



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 268 OF 2003**

**JOSEPH KAGUNYA..... PLAINTIFF**

**VERSUS**

**BONIFACE K. MULLI .....1ST DEFENDANT**

**NAIROBI CITY COUNTY.....2ND DEFENDANT**

**ATTORNEY GENERAL.....3RD DEFENDANT**

**CHARLES WANDUTO.....4TH DEFENDANT**

**JUDGMENT**

This suit was commenced by way of a Further Further Amended Plaint dated 10<sup>th</sup> June 2015 and filed on 12<sup>th</sup> June 2015 in which the Plaintiff prayed for Judgment against the Defendants for:

- a. A declaration that the parcel of land known as Nairobi/Block 63/301 (hereinafter referred to as the “suit property”) lawfully belongs to the Plaintiff.
- b. An order of rectification of the land register in respect of the suit property to reflect the Plaintiff as the registered proprietor.
- c. A permanent injunction restraining the 1<sup>st</sup> Defendant from trespassing, constructing in or in any other way whatsoever interfering with the Plaintiff’s possession and or ownership of the suit property.
- d. General damages
- e. Costs of the suit and interest.

**The Pleadings**

In the Further Further Amended Plaint, the Plaintiff stated that on 10<sup>th</sup> February 1992, he was allotted Plot No. 277 Jamhuri Phase II now known as Nairobi/Block 63/301 being the suit property, by the Nairobi City Commission, now the Nairobi City County. He further stated that upon the said allotment, he paid the stand premium, ground rent, survey fees and part of the conveyance fees. He then stated that in the year 2000, he laid a foundation for a house on the suit property but was not able to put up a building. The Plaintiff then stated that the 4<sup>th</sup> Defendant illegally and fraudulently got himself registered as the owner of the suit property. He listed the particulars of fraud and illegality as applying for registration as owner of the suit property and disregarding the proper process of allocation of plots. He added that the 4<sup>th</sup> Defendant subsequently transferred the suit property to the 1<sup>st</sup> Defendant who trespassed thereon and build structures on it. The Plaintiff further stated that the 2<sup>nd</sup> Defendant connived and took part in the said fraud and illegality. He also stated that the 3<sup>rd</sup> Defendant improperly, unprocedurally and or unlawfully registered the 1<sup>st</sup> and 4<sup>th</sup> Defendants as the proprietors of the suit property. He added that he had suffered loss and damage due to the Defendants’ actions.

The 1<sup>st</sup> Defendant filed his Statement of Defence dated 5<sup>th</sup> May 2003 in which he denied having been registered as the proprietor of the suit property illegally or fraudulently. He stated that he purchased the suit property from the original allottee, one Charles Wanduto, the 4<sup>th</sup> Defendant, on or about 27<sup>th</sup> August 2002. He further added that he was issued with a Certificate of Title to the suit property on 3<sup>rd</sup> September 2002. He further stated that he took immediate possession of the suit property and has already put up a two storey building in the suit property.

The 2<sup>nd</sup> Defendant filed its Statement of Defence dated 14<sup>th</sup> July 2003 in which it stated that it learnt from the Plaintiff about the alleged fraudulent appropriation of the suit property otherwise its records thereof still bear out the Plaintiff as the rightful allottee of the suit property. The 2<sup>nd</sup> Defendant further stated that it was also a victim of the alleged fraud respecting the suit property and generally the “Jamhuri allocations” which fraud was orchestrated by third parties such as the 1<sup>st</sup> Defendant herein in collusion with certain criminal elements within its employment. The 2<sup>nd</sup> Defendant stated that it recognized the Plaintiff’s alleged proprietary interest in the suit property as against the 1<sup>st</sup> Defendant. The 2<sup>nd</sup> Defendant also pleaded that the 1<sup>st</sup> Defendant’s purported title and development on the suit property were invalid for the following reasons:

- a. The proprietorship section does not bear out the alleged transaction with the alleged previous lessee.
- b. No consent to transfer was granted by the 2<sup>nd</sup> Defendant.
- c. No development permission and or approved building plans were granted prior to the alleged construction by the 1<sup>st</sup> Defendant.
- d. Particulars of fraud pleaded by the Plaintiff.

