



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELC CASE NO. 124 OF 1997**

**BICHABHAI NATHURBHAI PATEL.....1<sup>ST</sup> PLAINTIFF**

**DR. FRANK IBURI NGARURO.....2<sup>ND</sup> PLAINTIFF**

**CYPRIAN IBURI NGARURO.....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**MACCU MOTORS LTD.....1<sup>ST</sup> DEFENDANT**

**YUSUF MUSA MUCHEKE.....2<sup>ND</sup> DEFENDANT**

**MR. KIRUKI T/A G.T. MOTORS.....3<sup>RD</sup> DEFENDANT**

**GERVASIO KARIUKI.....4<sup>TH</sup> DEFENDANT**

**SALIM KAMATHI.....5<sup>TH</sup> DEFENDANT**

**JAMES MBAABU.....6<sup>TH</sup> DEFENDANT**

**JOHN KURIA.....7<sup>TH</sup> DEFENDANT**

**FRANCIS MURIITHI.....8<sup>TH</sup> DEFENDANT**

**JOHN GATEMBU.....9<sup>TH</sup> DEFENDANT**

**HENRY MURIUNGI.....10<sup>TH</sup> DEFENDANT**

**NICHOLAS KINYUA.....11<sup>TH</sup> DEFENDANT**

**NJOROGE T/A SUNBIRD BUS SERVICES.....12<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

In a plaint dated 1<sup>st</sup> November 1992, the plaintiffs filed the instant suit being HCCC No. 124 of 1997 in which they were seeking an order that the defendants vacate from land parcel Number MERU MUNICIPALITY BLOCK 11/50 (hereinafter referred to as the suit property). The plaintiffs also sought to be given vacant possession, mesne profits and costs.

In a statement of defence and counter-claim dated 28<sup>th</sup> November 1997, the defendants denied the plaintiffs claim and in the alternative and by way of counter-claim sought for an order declaring that the allocation of the suit land to the plaintiffs was unlawful, and that an order of permanent injunction and general damages be issued. The plaintiffs filed a reply to the defence and counter-claim on 11<sup>th</sup> December 1997 and traversed the defendants counter-claim.

The 2<sup>nd</sup> defendant in HCCC No. 124 of 1997 passed on during the pendency of this suit and was substituted by his wife Time Karimi Yusuf. At the same time, the 2<sup>nd</sup> defendant after being substituted as a party in HCCC No. 124 of 1997 filed yet another case being No. HCCC No. 7 of 2004 seeking compensation for structures that she had erected on the suit property. The plaintiffs in that subsequent suit were enjoined as 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants while the 1<sup>st</sup> defendant Maccu Motors Ltd was retained as 1<sup>st</sup> defendant like in the later suit.

Later on, the two cases were consolidated and HCCC No. 124 of 1997 was retained as the running file (ELC No. 124 of 1997).

#### PLAINTIFFS CASE

The 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs gave evidence as PW1 and PW2 respectively while the 3<sup>rd</sup> plaintiff authorized PW1 to appear plead and act for him in this matter vide a letter dated 21<sup>st</sup> December 2012 and filed in Court on 15<sup>th</sup> February 2013. The plaintiff also called one Mr. Silas Kiogora Mburugu (PW2) who is a Principal and Administration officer who had in his custody the original file for the suit property from Arthi House, Nairobi which was produced as Exhibit No. 18 'A' – 18 'S'.

From the evidence adduced, the following issues stand out as contested. First, the suit property was originally registered as L.R No. 1104/143 and had been allocated to Ranchobhai Hirashae Patel and 4 others for a term of thirty three (33) years running from 1<sup>st</sup> January 1960 (see Plaintiff Exhibits No. 18 A and 18 B). Before the term of thirty three (33) years could come to an end, one Vithalpbhai Patel, holder of Power of attorney of the five (5) Patels applied for extension of the lease vide a letter dated 28<sup>th</sup> October 1991. As at that time, the thirty three (33) years term was still in force (see Exhibit No. 18 H). The 1<sup>st</sup> defendant was allegedly issued with a letter of allotment dated 17/6/1994 which was subsequently cancelled vide Exhibit No. 18 J. The 2<sup>nd</sup> plaintiff was issued with a letter of allotment dated 15<sup>th</sup> May 1996 (Plaintiff Exhibit No. 18 P).

The plaintiffs are the registered proprietors of the leasehold interest over the suit property as shown in Plaintiffs Exhibit No. 1, 2 and 3 which is a certificate of lease, green card and official search respectively.

#### DEFENDANTS CASE

According to the defence in the year 1967, M/S R.H. Patel, M.H. Patel, MS Patel VR Patel, K.G. Patel and C.M. Patel sold land reference No. 1104/143 Meru Township to one Michael Mwenda at a consideration. In 1968, the said Michael Mwenda sold the said land to Maccu Motors, the 1<sup>st</sup> defendant herein and CHADWICK LIMITED, a subsidiary Company of the 1<sup>st</sup> defendant.

