



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

E.L.C. CASE NO. 418 OF 2010

SUSAN NYOKABI MWANGI KING'ORI.....PLAINTIFF

VERSUS

NAIROBI CITY COUNCIL.....1ST DEFENDANT

CHRISTOPHER MAINA CHEGE.....2ND DEFENDANT

PETER KUNG'U NG'ANG'A.....3RD DEFENDANT

JUDGEMENT

1. The Plaintiff claims that she was the allottee from the 1st Defendant of plot numbers 209/6604/3, 4 and 5 (“the Suit Properties”) located in Ofafa Maringo situated within Nairobi County. The plots were allocated to her vide a letter of allotment dated 3/5/1996. She claims she accepted the offer and made the requisite payments under the offer of allotment. The 1st Defendant issued leases in respect of these plots dated 30/10/1996 which it was to register. The Plaintiff claims that the 2nd and 3rd Defendants encroached on the plots and begun construction in February, purporting that they hold valid registered leases issued by the 1st Defendant over the plots.

2. The Plaintiff seeks a declaration that she is the rightful owner of the Suit Properties and seeks an injunction to restrain the 2nd and 3rd Defendants from interfering with or further constructing on the Suit Properties. The Plaintiff also seeks an order compelling the 1st Defendant to transfer the Suit Properties to her and an order of eviction against the 2nd and 3rd Defendants from the Suit properties. She also seeks the costs of this suit in the plaint filed in court on 9/9/2010.

3. The 1st Defendant denies the Plaintiff’s claim and concedes that it approved the 2nd and 3rd Defendants’ architectural drawings for development since they hold ownership documents for the Suit Properties. The 1st Defendant avers that it was the registered owner of the mother title of the Suit Properties being L. R. No. 209/6604 which it had leased to the Young Women Christian Association from 1/1/1988 for 14 years. That lease expired in 2002 and the 1st Defendant argues therefore that it could not have allocated the Suit Properties before the expiry of the lease term. After the lease for YWCA expired, the 1st Defendant subdivided the mother title in 2006. It leased the resultant parcel numbers 209/664/3, 209/664/4 and 209/664/5 to Mitchell Musimbi, Evans Nyaberi and Josephine, Maina Nyaga and Francis Kariuki Ndirangu respectively.

4. The 2nd and 3rd Defendants denied encroaching on the Suit Properties in their defence filed on 13/10/2010. They aver that they rightfully and lawfully entered the Suit Properties since they are registered owners as lessees from the City Council of Nairobi. The 3rd Defendant owns L.R. No. 209/6604/3, the 2nd Defendant owns L.R. No. 209/6604/4 while both of them jointly own L.R. No. 209/6604/5. The 2nd and 3rd Defendants were jointly carrying out construction on L.R. No. 209/6604/5. They denied being illegally on the Plaintiff’s land and further denied the particulars of loss and damage set out by the Plaintiff. They deny the allegation that they colluded with the 1st Defendant to deny the Plaintiff her rights in the Suit Properties.

5. The case was heard by the late Justice Louis Onguto. Parties agreed that proceedings would be typed and another Judge would deliver the judgement. The Plaintiff gave evidence. By a letter of offer dated 3/5/1996 the 1st Defendant allotted her the three (3) plots located in Ofafa Maringo within Nairobi County. She made the requisite payments under the letter of offer and executed lease agreements on 30/10/1996 which the 1st Defendant was to register in her favour. She noticed in February 2010 that the 2nd Defendant had encroached on the suit plots and begun construction. She accused the 1st Defendant of colluding with the 2nd and 3rd Defendants to fraudulently deny her ownership of the suit plots.

6. She produced copies of the letters of allotment for plot number A, B, C comprised in part of L.R. No. 209/6604. The letters stated that written acceptance together the charges indicated in the letters of allotment were to be received within 30 days of the date of the letters. The

copies of the receipts issued by the 1st Defendant are dated 8/7/1996. They are in respect of stand premium, survey fees and legal charges for the preparation of the leases. She also produced the deed plans for L.R. No. 209/6604/4 and 5 which are dated 19/6/1996. The copies of the unregistered leases dated 30/10/1996 which she produced in evidence were executed by the Town Clerk and Mayor and on her part. She also produced a copy of a letter dated 5/5/2003 addressed to the Director of Surveys seeking certified copies of the deed plans which she claimed she had lost. Several letters were written by Ministry of Lands seeking copies of the deed plans.

7. On cross examination she stated that she made an oral application for allocation of the plots after her husband told her about the plots. Her husband applied for her. Her husband, John Mwangi King'ori was the Mayor of Nairobi in 1996 when the plots were allocated to her.

8. The Plaintiff's husband gave evidence. He stated that the 1st Defendant allotted to the Plaintiff three (3) plots through the letter offer dated 3/5/1996. His wife made payments with his assistance and later executed the leases. All the while the 1st Defendant represented to him and the Plaintiff that the process of registration of the leases was underway. In February 2010 the 2nd and 3rd Defendants encroached on the suit plots and started construction claiming they held valid registered leases which were issued by the 1st Defendant. He reported the matter to Buruburu Police Station for investigation. He denied allocating the property to himself when he was the Mayor of Nairobi City Council in 1996. He confirmed signing the leases issued to his wife as the Mayor of the 1st Defendant but denied abusing his office or grabbing the plots. He was not aware and insisted that it was incorrect to say that the land had been leased to YWCA in 1988. He maintained that he was the owner of the Suit Properties because the 1st Defendant failed to register the leases after he had made payments. He claimed he was in possession of the Suit Properties.