The 4<sup>th</sup> Defendant filed his Statement of Defence dated 11<sup>th</sup> September 2006 and filed on 13<sup>th</sup> September 2006 in which he stated that he was allocated the suit property by the 2<sup>nd</sup> Defendant after which the 3<sup>rd</sup> Defendant proceeded to issue him with a Certificate of Title. He denied all the particulars of fraud listed in the Further Further Amended Plaintiff. He further added that the allocation and subsequent registration was legal and the Plaintiff lacks *locus standi* to challenge the same. He further stated that the 4<sup>th</sup> Defendant being the registered proprietor of the suit property proceeded to sell the same to the 1<sup>st</sup> Defendant on 27<sup>th</sup> August 2002. He added that as a result, he currently has no proprietary interest in the suit property. He further added that his registration as the proprietor of the suit property was a first registration which the Plaintiff cannot challenge nor can this court rectify or nullify. Further, the 4<sup>th</sup> Defendant denied that the Plaintiff has suffered irreparable loss and damages.

### **The Evidence**

The hearing of this suit proceeded on 4<sup>th</sup> April 2017 when the Plaintiff, Joseph Kagunya Ndarari, presented his case before the court. He told the court that he was allotted the suit property by the then Nairobi City Commission and was given a Letter of Allotment, a copy of which he produced in evidence. He stated that the said allotment was on condition that he makes payment of a total of Kshs. 10800/- comprising of stand premium, among others, which he paid. He produced the receipt in evidence. He further testified that he paid the annual rent in the year 2003 and was issued with a receipt, a copy of which he produced. He told the court that he paid survey fees of Kshs. 13,160/- on 14<sup>th</sup> August 2000 and was issued with a receipt, a copy of which he produced. He added that he was shown the beacons of the suit property and a Beacon Certificate was issued to him, a copy of which he produced. He pointed out that the Beacon Certificate showed Plot No. 277 Jamhuri Phase II which is the suit property. He then told the court that the then Nairobi City Council appointed an external lawyer to do the conveyancing for title issuance. He stated that he paid that lawyer the money required for title issuance and he produced a copy of the receipt issued to him by those lawyers dated 23<sup>rd</sup> November 2001. He then told the court that he proceeded to take possession of the suit property by putting up a perimeter wall around the suit property. He further testified that he was waiting for the title to be issued so that he could borrow money from the bank to develop the suit property. He stated that the title was never issued to him nor was it communicated to him why the issuance of the title was taking so long. He then told the court that he later received information that someone was tampering with the suit property. He testified that some bulldozers were excavating the suit property. He stated further that on learning this, he proceeded to the City Hall where he confirmed that the suit property was still in his name. He testified that despite reporting this activity on the suit property, he received no assistance from the 2<sup>nd</sup> Defendant. He stated that he further reported this encroachment to the Chief of the area, the District Officer, the Anti-corruption and finally decided to file this suit. He told the court that he has never received any letter from the 2<sup>nd</sup> Defendant to the effect that the suit property had been repossessed or revoking his letter of allotment. He pointed out that instead, he received a letter from the 2<sup>nd</sup> Defendant dated 15<sup>th</sup> April 2003 to the effect that the suit property was still his. He produced a copy of that letter. He further told the court that as a result of the encroachment, he had suffered loss and damages and had incurred legal costs. He added that there would be need to demolish the structures on the suit property. He further stated that he was not informed of the transactions between the 1<sup>st</sup> and 4<sup>th</sup> Defendants relating to the suit property. He stated that he sued the 4<sup>th</sup> Defendant because he is the one who sold the suit property to the 1<sup>st</sup> Defendant. He further stated that he has sued the 1<sup>st</sup> Defendant because he is the intruder on the suit property.