The 1<sup>st</sup> defendant took possession of the land and started paying land rates and all chargeable rents to the former County Council and Municipal Council. On 17<sup>th</sup> June 1994, the Commissioner of Lands issued a letter of allotment to the 1<sup>st</sup> defendant herein. Maccu Motors complied with the terms and conditions contained in the letter of allotment by paying all the dues to the Municipal Council of Meru and the Commissioner of Lands. The defendants list of documents filed in Court on 8<sup>th</sup> December 2014 shows evidence of compliance. As the property was registered under the County Council of Meru, the 1<sup>st</sup> defendant obtained County Council minutes on 12<sup>th</sup> July 1978 formally authorizing the transfer of Meru Municipality Block 11/50 to the 1<sup>st</sup> defendant herein (Exhibit No. 8). As the law then required, the 1<sup>st</sup> defendant obtained no objection letters from various offices namely:

- (a) *The District Commissioner in his capacity as the Chairman of the District Land allocation Committee - Exhibit No. 10.*
- (b) *The Physical Planner – Exhibit No. 11*
- (c) *The District Land Registrar Meru – Exhibit No. 12*
- (d) *The Municipal Council of Meru – Exhibit No. 13.*

#### PLAINTIFFS SUBMISSIONS

The plaintiffs through the firm of J.M. Mwangi & Co. Advocates made an extensive and detailed written submissions in which he stated that the plaintiffs derive their ownership to the suit property from the five (5) Patels who were the original joint owners of the suit property. The plaintiffs also submitted that DW2 was candid in his evidence as to his relationship with all the five (5) Patels with M.H. Patel being his father while the others were either his cousins or relatives. The plaintiffs further argued that there was no dispute at all between the plaintiffs herein with any of the Patels and the process of transfer of ownership from the original Patels to the 2<sup>nd</sup> plaintiffs is not a subject of this litigation. The plaintiffs further submitted that the Commissioner of Lands issued a letter of allotment to the 2<sup>nd</sup> plaintiff dated 15<sup>th</sup> May 1996 (Exhibit No. 4 and Exhibit No. 18 P) who on 20<sup>th</sup> May 1996 accepted the offer and made the necessary payments as evidenced by a receipt produced as Plaintiffs Exhibits 5 and 18Q respectively. After acquiring the suit property, the 2<sup>nd</sup> plaintiff transferred 30% share to each of his co-plaintiffs and he retained 40% and thereafter made relevant payments as per Plaintiffs Exhibits No. 7 and 8 respectively.

The plaintiffs submitted that the said transfer was sanctioned by the Commissioner as evidenced by Plaintiffs Exhibit No. 18 R which is a form of transfer dated 5<sup>th</sup> June 1996. After the transfer through a letter dated 9<sup>th</sup> July 1996 (Plaintiffs Exhibit No. 18 G – the lease (Plaintiffs Exhibit No. 17) was forwarded to Meru District Land Registrar for registration which lease was registered and a certificate of lease issued in favour of the three (3) plaintiffs (Plaintiffs Exhibit No.1). It was submitted that the process through which the three plaintiffs acquired the suit property was clearly explained by DW3.

#### DEFENDANTS SUBMISSIONS

The defendants through the firm of Leonard Ondari & Co. Advocates submitted that before the suit land parcel No. Meru Municipality Block 11/50 was registered in the name of the plaintiff, it was registered in the name of County Council of Meru and that there is a strict procedure in acquiring such land. The defendants submitted that the plaintiffs failed to follow the laid down procedure on how an interest on land held by the former County Council Municipal Council could be acquired. The defendants argued that the 1<sup>st</sup> defendant has not only given tracing history of how interest on the subject matter was acquired but also given documentary evidence on the channels used to stake a claim on the subject matter. These include the following:

- (a) *Minutes of the Local County Council finalizing allocation – Defence Exhibit No. 8.*
- (b) *A letter of no objection from the District Commissioner in his capacity as the Chairman of the Land allocation Committee – Defence Exhibit No. 10.*
- (c) *A letter of no objection from the District Physical Planning officer - Defence Exhibit No. 11.*
- (d) *A letter of no objection from the Ministry of Lands, District Land Registrar – Defence Exhibit No. 12.*
- (e) *A letter of no objection from the Local Municipal Council – Defence Exhibit No. 13.*

The defence stated that the 1<sup>st</sup> defendant had all these documents and were therefore entitled to transfer and/or extension of lease. It is submitted that the application for extension of lease was made and that the Commissioner of Lands asked for these documents. The Defence further submitted that the 1<sup>st</sup> defendant upon receiving the letter of allotment dated 17<sup>th</sup> June 1994 made efforts to comply with the conditions set out thereunder which include the acceptance of the letter of allotment by paying the requisite fee through bankers cheque No. MRU 014447 for Ksh. 960 to the Commissioner of Lands and a cheque No. 488872 for Ksh. 18,000/= to the Municipal Council of Meru.

