



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT & LAND COURT**  
**AT NAIROBI**  
**ELC SUIT NO. 1524 OF 2002**

**EUNICE CYNTHIA NJERI.....PLAINTIFF**

**VERSUS**

**ANDREW T. KIPTANUI.....1<sup>ST</sup> DEFENDANT**

**NAIROBI CITY COUNCIL.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

The Plaintiff brought this suit on 24<sup>th</sup> September, 2002 seeking the following reliefs against the defendants:

- (a) A permanent injunction restraining the defendants from excavating, developing, building, erecting or continuing with any excavation, development and erection of any permanent and/or temporary structures on the parcel of land known as L.R No. Nairobi/Block 63/514, Nairobi/Block 63/514 (hereinafter referred to as “the suit property”).
- (b) An order revoking the alleged allocation of the suit property to the 1<sup>st</sup> defendant by the 2<sup>nd</sup> defendant.
- (c) An order for the eviction of the defendants from the suit property and for vacant possession.
- (d) General damages for trespass

In her plaint dated 24<sup>th</sup> September, 2002, the plaintiff averred that she was the proprietor and registered owner of the suit property. The plaintiff averred that in August, 2002 she visited the suit property and found some workers on the property putting up a building thereon and upon inquiry she learnt that the said workers were agents of the 1<sup>st</sup> defendant. The plaintiff averred that the 1<sup>st</sup> defendant unlawfully and illegally entered the suit property and commenced construction of a building thereon thereby causing her loss and damage.

The plaintiff averred that the 2<sup>nd</sup> defendant had no capacity to allocate the suit property to the 1<sup>st</sup> defendant or to any other person because the suit property already belonged to the plaintiff and the 2<sup>nd</sup> defendant could not pass any other title to a third party in respect thereof. The plaintiff averred that despite demand and notice of intention to sue having been given the defendants refused and/or neglected to settle the matter.

The defendant's filed a joint amended defence and counter-claim against the plaintiff on 25<sup>th</sup> March, 2011. The defendants denied the plaintiff's claim in its entirety. The defendants averred that if at all the plaintiff was registered as the owner of the suit property, such registration was illegal and void for want of legal and procedural propriety. The defendants averred that the suit property was validly allocated by the 2<sup>nd</sup> defendant to the 1<sup>st</sup> defendant on 13<sup>th</sup> February, 1992 and that the 1<sup>st</sup> defendant became the bona fide proprietor of the suit property upon accepting and meeting the conditions of the allotment.

The defendants averred that the allotment of the suit property to the 1<sup>st</sup> defendant had not been revoked and/or cancelled and that the 1<sup>st</sup> defendant had continued to pay land rates and rent to the 2<sup>nd</sup> defendant in respect of the property. The 1<sup>st</sup> defendant averred that the suit property was not available for allocation to the plaintiff once the same was allocated to the 1<sup>st</sup> defendant by the 2<sup>nd</sup> defendant and as such the claim of ownership by the plaintiff over the suit property was legally untenable. The defendants averred that the registration of the plaintiff as the leasehold proprietor of the suit property was vitiated by mistake or impropriety because the same did not follow the procedural formalities of the 2<sup>nd</sup> defendant and that the plaintiff's title was not traceable from or noted in the 2<sup>nd</sup> defendant's records. The defendants averred that the suit property having been validly allocated to the 1<sup>st</sup> defendant by the 2<sup>nd</sup> defendant prior to the alleged registration of the same in the name of the plaintiff, the plaintiff had no valid claim over the same.

In his counter-claim against the plaintiff, the 1<sup>st</sup> defendant reiterated the averments in the statement of amended defence. The 1<sup>st</sup> defendant reiterated that he was the bona fide proprietor of the suit property and that the plaintiff's claim in respect of the property was illegitimate, fraudulent and vitiated by mistake. The 1<sup>st</sup> defendant averred that the lease that was issued to the plaintiff in respect of the suit property was liable to nullification and cancellation by the court. The 1<sup>st</sup> defendant set out the particulars of fraud and mistake in the acquisition of the suit property by the plaintiff. The 1<sup>st</sup> defendant sought judgment against the plaintiff for:

- (a) An order that the register of the suit property be rectified by the cancellation of the registration of the suit property in the name of the plaintiff.**
- (b) A permanent injunction restraining the plaintiff from interfering with the 1<sup>st</sup> defendant's proprietorship, possession and enjoyment of the suit property.**

The Plaintiff filed a defence to the counter-claim on 8<sup>th</sup> April, 2011. The plaintiff denied the 1<sup>st</sup> defendant's counter-claim in its entirety. The plaintiff averred that the suit property was allocated to her legally and that all the necessary procedures were followed before a title was issued to her. The plaintiff averred that if the 1<sup>st</sup> defendant had any claim based on fraud and mistake, the same was supposed to be directed against the 2<sup>nd</sup> defendant. The plaintiff averred that the 1<sup>st</sup> defendant's claim against her was an afterthought and that the same was brought in collusion with the 2<sup>nd</sup> defendant. The plaintiff averred that the said counter-claim was defective, bad in law and an abuse of the process of the court.

