



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC CASE NO 192 OF 2017**

**(FORMERLY NAIROBI ELC CASE NO 813 OF 2013)**

**GEORGE GATHUKI NG'ANG'A.....PLAINTIFF**

**VERSUS**

**GASKI INVESTMENT LIMITED.....1<sup>ST</sup> DEFENDANT**

**THE REGISTRAR OF TITLES.....2<sup>ND</sup> DEFENDANT**

**THE CHIEF LAND REGISTRAR.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The parcel of land in dispute in the instant suit is comprised in title number Thika Municipality Block 6/1062 containing by measurement one decimal nine five eight (1.958) hectares or there abouts in area (herein after referred to as the suit property). It was initially allocated as UNS. residential plot "A" Thika Municipality. It is a leasehold interest from the Government of the Republic of Kenya (the lessor).

2. By a plaint (Multi-Track) dated 5<sup>th</sup> July, 2013 filed on even date, the plaintiff namely George Gathuki Ng'ang'a through M/s Gatheru Gathemia and company Advocates has sued the defendants jointly and severally for ;

**a) A declaration that the certificate of lease , registered on the 3<sup>rd</sup> January 2012 and issued on 10<sup>th</sup> April 2012 by the Commissioner of Lands is the valid title issued to George Gathuki Ng'ang'a.**

**b) A declaration that the certificate of lease, registered on the 13<sup>th</sup> September 2011 and issued on 14<sup>th</sup> September 2011 by the Commissioner of Lands to Gaski Investment limited is not a valid title.**

**c) A permanent injunction restraining the 1<sup>st</sup> defendant whether by itself, its agents and or servants from interfering, trespassing, construction, alienating, charging, selling, disposing of, dealing or in any way interfering with the Plaintiff's quiet possession of the suit property, THIKA MUNICIPALITY BLOCK 6/1062.**

**d) A mandatory injunction compelling the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to cancel, revoke and expunge from the records at Land Registry all records pertaining to the fraudulently obtained title held by the 1<sup>st</sup> defendant.**

**e) General damages.**

**f) Costs of this suit.**

3. The plaintiff claims that by a letter dated 18<sup>th</sup> May, 1992 (P Exhibit A1) he sought to be allocated the suit property from the lessor through the Commissioner of Lands. Subsequently, his application was approved and he was issued with a letter of allotment dated 10<sup>th</sup> September, 1992 (P Exhibit A2). He paid the requisite acceptance fees for allotment and lawfully obtained all the relevant documents which include the certificate of lease dated 10<sup>th</sup> April, 2012 (P Exhibit A26). That the plaintiff is the sole indefeasible proprietor of the suit property.

4. The plaintiff further claims that on or about November, 2012, it came to his attention that the suit property was also leased to the 1<sup>st</sup> defendant since 13<sup>th</sup> September, 2011. That the 1<sup>st</sup> defendant had formerly procured a title over the suit property and threatened to possess of the said property hence precipitating this suit.

