



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAJIADO**

**ELC CASE NO. 15 OF 2017**

**(Formerly Nairobi ELC No. 101 of 2001)**

**RAPHAEL MUGWANJA WARARI.....PLAINTIFF**

**VERSUS**

**OL KEJUADO COUNTY COUNCIL.....1<sup>ST</sup> DEFENDANT**

**JACOB MWANTO WANGORA.....2<sup>ND</sup> DEFENDANT**

**DISTRICT LAND REGISTRAR.....3<sup>RD</sup> DEFENDANT**

**JUDGEMENT**

By a Plaint dated the 11<sup>th</sup> January, 2001, the Plaintiff prays for a judgement against the Defendants jointly and severally for:

- a) A cancellation of the register and the certificate of title in respect of LR. No. NGONG TOWNSHIP/ BLOCK 1/ 423.
- b) A Declaration that LR. No. NGONG TOWNSHIP/ BLOCK 1/ 423 belongs to the Plaintiff.
- c) An order of permanent injunction to restrain the Defendants from alienating, dealing, transferring or trespassing on the subject property.
- d) General Damages.
- e) Costs and interests.

The 1<sup>st</sup> Defendant filed its Defence on 13<sup>th</sup> February, 2001 where it denied that the Plaintiff is the legal or beneficial owner of an alleged plot No. 14573 (allegedly formerly Plot No. 305/ 279) Ngong. It averred that the Plaintiff lacks locus to bring this suit and is not entitled to the orders sought. It denied the allegations of fraud contained in the Plaint and contended that the area known as Ngong was not surveyed at the material time. It reiterated that the alleged rights claimed by the Plaintiff are unknown in law and cannot accrue at all. It pleaded that the suit is bad in law for duplicity and prayed that the same be dismissed with costs.

The 2<sup>nd</sup> Defendant filed a Statement of Defence on 2<sup>nd</sup> July, 2009 where he denied every allegation in the Plaint except for paragraph 1 and 2 on the descriptive. He denied that the Plaintiff had carried developments on the suit land. He further denied that the 1<sup>st</sup> Defendant had acted fraudulently in issuing authority to the Commissioner of Lands to issue Title Deed for LR. Ngong Township/ Block 1/ 423. He disputed the particulars of fraud and denied that his registration as the proprietor was wrongful as well as unlawful and asserts that his title is indefeasible in law. He contended that he was never served with any notice of intention to sue and averred that there was already a pending suit vide Nairobi Milimani CMCC No. 6464 of 1995 between the same parties, hence this suit is barred in law. He stated that he was issued with a Certificate of Lease well before the institution of the aforementioned suit. He reiterated that the Plaintiff is not entitled to the orders sought and the suit should be dismissed with costs.

The Plaintiff called two witnesses while the Defendants also had two witnesses.

**Plaintiff's Case**

PW1 RAPHAEL MUGWANJA who is the Plaintiff herein adopted his witness statement and produced documents as exhibits. He testified that the 2<sup>nd</sup> Defendant was illegally allocated his plot. He claims he was allocated plot no. 305/ 279 Ngong Township on 4<sup>th</sup> January, 1978 and paid plot rent, rates, service charges and standing premiums to the County Council. He testified that he paid plot rent from 1978 upto 1990 and produced receipts to that effect. He averred that his plot 305/ 279 Ngong was subdivided into two namely 14572 and 14573 after which he was issued with two letters of allotment in that respect on 2<sup>nd</sup> September, 1991. He confirmed processing a Certificate of Lease for plot 14572 but as for plot 14573, it was illegally allocated to the 2<sup>nd</sup> Defendant. He averred that the 2<sup>nd</sup> Defendant paid for plot number 14573, in his name, without his knowledge nor consent, so as to obtain a Certificate of Lease. He lodged a complaint with the Commissioner of Lands after receiving a copy of the receipt and he wrote to the Clerk to Council stating that there were two allocations for the same parcel of land. He referred to the Letter of Allotment given to the 2<sup>nd</sup> Defendant and stated that the same was issued in 1995. He confirmed there was a criminal case against the 2<sup>nd</sup> Defendant where he was the complainant but the 2<sup>nd</sup> Defendant was acquitted. He clarified that plot no. 14573 – 305/329 B is now Block 1/ 423. It was his testimony that he installed 1000 gallons of solid tank on the suit land including erecting a fence thereon.