On 25<sup>th</sup> September, 2013 the parties filed in court a statement of agreed issues. The issues framed by the parties and agreed on were the following:

- 1. When was the plaintiff's letter of allotment issued?**
- 2. When was the 1<sup>st</sup> defendant's letter of allotment issued?**
- 3. As between the plaintiff and the 1<sup>st</sup> defendant whose allotment letter is valid?**
- 4. Has the plaintiff's or the 1<sup>st</sup> defendant's letter of allotment been previously cancelled or revoked by the 2<sup>nd</sup> defendant?**

- 5. If the 1<sup>st</sup> defendant's letter of allotment was valid, was the suit property available for allocation to the plaintiff?**
- 6. Does the plaintiff hold a valid lease from the 2<sup>nd</sup> defendant over the suit property?**
- 7. As between the plaintiff and the defendants who is to blame for the letters of allotment issued to both the plaintiff and the 1<sup>st</sup> defendant?**
- 8. Is the plaintiff's certificate of lease dated 24<sup>th</sup> September, 2001 valid?**
- 9. Are the plaintiff's documents of title to the suit property valid?**
- 10. Are the 1<sup>st</sup> defendant's documents of title to the suit property valid?**
- 11. Has the 1<sup>st</sup> defendant wrongly interfered with the plaintiff's quiet enjoyment of the suit property?**
- 12. Who is the bona fide proprietor of the suit property?**
- 13. What is the value of the 1<sup>st</sup> defendant's developments on the suit property?**
- 14. Are the alleged developments by the 1<sup>st</sup> defendant on the suit property lawful?**
- 15. What reliefs should be granted in this case in respect to the plaintiff and the 1<sup>st</sup> defendant's claim?**
- 16. Who should bear the costs of the suit?**

The suit was fully heard before Nyamweya J. before she was transferred. What remained was closing submissions which the parties were directed to make in writing. On 10<sup>th</sup> December, 2015, the advocates for the parties agreed that the hearing of the suit does proceed from where it stopped before Nyamweya J. and that the parties do file their submissions within 42 days. The plaintiff filed her submissions on 3<sup>rd</sup> March, 2016 while defendants filed their submissions on 6<sup>th</sup> September, 2016.

I have considered the pleadings by the parties, the evidence on record and the submissions by the parties' respective advocates. At the trial the plaintiff gave evidence and called one witness. The plaintiff told the court that the suit property was formerly known as Plot No. 181, Jamhuri II and that the same was registered in her name. She stated that the suit property was given to her by her father as an incentive for her to perform well in school. She stated that in the year 2001, her father showed her all the documents pertaining to the property and a stand premium was paid. The plaintiff stated that in 2002 when her father went to check on the property, he found construction going on prompting the filing of this suit. The plaintiff stated that the structure on the suit property had been put up illegally. The plaintiff produced as exhibits, copies of a letter of allotment dated 17<sup>th</sup> July, 1998, a receipt for Kshs.10,800/= dated 3<sup>rd</sup> July, 2001, undated lease registered on 24<sup>th</sup> September, 2001, certificate of lease dated 24<sup>th</sup> September, 2001, the register for the suit property, certificate of official search in respect of the suit property dated 17<sup>th</sup> October, 2002, a receipt for Kshs.3000/= dated 7<sup>th</sup> August, 2002, a receipt for Kshs.3,600/= dated 19<sup>th</sup> August, 2002, a receipt for Kshs.11,032/= dated 19<sup>th</sup> August, 2002, a receipt for Kshs.2,500/= and a rates clearance certificate dated 23<sup>rd</sup> August, 2002.

The plaintiff's witness was her father, Elisius Muranga (PW 2). He told the court that he was a retired civil servant and that the plaintiff was her daughter. He stated that when the plaintiff was allocated the suit property, she was still in school and that he was the one who processed the necessary documentation on her behalf. He stated that he is the one who made the necessary payments and was issued with receipts

after which a lease was prepared and signed by the plaintiff before Ms Ngethe the then legal officer of the 2<sup>nd</sup> defendant.

