



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MAKUENI

ELC CASE NO. 75 OF 2017

JOHN SILA NGANDA.....1ST PLAINTIFF/APPLICANT

JOHN KYALO MUTUA.....2ND PLAINTIFF/APPLICANT

VERSUS

ALFRED MUEMA MAKAU.....1ST DEFENDANT/RESPONDENT

NATIONAL LAND COMMISSION.....2ND DEFENDANT/RESPONDENT

DIRECTOR OF LAND

ADJUDICATION AND SETTLEMENT.....3RD DEFENDANT/RESPONDENT

PERMANENT SECRETARY MINISTRY OF LAND,

HOUSING AND URBAN DEVELOPMENT.....4TH DEFENDANT/RESPONDENT

JUDGEMENT

1. By their amended plaint dated 09th April, 2018 and filed in court on 10th April, 2018, Ferrister Ndanu Mwanja and John Kyalo Mutua (hereinafter referred to as the 1st and 2nd Plaintiffs) pray for judgment against Alfred Muema Makau, National Land Commission, Director of Land Adjudication and Settlement, Permanent Secretary Ministry of Lands, Housing and Urban Development (hereinafter referred to as the 1st, 2nd, 3rd and 4th Defendants respectively for orders: -

(a) A declaration that parcel of land No.153 approximately 2.96Ha Kiboko 'B' settlement scheme in Kibwezi is registered in the names of John Sila Nganda and the property of John Sila Nganda the 1st plaintiff pending transfer to the 2nd plaintiff John Kyalo Mutua and title deed to be issued as such from the ministry of Lands.

(b) An order of permanent injunction against the 1st defendant, his family or anyone claiming under him from using, alienating, stepping foot, trespassing or claiming ownership or being registered as owner of parcel of land No.153 approximately 2.96Ha Kiboko 'B' Settlement Scheme in Kibwezi.

(c) An Order barring the 2nd, 3rd and 4th defendants herein from changing the names of the registered owner John Sila Nganda from the Land Register, title documents or any documents held by them as the registered owner of parcel of land No.153 approximately 2.96 Ha Kiboko 'B' Settlement Scheme in Kibwezi save to only change to John Kyalo Mutua the bonafide purchaser.

(d) Costs of the suit and interest.

(e) Any other relief that this Honourable Court may deem fit and just to grant.

2. The 1st Plaintiff is the legal representative of the estate of the late John Sila Nganda while the 2nd Plaintiff is the purchaser of land parcel No.153 Kiboko 'B' Settlement Scheme.

3. The Plaintiffs' claim is denied by the 1st Defendant vide his statement of defence and counterclaim dated 01st February, 2018. In paragraphs 6, 8 and 9 of their amended plaint, the two plaintiffs have averred that the 1st Plaintiff was and is registered owner of parcel of land number 153 approximately 2.96 hectares Kiboko 'B' Settlement Scheme in Kibwezi, that on or about October, 2014 the 1st Defendant started laying false and malicious claims of the said land parcel No. 153 Kiboko 'B' Settlement Scheme and that on or about 21st September, 2012, the 1st Plaintiff sold the said land parcel number 153 Kiboko 'B' Settlement Scheme to the 2nd Plaintiff for value after the latter established through the relevant registers, offices and Ministry that the land solely belonged to the 1st Plaintiff.

4. In his counterclaim, the 1st Defendant has averred in paragraphs 17, 20, 26, 27 and 30 that at all times he was and is the owner and proprietor of plot No.153 Kiboko 'B' Settlement Scheme in Kibwezi having been allocated the same way back on 30/06/1999 by the Land Adjudication and Settlement Department Nairobi, further letter of acceptance for plot number 153 Kiboko 'B' Settlement Scheme on 09th May, 2001, that he duly paid the 10% Land Deposit and Conveyance Fee, that he immediately took possession of the plot after allotment and tilled a portion thereof and used the other portions to rear goats, that he presented himself to the National Land Commission officials and presented his case and documents while the 1st Plaintiff also presented his documents, that upon deliberation the National Land Commission made a finding that he (1st Defendant) was the bona fide owner of the suitland having been the original allottee and having met all the required conditions of the allotment and that he has never acceded to the 1st Plaintiff's claim to ownership of the subject plot.

5. The 1st Defendant therefore prays for judgement against the Plaintiff for:-

1) A declaration that the 1st defendant, being the original allottee of the suit land and having satisfied all the conditions of the allotment is the legal owner of the suit premises plot No.153 Kiboko 'B' Settlement Scheme and that any sale on/or purported conveyance of the suit land by the 1st Plaintiff and the 2nd plaintiff is null and void.