In cross examination, he confirmed that he was seeking general damages as his plot was subdivided into two but only one was returned to him while the other was allotted to the 2<sup>nd</sup> defendant. He stated the Ol kejuado County Council was the allotting authority while the Commissioner of Lands was acting on their instructions.

In reexamination, he clarified that plot LR No. 14573 and 14572 are formerly 305/279 and 305/ 329B respectively which are different plots. He however confirmed the two parcels look different but it is one plot. He reiterated that he had put up a permanent structure, site office and storage tank on the said plot.

PW2 Anthony Macharia Kariuki stated that while working at the CID Department in 2006 he received a complaint from the Plaintiff in respect of land parcel number 305/ 279 which had been subdivided by the County Council of Ol kejuado without his consent with one of the portions allocated to the 2<sup>nd</sup> Defendant herein. It was his testimony that LR 303/ 279 'A' was given a new number 14572 while 305/279 'B' was given number 14573. He confirmed that during his investigation, he discovered that the two plots were LR 305/ 279, which had been subdivided through, file number 134282, with the new numbers being LR. No. 14572 and 14573 respectively. He was aware the 2<sup>nd</sup> Defendant processed a Certificate of Lease in respect of Ngong Block 1/ 423. It was his testimony that the document used to register is a payment done through cheque number 00056 dated the 17<sup>th</sup> June, 1994 which was in the name of the Plaintiff but paid by the 2<sup>nd</sup> Defendant. It was his evidence that the Plaintiff's plot was subdivided into two plots and he was requested by the Ol kejuado County Council to apply for two letters of allotment from the Commissioner of Lands. He confirmed that the plaintiff was given allotment numbers 119755/ 11/ 42 and 119755/ 43 for the two land references 14572 and 14573 respectively. He stated that the 2<sup>nd</sup> Defendant produced a letter of allotment number 119755/11 for land reference 14573 (305/329)

In cross examination, he testified that as a result of his investigation, the 2<sup>nd</sup> Defendant was charged vide Nairobi CMC Cr. Case No. 810 of 2007 but was acquitted and he does not know whether the said judgment was appealed from. He confirmed that the allotting authority was the county council of Ol kejuado who subdivided disputed plot into two.

The Plaintiff thereafter closed his case.

### **Defendants' Case**

DW1 Jacob Mwanto Wangora who is the 2<sup>nd</sup> Defendant herein denied that he paid the statutory fees using the Plaintiff's name and insisted he used his name. He testified that he did not know the plot belonged to the Plaintiff but knew the same was his. He claimed the Plaintiff had filed several cases against him including Nairobi CMCC No. 6464 of 1995 but the same was withdrawn. Another case Kajiado LDT no. 164 of 2001 was filed by the Plaintiff but it never took off. The Plaintiff further filed Nairobi Miscellaneous Application No. 761 of 2001 but the same was dismissed. He explained that he was issued with a letter of allotment by the Ol Kejuado County Council on 23<sup>rd</sup> November, 1978 for plot no. 305/329 and produced a copy of the said letter as his exhibit. It was his testimony that he received a letter dated the 8<sup>th</sup> December, 1993 whose reference was 119755/11 in respect of LR No. 14573 (305/329 B) now Block 1/ 423 Ngong which confirmed he had been allocated the plot and a sketch map showing the site of the said plot. He explained that after he received the said letter a surveyor from the County Council visited the site on 18<sup>th</sup> March, 1994 after which he paid the stamp duty for the plot, and that is when the Plaintiff raised issues seeking clarity from the Commissioner of Lands over the ownership of the said plot. He averred that after deliberation between the Commissioner of Land and the County Council, it emerged that LR 14573 (formerly 305/ 329 B) belonged to him and was different from LR 14572 ( formerly 305/ 279) which was the Plaintiff's. He referred to a letter dated the 23<sup>rd</sup> May, 1995 from the Clerk to Council, concerning encroachment, where the Plaintiff was directed to remove his fence and move from LR 14573, which directive he complied with. He reiterated that he obtained his Certificate of Lease dated the 14<sup>th</sup> September, 1995 from the Land Registrar and the same has never been cancelled nor revoked. He disputed the valuation done on his land, photographs taken and insists the Plaintiff trespassed on his land to undertake the same.