The lease was thereafter forwarded to the lands office where the same was registered and a certificate of lease issued in favour of the plaintiff. PW 2 told the court that when he wanted to assist the plaintiff to develop the suit property, he found some people developing the same who claimed to own the property. He stated that he carried out a search on the suit property and confirmed that the same was still registered in the name of the plaintiff. He denied that the suit property was allocated to the 1<sup>st</sup> Defendant in 1992. He stated that he surrendered the original letter of allotment when he got the lease. He stated that all the necessary procedures were followed in the acquisition of the suit property by the plaintiff.

The 1<sup>st</sup> defendant gave evidence and did not call a witness while the 2<sup>nd</sup> defendant called two witnesses. The 1<sup>st</sup> defendant told the court that he applied for the suit property and the same was allocated to him on 13<sup>th</sup> February, 1992. He stated that he accepted the allotment and paid the amount that was required in the sum of Kshs.10,800/=. It was after making that payment that he started construction of a building on the property. He stated that he received a letter from the plaintiff's advocates demanding that he stops the construction. He thereafter wrote to the 2<sup>nd</sup> defendant about the plaintiff's claim and the 2<sup>nd</sup> defendant confirmed that he was the owner of the suit property. He stated that when he received a letter from the plaintiff to stop construction he had reached the 1<sup>st</sup> floor of the building and had spent Kshs.5.5 million on the suit property. The 1<sup>st</sup> defendant produced as exhibits the letter of allotment dated 13<sup>th</sup> February, 1992, the letter of acceptance of the said allotment dated 18<sup>th</sup> February, 1992, a receipt for Kshs.10,800/= dated 24<sup>th</sup> February, 1992, a receipt for Kshs.18,000/= dated 11<sup>th</sup> January, 2002, a letter to the allottees of plots in Jamhuri Phase II, a letter dated 30<sup>th</sup> September, 2002 to the 2<sup>nd</sup> defendant, a valuation report dated March, 2004 by Denis K. Kirui and a valuation report dated 27<sup>th</sup> September, 2011 by Bel Air Properties Limited.

The 2<sup>nd</sup> defendant's first witness was Ms Zipporah Wandera (DW 2). DW 2 told the court that she was the town clerk of the 2<sup>nd</sup> defendant in 1992 and that she was familiar with the suit property. She told the court that the plots in Jamhuri phase II were allocated in 1992 and that as the town clerk, it was her responsibility to sign letters of allotment. She confirmed that she was the one who signed the letter of allotment of the suit property to the 1<sup>st</sup> defendant dated 13<sup>th</sup> February, 1992. DW 2 stated that there were no further allotments of plots in Jamhuri Phase II after 1992. Asked to comment on the plaintiff's letter of allotment dated 17<sup>th</sup> July, 1998, DW 2 stated that the font on page 1 of the said letter of allotment was different with the one on page 2. She stated that there were no more plots to be allocated in Jamhuri Phase II and as such she could not have allocated the suit property to the plaintiff. DW 2 stated that the 2<sup>nd</sup> defendant did not issue leases for the plots in Jamhuri Phase II immediately because it faced some challenges.

The 2<sup>nd</sup> defendant's last witness was Abwao Erick Odhiambo (DW 3). DW 3 was the Assistant Director, Legal Affairs at Nairobi City County. DW 3 narrated to the court the procedure for allocation of land at the 2<sup>nd</sup> defendant. DW 3 was shown the letters of allotment that were issued to the plaintiff and the 1<sup>st</sup> defendant and the receipts for the payments which the two made for the allotments. He noted that after the allotment of the suit property to the 1<sup>st</sup> defendant, the 1<sup>st</sup> defendant made the payment that was required within the period that was specified in the letter of allotment while the plaintiff made the payment after 2 years. DW 3 told the court that the 2<sup>nd</sup> defendant made a list of allottees of land. He was shown a memo dated 10<sup>th</sup> February, 1998 in the defendants' further list of documents. He confirmed that it was an internal memo that contained a list of allottees of land in Jamhuri Phase II. He stated that in that list, Plot No. 181 is shown to have been allotted to the 1<sup>st</sup> defendant. DW 3 was shown the lease that was said to have been issued to the plaintiff by the 2<sup>nd</sup> defendant. He commented that the lease was not dated and that the fonts that were used while typing the same were not uniform. DW 3 stated that according to the records held by the 2<sup>nd</sup> defendant/Nairobi City County, the suit property belonged to the 1<sup>st</sup> defendant. He stated that the documents that the plaintiff produced in evidence were not supported by the

records held by the 2<sup>nd</sup> defendant. He stated that for the 2<sup>nd</sup> defendant to repossess a parcel of land there was a process to be followed.

