, letter of allotment and power of attorney to transfer the suit property to themselves. He stated that he has been paying rates for the suit property but had not filed any documents to support the same. He

testified that they demolished the structure they found there on the land, before developing their structure from which they get Kshs.189,000 per month when fully occupied. He admitted that they did not value the incomplete structure they found on the suit property, but they paid the full purchase price of Kshs.1,500,000. He stated that the special power of attorney was not signed by the plaintiff, and that all the documents they received from the 1st defendant were signed by her alone.

10. The learned counsel for the plaintiff and defendants filed their submissions dated 27th October 2025 and 5th November 2025 respectively, and the court has considered them.

11. The issues for the determinations by the court as agreed by the parties through the Partial Mediation Report are as follows:

- a. Whether the plaintiff should get a proportionate share of the prospective income generated by the structure up to ground floor and its 1st floor if any. [See No. 1 of the issues not agreed upon on the partial settlement agreement]*

b. Whether the plaintiff is entitled to refund of the rates paid.[see ruling dated 11th April 2024]

c. Whether the plaintiff is entitled to costs. [See No. 1 of the issues not agreed upon on the partial settlement agreement]

12. The court has carefully considered the pleadings by the parties, oral by PW1, DW1, DW2 & DW3, submissions by the learned counsel, superior court decisions cited thereon and come to the following determinations:

a. The court reminds itself that the parties submitted themselves to mediation and a partial settlement agreement signed on 29th May 2023 and dated 5th June 2023 that was filed in court, and adopted as an order of the court on 19th July 2023. The partial mediation settlement agreement contains the issues agreed upon and those not agreed upon, as summarized in (5) above. The court's duty is to consider the facts as presented and apply the law in determining the two issues in (5) (i) & (ii) above, that were identified as outstanding.

b. In disposition or acquisition of land, the purchaser is expected to perform due diligence, which is a universal legal concept and recently inculcated by the Supreme Court decision in the case of Dina Management Ltd versus County Government of Mombasa & 5 Others [2023] KESC 30 (KLR). Though the Dina case [supra] decision is a recent one, it approved the superior courts position that in doing due diligence, one has to go to the root of the title. The 2nd & 3rd defendants relied on the letter of allotment in the name of the plaintiff and 1st defendant when buying the suit property, then described as plot 565, Mikindani. It is now trite law that a letter of allotment is not a title for ownership of land, and there are a plethora of superior court cases in that respect. In the case of Joseph N.K. Arap Ng'ok versus Moijo Ole Keiwua & 4 Others [1997] KECA 1 (KLR) the court held as follows:

“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.”

c. From the testimonies of DW2 and DW3, the purchasers, relied on a letter of allotment, drawing plans for an incomplete building and a special power of attorney that they received from the 1st defendant as proof that she was the owner of the suit property. The only other due diligence the 2nd & 3rd defendants mentioned was a search they did at the Mombasa Municipal Council that confirmed the letter of allotment was genuine, but there was no mention of a title document. In the case of Torino Enterprises Limited versus Attorney General (Petition 5 (E006) of 2022) [2023] KESC 79 (KLR) (22 September 2023) (Judgment) the court held as follows:

“So, can an allotment letter pass good title? It is settled law that an allotment letter is incapable of conferring interest in land, being nothing more than an offer, awaiting the fulfilment of conditions

stipulated therein. In Dr Joseph NK Arap Ng'ok v Justice Moijo Ole Keiyua & 4 others [unreported]; and in Gladys Wanjiru Ngacha v Teresa Chepsaat & 4 others CA 60/1997 HC Civil Case No 182 of 1992; [2008] eKLR, the superior courts restated this principle as follows:

“It has been held severally that a letter of allotment per se is nothing but an invitation to treat. It does not constitute a contract between the offerer and the offeree and does not confer an interest in land at all” [Emphasis added].”

Flowing from the decisions in the above superior court cases, the said Japhet N. Mwangi, who sold to the plot 565 Mikindani to the plaintiff and 1st defendant, on the strength of a letter of allotment, he did not have title over the said land capable of being transferred/conferred upon the purchasers. Likewise, the 1st defendant had no title to the suit property by the time she entered into the sale agreement with the 2nd & 3rd defendant that she could pass/transfer to them.

d. Even if for a moment the court takes that the plaintiff and 1st defendant had acquired a good title to the suit property, the fact that the plaintiff was evidently not involved in its sale and transfer, as he neither signed the sale agreement and the transfer document in favour of the 2nd & 3rd defendants, nor the alleged special power of attorney that the 1st defendant allegedly derived authority from to sign the said documents on his behalf, makes the entire transaction, transfer and registration of title a nullity. That as this decision means the title document held by the 2nd & 3rd defendants is impugned and null ab initio, the suit land documentary existence returns to the letter of allotment in the name of plaintiff and 1st defendant. Consequently, the plaintiff would be without any legal standing to bring this suit over this suit property on the strength of a letter of allotment.