During cross examination he confirmed being allocated land parcel number 305/329 on 23<sup>rd</sup> November, 1978. His testimony was that he did not construct immediately but did so in 1995 when he put up temporary structures thereon. He stated that his letter of allotment from the Commissioner of Lands came on 8<sup>th</sup> December, 1993 after which he started processing his Certificate of Lease. Further, that he was paying fees to the Council and recalls the Cheque paid to the Commissioner of Lands was for Kshs. 3260. He contends that he did not take the Plaintiff's plot and confirmed his property is No. 14573 and that plots 305/329 and 305/ 279 are adjacent to each other.

DW2 Joel Muimi Mwinzi who was the Land Registrar Kajiado North confirmed that Ngong Town Block 1/ 423 is a leasehold property. His testimony was that pursuant to a letter dated the 6<sup>th</sup> September, 1995, the Lease document was forwarded to the Land Registrar for purposes of registration and issuance of a Lease in favour of the 2<sup>nd</sup> Defendant as the Lessee while the Lessor was County Council of Ol kejuado. He confirms the 2<sup>nd</sup> Defendant was issued with Certificate of Lease on 14<sup>th</sup> September, 1995.

In cross examination, he confirmed that he was instructed to issue a Certificate of Lease and does not inquire on the process of acquisition of the same.

The Defendants thereafter closed their case.

All the parties filed their written submissions that I have considered.

### **Analysis and Determination**

Upon perusal of the pleadings filed herein including exhibits and upon hearing the testimonies of the witnesses as well as considering submissions from the parties, the following are the issues for determination.

- i. Whether Land Reference No. 14573 (Formerly plot No. 305/ 279) under reference 119755/11/43 was available for allocation.
- ii. Whether land reference number. 14573 (formerly plot No. 305/279 was fraudulently registered in the name of the 2<sup>nd</sup> Defendant.
- iii. Whether the Certificate of Lease in respect of plot number 14573 in the 2<sup>nd</sup> Defendant's name should be cancelled.
- iv. Whether the Plaintiff is entitled to the General Damages.
- v. Who should bear the costs of the suit.

As to whether Land Reference No. 14573 (Formerly plot No. 305/ 279) under reference 119755/11/43 was available for allocation, it was the Plaintiff's contention that he was allocated plot no. 305/279 by the Ol kejuado County Council. It was his testimony that the said plot was subdivided without his knowledge and consent, into two (LR. 14572 and 14573 respectively) and he was requested to apply for two letters of allotment. However later on, one of the plots LR 14573 was allocated to the 2<sup>nd</sup> Defendant who processed a Certificate of Lease on the same. He submitted that the said parcel of land was not available for allocation and relied on the case of **Ali Mohammed v David Gikonyo Nambacha & Another, Kisumu HCCA No. 9 of 2004; Ali Gaddafi & Anor Vs Francis Muhia Mutungu & 2 others (2017) eKLR** to support this argument. The 2<sup>nd</sup> Defendant submitted that all along he made payments in respect of plot 305/329B and was not allotted 305/279. Further, it is 305/329 B that was changed to NGONG TOWNSHIP/ BLOCK 1/ 423 and has been in possession of the said land. He relied on the case of **Mwangi & Another Vs Mwangi KLR 328 quoted in Henry Muthee Kathurima Vs Commissioner of Lands & Another (2015) eKLR** to buttress his arguments that the rights of a person in possession or occupation of land are equitable rights which are binding on the land.

