



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC. CASE NO. 108 OF 2012

MOHAMED KENYI SULEIMAN

MAIMUNA KENYI SULEIMAN

TALIB KENYI SULEIMAN (Suing as the Administrator of the estate of

KENYI SULEIMAN KENYI - DECEASED.....PLAINTIFFS

VERSUS

JIMBORG OTIENO SIAGA.....DEFENDANT

JUDGMENT

MOHAMED KENYI SULEIMAN, MAIMUNA KENYI SULEIMAN and TALIB KENYI SULEIMAN (the plaintiffs herein) filed this suit as representatives of the estate of **KENYI SULEIMAN KENYI** seeking against the defendant a declaration that the land parcel **No. 5/343 NUBIAN SITE SCHEME** belongs to them and that it be transferred by the District Land Registrar. They also sought an order of costs and interest. Accompanying the suit are their statements and list of their documentary exhibits No. 1 to 13. These include an agreement dated 20th July 1938 between the Land Officer for the Colony and Protectorate of Kenya and **NAFISA BEI BINT KENYI**, the Green card for parcel **No. KISUMU MUNICIPALITY BLOCK 5/343**, letter from the District Commissioner dated 4th February, 2003, summons map, letter of allotment, letters of Administration and other documents.

It would appear from the record that on 12th June 2013, a judgment was entered against the defendant for failure to enter appearance. It is also clear from the record that on 17th August 2018 another judgment was entered against the defendant *“even after being given leave by the court to file the same pending formal proof.”* On 26th September 2018 the plaintiffs’ advocate appeared before the Deputy Registrar **HON. A. ODAWO** and sought a date for formal proof. On 2nd November 2018 the suit was placed before me for formal proof during the service week at the **KISUMU ELC.**

MAIMUNA KENYI SULEIMAN (2nd plaintiff) and **TALIB KENYI SULEIMAN** (3rd plaintiff) testified and called as their witness **MARIAM KENYI SULEIMAN**. They all adopted their written statements. Prior to that, however, I noticed that their plaint did not identify the property in dispute which was only referred to as *“the land”*. When I drew this omission to their counsel **Mr. MWAMU**, he made an oral application, which I allowed to amend paragraph 2 of the plaint by inserting paragraph 2 (a) which now reads:

“The plaintiffs aver that land parcel No. 5/343 NUBIAN SITE SCHEME KISUMU belongs to them”

A similar insertion was made in paragraph 17 (a).

The veracity of the plaintiff’s claim is that the land parcel **No. 5/343 NUBIAN SITE SCHEME** belonged to their late father **KENYI SULEIMAN KENYI** (deceased) and that sometime between the years 2002 and 2003, the defendant who is an officer from the Kenya Army laid claim to a house on the land saying he was the rightful owner as the same had been allocated to him by the Government. The plaintiffs reported the matter to the **ASSISTANT CHIEF, DISTRICT OFFICER WINAM** and the **DISTRICT COMMISSIONER KISUMU** who summoned the defendant and told him to desist from claiming the land but he persisted and even demolished the house. Then on 1st June 2012 the defendant told them to vacate the land and when the chief summoned him to a meeting, he boycotted.

As the defendant and his advocate **MR. MADIALO** did not appear for the trial, the only evidence I have on record is that of the plaintiffs. Having said so, however, I have also noticed that although a judgment had been entered against the defendant for failure to enter appearance, there is infact an application dated 2nd October 2013 by the defendant seeking to have the default judgment dated 12th June 2013 set aside. That application was canvassed and on 31st May 2017, **KIBUNJA J** allowed it and gave the defendant twenty one days to file his defence and counter-claim in terms of the copy that was annexed to the application. Also annexed to the said application is a copy of the certificate of

lease to a parcel of land described as **KISUMU/MUNICIPALITY/BLOCK 5/343** issued to the defendant on 15th January 2001 for a term of 99 years from 1st September 1998. I also notice from the plaintiffs' list of documents is the Green Card for the land parcel described as **KISUMU/MUNICIPALITY BLOCK 5/343**. Although the plaintiffs in their plaint (as orally amended prior to the hearing) described the land in dispute as parcel No. 5/343 **NUBIAN SITE SCHEME KISUMU**, it is clear to me that that parcel and the parcel No. **KISUMU MUNICIPALITY/BLOCK 5/343** as appearing in the certificate of lease annexed to defendant's defence must be one and the same parcel of land. And that explains why the plaintiffs have in their list of documents annexed the Green Card for the same parcel of land. Clearly therefore, the land in dispute is **KISUMU MUNICIPALITY/BLOCK 5/343** and in view of the fact that the certificate of lease for that parcel is in the names of the defendant as confirmed by the plaintiffs own documents, it must be obvious by now that notwithstanding the fact that the defendant did not take part in this trial, there can be no basis upon which this court can make a declaration, as sought by the plaintiffs that the land in dispute belongs to them.