The 1<sup>st</sup> Defendant, Boniface Kaninda Mulli, also gave his testimony in court. He told the court that on 27<sup>th</sup> August 2002, he was looking for a plot of land to purchase. He stated further that he met the 4<sup>th</sup> Defendant who told him that he had a plot in Jamhuri for sale. He further stated that they agreed on a purchase price of Kshs. 900,000/- and entered into a Sale Agreement dated 27<sup>th</sup> August 2002, a copy of which he produced. He added that he paid stamp duty and registration fees. He produced a copy of the Transfer of Lease lodged and stated that he was subsequently issued with a Certificate of Lease, a copy of which he produced. He further told the court that upon receipt of the Certificate of Lease, he took possession of the suit property and proceeded to construct 6 two-bedroomed flats all of which are occupied. He further indicated that he charged the suit property but did not disclose to which financier. He told the court that he is an innocent purchaser with no notice. On cross-examination, he told the court that he conducted a search on the suit property prior to purchase with the 2<sup>nd</sup> Defendant and established that the same was in the 4<sup>th</sup> Defendant’s name. He clarified that the search was conducted by his lawyer Ms. Ngethe. He confirmed that he paid a purchase price of Kshs. 900,000/- to the 4<sup>th</sup> Defendant and disowned the Transfer of Lease which indicated the consideration as Kshs. 300,000/-. He told the court that the signature on the Transfer of Lease was not his. He further told the court that the undervaluation to Kshs. 300,000/- was done for purposes of stamp duty. He further told the court that the 4<sup>th</sup> Defendant’s signature on the Lease Agreement is different from his signature on the Sale Agreement. He added that since he was shown the Lease Agreement, he did not find out whether the 4<sup>th</sup> Defendant had a Letter of Allotment from the 2<sup>nd</sup> Defendant. He added that he did not find out if the rates were up to date. He stated that he fully relied on his lawyer who assured him that everything was ok. In further cross-examination, he told the court that he submitted his architectural plans to the 2<sup>nd</sup> Defendant for approval. He did not, however, produce the approved drawings.

## Issues for Determination

The following are the issues that arise in this suit for determination:

- a. Who, as between the Plaintiff and the 1<sup>st</sup> Defendant, is the lawful owner of the suit property.
- b. Whether to issue an order of rectification of the land register in respect of the suit property to reflect the Plaintiff as the registered proprietor.
- c. Whether to issue an order of permanent injunction restraining the 1<sup>st</sup> Defendant from trespassing, constructing in or in any other way whatsoever interfering with the Plaintiff's possession and or ownership of the suit property.
- d. Whether to award the Plaintiff general damages and in what amount.
- e. Who shall bear the costs of the suit and interest.

## Analysis and Determination

- a. Who, as between the Plaintiff and the 1<sup>st</sup> Defendant, is the lawful owner of the suit property.

Both the Plaintiff and the 1<sup>st</sup> Defendant went to great lengths to convince this court that they are the lawful owners of the suit property. On his part, the Plaintiff told the court that he was allotted the suit property by the 2<sup>nd</sup> Defendant on 10<sup>th</sup> February 1992. He produced to this court a copy of his Letter of Allotment, whose validity was not challenged at all by the Defendants. He also demonstrated to the court that he made the required payment of stand premium and annual ground rent amounting to Kshs. 10,800/- and he produced a copy of the receipt dated 18<sup>th</sup> February 1992 issued by the 2<sup>nd</sup> Defendant. He also produced a copy of a receipt dated 14<sup>th</sup> August 2000 issued to him by the 2<sup>nd</sup> Defendant to prove a payment of Kshs. 13,160/- being survey fees. To further support this claim over the suit property, he produced a Beacon Certificate dated 28<sup>th</sup> August 2000, also issued to him in respect of the suit property by the 2<sup>nd</sup> Defendant. Additionally, he produced a copy of a receipt issued by the 2<sup>nd</sup> Defendant's external lawyers known as M/s Mbesa & Kitur Advocates being his payment of conveyancing fees amounting to Kshs. 6,400/- which was for the processing of the title deed of the suit property into his name. None of the Defendants successfully challenged the validity of any of these documents. It was the Plaintiff's evidence that having fully complied with all the requirements of the 2<sup>nd</sup> Defendant, he was only waiting for the issuance of the title deed into his name when the 1<sup>st</sup> Defendant encroached into the suit property and started putting up structures.