9. The 2nd Defendant gave evidence. He stated that he purchased L.R. No. 209/6604/4 from Justine Maina Nyaga in September 2007 for Kshs. 3.6 million and made payment in accordance with the sale agreement. On 4/3/2008, he purchased L.R. No. 209/6604/5 jointly with the 3rd Defendant from Francis Kariuki Ndirangu for Kshs. 3.4 million which they paid according to the terms of the sale agreement. They started construction on L.R. No. 209/6604/5 and were summoned by the Police officers based in Buruburu in February, 2010 and were requested to cease construction to allow investigations into the two (2) plots. He maintained that he is the lawful owner of L.R. No. 209/6604/4 while he jointly owned L.R. No. 209/6604/5 with the 3rd Defendant.

10. He produced copies of the Deed Plans for the three (3) plots together with the leases for these plots which were registered on 8/7/2006. The 1st Defendant initially leased L.R. No. 209/6604/3 to Mitchell Musimbi, Evans Nyaberi and Josephine Okoth. L.R. No. 209/6604/5 was leased to Francis Kariuki Ndirangu. The witness also produced the agreement for sale dated 25/9/2007 entered into with the original allottees. Copies of the rates demand notes reflected the names of the original leases. L.R. No. 209/6604/5 was transferred to the 2nd and 3rd Defendants on 21/4/2008 while L.R. No. 209/6604/4 was transferred to the 2nd Defendant on 21/4/2008. The Defendant also produced the demand for stamp duty declarations on the transfer of the leases. The Defendants produced copies of the payment vouchers for the stamp duty. The 1st Defendant issued receipts for payment for building approvals to the Defendants in September 2009.

11. Parties filed submissions. The issue for determination is whether the Plaintiff has proved that she is entitled to the orders she seeks in the plaint. The Plaintiff maintains that she is entitled to the orders having been allocated the three (3) plots vide the letters of allotment dated 3/5/1996. She executed the lease agreement and argues that she was the first to acquire the Suit Properties. She relied on the decision in **Gitwany Investment Limited v. Tajmal Limited & 3 others** [2006] eKLR in support of her argument that the first title in time must prevail where the Commissioner of Lands issues two (2) titles in respect of the same land.

12. She also relies on Section 6 of the Land Registration Act which basically states that a certificate of title acquired illegally, unprocedurally or through a corrupt scheme is not to be taken by the courts as prima facie evidence that the person named as the proprietor is the absolute and indefeasible owner. The Plaintiff maintains that the 2nd and 3rd Defendant's claim to be bona fide purchasers for value without notice must first be investigated before they can enjoy the protection afforded by the law to bona fide purchasers for value without notice. She denies that the 2nd and 3rd Defendants carried out due diligence before purchasing the suit plots and that they were part of the scam.

13. She urges the court to order the cancellation of the entries in the register under Section 80 of the Land Registration Act which empowers the court to order rectification of the register by directing that any registration be cancelled or amended if the court is satisfied that the registration was obtained or made by fraud or mistake. The Plaintiff urges the court to direct the 1st Defendant to finalise the registration of the leases over the Suit Properties in her name.

14. The 2nd and 3rd Defendants in their submissions contend that the fact that the Plaintiff knew very little about the transaction confirms that her husband who was then the Mayor of Nairobi was actually allocating himself the three (3) plots using the Plaintiff's name. The Defendants urged that it was irregular for the Mayor to execute the leases in favour of the Plaintiff for the allocation of the plots. They maintain that they were innocent purchasers for value who purchased the plots from original allottees and that the Plaintiff failed to prove any fraud on their part. They argue that Section 25 and 26 of Land Registration Act protects them since they are registered lessees and that the evidence of the Plaintiff is insufficient to impeach their rights to the three (3) plots. They argued that the case of **Gitwany Investments Limited** is distinguishable because in that case the Commissioner of Lands had issued two (2) titles over the same piece of land unlike the instant case where the Plaintiff does not hold the title over the three (3) plots.

15. The 1st Defendant in its submissions urges that the suit lacks merit since the plots were never allocated to the Plaintiff. It submits that the Plaintiff cannot seek the court's intervention to secure the proprietary rights that she is not entitled to in the first place.

16. The Plaintiff relies on the letters of allotment and the leases which are not registered in support of her claim. The Plaintiff's husband executed the leases in favour of the Plaintiff in 1996. He gave no explanation as to why the leases were not registered in favour of the Plaintiff when they were prepared. The letters of allotment and the unregistered leases cannot confer title to the Plaintiff. There was no evidence adduced to show that the Plaintiff took possession of the Suit Properties in 1996 which is when she claims the plots were allocated to her by the 1st Defendant.

17. The 2nd and 3rd Defendants were registered as lessees and issued certificates of lease over the Suit Properties. Under Section 26 of the Land Registration Act, the court is to take the 2nd and 3rd Defendants' certificates of lease over the Suit Properties as *prima facie* evidence that they own the property unless it is demonstrated that there was fraud or misrepresentation in their acquisition to which these Defendants were party; or if it is shown that the certificates of title were acquired illegally, unprocedurally or through a corrupt scheme. The Plaintiff failed to prove these grounds against the 2nd and 3rd Defendants.

18. Weighing the evidence of the Plaintiff against that of the Defendants, the court finds that Plaintiff has failed to prove her case on a balance of probabilities. The suit is dismissed with costs to the Defendant.

Dated and delivered at Nairobi this 26th July 2018.

K. BOR

JUDGE

In the presence of: -

Mr. Kairu for the Plaintiff

Ms. Irubgu for the 2nd and 3rd Defendants

Mr. V. Owuor- Court Assistant

No appearance for the 1st Defendant