Analysis of the evidence and determination of the issues raised:

I will consider the issues that have been framed by the parties in various clusters.

The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 7<sup>th</sup> issues:

It is not disputed that the letter of allotment in favour of the plaintiff was issued on 17<sup>th</sup> July, 1998 while the letter of allotment in favour of the 1<sup>st</sup> defendant was issued on 13<sup>th</sup> February, 1992. Both letters of allotment are said to have been issued by the 2<sup>nd</sup> defendant and signed by Ms. Zipporah Wandera (DW 2) who was the town clerk of the 2<sup>nd</sup> defendant at the material time. It is not in dispute that the 1<sup>st</sup> defendant's letter of allotment was the first in time. It is also not disputed that the 1<sup>st</sup> defendant accepted the allotment and paid the stand premium and other charges that were set out in the said letter of allotment within the prescribed time. I am in agreement with the submissions by the defendants which is supported by the decisions in the cases of Suleiman Murunga v Nilestar Holdings Limited and Another (2014) eKLR and Rukiya Ali Mohamed v David Gikonyo Nambacha & Another Kisumu HCCA No. 9 of 2004 that once a letter of allotment has been issued and the allottee meets the conditions therein, the land the subject of the letter of allotment is no longer available for allotment to any other person unless the allotment has been cancelled or revoked by the allotting authority. In this case, DW 2 and DW 3 denied that the 2<sup>nd</sup> defendant allotted to the plaintiff the suit property on 17<sup>th</sup> July, 1998 after the property had been allotted to the 1<sup>st</sup> defendant on 13<sup>th</sup> February, 1992. DW 2 who was said to have signed the letter of allotment dated 17<sup>th</sup> July, 1998 in favour of the plaintiff denied her alleged signature in the said letter of allotment. DW 2 was emphatic that there were no further allotments of plots in Jamhuri phase II Scheme after the allotments of 1992 because there were no more plots to allocate. I am of the view that even if I give the plaintiff the benefit of doubt that her letter of allotment dated 17<sup>th</sup> July, 1998 was issued by the 2<sup>nd</sup> defendant, that fact would not clothe the allotment with any legitimacy. The suit property was not available for allocation to the plaintiff unless the allotment of the same property to the 1<sup>st</sup> defendant was cancelled. There is no evidence that the letter of allotment dated 13<sup>th</sup> February, 1992 to the 1<sup>st</sup> defendant was cancelled by the 2<sup>nd</sup> defendant. It follows therefore that the purported allotment of the suit property by the 2<sup>nd</sup> defendant to the plaintiff was irregular and unlawful. The letter of allotment dated 17<sup>th</sup> July, 1998 could not therefore confer any valid interest on the plaintiff in respect of the suit property.

From the evidence before me, I have noted that the 2<sup>nd</sup> defendant received payments from the plaintiff on the strength of the letter of allotment dated 17<sup>th</sup> July, 1998 although it denied issuing the letter. I doubt if the 2<sup>nd</sup> defendant would have received the stand premium and land rent from the plaintiff if it was not privy to the allotment of the suit property to the plaintiff. In the circumstances, the 2<sup>nd</sup> defendant cannot escape blame for the double allocation of the suit property to the 1<sup>st</sup> defendant and the plaintiff. On the material before me, I am also of the view that if the plaintiff and her father (PW 2) had conducted due diligence, they would have discovered that the suit property was already allocated to the 1<sup>st</sup> defendant. As at 17<sup>th</sup> July, 1998 when the plaintiff was issued with a letter of allotment in respect of the suit property, there was in existence a list containing the names of the people to whom plots had been allocated at Jamhuri Phase II scheme and the 1<sup>st</sup> defendant's name appeared against Plot No. 181 (Block No. 154). The plaintiff and the 2<sup>nd</sup> defendant must bear full responsibility for the double allocation of the suit property.