On the other hand, the 1<sup>st</sup> Defendant also claimed ownership of the suit property. It was his evidence that he bought the suit property from the original allottee, one Charles Wanduto, the 4<sup>th</sup> Defendant, on or about 27<sup>th</sup> August 2002 at a purchase price of Kshs. 900,000/-. He however did not produce any evidence to prove that the said Charles Wanduto was indeed the original allottee of the suit property. He further added that he was issued with a Certificate of Lease to the suit property on 3<sup>rd</sup> September 2002. He added that he took immediate possession of the suit property and has already put up a two storey building which is occupied by tenants. During the hearing, the 1<sup>st</sup> Defendant did not explain to the court how he met the 4<sup>th</sup> Defendant. He further failed to convince the court that he did any search of the suit property with the 2<sup>nd</sup> Defendant to ascertain whether indeed the 4<sup>th</sup> Defendant was the recognized owner of the suit property according to the records of the 2<sup>nd</sup> Defendant. It was the 1<sup>st</sup> Defendant's case that his lawyer, one Ms. Ngethe, is the one who conducted the search and told him that the results were positive. The purported search results were not produced before the court. Further, the 1<sup>st</sup> Defendant told the court that the signature on the Transfer of Lease he produced was not his. He did not produce an alternative transfer of lease containing his correct signature. He further told the court that the 4<sup>th</sup> Defendant's signature on the Lease Agreement was different from his signature on the Sale Agreement. This discounted the validity of that Sale Agreement. He added that since he was shown the Lease issued by the 2<sup>nd</sup> Defendant, he did not find out whether the 4<sup>th</sup> Defendant had a Letter of Allotment from the 2<sup>nd</sup> Defendant. He added that he did not find out if the rates were up to date. He further told the court that he submitted his architectural plans to the 2<sup>nd</sup> Defendant for approval but did not produce the approved drawings. The defense that the 1<sup>st</sup> Defendant put before the court was that he was an innocent purchaser for value without notice.

The 2<sup>nd</sup> Defendant told the court that it recognized the Plaintiff's alleged proprietary interest in the suit property as against the 1<sup>st</sup> Defendant. The 2<sup>nd</sup> Defendant also pleaded that the 1<sup>st</sup> Defendant's purported title and development on the suit property were invalid for the following reasons:

- a. The proprietorship section does not bear out the alleged transaction with the alleged previous lessee.
- b. No consent to transfer was granted by the 2<sup>nd</sup> Defendant.
- c. No development permission and or approved building plans were granted prior to the alleged construction by the 1<sup>st</sup> Defendant.

There were many pointers to the fact that the transaction for the purchase of the suit property between the 1<sup>st</sup> Defendant and the 4<sup>th</sup> Defendant was suspect. The documents produced in evidence by the 1<sup>st</sup> Defendant which I have mentioned above all point to an illegality. The 1<sup>st</sup> Defendant may be the holder of a Certificate of Lease in respect of the suit property but has failed to convince this court that he was indeed an innocent purchaser for value without notice. The position of the holder of a title deed over a parcel of land is well stated in **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 ... 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 , ... 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.”**

In this particular suit, it is alleged by the Plaintiff that the 1<sup>st</sup> Defendant’s Certificate of Lease was acquired illegally and unprocedurally. I have raised several issues in the manner in which the 1<sup>st</sup> Defendant acquired the title which point to illegality. I seek to rely on the following observation of the court in the case of **Daudi Kiptugen versus Commissioner of Lands & 4 Others (2015) eKLR**:

**“In order to determine the question whether the lease held by the plaintiff is valid, it must be demonstrated that it was properly acquired. It is not enough that one waves a Lease or a Certificate of Lease and assert that he has good title by the mere possession of the Lease or Certificate of Lease. Where there is contention that a Lease or Certificate of Lease held by an individual was improperly acquired, then the holder thereof must demonstrate through evidence that the Lease or Certificate of Lease that he holds was properly acquired. The acquisition of title cannot be construed only in the end result, the process of acquisition is material. It follows that if a document of title was not acquired through the proper process, the title itself cannot be said to be a good title. If this were not the position, then all one would need to do is to manufacture a Lease or Certificate of Title at a backyard or the corner of a dingy street and by virtue thereof claim to the rightful proprietor of the land indicated therein. It is therefore necessary for this court to determine how the plaintiff ended up having a Lease and Certificate of Lease in his name and further determine if the Government did intend to issue the plaintiff with a Lease over the suit land.”**