5. In a statement of defence dated 9<sup>th</sup> July, 2014, through Gitonga Muriuki and company Advocates, the 1<sup>st</sup> defendant denied the plaintiff's claim and sought its dismissal with costs. That the 1<sup>st</sup> defendant is the bonafide registered owner of the suit property and termed the plaintiff's title illegal, fraudulent and obtained after the registration of the 1<sup>st</sup> defendant's title.
6. The 1<sup>st</sup> defendant's also stated, inter alia, that the plaintiff's title is founded on fraud, conspiracy and other related criminal activities and that the same should be deleted from the Land Registry documents. That the reliefs sought by the plaintiff are not available as they are not supported or at all.
7. In their statement of defence filed on 30<sup>th</sup> June, 2015, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants denied the plaintiff's claim and termed P Exhibit A 26 issued to the plaintiff irregular and fraudulent. They stated that on 2<sup>nd</sup> September, 1992, the suit property was offered to the plaintiff who failed to accept the offer within the stipulated period of thirty (30) days from that date and did not bother to pay the required fee. That on 17<sup>th</sup> December, 1997, the said offer was withdrawn from the Land Registry. They are represented by learned counsel, Njoroge Allan Kamau.
8. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants further stated that on 10<sup>th</sup> September, 2010, the 1<sup>st</sup> defendant applied for allotment of the suit property by a letter of even date (2<sup>nd</sup> and 3<sup>rd</sup> D Exhibit 10) which received the necessary consideration and ultimately a letter of allotment dated 23<sup>rd</sup> December, 2010 was issued in favour of the 1<sup>st</sup> defendant (2<sup>nd</sup> and 3<sup>rd</sup> D Exhibit 9). The requisite fees as per receipt reference 2214271 dated 13<sup>th</sup> January, 2011 (2<sup>nd</sup> and 3<sup>rd</sup> D Exhibit 7) was paid by the 1<sup>st</sup> defendant.
9. The plaintiff contended that he presented a copy of payment receipt No. E200734 dated 8<sup>th</sup> December, 1997 being payment fees for the initial unsurveyed plot "A" Thika (P Exhibit A3). The 2<sup>nd</sup> and 3<sup>rd</sup> defendants initiated the process of preparing another lease on a temporary file. Further to a letter reference. 144938/TC/11 (2<sup>nd</sup> and 3<sup>rd</sup> D Exhibit 12), the 1<sup>st</sup> defendant made additional payment for the then unsurveyed suit property as per official receipt No. 2270961 dated 21<sup>st</sup> July, 2011. That two leases namely P Exhibit A26 and 1<sup>st</sup> D Exhibit 12 2<sup>nd</sup> and 3<sup>rd</sup> D Exhibit 9) were prepared in respect of the suit property for plaintiff and 1<sup>st</sup> defendant respectively.
10. The plaintiff filed an application by way of notice of motion dated 14<sup>th</sup> August, 2017 to enjoin the National Land Commission (NLC) as a defendant to these proceedings. However, on 22<sup>nd</sup> March, 2018, the application was withdrawn by consent of the parties herein.
11. The plaintiff (PW1) testified and relied on his list of documents of even date (P Exhibits A1 to 29). He also relied on his supplementary list of documents (P Exhibits B1 to 64) and further supplementary list of documents dated 31<sup>st</sup> October, 2018 (P Exhibit C1 to 9) in his testimony.
12. PW2, Francis Kenyori Orioki, a Land Registrar stated that he authored a letter dated 9<sup>th</sup> March 2010 (P Exhibit B18). He confirmed that he certified P Exhibit B20 having seen its original which had been issued in favour of PW1.
13. PW3 was Janet Aluoch Oregu, Chief Land administration officer who testified that she authored (P Exhibit B30). She made reference to and relied on several documents including P Exhibits B30, 31, 32, 34 and P Exhibit C1. She stated that two (2) leases were issued in respect of the suit property.
14. DW1 was Silas Kiogora Mburugu and a director with the 1<sup>st</sup> defendant. He relied on his statement dated 7<sup>th</sup> June, 2017 as his evidence in chief. He also premised his testimony on his list of documents dated 18<sup>th</sup> July, 2014 filed on 21<sup>st</sup> July, 2014 (1<sup>st</sup> Defendant Exhibits 1 to 12).
15. DW2 was Gideon Odeka Ochieng, senior Assistant Director Land Administration. He relied on his statement dated 30<sup>th</sup> June, 2015 as well as his list of documents of even date (2<sup>nd</sup> and 3<sup>rd</sup> D Exhibits 1 to 17).
16. Learned counsel for the plaintiff filed submissions dated 30<sup>th</sup> November, 2015 filed on even date. He made reference to the orders sought in the plaint dated 5<sup>th</sup> July, 2013 and submitted; inter alia, that the evidence on record confirms that DW1, a director of the 1<sup>st</sup> defendant purported to obtain a letter of allotment and to register a lease whereas the suit property had already been allocated to the plaintiff who had made numerous deposits in acceptance of the allocation. That the purported lease of the 1<sup>st</sup> defendant is not signed as required under section 3(3) and 3(6) of the law of contract Act (Cap 23). That the suit property was not available for allocation as unsurveyed plot in the year 2010 hence urged the court to uphold the plaintiff's case and revoke the defective and irregular lease issued to the 1<sup>st</sup> defendant.
17. Counsel relied upon authorities including Snell's Equity 29<sup>th</sup> Edition P.V Baker London sweet and Maxwell 1990 at pages 27-41 on the relevant maxims of Equity, among them, Equity follows the law and **Caltex Oil (Kenya) Limited-vs- Rono Limited (2016) eKLR** as regards a claim for general damages.
18. Learned counsel for the 1<sup>st</sup> defendant filed submissions dated 5<sup>th</sup> December, 2018 on even date. He framed and analysed three (3) issues for determination, inter alia, which of the two (2) certificates of lease was procedurally and legally allocated? He submitted that the plaintiff never accepted the allotment made to him which justified the withdrawal of the allotment. That the defendants' documents are authentic, credible and were lawfully issued.
19. Counsel urged this court to dismiss the plaintiff's suit with costs and that his certificate of lease be cancelled accordingly. To buttress his submissions, counsel relied on the case of **Pius Kimaiyo Langat-vs- The Cooperative Bank of Kenya Limited (2017) eKLR** and the case of **Caroline Wanjiku Ngugi-vs-Republic (2015) eKLR** on enforceability of written contracts and necessary ingredients for the offence forgery respectively.