2) A permanent injunction restraining the plaintiffs by themselves, agents servants or otherwise howsoever from interfering with the 1st defendants quiet enjoyment of plot No.153 Kiboko 'B' Settlement Scheme.

3) An order of eviction directed against the 1st and 2nd plaintiffs to vacate the suit premises. The said order to be enforced through the OCS Makindu Police Station.

4) Costs.

5) Any other or further relief that this Honorable court will deem it fit to grant.

The Plaintiffs did not reply to the defence and counterclaim but instead chose to amend their plaint.

6. The 2nd Defendant entered appearance on the 26th September, 2016 vide its memo of appearance of the same date. Apart from the notice of Preliminary Objection dated 14th October, 2016 and filed in court on 18th October, 2016, the 2nd Defendant did not file its defence. The 2nd Defendant did not endeavour to prosecute the Preliminary Objection.

7. The 3rd and the 4th Defendants have opposed the claim vide their joint statement of defence dated 17th June, 2016 and filed in court on 20th June, 2016. The two have denied the averments in the plaint and have put the plaintiff to strict proof.

8. During the hearing, the 1st Plaintiff adopted her statement dated 02nd February, 2018. She said that she has letters of administration to enable her enjoin this suit. Briefly her evidence was that her late husband, John Sila Ngonda, acquired land No.153 Kiboko 'B' Settlement Scheme in Kibwezi through invitation and allotment by the Ministry of Lands in the year 2012. That her late husband later sold the land to John Kyalo Mutua, the 2nd Plaintiff herein, in the year, 2015. That her late husband and the 2nd Plaintiff went to the lands offices to have land documents changed in the name of the 2nd Plaintiff. It was also her evidence that the 1st Defendant has never been the owner of the suitland.

9. Her evidence in cross-examination by Mr. Musyoka for the 1st Defendant was that she did not know Alfred Mutua was allocated the land in 1999. She added that her late husband carried out a search in 2012 when he was allocated the suit land. She acknowledged that she did not have a certificate of official search.

10. The 2nd Plaintiff, John Kyalo Mutua, too adopted his statement that he recorded on 11th April, 2016 as his evidence. His evidence was that he came to know John Sila Nganda when the latter sold a parcel of land to him. He said that a signed letter of offer dated 01/02/12 was given to Nganda by one E. N. Ogega the Director of Lands and Adjudication. That Nganda paid 10% on 09/03/12 and a receipt was issued to him together with a letter of offer of the same date. That Nganda paid the balance of 90% on 08/08/13 and the Ministry of Lands issued a receipt. That on 05/04/12 he and Nganda entered into a sale agreement which was witnessed by their witnesses. That after paying for the full purchase price, he visited the Lands office for the process of transferring ownership of the land to himself. The witness produced several documents related to the transaction as they appear in his bundle of documents dated 11/04/18 and 04/04/18 as P.Exhibit Nos.2 to 14 and 15(a) and (b) respectively.

11. The 2nd Plaintiff's evidence in cross-examination by Mr. Musyoki was that he carried out a search for the land even though he did not check the adjudication report. He said that in the report dated 19/03/18 that deals with the register of beneficiaries of Kiboko 'B' Settlement Scheme, Alfred Makau's name has been cancelled and replaced with that of John Sila Nganda. He admitted that the documents by the 1st Defendant shows that he was offered land in 1999 while the offer to Nganda was in the year 2012. He said that when they appeared before the National Lands Commission, it was decided that suitland belongs to Alfred Makau.