The certificate of lease for the land in dispute was issued under the now repealed **Registered Land Act (CHAPTER 300 LAWS OF KENYA)** on 15th January 2001. This is confirmed also by the plaintiffs own document being the Green Card for the same land (document No. 2). In support of their case however, the plaintiffs have produced an agreement dated 20th July 1938 issued by the District Commissioner. Paragraph one of the said agreement is important for purposes of this agreement and I shall reproduce it:

“An agreement made this 20th day of July 1993 one thousand nine hundred and twenty eight between the Land Officer for the Colony and Protectorate of Kenya (hereinafter referred to as the Land Officer) of the one part and NAFISA BINTI KENYI (hereinafter referred to as the licensee) of the other part. The land officer in pursuance of the powers conferred on him by Section fifty one of the Crown Lands Ordinance Cap 140 LAWS OF KENYA agrees to license and the licensee agrees to occupy all the piece or parcel of land plot No.situate in the Native location Extension, Kisumu Township in the District of Kisumu by measurementfeet by.....feet for the purposes of residence free of rental during your life time provided that in the event of your wife or wives outliving you, they may continue in occupation free of rent during their life time.”

The other document produced by the plaintiffs is a letter of allotment dated 2nd July 2003 addressed to the Commissioner of Lands Nairobi from the Director of Housing Development Department requesting the said Commissioner to allocate the land in dispute and another parcel known as plot No. 5/347 to **KENYI SULEIMAN KENYI**. There is also a letter of allotment from the Commissioner of Lands dated 15th April 2003 allocating to **KENYI SULEIMAN KENYI** the parcel No. **BLOCK/5/343 NUBIAN S & S SCHEME KISUMU MUNICIPALITY** and requesting him to pay Kshs. 13,050 within thirty (30) days. The said letter has the following proviso:

“In acceptance and payment respectively are not received within the said thirty (30) days from the date thereof, the offer herein contained will be considered to have lapsed.”

Then there is a letter dated 20th June 2005 from **KENYI SULEIMAN KENYI** accepting the offer and enclosing a Bankers cheque for Kshs. 13,500 also dated 20th June 2005. The Department of Lands issued a receipt for the said sum on 22nd June 2005.

The chronology of events herein therefore is that the plaintiffs have an agreement dated 20th July 1938 between one **NAFISA BINTI KENYI** and the Colony and Protectorate of Kenya over a plot that is not identified and a letter of allotment dated 15th April 2003 while the defendant, as is clear from the plaintiffs own documents, has a certificate of lease issued on 15th January 2001. Even assuming that the agreement dated 20th July 1938 was in respect to the land in dispute, it was only a licence. Therefore both **NAFISA BINTI KENYI** and her heirs were only licensees and acquired no other interest in the plot for which the license was issued on 20th July 1938 even if it was the land now in dispute.

With regard to the letter of allotment dated 15th April 2003, it is clear that by the time that letter was being issued, the defendant had already acquired title to the land in dispute two (2) years earlier through the certificate of lease dated 15th January 2001. A letter of allotment confers no title to land. In **DR JOSEPH M.K. ARAP NGOK V JUSTICE MOIJO OLE KEIWA & ANOTHER C.A CIVIL APPEAL No. 60 of 1992**, the Court of Appeal said:

“It is trite that such title to landed property can only come into existence after issuance of a letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of title document pursuant to provisions in the Act under which the property is held”

In this case, not only did the plaintiffs' late father not pay the requisite fees within thirty (30) days of the issuance to him of the letter of allotment but by the time he paid it (20th June 2005) the defendant had already been issued with the certificate of lease way back on 15th January 2001. The said certificate of lease also pre-dates the letter of allotment which was issued on 15th April 2003.

The plaintiffs must have known at the time of filing this suit that the land in dispute was registered in the defendant's names and a certificate of lease issued because they produced as part of their documents the Green Card to the land. Such registration is prima facie evidence that the defendant is the absolute and indefeasible owner of the land in dispute. That is what **Section 27 of the repealed Registered Land Act** under which the title to the land in dispute was issued. A similar provision is found in **Section 26 (1) of the new Land Registration Act**. Therefore, in order to challenge the defendant's title to the land in dispute, it was incumbent upon the plaintiffs to plead and lead evidence that the certificate of lease dated 15th January 2001 was obtained by the defendant through fraud, misrepresentation, un-procedurally or through a corrupt scheme. There was no such pleading nor evidence placed before me to that effect yet the law is that fraud must be distinctly alleged and proved to the required standard- **VIJAY MORJARIA V NANSINGH MADHUSING DARBAR & ANOTHER 2000 eKLR**. It must be clear by now that in the absence of an evidence to impugn the defendant's title to the land in dispute, it would be a travesty of justice for this court to make a declaration that the same belongs to the plaintiffs or to direct any transfer thereof in their favour.

The plaintiffs' suit must accordingly be dismissed.

On costs, the defendant did not attend the trial even after getting leave to file his defence and counter-claim. Indeed interlocutory judgment was entered against him twice first on 12th June 2013 and secondly on 17th August 2018. Those are good reasons to disentitle him to costs.

Ultimately therefore, the plaintiffs' suit is dismissed with no order as to costs.

Judgment Dated, Signed and Delivered this 7th day of November, 2018 in Open Court at Kisumu

Ms Essendi for Mr. Mwamu for the Plaintiffs - present

Mr. Madialo for the Defendant- Absent

B. N. Olao

Judge

7th November 2018