20. Learned counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants filed submissions dated 4<sup>th</sup> December, 2018. It was submitted that the 1<sup>st</sup> defendant obtained a lease upon allocation of the suit property. That the plaintiff's lease thereof was processed on a temporary cover hence prompting the issuance of two certificates of lease for the suit property.

21. Counsel framed and analysed four (4) issues for determination including whether the plaintiff's the rightful owner of the suit property and whether there was a fraud or irregularity in obtaining any of the two (2) titles to the suit property. Reliance was placed on authorities among them, **Wreck motor Enterprises-vs- Commissioner of Lands and 3 others (1999) eKLR** regarding issuance of a letter of allotment and **Nancy Kahoya Amadiva-vs- Expert Credit Limited and another (2015) eKLR** on proof of allegations of fraud.

22. Counsel further relied on the case of **Kenya Medical supplies Agency (KEMSA)-vs- Marji Kanji Hirani and 8 others (2018) KLR** on failure to meet the conditions of acceptance and payment contained in an allotment letter and **Gitwany Investment Limited-vs- Tajmal Limited and 3 other (2006) KLR** that in equity the first in time must prevail as well as **Munyu Maina-vs-Hiran Gatiha Maina (2013)** regarding legal acquisition of title.

23. The plaintiff's counsel also filed further submissions dated 10<sup>th</sup> December, 2018 in response to the 1<sup>st</sup> defendant's submissions as well as the 2<sup>nd</sup> and 3<sup>rd</sup> defendant's submissions. Counsel submitted that Wreck and the other cases (supra) relied upon in the defendants' submissions have no useful application in this matter. Accordingly, he reiterated his submission dated 5<sup>th</sup> December, 2018.

24. I have carefully considered the parties' respective cases and rival submissions in this suit. A list of agreed and dispute issues dated 27<sup>th</sup> August, 2014, issues in the plaintiff's submissions as well as issues in the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants' submission are taken into account. I embrace the said issues and bearing in mind the decision in **Galaxy Paints Company Limited-vs- Falcon Grounds Limited (2000) 2 EA 385**, the issues for determination are condensed to;

(a) Who is the lawful proprietor of the suit property?

(b) Are the parties entitled to the reliefs sought in their respective pleadings?

25. On the first issue, the plaintiff (PW1) stated that there are two (2) leases. One in the name of PW1 and another in the name of 1<sup>st</sup> defendant in respect of the suit property. During cross-examination by learned counsel of the 1<sup>st</sup> defendant, he confirmed that there are two (2) green cards (registers) in respect of the suit property.

26. PW3 fortified the evidence of PW1 that there are two (2) leases in respect of the suit property. It was also confirmed by DW2 who testified that there are two (2) titles for the suit property. Therefore, it is common good that there is a lease issued to PW1 and another issued to the 1<sup>st</sup> defendant for the suit property.

27. It was the testimony of PW1 that he applied for allotment of the suit land through the commissioner of lands on 18<sup>th</sup> May, 1992 and he obtained P Exhibit A26. That he is in physical possession of the suit property and his house stands thereon. During cross-examination by counsel for the 1<sup>st</sup> defendant, he stated that he obtained no search certificate for the suit property and that P Exhibit A2 was a conditional letter for an unspecified period of time. He also stated, inter alia;

**“There are two (2) green cards in respect of the suit land. The certificate of search shows that the land belongs to 1<sup>st</sup> defendant. The land is mine. I have no certificate thereof.....” (Emphasis added).**

28. On cross-examination by learned counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, PW1 stated that he did accept allotment of the suit property in writing and that he has no green card with regard to the said property. He testified, that;

**“I did not do a formal acceptance and payment within the time stated in P Exhibit B4 which is also P Exhibit A2. I obtained the land from the government as shown in P Exhibit B3. “(Emphasis laid).**

29. According to PW2, P Exhibit B58 being a notice of 21 days given to PW1 in respect P Exhibit 20 was not drawn to his attention. That it was occasioned by the unavailability of the original files hence did” P Exhibit B18 on a temporary cover or file (TC).