12. His evidence in re-examination was that the letter of offer issued to Alfred Makau on 30/6/1999 shows that it was valid for 90 days and that it would be cancelled without notice.
13. Benson Musyoka Mwilu (PW1) adopted the statement that he recorded on 04/04/2018 as his evidence. His evidence was that the suitland belonged to the late John Sila Nganda according to the records that he saw.
14. His evidence in cross-examination by Mr. Musyoka was that he did not have a certificate of official search. That he saw the cancellation of Alfred Muema's name. He said that he did not know that Alfred Mwema was offered the land in 1999.
15. Erick Muloki Muyanga (DW2) in his evidence in chief adopted the statement that he recorded on 02/02/18. In brief, his evidence was that while at Kibwezi, he confirmed that the suitland belonged to John Sila. That there was letter of offer and other documents. That between Alfred Mwema and John Kyalo, it is the latter who uses the land.
16. His evidence in cross-examination by Mr. Musyoki for the 1st Defendant was that he did not have a certificate of search even though he carried out a search on plot No.153. He said that he did not see Alfred Muema Makau in October, 2014 even though he heard that the latter had offloaded building stones into the suitland. He disagreed with the Counsel's suggestion that the suitland belongs to Alfred Muema Makau.
17. Only the 1st Defendant testified. Like the Plaintiffs and their witnesses, the 1st Defendant adopted his statement that was filed in court on 21/02/18 as his evidence. His evidence was that plot No.153 Kibwezi 'B' Settlement Scheme was allocated to him on 30th/06/1999 and proceeded to produce the letter of offer issued to him as D.Exhibit No.1. He pointed out that the letter of offer was presented to him in May, 2001 and he wrote a letter dated 09/05/01 (D.Exhibit No.2) to accept the offer. That he paid 10% on 16/06/01 (D.Exhibit No.3). That having complied with the Government requirement, he has never received notice of land cancellation from the land officials. That it was his brother who used to cultivate on the suitland before he gave it out to someone to graze on it until another person laid claim on it.
18. That when he went to the district Land Adjudication Officer Kibwezi to make enquiry, office Mbiuki refused to hear him. That the officer referred him to a committee that had been appointed by the Governor Makueni to look into the issue but he got any of the committee members. That there was a notice by the National Land Commission that visited Makindu to verify the allotment. He and John Sila presented their respective documents to the Vice Chair of the Commission whereupon his documents were declared genuine and John Sila was ordered to vacate the suit premises. That on the basis of the letter of offer (D.Exhibit No.1) there was nothing that he did not comply with.
19. On being cross-examined by Mr. Makau, the 1st Defendant told the court that the suitland is his because he got his letter of offer before John Sila Nganda got his. He agreed that his letter of offer and that of John Sila came from the director of Adjudication and Settlement. He further agreed that his letter of offer was valid for 90 days from the date of offer failure of which it would have led to cancellation. That he was required to pay 100% or else the letter of offer would be cancelled without further notice to him. He pointed out that he never received the letter of offer. He said that his payment of 16/05/01 was two years after he got the letter of offer and asserted that the Director of Adjudication and settlement was wrong to cancel the letter of offer. He said that he has never paid the 90% balance and the reason that he gave was due to none documentation. He went on to say that his letter of offer came in May, 2001 and he went to the Lands office Makueni to pick it up. That having gotten it on 09/05/01, he paid the 10% on 16/05/01. He said that although he was a district Officer in 2001, he has never used his office to manipulate other officers. He maintained that both John Sila and the 2nd Plaintiff were told to vacate the suitland and lay their claim to whoever issued them with the documents that they had. He however agreed that he had not produced any report by the National Land Commission.
20. His evidence in re-examination was that he has never received any notice from the Land Adjudication office.
21. Only the Plaintiffs and the 1st Defendant had filed their submissions by the time of writing this judgment.
22. The Plaintiff's Counsel raised the following issues for determination:-

- 1) Does parcel No. 153 Kiboko 'B' Settlement Scheme in Kibwezi exist and where did it come from?**
- 2) Who is the registered owner of parcel No. 153 Kiboko 'B' Settlement Scheme in Kibwezi defendant and what is the procedure of registration?**
- 3) Who has or is in occupation and use of parcel No. 153 Kiboko 'B' Settlement Scheme in Kibwezi and who is the trespasser?**
- 4) Is the registration of the suit land proper and complied with by the owner?**
- 5) Is Plaintiff entitled to costs of suit?**

The Counsel for the 1st Defendant did not raise any issue for determination but from his submissions, it would appear that the Counsel addressed his mind to issued number 2 and 3 that were raised by the Plaintiff's Counsel.

23. The Plaintiff's Counsel addressed issues number 1 and 2 together as follows:- That the suitland having been a Settlement Scheme under the control of the Government, it remain government land until it is disposed off in accordance with the law. That the letters of offer issued by the director of Land Adjudication and Settlement remain as letters of offer until fulfillment of the conditions indicated thereon. The Counsel pointed out that the 1st Defendant received a letter of offer dated 30/06/1999 (D.Exhibit No.1) which had an express validity of 90

days. That by the 1st Defendants own documents, he paid 10% on 15/05/2001 which was a period of 2 years later. That when the 1st Plaintiff received his letter of offer dated 01/02/12, he complied by paying the 10% required on 09/03/12 and the 90% balance on 08/08/18 upon which the land was released to him. That the 1st plaintiff thereafter sold the suitland to the 2nd plaintiff and the transaction was approved by the lands office as per the exhibits produced.

24. Regarding the 4th issue for determination the Counsel submitted that the Plaintiffs should be granted the orders sought.

