



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 797 OF 2017**

**MAGUTU ELECTRICAL SERVICES LIMITED.....PLAINTIFF**

**VERSUS**

**MIRIAM NYAWIRA NGURE.....1<sup>ST</sup> DEFENDANT**

**NATIONAL LAND COMMISSION .....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Introduction:**

1. This suit was commenced by way of a Plaint dated 23<sup>rd</sup> August, 2011. On 24<sup>th</sup> January, 2014, the Plaint was Re-Amended in which the names of the initial 1<sup>st</sup> and 2<sup>nd</sup> Defendants were struck out of the suit as parties.
2. In the Re-Amended Plaint, the Plaintiff averred that at all material times, it was the registered allottee by the Commissioner of Lands of unsurveyed land known as Plot No. G -Thika Municipality -L.R. No. 4953/1792 - vide a Letter of Allotment dated 9<sup>th</sup> June, 1989.
3. The Plaintiff averred that while in the process of acquiring the Certificate of Title for the land, some unknown people invaded the suit land on 22<sup>nd</sup> August, 2011 and started to undertake acts of waste. The Plaintiff further averred that he later learnt that the 1<sup>st</sup> Defendant acquired a Certificate of Lease from the 2<sup>nd</sup> Defendant and then sold the land to Haki Imetimizwa Company *Limited* (the initial 1<sup>st</sup> Defendant) and that the acquisition of the Certificate of Lease in respect of land known as Thika Municipality Block 14/96 by the 1<sup>st</sup> Defendant was fraudulent, illegal and unlawful. Other than seeking for a permanent injunction restraining the Defendants from interfering with the suit land, the Plaintiff is also seeking for compensation for the value of the suit land together with damages for fraud.
4. In her Defence to the Re-Amended Plaint, the 1<sup>st</sup> Defendant averred that on 29<sup>th</sup> July, 1989, the then Commissioner of Lands allocated her an unsurveyed Plot No. 3 - Thika Municipality and that on 27<sup>th</sup> March, 1997, she paid a total of Kshs. 196,534 to the Commissioner of Lands being payment for stand premium, land rent, stamp duty, conveying and survey fees.
5. According to the 1<sup>st</sup> Defendant, after paying the requisite charges to the Commissioner of Lands, she was issued with a Lease for the plot known as Thika Municipality Block 14/96 and that she sold the said land to Haki Imetimizwa Limited in the year 2010.

**The Plaintiff's case:**

6. In his evidence, the Plaintiff's Director, PW1, informed the court that on 6<sup>th</sup> May, 1987, he applied to the then Commissioner of Lands to be allocated an industrial plot in Thika Township being L.R. No. 4953/445; that the said Application was rejected and instead the Plaintiff was allocated plot number 4953/1792 and that on 22<sup>nd</sup> June, 1989, the Plaintiff accepted the allocation of the suit land in writing and paid Kshs. 20,000 to the Government.
7. According to the Plaintiff's Director, the Plaintiff took possession of the said land; that the then Thika Municipal Council approved the construction of a boundary wall around the suit land; that on 22<sup>nd</sup> August, 2011, he found some strangers depositing materials on the suit land and that he later on learnt that the 1<sup>st</sup> Defendant had been issued with a Lease in respect of the same land.
8. PW1 informed the court that from the extract of the Part Development Plan (PDP) that was issued to the 1<sup>st</sup> Defendant, the same amended the original Part Development Plan (PDP) wherein the Plaintiff's plot number "G" was changed to read "3"; that all the other plots are in an alphabetical order starting from "A" to "H" and that the 1<sup>st</sup> Defendant did not have a valid Lease to sell to Haki Imetimizwa.
9. Although the Plaintiff was granted an opportunity by the court to produce the original documents in support of his case, PW1 informed

the court that he did not have the original Letter of Allotment dated 9<sup>th</sup> June, 1989. According to PW1, he surrendered the original Letter of Allotment to the 2<sup>nd</sup> Defendant.

10. PW1 accused the 1<sup>st</sup> Defendant of having obtained the Lease in respect of land known as Thika Municipality Block 14/96 fraudulently. PW1 has sought for the payment to the Plaintiff the value of the plot, general damages for fraud and the costs of the suit.

