



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAIROBI
MILIMANI LAW COURTS
ELC. CASE NO. 3625 OF 1995

EDITH NUNGARI KUNGU.....PLAINTIFF

**SUING AS ADMINISTRATRIX OF THE ESTATE OF
THE LATE DAMIAN COSMAS KUNGU**

VERSUS

LALANG INVESTMENTS LTD.....1ST DEFENDANT

CITY COUNCIL OF NAIROBI.....2ND DEFENDANT

REGISTRAR OF TITLES.....3RD DEFENDANT

JUDGMENT

This suit was filed by way of an Amended Plaint dated 9th March 2011 and filed on 10th March 2011 in which the Plaintiff seeks for Judgment to be entered in her favour as follows:

(a) An injunction restraining the Defendants or any and each of them by themselves, their agents, servants or otherwise howsoever from dispossessing or attempting to dispossess the Plaintiff and/or the Plaintiff's tenants, licensees, agents and/or servants of the parcel of land known as L.R. Number 3734/449 located in Lavington (hereinafter referred to as the "suit property") by demanding rents or in any way dealing, transferring, charging or alienating the suit property.

(b) A declaration that the Raising Order and the Vesting Order are null and void and of no effect and the Register at the Land Titles Registry be rectified accordingly.

(c) A declaration that the issuance of the Provisional Certificate of Title is null and void and of no effect and the Land Titles Register be rectified accordingly.

(d) A declaration that the charge in favour of Prudential Finance Co. Ltd is null and void and the Land Titles Register be rectified accordingly.

(e) The Raising and Vesting Orders given and issued on 14th December 1994 be set aside.

- (f) General damages.
- (g) Exemplary, aggravated and punitive damages.
- (h) Costs of this suit.
- (i) Interest on (f) and (h).
- (j) Such further and other relief as may seem just to this honourable court.

The Pleadings:

In the Amended Plaint, the Plaintiff stated that she purchased the suit property in 1976. She further stated that in 1991, she obtained a loan of Kshs. 400,000/- from Postbank Credit Limited using the suit property as security and that a charge to secure payment of the amount was duly registered in favour of Postbank. She further indicated that in August 1994, she received Rates Demand Note from the City Treasurer requiring her to pay a total of Kshs. 141,655.50 being arrears of rates. She stated further that she contacted the City Treasurer who allowed her time to pay this amount on or before 31st May 1995. She further stated that on 12th November 1994, her attention was drawn to an advertisement appearing in the Standard newspaper in which M/s Capital Auctioneers announced that the suit property would be sold by public auction on 28th November 1994. The Plaintiff further indicated that she visited the said auctioneers who asked her to pay their charges of Kshs. 5,000/- to stop the sale which she did. She also stated that she went to see the City Treasurer again who committed not to sell the suit property and also allowing her to pay the rates arrears by May 1995. She stated further that on 28th April 1995, the Plaintiff paid a total of Kshs. 169,162/- to the 2nd Defendant being all the rates arrears. She further stated that on 18th August 1995, her tenant on the suit property, Mr. J. G. Mureithi, received a letter dated 18th August 1995 from M/s Kinyua Koech Ltd in which they introduced themselves as the duly appointed managing agents of the suit property with immediate effect. It was further stated that the new owner of the suit property was Lalang Investments Ltd, the 1st Defendant. She further stated that upon carrying out an official search on the suit property at the Lands Office she came to learnt that:

- (i) The charge in favour of Postbank Credit Limited was still registered against the title.
- (ii) A prohibitory order by Nairobi City Council (as it then was) for recovery of rates arrears pursuant to Municipal Case No. 599 of 1991 had been registered against the title.
- (iv) The Prohibitory order was raised by an order of the Municipal Court given and issued on 14th December 1994.
- (v) A vesting order in favour of the 1st Defendant, Lalang Investment Limited, was given and issued by the Municipal Court on 14th December 1994.
- (vi) The Raising and Vesting Orders were registered against the title on 20th December 1994.