25. On the other hand, the Counsel for the 1st Defendant submitted that the 1st Defendant was the first allottee of the suitland by the Government and as such the said land belongs to him. The Counsel added that no due process was followed by the District Land Adjudication Officer to inform him that his ownership of the suitland had been cancelled.

26. Arising from the above, the counsel urged the court to make a finding that the plaintiffs have failed to prove their case of a balance of probabilities and proceed to dismiss their case with costs to the 1st defendant upon which the court should also enter judgement in his favour and against the defendants in terms of prayers 1, 2, 3 and 4 of his defence and counterclaim.

27. The 1st Defendant's counsel cited the case **Metian Kitili Nkoiboni vs. Richard Salaton Torome [2011] eKLR** where Anyara Emukule J rendered himself thus:-

“As I understand the requirement of allocation of land, once a parcel has been allotted, there has to be followed a procedure for either cancellation or forfeiture of the allocation. This is usually premised upon either breach of the conditions of allocation, such as development, or outright rejection of the allotment. Once an allottee has accepted the allotment, for the allotment to be forfeited there has to be a notification to the allottee of the cancellation or forfeiture. It is a cardinal principle of the rules of natural justice...”

28. Having carefully evaluated the evidence on record and the submissions filed by the Counsel for the plaintiffs and the Counsel for the 1st Defendant, my finding is that this case will turn on the validity of whose letter of offer is valid and hence fit to be declared the lawful owner of land parcel number 153 Kiboko 'B' Settlement Scheme Kibwezi. whereas I agree with the 1st Defendant's Counsel that once land was allocated to the 1st Defendant, it was not available for allocation to the Plaintiffs herein, in my view, this could only be subject to the 1st Defendant having fulfilled the conditions set out in the letter of offer. One of the conditions was payment of 10% deposit within 90 days. The 1st Defendant has by his own admission stated that although he received the letter of offer on 30/06/1999, he paid the 10% on 15/05/2001. This was clearly outside the window period of 90 days. The letter of offer that the 1st Defendant relies on had notice that failure to comply would lead to the cancellation of the offer without further notice.

29. From the evidence on record the 1st Plaintiff received his letter of offer on 01/02/12 and paid his 10% deposit on 09/03/12 and thereafter cleared the balance of 90% within the 90 days period while the 1st Defendant is yet to clear the outstanding amount.

30. In the case of **John Muchiri Mbuthia vs. Rebecca Were Matinda & Another [2015] eKLR** the Court relied on the case **Rukaya Ali Mohamed vs. David Kikongo Nambacha & Another in Kisumu HCCA No.9 of 2004** where the Court held thus:-

“...once allotment letter is issued and allottee meets the conditions therein, the land in question is no longer available for allotment since a letter of allotment confers absolute right of ownership or proprietorship unless it is challenged by the allotting authority or is acquired through fraud, mistake or misrepresentation or that the allotment was outrightly illegal or it was against public interest. In other words, where land has been allotted, the same land cannot be reallocated unless the first allocation is validly and lawfully cancelled.”

31. In the matter before me, the 2nd to the 4th defendants did not testify to show whether the letter of offer given to the 1st Defendant had been lawfully cancelled but by implication that there was a rider in the letter of offer issued to both the 1st Plaintiff and the 1st Defendant that the offer would be cancelled without further notice for failure to meet the conditions thereon, it is safe to conclude that this what happened in respect of the 1st Defendant otherwise the Director of Land Adjudication and Settlement would have had no authority to issue a letter of offer to the 1st Plaintiff. The 1st Defendant's letter of offer having been cancelled by affluxion of time, I hold that the letter of offer to the 1st Plaintiff is the valid one and therefore, she and the 2nd Plaintiff are the owners of the suitland.

32. Arising from the above, my finding is that the Plaintiffs have on a balance of probabilities satisfied this court that they have a cause of action against the defendants. The 1st Defendant having failed to satisfy the court that he has a cause of action against the Plaintiffs on a balance of probabilities, his counterclaim must fail. In the circumstances, I hereby proceed to dismiss his counter claim with costs to the plaintiffs. In the same vein, I proceed to enter judgment for the plaintiffs and against the Defendants jointly and severally terms of prayers (a), (b) (c) and (d) of the amended plaint. It is so held.

Signed, Dated and Delivered at Makueni this 03rd day of **October, 2019.**

MBOGO C. G.

JUDGE.

In the presence of: -

Ms. Kerubo holding brief for Ms. Ndundu for the 3rd & 4th Defendants

No appearance for the Plaintiff

No appearance for the 1st and 2nd Defendants

Ms. C. Nzioka – Court Assistant

MBOGO C. G., JUDGE

03/10/2019