**The Defence case:**

11. The 1<sup>st</sup> Defendant, DW1, informed the court that he applied to be allocated the suit land by the Commissioner of Lands in 1989; that the then Commissioner of Lands allocated her the suit land vide a Letter of Allotment dated 29<sup>th</sup> May, 1989 for unsurveyed plot number 3 and that the plot was marked as “3” on the Part Development Plan (PDP).

12. It was the evidence of DW1 that on 27<sup>th</sup> March, 1997, she paid to the Commissioner of Lands Kshs. 196,534; that on 17<sup>th</sup> December, 2002, she was issued with a Lease dated 27<sup>th</sup> November, 2002 for Thika Municipality Block 14/96 and that she sold the said land to Haki Imetimizwa Company Limited. The 1<sup>st</sup> Defendant did not produce any documents in support of her case.

**Submissions:**

13. The Plaintiff’s advocate submitted that the allocation of the suit land to the 1<sup>st</sup> Defendant by the Commissioner of Lands was fraught with fraud and misrepresentation; that the 1<sup>st</sup> Defendant never applied for the suit land and that the Plaintiff has suffered great loss occasioned by the acts of the 1<sup>st</sup> Defendant and agents of the Commissioner of Lands.

14. Counsel submitted that the Plaintiff’s rights and interests in the suit land were unlawfully extinguished and is therefore entitled to compensation and that it is the 2<sup>nd</sup> Defendant who should be ordered to compensate the Plaintiff for the land.

15. The 1<sup>st</sup> Defendant’s counsel submitted that PW1 did not produce the resolution of the Board of Directors of the Plaintiff conferring any authority on him to plead in the matter; that this suit was instituted without the knowledge, consent and authority of the purported Plaintiff and by Advocates who had no instructions whatsoever to act on its behalf. Counsel submitted that on that ground alone, the suit should be dismissed.

16. The Defendants’ counsel submitted that in any event, the Plaintiff did not produce any compelling evidence to prove its case; that the 1<sup>st</sup> Defendant was allocated the suit land earlier than the Plaintiff and that a Letter of Allotment is subservient to a registered interest in land. Both the Plaintiff’s and the Defendants’ counsels relied on numerous authorities which I have considered.

**Analysis and findings:**

17. It is not in dispute that the parcel of land known as Thika Municipality Block 14/96 (*the suit land*) was registered in favour of the 1<sup>st</sup> Defendant on 17<sup>th</sup> December, 2002. According to both the Plaintiff and the 1<sup>st</sup> Defendant, the said land has since been sold to an entity known as Haki Imetimizwa Company Limited.

18. Although the said Haki Imetimizwa Company Limited was initially sued by the Plaintiff as the 1<sup>st</sup> Defendant, the Plaintiff withdrew the suit against it on 16<sup>th</sup> January, 2014. The reasons for the withdrawal of the suit as against the current registered owner of the suit property are unknown to this court.

19. Having withdrawn the suit against the current registered proprietor of the suit land, the Plaintiff’s only claim is for compensation of the suit land as against the Defendants. Indeed, the Plaintiff can only succeed in such a claim if it proves on the required standards that the Defendants had the suit land fraudulently or by misrepresentation registered in favour of the 1<sup>st</sup> Defendant.

20. From the pleadings and the evidence before this court, the issues for determination herein are as follows:

**a. Whether the Plaintiff is properly before this court;**

**b. Whether the Plaintiff has proved the allegations of fraud as against the Defendants;**

**c. Whether the Plaintiff has a valid legal claim as against the Defendants viz-a-viz parcel of land known as Thika Municipality Block 14/96.**

21. The Plaintiff is a Limited Liability Company. According to PW1, he is the Plaintiff’s Managing Director. I have perused the Plaintiff and the Verifying Affidavit of PW1 that was filed on 24<sup>th</sup> August, 2011. There is no evidence attached on the said Verifying Affidavit or produced by PW1 showing that PW1 was authorized by the Plaintiff to swear the Verifying Affidavit as required by the law. The absence of a Letter of Authority by the Board of Directors of the Plaintiff allowing PW1 to plead on behalf of the Plaintiff offends the provisions of Order 4 Rule 1 (4) of the Civil Procedure Rules which provides as follows:

**“(4) Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so.”**

22. Indeed, in cross-examination, PW1 stated that it is his lawyer who had the Minutes of the Plaintiff authorizing him (PW1) to testify on behalf of the Plaintiff. However, he did not produce the said Minutes in evidence. The failure by PW1 to produce the resolution of the Company authorizing him to plead and testify on behalf of the Plaintiff renders the suit a non-starter. In the case of **Chevron (K) Limited vs. Harrison Charo Wa Shutu (2016) eKLR**, the Court of Appeal held as follows:

***“Regarding the Appellants’ complaint, it is well known principle of company law that, being an artificial body, a company can only act through the agency of its organs, the Board of Directors and shareholders. Where, for example, it is demonstrated that a suit was instituted without the resolution of the board, the company cannot be said to be before the court.”***

23. Although PW1 informed the court that the Plaintiff was allocated a parcel of land known as unsurveyed plot number G -Thika Municipality, also known as Plot number 4953/1792, he did not produce the Letter of Allotment and the approved Part Development Plan (PDP) to prove his claim. Indeed, the burden of proving that by the time the 1<sup>st</sup> Defendant was registered as the proprietor of the suit land, the Plaintiff had been offered by the Government the same land was on the Plaintiff. In the case of **Denis Noel Mukhulo Ochwada & Another vs. Elizabeth Murungari Njoroge & Another (2018) eKLR**, the Court of Appeal quoted with approval the case of **R.G. Patel vs. Lalji Makanji (1957) EA 314** as follows:

***“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”***

24. In the case of **John Mbugua Gitau vs. Simon Parkoyiet Mokare & 4 others (2017) eKLR**, the court reiterated its findings in **Emfil Ltd vs. Registrar of Titles**, Mombasa as follows:

***“Allegations of fraud are allegations of a serious nature normally required to be strictly pleaded and proved on a higher standard than the ordinary standard of balance of probabilities.”***

25. It is trite that proof of fraud involves questions of fact and not speculation. Indeed, one can only show that a title document was procured fraudulently if he produces documents showing that the same land had not only been allocated to him, but that he had complied with all the conditions appertaining to the said allocation.

26. The Plaintiff herein did not produce the Letter of Allotment that was purportedly issued in its favour on 9<sup>th</sup> June, 1989. Although PW1 informed the court that it surrendered the said Letter of Allotment to the 2<sup>nd</sup> Defendant, he did not produce any letter forwarding the original letter to the 2<sup>nd</sup> Defendant as alleged.

27. Having failed to produce the Letter of Allotment that was issued to the Plaintiff, together with an approved Part Development Plan, it follows that the allegations that the Certificate of Lease that was issued to the 1<sup>st</sup> Defendant was fraudulently procured has not been proved.

28. Indeed, the 1<sup>st</sup> Defendant was not under any legal obligation to prove that he procured the Certificate of Lease lawfully until the Plaintiff discharges its burden of proof. That was the position that the Court of Appeal took in the case of **Peter Kamau Njau vs. Emmanuel Charo Tinga (2016) eKLR** where it held as follows:

***“The copies of the Title Deeds produced in evidence are, by the provisions of Section 26 of the Land Registration Act, 2012, to be taken by all courts as prima facie evidence that the person named as the proprietor is, in fact, the absolute and indefeasible owner...”***

29. That being the case, and the Plaintiff having failed to produce the Letter of Allotment and the Part Development Plan, I find that the Plaintiff has not proved its case on the required standards.

30. For the reasons I have given, I dismiss the Plaintiff’s Re-Amended Plaint dated 24<sup>th</sup> January, 2014 with costs.

**DATED AND SIGNED AT MACHAKOS THIS 19<sup>TH</sup> DAY OF SEPTEMBER, 2019.**

**O.A. ANGOTE**

**JUDGE**

**DATED, DELIVERED AND SIGNED AT THIKA THIS 18<sup>TH</sup> DAY OF OCTOBER, 2019.**

**L. GACHERU**

**JUDGE**