



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 24 OF 2015**

**LYDIA WANJIRU MURIITHI.....PLAINTIFF**

**VERSUS**

**THE ATTORNEY GENERAL .....DEFENDANT**

**JUDGEMENT**

1. The Plaintiff brought this suit against the Attorney General on behalf of the Commissioner of Lands pursuant to the provisions of the Government Proceedings Act.
2. The Plaintiff claims that the Commissioner of Lands allocated Un-Surveyed Plot Number G at Donholm Estate, Nairobi measuring approximately 0.14 hectares to John G. Thogo, who is now deceased, vide a letter bearing reference number 361/111 dated 28/4/1994. John Thogo transferred this parcel of land to the Plaintiff on 5/9/1995 with the consent of the Commissioner of Lands. Following the survey, the land was delineated as Nairobi/Block 82/5892 (“the Suit Property”). A grant of lease was issued to the Plaintiff for 99 years with effect from 1/5/1994.
3. When the Plaintiff sought to change the user of the Suit Property to commercial-cum-residential, she was advised by the City Council of Nairobi that the Suit Property could not be developed because it cuts across the trunk sewer line that serves Donholm Estate.
4. The Plaintiff filed this suit seeking special damages of Kshs. 325,500; compensation equivalent to the current market price of the Suit Property; general damages; interest and any other relief the court may deem fit to grant.
5. The Plaintiff claims that the Commissioner of Lands is liable to pay damages for negligence in allocating plot number G Nairobi to John G. Thogo when he knew or ought to have known that the plot was on a sewer line and was therefore unavailable for private development. Further, that by consenting to the transfer of the Suit Property from John Thogo to the Plaintiff when he knew that it was on a sewer line and not available for private development, the Commissioner was negligent.
6. The Plaintiff called two witnesses. Anne Wangeci Ndegwa, the Plaintiff’s sister gave evidence in this case. The Plaintiff resides in Washington DC, USA granted her sister a Power of Attorney to act for her in connection with the dispute concerning the Suit Property which is registered in her name. The witness adopted her witness statement filed in court on 5/8/2014.
7. It was her evidence that through the letter of allotment dated 28/4/1994, the Commissioner of Lands allocated Un-surveyed Plot Number G to John G. Thogo who later sold it to the Plaintiff. On applying to change the user of the Suit Property from the Nairobi City Council, the Plaintiff was informed that she could not develop the Suit Property. That is when she learnt that the plot she bought was completely

worthless.

8. The witness produced a copy of the lease together with the certificate of lease for the Suit Property issued on 13/11/1995; a copy of the search done on 4/6/2014; a copy of the amended Registry Index Map (RIM) showing the location of the Suit Property together with the letter from Nairobi City Council notifying the Plaintiff that the Suit Property cannot be developed since it cuts across the trunk sewer line serving Donholm Estate.

9. She maintained that the Commissioner of Lands was negligent in allocating the Suit Property to John G. Thogo for private use and by consenting to the transfer of the Suit Property to the Plaintiff while knowing that it was on a sewer line and not capable of private development.

10. It was her evidence that the Defendant had prevented the Plaintiff from utilising the Suit Property and that indeed the Ministry of Interior and Coordination of the National Government had set up a Chief's Camp on the Suit Property.

11. As a result of the negligence of the Commissioner of Lands, the Plaintiff argues that she ended up with a useless piece of land thereby suffering loss and damage. She gave particulars of the damage; she produced the receipts for Kshs. 260,000 dated 28/9/1995 for the purchase of plot G. Donholm Nairobi; a receipt for 26,500 issued by Wamae Mureithi and Associates for fencing the plot.

12. A copy of the official search dated 18/8/1999 shows that a restriction was registered against the Suit Property on 18/12/1996 indicating that no dealings should be registered until the Chief Land Registrar's consent is obtained and that no disposition by the proprietor is to be registered without the written consent of the lessor.

13. Mr. James Githaiga Thirikwa, who valued the Suit Property also testified for the Plaintiff and produced the valuation report dated 12/6/2014 in which he gave the value of Kshs. 75 million for the Suit Property. He explained that he used the comparison method in arriving at this figure. The plots that he compared the Suit Property with in the same neighbourhood were valued at Kshs. 8 Million and 12 Million.

14. The Defendant who failed to appear on the date set for hearing did not call any evidence. After the hearing, the Defendant applied to have the Plaintiff's witness recalled for cross examination and sought leave to file written submissions. The Plaintiff's counsel opposed the application to have the witnesses recalled for cross examination on the ground that it is difficult to procure the attendance of one of the witnesses. However, he was agreeable to the Defendant's counsel being allowed to file its submissions.

15. The issues for determination are: whether the Plaintiff obtained her title legally; whether the Commissioner for Lands was negligent in issuing a lease and title to the Plaintiff; and lastly, if the special damages the Plaintiff seeks ought to be granted by the Court.