30. PW2 and DW2 confirmed that P Exhibits B32 and 58 were done on a temporary cover as the original file or record was not available. During cross-examination by learned counsel for the 1<sup>st</sup> defendant, PW3 stated;

**“I have seen P Exhibit 58 and it is in the temporary cover. P Exhibit 58 was a notification to PW1. Conditions in a letter of allotment must be met otherwise it becomes invalid.”**

31. It is quite clear that the plaintiff's claim is grounded on a conditional letter of offer (P Exhibit A2). Does it constitute a contract between PW1 and the government of Kenya through the commissioner of lands? The answer is in the negative going by the evidence of PW1, PW2, PW3 and DW2. I agree with the 1<sup>st</sup> defendants' counsel that the transaction is not valid as there was an offer (P Exhibit A2) but there was no acceptance and consideration thereof; see **William Muthee Muthami-vs-Bank of Baroda (2014) eKLR cited in Pius Langat case** (supra).

32. DW1 made reference to 1<sup>st</sup> D Exhibit 4 and told the court that an earlier allotment of the suit property to PW1 had been withdrawn thus the same property was available for reallocation to himself together with his wife, a co-director of the 1<sup>st</sup> defendant. In his statement dated

7<sup>th</sup> June, 2017 and filed on 9<sup>th</sup> June, 2017, DW1 stated that;

***“We agreed with my co-director and my wife to apply in the company’s name Gaski Investment Limited and the commissioner for land accepted the application and granted the offer.***

***We were issued with allotment letter and paid the requisite fee in the sum of 174,000/- which we paid vide cheque No 03759 and dated 28<sup>th</sup> December, 2010.***

***We paid all the necessary fee as required by the ministry officials and our Company was accordingly issued with a title certificate No. Thika Municipality Block 6/1062 on 14<sup>th</sup> September, 2011.....”***

33. DW1 maintained that he accepted the allotment letter in respect of the suit property within the requisite period of time as revealed in 1<sup>st</sup> D Exhibit 1. That the 1<sup>st</sup> defendant followed due process in obtaining lease as shown on 1<sup>st</sup> D Exhibits 2 and 12. That he erected a perimeter wall around the suit property hence he is in possession of the property.

34. 1<sup>st</sup> D Exhibit 2 and 12 show that the 1<sup>st</sup> defendant was issued with a certificate of lease on 13<sup>th</sup> September, 2011. P Exhibit A 26, B41 and P Exhibit C8 reveal that PW1 was issued with a certificate of lease on 10<sup>th</sup> April, 2012. On that basis, the first in time must prevail bearing in mind the decision in **Gitwany case** (supra) and the principles of equity entrenched under **Article 10 (2) (b) of the Constitution of Kenya, 2010.**

35. The plaintiff pleaded particulars of fraud and illegality at paragraph 28 of his plaint. He failed to prove the allegations to the required standard going by the decision in of **Amadiva case** (supra); see also **Raila Odinga and 2 others –vs- Independent Electoral and Boundaries Commission (2017) eKLR and Paul Kimaru Njuguna –vs- Pius Karuri Kigumi and another (2009) eKLR.** It follows that 1<sup>st</sup> defendant has proved by way of 1<sup>st</sup> D Exhibits 1 to 12 that he acquired his certificate of lease through a process which was legal, formal and free from any encumbrances as envisaged in **Munyu Maina** case (supra).

36. In the premises, I find that the plaintiff’s claim is anchored on a temporary cover as confirmed by PW2 and DW2. Therefore, the certificate of lease as shown on P Exhibit A26 and P Exhibit 41 is irregular. The plaintiff has failed to prove his allegations against the defendants to the required standard.

37. I further find that the 1<sup>st</sup> defendant has demonstrated that the certificate of lease as shown by 1<sup>st</sup> D Exhibits 2 and 12 was acquired through a process which was legal, formal and free from any encumbrances. This court hereby upholds the certificate of lease issued to the 1<sup>st</sup> defendant who is the sole bonafide registered owner of the suit property. The 1<sup>st</sup> defendant is entitled to the absolute ownership of the suit property under Article 40(1) of the Constitution (supra). The orders sought in the plaint are not merited in the circumstances.

38. Wherefore, I dismiss the plaintiff’s case with costs to the defendants.

**SIGNED and Dated at Migori this 7<sup>th</sup> day of May, 2019**

**G.M.A ONG’ONDO**

**JUDGE**

**SIGNED, Dated and Delivered at Thika this 14<sup>th</sup> day of JUNE 2019**

**L.N GACHERU**

**JUDGE**

**In the presence of:**

1. Mr. Owade holding brief for Mr. Gatheru Gathemia for plaintiff
2. Mr. Muriuki for the defendant
3. M/s Fatma for 2<sup>nd</sup> and 3<sup>rd</sup> defendant
4. Lucy –Court Assistant