e. However, the situation that the parties would have found themselves in, has been saved by the parties' mediation agreement on the agreed issues, and

issues not agreed upon that were returned to court for determinations. That as the court observed at paragraph (5) (f) of the ruling delivered on 11th April 2024 in this matter, which has not been reviewed or appealed against, the partial settlement agreement was conscientiously and voluntarily executed by the parties and their counsel on record, and there is nothing to suggest the execution by any one of them was influenced or obtained through fraud, collusion, misapprehension, mistake or is against public policy. The record confirms that the plaintiff had moved the court through the application dated 3rd November 2023 seeking to inter alia set aside the partial settlement agreement. The application was heard on merit and through the ruling of 11th April 2024, the court ordered as follows:

- i. That the application succeeds only in respect of the agreed issue number 2 in the partial settlement agreement that is against the unspecified County Government, that is not a party in the suit which is hereby set aside.*

- ii. *The issue of rates paid to remain as part of the outstanding matters to go to trial if not otherwise resolved by the parties.*
 - iii. *That the rest of the partial settlement agreement is upheld.*
 - iv. *Each party to meet their own costs in the application.*
- f. The record also confirms that the defendants filed the notice of motion dated 23rd April 2025 seeking for inter alia to strike out the further amended plaint dated 21st February 2022. The application was heard on merit and dismissed with costs vide the ruling delivered on 9th July 2025. The court observed at paragraph (d) of the said ruling inter alia that *"...to consider allowing the instant application will be tantamount to setting aside the parties' partial settlement...."* It is trite that courts will rarely consider interfering with the terms of settlement that parties have voluntarily agreed upon. That is why the court declined to allow the plaintiff's and defendants' applications dated above as to allow

them would have amounted to setting aside the parties' partial settlement agreement that contained the parties negotiated contract terms on agreed and not agreed terms. Like in other agreements, the court's duty in this matter is to help the parties implement or execute what they have voluntarily agreed in their partial settlement agreement, before the Court Appointed Mediator. This is especially so as the parties' partial settlement agreement has not been set aside, and the rulings of 11th April 2024 and 9th July 2025 that more or less confirmed it have not been reviewed and or successfully appealed against.

g. The parties' partial settlement agreement and the ruling of 11th April 2024 have shaped the outstanding issues for court's determinations. Having considered the evidence tendered and noting that the plaintiff has not tendered any evidence to confirm or suggest that he contributed in the development of the structure now standing on the suit property after the sale of the plot by 1st

defendant to the 2nd & 3rd defendants, it follows therefore that he has failed to establish any basis for a claim on any share of income arising from the development after the said sale.

h. On the question of rates the plaintiff paid for the suit property, the court finds it fair and just that it is shared between him and the 1st defendant equally, the same way that they agreed to share the value of the plot and development they had put on it before sale.

i. The parties' partial agreement that a valuation be done for the plot and initial incomplete structure from the ground floor to the 1st floor, before sale, and the 1st defendant to give the plaintiff half the value, clearly show that the plaintiff claim against the title for the 2nd & 3rd defendant over the suit property was mutually abandoned through the mediation. It also means the 2nd & 3rd defendants counterclaim that they be declared as the lawful owners of Mombasa/ MN/ Block1/1172 situated in Mombasa County was conceded. What the parties

failed to agree is who gets the costs in the main suit and counterclaim.

j. *Section 27 (1)* of the Civil Procedure Act chapter 21 of Laws of Kenya provides that costs follow the event unless where the court directs differently for good reasons. I do not find any basis to depart from that edict and the plaintiff will have costs on both the main suit only against the 1st defendant. Further, though the 2nd & 3rd defendants are successful in the counterclaim, as shown in (i) above, I find it fair and just that parties meet their own costs in the counterclaim.

13. From the foregoing determinations, the court finds and orders as follows:

a) The plaintiff's suit and 2nd & 3rd defendants' counterclaim are marked as settled in terms of the parties' partial settlement signed on 29th May 2023 dated 5th June 2023 that was adopted as an order of the court on 19th July 2023.

- b) That the plaintiff's claim for a share of the income arising from the development on the suit property after its sale fails.*
- c) The 1st defendant to pay the plaintiff an amount equal to half share of the total rates paid and receipted for the suit property before its sale.*
- d) The 1st defendant to pay the plaintiff's costs in the main suit, but the 2nd & 3rd defendants to bear their own costs.*
- e) The parties to bear their own costs in the 2nd & 3rd defendants' counterclaim.*

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 17TH DAY OF DECEMBER 2025.

S. M. Kibunja, J.
ELC MOMBASA.

IN THE PRESENCE OF:

PLAINTIFF : Mr. Oddiaga

DEFENDANTS : Mr Jengo

KALEKYE-COURT ASSISTANT.

S. M. Kibunja, J.

Original