16. Both counsels filed their written submissions. The Plaintiff seeks compensation under Section 144 (2) of the Registered Land Act and Section 81 of the Land Registration Act. He relied on the case of **Samuel Kamere v Lands Registrar** [2015] eKLR and urged the court to consider awarding the Plaintiff the sum of Kshs. 75 Million indicated in the valuation report as compensation for the loss she suffered on account of the negligence of the Commissioner of Lands.

17. The Plaintiff claims she purchased the Suit Property from John Thogo who had a letter of allotment in respect of the unsurveyed plot. The letter of allotment was not produced in evidence. Neither was the application which the late John Thogo made for allocation of the plot. Ordinarily, the application for the allotment indicates which plot one is applying to be allocated. The letter of allotment would have the conditions upon which the offer for allotment was made.

18. The Plaintiff's witness stated in evidence that the Plaintiff only learnt of the existence of the sewer line when she applied to change the user of the Suit Property. This raises doubt as to whether the Plaintiff

inspected the land when she purchased it from John Thogo, now deceased. The certificate of lease produced in court was issued on 13/11/1995 while copies of the receipts dated 30/11/2007 and 30/11/2007 on account of the fencing of the Suit Property bear the name of James Githaiga and not the Plaintiff's name.

19. The copy of the Amended Registry Index Map produced by the Plaintiff, shows that plot number 5892 which is the Suit Property sits on what appears to be a road abutting plots 1633 and 381. If the Plaintiff had done due diligence before purchasing the suit land she would have realised that it was a public utility plot incapable of being acquired for private development.

20. The Defendant argues that the Plaintiff ought to have sued the Commissioner of Lands or called him to testify in the matter. The court agrees that the Commissioner for Lands ought to have been called to give evidence on the procedure followed when one applies for allocation of land. The Defendant also takes issue with the fact that the Plaintiff did not produce evidence of payment of stamp duty, consent to transfer fees, rates, rent and other title processing fees. These would have confirmed that the Plaintiff followed the procedure for the processing of a valid title.

21. The onus of showing that the Defendant was negligent in allocating the Suit Property to John Thogo who in turn sold it to the Plaintiff rests fairly and squarely on the Plaintiff and that onus has not been discharged.

22. The court is inclined to agree with the Defendant that the Plaintiff failed to demonstrate that she acquired title over the Suit Property properly. She also failed to prove that the late John Thogo who sold her the plot acquired the plot properly.

23. The Defendant concedes that a certificate of title is conclusive proof of ownership of land but argues that under Section 26 of the Land Registration Act the protection afforded to a registered absolute owner can be challenged if it was obtained through fraud or misrepresentation or where it is procured illegally, unprocedurally or through corrupt scheme.

24. The Plaintiff relied on the case **Samuel Kamere v Lands Registrar** [2015] eKLR in support of her prayer for indemnity. In this appeal, the appellant sought to be indemnified by the Land Registrar for the cancellation of his name on the register and reinstatement of the previous proprietor on the register. The facts in the appeal are not similar to the facts in the instant case which relates to public utility land.

25. The Court of Appeal cited the case of **Munyu Maina v Hiram Gathiha Maina** Civil Appeal No. 239 of 2009 where the court stated that:

“We state that when a registered proprietor's root title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered owner must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

26. The Court of Appeal found that to be entitled to indemnity under Section 144(2) of the Registered Land Act, it must be shown that neither the person nor the person from whom he acquired title, caused or substantially contributed to the damage by his fraud or negligence. It must also be shown that the registration was based on valuable consideration.

27. If the Plaintiff had carried out thorough investigations or even made inquiries from the neighbouring residents as to whether the Suit Property was reserved for public utility, she would have discovered that there was a sewer line running through the Suit Property that serves Donholm residents. The Plaintiff has not established that she is entitled to the indemnity she seeks from the Defendant. She also failed to prove that her registration was based on valuable consideration.

28. The right to indemnity under Section 81 of the Land Registration Act arises where a person suffers

damage by reason of any rectification of the register under that Act or by reason of any error in a copy of, or extract from the register or document or plan certified under the Act. The Plaintiff still holds the certificate of lease over the Suit Property. The register has not been rectified. The Plaintiff has not shown that she suffered damage by reason of an error in the copy of, or extract from the register.

29. The court has considered the evidence presented before it and finds that the Plaintiff failed to prove her case on a balance of probabilities. It is dismissed with costs to the Defendant.

**Dated and delivered at Nairobi this 8<sup>th</sup> day of February 2018.**

**K. BOR**

**JUDGE**

In the presence of: -

Mr. Muchoki for the Plaintiff

Ms. Ndundu for the Defendant

Mr. V. Owuor- Court Assistant