The 6<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> issues:

The undated lease in favour of the plaintiff that was registered on 24<sup>th</sup> September, 2001 derived its validity from the letter of allotment dated 17<sup>th</sup> July, 1998. As I have held above, the said letter of allotment was invalid and could not confer any proprietary interest upon the plaintiff in respect of the suit

property. Similarly, the lease and certificate of lease that were issued pursuant to that letter of allotment were invalid as they were anchored on an illegality. It is my finding that the said letter of allotment, the lease and the certificate of lease on which the plaintiff has based her claim against the defendants are all invalid. In view of the provisions of Article 40(6) of the Constitution, section 26 of the Land Registration Act, 2012 that has been relied upon by the plaintiff cannot protect her title that was created illegally. In the case Henry Muthee Kathurima v Commissioner of Lands & Another (2015) eKLR, the Court of Appeal stated that:

*“We have considered the provisions of Section 26 of the Land Registration Act in light of the provisions of Article 40(6) of the Constitution and it is our considered view that the concept of indefeasibility of title is subject to Article 40(6) of the Constitution Guided by Article 40 (6) of the Constitution, we hold that the concept of indefeasibility or conclusive nature of title is inapplicable to the extent that the title to the property was unlawfully acquired.”*

In Nairobi High Court Misc. Civil Application No. 1732 of 2004, James Jorum Nyaga & another v The Honourable Attorney General & 2 another, a three judge bench stated as follows:

*“We hold that the registration of title to land is absolute and indefeasible to the extent **firstly** that the creation of such title was in accord with the applicable law and **secondly** where it is demonstrated to a degree higher than the balance of probability that such registration was not procured through fraud and misrepresentation to which the person or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law, and the public interest”.*

On the other hand, it is my finding that the letter of allotment dated 13<sup>th</sup> February, 1992 that was issued to the 1<sup>st</sup> defendant by the 2<sup>nd</sup> defendant in respect of the suit property is valid and confers upon the 1<sup>st</sup> defendant beneficial interest in the suit property.

The 11<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup> and 14<sup>th</sup> issues:

As I have held above, the suit property was lawfully allocated to the 1<sup>st</sup> defendant by the 2<sup>nd</sup> defendant. The 1<sup>st</sup> defendant accepted the allotment and satisfied the terms thereof. The 1<sup>st</sup> defendant as the lawful allottee of the suit property had a right to enter and develop the suit property. Since the plaintiff did not have a valid title over the suit property, the 1<sup>st</sup> defendant did not require her permission to enter the suit property. In any event, there is no evidence that the plaintiff was in possession of the suit property when the 1<sup>st</sup> defendant commenced construction thereon. It is my finding that the 1<sup>st</sup> defendant’s entry onto the suit property did not amount to interference with the plaintiff’s quiet enjoyment of the property since the plaintiff neither had possession of the property nor the right to a quiet enjoyment of the same. On the issue of the value of the developments that the 1<sup>st</sup> defendant had carried out on the suit property, nothing turns out on the same as no claim was raised in respect thereof.

The 15<sup>th</sup> and 16<sup>th</sup> issues:

The upshot of the foregoing is that I find no merit in the plaintiff’s claim. The plaintiff in the circumstances is not entitled to any of the reliefs sought in the plaint dated 24<sup>th</sup> September, 2002. On the other hand, I find the 1<sup>st</sup> defendant’s counter-claim well founded. I am in agreement with the 1<sup>st</sup> defendant that the suit property was allocated to the plaintiff and a lease and certificate of lease issued to her through acts of fraud or mistake.

The suit property is registered under the Registered Land Act, Chapter 300 Laws of Kenya (now repealed). Under section 143 of the Registered Land Act, this court has power to rectify the register if it found that the registration was made by fraud or through a mistake. For the reasons, I have given above, I am satisfied that this is an appropriate case in which an order for the rectification of the register should be made. Since the 1<sup>st</sup> defendant has established that he is the bona fide owner of the suit property, the 1<sup>st</sup>

defendant is also entitled to the injunction sought to restrain the plaintiff from interfering with his possession and enjoyment of the suit property.

On the issue of costs, as I have stated earlier, the 2<sup>nd</sup> defendant was to blame together with the plaintiff for the double allocation of the suit property to the plaintiff and the 1<sup>st</sup> defendant. For that reason, I will not award any costs to the 2<sup>nd</sup> defendant. For the 1<sup>st</sup> defendant, there is no reason why he should be denied his costs.

Conclusion:

In conclusion, I hereby enter judgment for the 1<sup>st</sup> defendant against the plaintiff in terms of prayers (a) and (b) in the amended defence and Counter-claim dated 23<sup>rd</sup> March, 2010. The plaintiff's suit is dismissed. The 1<sup>st</sup> defendant shall have the costs of the suit and the counter-claim.

**Delivered and Dated at Nairobi this 27<sup>th</sup> day of September 2018**

**S. OKONG'O**

**JUDGE**

**Judgment read in open court in the presence of:**

Mr. Kiragu h/b for Mr. Mbabu for the Plaintiff

Mr. Nyantika h/b for Mr. Oange for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants

Catherine Court Assistant