Insofar as the Plaintiff submitted that the 2<sup>nd</sup> Defendant is not a credible witness as he was a litigious person who had been convicted in a criminal case, at this juncture, it is the duty of the court to rely on evidence presented to come up with a determination of the dispute at hand, which is not concerned with character of the 2<sup>nd</sup> Defendant but the ownership of plot 14573. From the evidence presented by PW1 and DW1 it is evident that Ol Kejuado County Council that was the allotting authority, subdivided plot no. 305/279 into two, allocated the same separate numbers and allotted the separate portions to the Plaintiff as well as the 2<sup>nd</sup> Defendant respectively. According to the Letters of Allotment, sketch map and letters from the County Council of Ol kejuado presented in court, it is evident that the two plots are separated entities. The Court takes judicial notice of the fact that for purpose of processing the Certificate of Lease, it was the County Council that provided authority to the Commissioner of Lands that in turn granted a consent for issuance of the Certificate of Lease. I note the Plaintiff alleges fraud, but from the letters he produced in court, there is none where the Ol kejuado County Council directed the Commissioner of lands not to prepare a Certificate of Lease in respect of the 2<sup>nd</sup> Defendant. According to the Letter dated the 16<sup>th</sup> November, 1994 the Clerk to Council Mr. A. M. Leina explains that LR No. 14573 and 14572(formerly 305/ 329B and 305/279 Ngong) are two distinct plots with LR No. 14573 belonging to the 2<sup>nd</sup> Defendant while LR. No. 14572 belongs to the Plaintiff. He clarified to the Commissioner of Lands that his reference 11955/11.43 dated 2<sup>nd</sup> September, 1991 should be disregarded as it contradicts the fact that the plot is two parcels and insists the survey plan should be respected. This letter was in response to the Commissioner of Lands Letter dated the 23<sup>rd</sup> March, 1994 seeking clarity on the LR 305/ 329B and 305/279 Ngong. According to a letter dated the 23<sup>rd</sup> May, 1995, the Plaintiff was later directed by the Clerk to Council to cease encroaching on parcel number 305/329 B and remove his fence. All these are indicative that the Plaintiff was well aware the two plots were different and this was clarified by the County Council that was the allotting authority. As stated by DW2 pursuant to a letter dated the 6<sup>th</sup> September, 1995, the Lease document was forwarded to the Land Registrar for purposes of registration and issuance of a Lease in favour of the 2<sup>nd</sup> Defendant as the Lessee while the Lessor was County Council of Ol kejuado. I note that the Court had already expunged the County Government from this suit. It is not in dispute that both the Plaintiff and the 2<sup>nd</sup> Defendant all had their respective Certificate of Leases processed and issued. I note the Commissioner of Lands issued a letter of allotment to the 2<sup>nd</sup> Defendant on 8<sup>th</sup> December, 1993 for LR. No. 14573 (305/329 B) Now Block 1/423 Ngong. Since the Ol Kejuado County Council that was the allotting authority had already shed light on the two plots and directed the Commissioner of Lands to issue the Certificate of Leases, I hold that the two parcels of land were distinct and LR. No. 14573 (305/329 B) Now Block 1/423 Ngong was hence available for allocation.

As to whether land reference number. 14573 ( formerly plot No. 305/279) was fraudulently registered in the name of the 2<sup>nd</sup> Defendant, it was the Plaintiff's allegation that the 2<sup>nd</sup> Defendant obtained the parcel of land by fraud. I note the Certificate of Lease was issued to the 2<sup>nd</sup> Defendant on 14<sup>th</sup> September, 1995 for Ngong Township/ Block 1/ 423. It was PW1's testimony that the 2<sup>nd</sup> Defendant paid for the processing of the Lease in the Plaintiff's name and hence this points to fraud. PW2 testified that during his investigation he discovered 305/ 279 had been subdivided to LR. No. 14572 and 14573. Further that the 2<sup>nd</sup> Defendant paid for the processing of the Lease in the Plaintiff's name and as a result, he was charged vide Nairobi CMC Cr. Case No. 810 of 2007 but was acquitted and he did not know whether the said judgment was appealed from. He however confirmed that the allotting authority was the county council of Ol kejuado who subdivided the plot into two.

The Plaintiff submitted that the 2<sup>nd</sup> Defendant presented a Certificate of Lease but the process of its acquisition should be challenged as he should have demonstrated that it was properly issued. He relied on the case of **Daudi Kiptugen Vs Commissioner of Lands & 4 others (2015) eKLR; Elijah Makeri Nyangwara Vs Stephen Mungai Njuguna & Another (2013) eKLR** to buttress this argument. The 3<sup>rd</sup> Defendant submitted that the Plaintiff failed to demonstrate any nexus of the wrong committed by the allotting authority and the 3<sup>rd</sup> Defendant. However, from PW1's testimony, he informed Court that the County Government had been removed from the suit herein. The question we need to ponder at this juncture is whether the 2<sup>nd</sup> Defendant had the power to allocate land to himself and to this, the answer is no. Even if the Plaintiff's rights were violated, as claimed because he had initially been allotted the land, but since the same was subdivided by the said allotting authority that prepared a fresh survey plan, issued new letters of allotment and gave direction to the Commissioner of lands to prepare the certificate of lease in the 2<sup>nd</sup> Defendant name, this do not point to fraud on the part of the 2<sup>nd</sup> Defendant nor that the fact that the said land was acquired fraudulently. Since the 2<sup>nd</sup> Defendant had been issued with a Certificate of Lease which DW1 produced as an exhibit in Court, I wish to make reference to section 26(1) of the Land Registration Act which provides as follows"

