



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NAIROBI

CASE NO. 1082 OF 2004

MARY E. OMOLLO.....PLAINTIFF

VERSUS

THE CITY COUNCIL OF NAIROBI.....1ST DEFENDANT

DONALD MBUGUA MUGO.....2ND DEFENDANT

THE REGISTRAR OF TITLES.....3RD DEFENDANT

J U D G M E N T

1. The Plaintiff vide a plaint dated 6th October 2004 filed in Court on 13th October 2004 averred that the 1st Defendant allotted her **Plot No. 189 Jamhuri Estate (LR No. Nairobi Block 63/522)** through a letter of allotment of even date. The Plaintiff complied with the terms of allotment and the 1st Defendant as a consequence thereof prepared and executed for the benefit of the Plaintiff a lease agreement for the premises on 12th January 1998.

2. The Plaintiff claimed that instead of the 1st Defendant registering the executed lease and releasing the Certificate of Lease and the lease to her, went ahead and fraudulently registered the lease in favour of the 2nd defendant who was issued with a title. The Plaintiff contended that the registration of the 2nd defendant as the owner of the suits property was fraudulent and null and void and should be cancelled. The Plaintiff prayed for judgment against the Defendants jointly and severally for:-

1. Permanent mandatory injunction directed to the Registrar of Titles to deregister the 2nd defendant as the proprietor of Nairobi Block 63/522 and to register the Plaintiff as the proprietor hereof.

2. Permanent mandatory injunction against the 2nd Defendant restraining him from interfering in any manner whatsoever either through himself or anybody claiming through with LR No. Nairobi Block 63/522.

3. Damages against the 1st Defendant for unlawfully leasing the Plaintiff's property to the 2nd Defendant.

4. Costs and interests.

3. The 1st Defendant upon being served filed a defence dated on 22nd December 2004 on 3rd January 2005. The 1st Defendant denied the Plaintiff was allocated the suit property and further denied the allegations of fraud attributed to it and put the Plaintiff to proof. The 2nd Defendant never appeared and did not file any defence. The Attorney General who appeared for the Registrar of Titles, named as the 3rd Defendant, did not file a defence and was excused with the consent of the Plaintiff from participating in the proceedings.

4. The suit was heard before me on 29th November 2018 when the Plaintiff through her son Isaac Weda Otieno testified in support of the Plaintiff's case and called no other witnesses. The 1st Defendant elected to offer no oral evidence and explained they will rely on the evidence on record including the documents filed by the 1st Defendant.

5. Komingoi, J. on 25th October 2018 granted leave for the Plaintiff to be substituted by her son for purposes of adducing evidence in the suit. The Plaintiff's son Isaac Weda Otieno testified as PW1 and relied on the witness statement and affidavit sworn by the Plaintiff in support of the case. He also relied on the witness statement he had made on 23rd November 2018 and the bundle of documents filed in support of the Plaintiff's case on 28th October 2008.

6. PW1's evidence was to the effect that his mother was allocated **Plot No. 189 Jamhuri Phase II** now **LR No. Nairobi Block 63/522** as per

the letter of allotment dated 13th February 1992 (“**PEx.1**”). He stated that the Plaintiff accepted the terms vide letter dated 29th February 1992 (“**PEx.2**”) and made payment of the requisite fees as per the receipts exhibited in the Plaintiff’s bundle of documents (“**PEx.3(a)-(e)**”). The witness affirmed that he did not know the 2nd Defendant and stated that the Plaintiff has never sold her plot to anybody. The witness further stated in his witness statement that although his mother executed a lease agreement prepared by the 1st Defendant on 12th January 1998 she was never issued a title and efforts to follow up with the 1st Defendant’s Conveyance Department never yielded any results.

7. The Plaintiff carried out an official search on the suit property on 14th August 2004 and the search revealed a Mr. Donald Mboga Mugo the 2nd defendant herein had on 24th September 2001 been registered as the owner of the suit property and issued a certificate of lease. This prompted the Plaintiff to institute the present suit seeking the annulment of the said registration as the same was not obtained legally. The City Council of Nairobi vide a letter dated 18th June 2007 (“**PEx.10**”) affirmed that the Plaintiff was allottee of **Plot No. 189 Jamhuri Estate Phase II** and that she was the bona fide owner.

8. In cross examination, the witness stated that he did not know how the 2nd Defendant got registered as the owner of the suit property. He confirmed that the 1st Defendant has never requested them to vacate from the suit land. He affirmed that all through the plaintiff has been paying the rates for the plot to the 1st defendant.

9. The plaintiff and the 1st defendant filed their final written submissions which I have duly considered. The issues that arise for determination are as follows:-

(i) Whether the Plaintiff was allocated the suit property by the 1st Defendant?