The Plaintiff further stated that a director of the 1st Defendant applied for and obtained a Provisional Certificate of Title under Section 71 of the Registration of Titles Act whilst the charge in favour of Postbank Credit Limited was still registered against the title purporting to have lost the original Certificate of Title for the suit property. Further, she indicated that the 1st Defendant proceeded to cause a charge in the sum of Kshs. 5 million registered against the title in August 1995. The Plaintiff contends that the alleged raising of a prohibitory order, the vesting of the title in favour of the 1st Defendant, the issuance of a provisional certificate of title while all the time all the Defendants knew or ought to know that the suit property was charged in favour of M/s Postbank Credit limited is unlawful, fraudulent, null and void and of no effect. The Plaintiff further contends that the purported Vesting Order issued by the Municipal Court in Municipal Case No. 599 of 1991 is invalid and of no effect whatsoever because the

Municipal Court which is subordinate to the High Court has no jurisdiction to issue a vesting order, the order was obtained without service upon the Plaintiff, the order was obtained without informing the court about the already existing charge in favour of Postbank Credit Limited and that the order was obtained without informing Postbank Credit Limited about the proceedings.

On 29th November 2011, interlocutory judgment was entered against the Defendants who, though having been served with summons to enter appearance and Amended Plaintiff, failed to enter appearance or file a defence and the matter proceeded for formal proof on 14th March 2016.

The Evidence:

Only one witness testified being James Nganga Kungu. He informed the court that he together with his two sisters are the children of Damian Cosmus Kungu who was the initial Plaintiff in this suit and who died on 4th December 2001. He informed the court further that his mother, Mrs. Edith Nungari Kungu took over the suit in place of her husband but also passed on later on upon which he and his two sisters were substituted as the Plaintiffs. Mr. Kungu confirmed all the assertions contained in the Amended Plaintiff. In addition, he produced several documents in support the key ones being the Rates Demand Note dated 15th August 1994 from the City Treasurer demanding payment of Kshs. 141,655.50 from Mr. Damian Cosmus Kungu and the copies of two receipts each dated 28th April 1995 from the Nairobi City Council amounting to Kshs. 169,152.20 being payment of the rates arrears. He further produced a copy of the Certificate of Title No. I.R. 14086 in respect of the suit property the original of which he testified was now in his custody, having received it from Postbank Credit Limited. He also stated that he has been and remains in possession of the suit property to date.

Determination:

This suit is basically undefended. The current Plaintiffs have been able to demonstrate that the suit property was registered in the name of their late father Damian Cosmus Kungu prior to the issuance of a Prohibitory, Raising and Vesting Order in Municipal Case No. 599 of 1991 the effect of which was to vest the suit property in the name of the 1st Defendant, Lalang Investment Limited, on 20th December 1994. They have proved that they have in their custody the original Certificate of Title No. I.R. 14086 previously held by Postbank Credit Limited. The Plaintiffs have contested the Prohibitory, Raising and Vesting Orders on the grounds that neither they nor Postbank Credit Limited which at the time was the chargee were ever notified of those proceedings through service of process and that those orders are therefore of no effect. They further contest the Provisional Certificate of Title which was issued to the 1st Defendant when the original Certificate of Title was in the custody of Postbank Credit Limited. My findings are that the Plaintiffs have succeeded in proving that the Prohibitory, Raising and Vesting Orders were issued irregularly and are therefore null and void and of no effect. Further, I also find that the Provisional Certificate of Title issued to the 1st Defendant was irregularly issued and is null, void and of no effect.

I proceed to enter judgment in favour of the Plaintiffs as follows:

- (a) A permanent injunction is hereby issued restraining the Defendants or any and each of them by themselves, their agents, servants or otherwise howsoever from dispossessing or attempting to dispossess the Plaintiff and/or the Plaintiff's tenants, licensees, agents and/or servants of the suit property by demanding rents or in any way dealing, transferring, charging or alienating the suit property.
- (b) A declaration is hereby issued that the Raising Order and the Vesting Order are null and void and of no effect and the Register at the Land Titles Registry be rectified accordingly.
- (c) A declaration is hereby issued that the issuance of the Provisional Certificate of Title is null and void and of no effect and the Land Titles Register be rectified accordingly.

(d) A declaration is hereby issued that the charge in favour of Prudential Finance Co. Ltd is null and void and the Land Titles Register be rectified accordingly.

(d) The Raising and Vesting Orders given and issued on 14th December 1994 be and are hereby set aside.

The costs of this suit are awarded to the Plaintiffs.

It is so ordered.

DELIVERED, SIGNED AND DATED AT NAIROBI THIS 17TH DAY OF MARCH 2017.

MARY M. GITUMBI

JUDGE