**"The Certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except -**

**(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or**

**(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. '**

The 2<sup>nd</sup> Defendant produced various documents including a Certificate of Lease which was issued by the Land Registrar. DW2 who was the Land Registrar confirmed that he was directed by the Commissioner of Lands to issue a Certificate of Lease. From the foregoing, I find that the 2<sup>nd</sup> Defendant adhered to the process of acquiring the Certificate of Lease in respect of the suit land and the same was not acquired fraudulently. If the Plaintiff had an issue with the subdivision of the plot prior to issuance of the Certificate of Lease, he should have taken it up with the allotting authority and not the 2<sup>nd</sup> Defendant before filing this suit.

Whether the Certificate of Lease in respect of plot number 14573 in the 2<sup>nd</sup> Defendant's name should be cancelled.

It was the 2<sup>nd</sup> Defendant's testimony that he adhered to all the legal processes before he was issued with a Certificate of Lease for the suit land. Section 24 (b) of the Land Registration Act further stipulates as follows: '**subject to this Act, the registration of a person as a proprietor of lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto.....'**

In the case of **Ahmed Ibrahim Suleiman and Another vs. Noor Khamisi Surur (2013) eKLR** where Justice J.M. Mutungi stated that '**the Plaintiff having been registered as proprietor and having been issued with a certificate of lease over title No/ Nairobi/Block 61/69 are in terms of section 26(1) of the Land Registration Act entitled to the protection of the law**'.

Further in the case of **WILLY KIPSONGOK MOROGO v ALBERT K. MOROGO (2017) eKLR** where the Court held as follows: '**the evidence on record shows that the suit parcel of land is registered in the names of the Plaintiff and therefore is entitled to the protection under sections 24, 25 and 26 of the Land Registration Act.**'

The Plaintiff claims the 2<sup>nd</sup> Defendant fraudulently acquired the suit land. The burden of proof was upon the Plaintiff to present evidence to prove that the Ol Kejuado County Council did not allotte the suit land to the 2<sup>nd</sup> Defendant and further the Commissioner of Lands declined to issue the Certificate of Lease and the one presented in Court by the 2<sup>nd</sup> Defendant was hence fake. But he however failed to adduce any evidence to prove the said allegations of fraud.

Based on the evidence adduced above, and in relying on section 26(1) and 24(b) of the Land Registration Act, as well as being persuaded by the above cited authorities, the Court finds that the 2<sup>nd</sup> Defendant has indeed satisfied the legal proviso that he is the proprietor of the suit land and hence has absolute ownership including all rights and privileges appurtenant to it. I further find that the 2<sup>nd</sup> Defendant's Certificate of Lease supersedes the Plaintiff's alleged letters of Allotment over the suit land and will proceed to uphold it.

Whether the Plaintiff is entitled to the General Damages.

The Plaintiff did not adduce any evidence as to the General Damages he had incurred as a result of the 2<sup>nd</sup> Defendant being granted a Certificate of Lease. He claimed to have constructed a storage tank, fenced the land and put up a worker's house but did not present any quantification of the same. I note the County Clerk of Ol Kejuado had even directed him to remove his fence on the suit land prior to filing this suit. Since the Plaintiff had sought for the said damages, the burden of proof was upon him to present evidence of the losses he has incurred. It is against the foregoing that I find that the Plaintiff is not entitled to general damages as he did not prove them.

In the circumstances, I find that the Plaintiff has failed to prove his case on a balance of probability and will proceed to dismiss it. Since the Defendants have been inconvenienced, I award them the costs of the suit.

**Dated signed and delivered in open court at Ngong this 23<sup>rd</sup> day of October, 2018**

**CHRISTINE OCHIENG**

**JUDGE**