The 2<sup>nd</sup> Defendant is the one which has custody over the records for, among others, the suit property. In its pleadings, the 2<sup>nd</sup> Defendant confirmed that it allotted the suit property to the Plaintiff and according to its records, the suit property remains in the name of the Plaintiff. The 1<sup>st</sup> Defendant does not appear to have done a search with the 2<sup>nd</sup> Defendant because if he did, he would have come to know that the suit property had already been allotted to the Plaintiff. In the case of **Republic versus City Council of Nairobi & 3 Others (2014) eKLR**, Odunga, J. had this to say about land that has already been allotted:

**“once allotment letter is issued and the 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 unless it is challenged by the allotting authority or is acquired through fraud, mistake or misrepresentation or that the allotment was out rightly illegal or it was against public interest. In other words, where land has been allocated, the same land cannot be reallocated unless the first allocation is validly and lawfully cancelled.”**

No evidence was produced by the 1<sup>st</sup> Defendant that the Letter of Allotment issued by the 2<sup>nd</sup> Defendant to the Plaintiff in respect of the suit property was ever cancelled or was invalid in any way. The failure of the 1<sup>st</sup> Defendant to ascertain the true owner of the suit property prior to purchasing the same from the 4<sup>th</sup> Defendant is a failure in undertaking the due diligence required of him. Had he conducted that search in the records of the 2<sup>nd</sup> Defendant, he would have found out that the 4<sup>th</sup> Defendant is not the rightful owner of the suit property. He proceeded to deal with the 4<sup>th</sup> Defendant and even the transaction with the 4<sup>th</sup> Defendant is riddled with inconsistencies. The signature of the 4<sup>th</sup> Defendant in the Sale Agreement differs with his signature on the Lease. Even the 1<sup>st</sup> Defendant denied his purported signature on the Transfer of Lease he produced. Neither the 1<sup>st</sup> Defendant nor the 4<sup>th</sup> Defendant obtained the consent of the 2<sup>nd</sup> Defendant to transfer the suit property. The 1<sup>st</sup> Defendant proceeded to construct a storey building on the suit property without obtaining approval of the 2<sup>nd</sup> Defendant to his architectural drawings. This whole scenario paints a picture that the 1<sup>st</sup> Defendant was aware that the transaction was not above board. He was clearly not an innocent purchaser for value without notice.

Overall, this court finds that the Plaintiff is the rightful owner of the suit property and the Certificate of Lease held by the 1<sup>st</sup> Defendant over the suit property is invalid and of no legal effect for the reason that it was obtained illegally and unprocedurally.

b. Whether to issue an order of rectification of the land register in respect of the suit property to reflect the Plaintiff as the registered proprietor.

Having established that the suit property belongs to the Plaintiff and not the 1<sup>st</sup> Defendant, this court hereby issues an order for the rectification of the land register to reflect the Plaintiff as the registered proprietor of the suit property.

c. Whether to issue an order of permanent injunction restraining the 1<sup>st</sup> Defendant from trespassing, constructing in or in any other way whatsoever interfering with the Plaintiff’s possession and or ownership of the suit property.

With the above finding that the Plaintiff is the duly registered proprietor of the suit property, it follows that the Plaintiff has the rights over the suit property as set out in **section 24(a)** of the **Land Registration Act** which provides as follows:

**“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”**

I find that the Plaintiff is entitled to have exclusive use and possession of the suit property to the exclusion of the 1<sup>st</sup> Defendant. I therefore

issue an order of permanent injunction restraining the 1st Defendant from trespassing, constructing in or in any other way whatsoever interfering with the Plaintiff's possession and or ownership of the suit property.

d. Whether to award the Plaintiff general damages and in what amount.

After considering the factors relating to this case, particularly the circumstances through which the 1<sup>st</sup> Defendant came to occupy the suit property, this court declines to award general damages for trespass.

e. Who shall bear the costs of the suit and interest.

In light of the above, Judgment is entered in favour of the Plaintiff as set out herein with costs. The Plaintiff is entitled to impose interest at court rates on his costs of this suit until the same are paid in full.

**SIGNED AND DATED BY LADY JUSTICE MARY M. GITUMBI AT NAIROBI THIS 17TH DAY OF OCTOBER 2018.**

**MARY GITUMBI**

**JUDGE**

**DELIVERED BY JUSTICE BERNARD EBOSO AT NAIROBI THIS 22ND DAY OF OCTOBER 2018.**

**B. M. EBOSO**

**JUDGE**