(ii) Whether the registration of the 2nd Defendant as the owner of the suit property was fraudulent and if so whether the 1st Defendant was party to such fraud.

(iii) Whether the Plaintiff is entitled to the reliefs sought.

10. There is no dispute that the Plaintiff was allotted Plot No. 189 Jamhuri Phase II. The allotment is evidenced by the 1st Defendant’s letter dated 13th February, 1992 (“**PEx.1**”). The 1st Defendant acknowledged the allotment vide its letter dated 18th June 2007 (“**PEx.10**”). The last paragraph of that letter signed by Director of City Planning was in the following terms:-

“According to our 1992 records Plot No. 189 (Jamhuri Estate Phase II) was allocated to Mrs. M. E. Omondi, who is still the bonafide owner.”

11. The 1st Defendant’s list of documents “**Memo dated 10th February 1998 from Director of City Planning Architecture to Chief Counsel (c)**” enclosed an upto dated list of allottees - **Jamhuri Phase II** Scheme and against **Plot No. 189 Block 522** the name of Mrs. M. E. Omondi appears as the allottee. The 1st Defendant on the basis of the allotment to the Plaintiff executed a lease agreement in her favour on 12th January 1998 (“**PEx.8**”). In the circumstances, I am satisfied the Plaintiff was indeed allocated the suit property by the 1st Defendant.

12. On the second issue there is absolutely no evidence that the 1st Defendant allocated the suit property to the 2nd Defendant. The 1st Defendant in the witness statement dated 24th September 2013 by Rose Mwema, Director, City Planning of 1st Defendant under paragraph 4 of the statement states:-

“The 1st Defendant has never leased the said suit property to the 2nd defendant as alleged, there is no lease agreement between the 1st and 2nd Defendant.”

13. The 2nd Defendant was duly served with summons and never appeared and neither did he file a defence. Indeed, interlocutory judgment was entered against him on 2nd June 2005. It therefore remains unclear as to how the 2nd Defendant got to be registered as the owner of the suit property in September 2001. It is unfortunate that the Plaintiff did not avail copies of the registered documents to support her case against the 1st Defendant. Such documents ordinarily ought to be available in the parcel file held by the land registrar in regard to all registered land as it is the practice that the originals and/or copies of all registrable instruments be retained by the land registrar in the parcel file and/or deed file held by the lands office. Without the benefit of seeing such documents, it is not possible to impute or infer collusion between the 1st Defendant and the 2nd Defendant against the Plaintiff.

14. However, since the 1st Defendant had only allotted the subject property to the Plaintiff and executed a lease agreement in favour of the Plaintiff and not the 2nd Defendant, the 2nd Defendant could not have been validly registered as the owner of the suit property. On the evidence adduced by the Plaintiff and having regard to the documentary evidence, it is the Plaintiff who was allocated the suit land and it was in her favour that the lease in respect of the property was executed by the 1st Defendant. In the absence of any evidence to rebut the evidence by the Plaintiff that she was the lawful owner of the suit property, I hold and find that the registration of the 2nd defendant as the owner of the suit property could only have been procured fraudulently. The 1st Defendant by its letter of 18th June 2007 acknowledged they allotted the Plaintiff the suit property in 1992 and that as per their records she was the bonafide owner of the property. The supplementary list of documents filed by the Plaintiff on 29th November 2018 (rates payment receipts) shows that the plaintiff has been invoiced by the 1st Defendant for rates for the period 2009-2017 and she had all along been paying the rates.

15. The Plaintiff has not proved the 1st Defendant prayed any role to get the 2nd defendant to be registered as the owner of the suit property and I hold and find that no fraud or collusion has been established on the part of the 1st Defendant to render them liable to the Plaintiff in damages for unlawfully leasing the suit property to the 2nd Defendant. The Plaintiff nonetheless has proved she is the lawful owner of the suit property having been allocated the same by the 1st Defendant and having a lease agreement in respect of the property executed in her favour.

16. In the result, I find and hold that the Plaintiff's case is proved on a balance of probabilities against the 2nd Defendant. I enter judgment in favour of the Plaintiff on the following terms:

1. That the Plaintiff is the lawful owner of LR No. Nairobi Block 63/522.

2. The land registrar is directed to cancel the registration of Donald Mbugua Mugo, the 2nd Defendant herein as the proprietor of LR No. Nairobi Block 63/522 and to register Mary E. Omondi the Plaintiff herein as the proprietor thereof.

3. That each party will bear their own costs of the suit.

JUDGMENT DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MAY 2019.

J. M MUTUNGI

JUDGE

In the presence of:

M/s Ontinti for Okeyo for the Plaintiff

Owande for the 1st Defendant

N/A for the 2nd Defendant

Musyoki Court Assistant

J. M MUTUNGI

JUDGE