The defendants cited the following cases:

- (1) *Joseph Muthui Mwangi Vs Chief Land Registrar & 2 Others (2015) e K.L.R*
- (2) *Alice Chemutai Too Vs Nickson Kipkuri Korir & 2 Othes (2015) e K.L.R*
- (3) *Shimoni Resort Vs Registrar of titles & 5 others (2016) e K.L.R.*

#### ISSUES FOR DETERMINATION

The issue(s) for determination can be framed as follows:

- (1) ***Whether the plaintiff extension of the leasehold interest was proper***
- (2) ***Whether the plaintiff certificate of lease is indefeasible in law***
- (3) ***If the answer to paragraph 2 above is in the affirmative, whether the certificate of lease should be cancelled and the register rectified in favour of the 1<sup>st</sup> defendant.***
- (4) ***Who shall bear the costs of this suit?***

#### DISPOSITION

From the evidence on record, it is not in dispute that the suit property originally registered as L.R. No. 1104/143 was allocated to one Ranchobhai Hirashal Patel & 4 others for a term of thirty three (33) years with effect from 1<sup>st</sup> January 1960. Before the expiry of the said 33 years, one Vithalpbhai Patel holder of Power of attorney of the two of the five (5) Patels applied for extension of the lease vide a letter dated 28<sup>th</sup> October 1991. On 15<sup>th</sup> May 1996, the 2<sup>nd</sup> plaintiff was issued with a letter of allotment and later registered as proprietor of the leasehold interest over the suit property after fulfilling the terms and conditions set out thereunder as can be seen in the evidentiary documents produced as Plaintiffs Exhibit No. 1, 2 and 3 which are a certificate of lease, a green card and official search respectively. It is not in dispute that the plaintiffs in this case are the registered proprietors of the leasehold interest over the suit land. It is trite that registration conferred upon them rights and interests as stipulated under **Section 27 and 28 of the Registered Land Act** (Now repealed) which was in force by then. In **Denis Noel Mukhulo Ochwada & Another Vs Elizabeth Murungari Njoroge & Another (2018) e K.L.R.**, the Court of Appeal held:

***“Section 107 (1) of the Act, on Savings and Transitional provisions with respect to rights, actions and dispositions; makes further provisions that are relevant to this appeal as follows:***

***“107 (2) Unless the contrary is specifically provided for in this Act, any right, interest, title, power or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act (Emphasis added)***

***The rights and liabilities that the parties were agitating had accrued and the suit before learned Judge was filed on 31<sup>st</sup> May***

**2002, long before the commencement of the Land Registration Act. It would follow, therefore, that by dint of the foregoing provisions, the learned Judge should have applied provisions of the Registered Land Act, which was the law applicable to the suit property immediately prior to the commencement of the Land Registration Act (see also Ashit Patani & 2 Others Vs Dhirajlal V. Palani & 2 Others, C.A No. 316 of 2014)”.**

The rights of the plaintiffs are protected under **Section 143 of the Registered Act** which provides as follows:

**“143 Subject to sub-section (2), the Court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made, or omitted by fraud or mistake”.**

In the case of **James Mwangi Kamuru Vs Charity Kabura Thigingi & Another HCCC No. 133 of 2003 (Nyeri)** unreported, the Court faced with such an issue held as follows:

**“The title to the suit premises from the evidence was a first registration. In terms of Section 143 of the Registered Land Act therefore that title is indefeasible. It cannot be rectified or amended as had been sought by the Respondent ....”**

In my view, the plaintiffs’ rights as registered proprietors are still protected under **Sections 24, 25 and 26 of the Land Registration Act 2012**. They are therefore entitled to the protection of the law to enjoy possession, use and ownership of the suit premises.

In the result, I am satisfied that the plaintiffs have proved their claim on a balance of probabilities. To the contrary, the defendants who counter-claim is premised on fraud has not been proved to the required standard or at all. First, the purported sale agreement produced by the 1<sup>st</sup> defendant dated 24<sup>th</sup> November 1967 between the six Patel families and Michael Mwenda contains specific terms and conditions which were not complied with by the purchaser. The purported Michael Mwenda was not called as a witness. The letter of allotment issued to the 1<sup>st</sup> defendant pursuant to the purported sale agreement is not superior to the plaintiff’s certificate of lease. That was the holding in the case of **Lilian Waithira Gachuhi Vs David Shikuku Mzee (2005) e K.L.R** where it was held:

**“I have no doubt that legally a letter of allotment is an intention by the Government to allocate land. It is not a title. Therefore a letter of allotment cannot be used to defeat title of a person who has been registered as the proprietor of land”.**

In the upshot, I allow the plaintiffs’ claim with costs and dismiss the defendants defence and counter-claim with costs. It is so ordered.

**READ and SIGNED in open Court at Meru this 3<sup>rd</sup> day of June 2019.**

**E.C. CHERONO**

**ELC JUDGE**

**3<sup>RD</sup> JUNE, 2019**

*In the presence of:*

- 1. Mr. F.G. Honga holding brief for Mwangi for Plaintiffs*
- 2. Mr. Ondari for 1<sup>st</sup> Defendant and holding brief for Mr. Kurauka for 2<sup>nd</sup> Defendant*
- 3. Mr. B.G. Kariuki for Receiver Manager*