



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 164 OF 2011

JEREMIAH MUSEMBI KIKUVI.....PLAINTIFF

VERSUS

ALI IBIDO YUSUF

MOHAMED BUTE GALGALO

THE DISTRICT LAND REGISTRAR.....DEFENDANTS

J U D G M E N T

Introduction:

1. The Plaintiff has averred in his Complaint dated 17th October 2011 that pursuant to a letter of offer dated 9th September 2002, he was offered and allotted a piece of land known as Lake Kenyatta II Settlement Scheme No. 452, Lamu, (the suit property).
2. According to the Complaint, the suit property was initially allotted to the 1st Defendant who failed to comply with the conditions of the letter of allotment.
3. The Plaintiff has averred in the Complaint that he paid the requisite conveyancing fees; that during the issuance of the title deed, the title deed was erroneously issued in the name of the 1st Defendant who has proceeded to sell the suit property to the 2nd Defendant.
4. The Plaintiff is claiming for the rectification of the register and cancellation of the Title Deed that was issued to the 1st Defendant.
5. In his Defence, the 1st Defendant denied that he failed to comply with the conditions of the allotment; that he is the duly registered owner of the suit property and that as the first registered owner of the suit property, he has an indefeasible proprietary interest thereto.
6. The Attorney General filed a Defence on behalf of the 3rd Defendant and denied the averments in the Plaintiff's Complaint.

The Plaintiff's case:

7. The Plaintiff, PW1, informed the court that he applied to the government to be allocated the suit property, which application was accepted.
8. PW1 informed the court that he was issued with a letter of offer dated 19th September, 2002.
9. Although the land had initially been allocated to the 1st Defendant, PW1 informed the court that the said allocation was cancelled when the 1st Defendant was unable to meet the condition in the

- letter of offer.
- 10.PW1 informed the court that he paid Kshs.4,312.50 on 7th March, 2003 which was the requisite 10% deposit.
 - 11.It was the evidence of PW1 that he later on built a house on the suit property and planted trees.
 - 12.The evidence of PW1 was that the land was charged to the Settlement Fund Trustee and he was required to settle a loan of Kshs.40,837 which he did.
 - 13.PW1 informed the court that due to a mix up in the settlement office, the title deed was issued in the 1st Defendants' name instead of his name.
 - 14.According to PW1, the Ministry of Lands admitted in writing that the title deed had been issued to the 1st Defendant erroneously. However, he was advised to get an order of the court for cancellation of the title deed.
 - 15.In cross examination, PW1 admitted that he paid the requisite 10% deposit after the stipulated 90 days and that he off set the amount due to SFT on 6th December, 2011, which was after this suit was filed.
 - 16.According to PW1, he put up a temporary structure on the suit property in the year 2003 and that it is his worker who is staying on the land.
 - 17.PW2 informed the court that the Plaintiff was allocated the suit property by the government in the year 2002.
 - 18.However, PW2 admitted that he was not aware of the process that PW1 followed to acquire the suit land.
 - 19.The Lamu County Adjudication and Settlement Officer, PW3, informed the court that the suit property was allocated to the 1st Defendant on 31st January, 1997.
 - 20.According to PW1, the 1st Defendant was required to pay a deposit of Kshs.3,750 which he paid. A charge document was then prepared in favour of the SFT.
 - 21.When he failed to pay the balance of the loaned amount, PW1 informed the court that a notice was issued to the 1st Defendant which required him to remedy the breach within 45 days.
 - 22.When he failed to remedy the breach, PW3 informed the court that the 1st Defendant's letter of offer was cancelled vide a letter dated 5th August, 2002 and a new offer was made to the Plaintiff on 19th September, 2002.
 - 23.PW3 stated that the Plaintiff paid the requisite 10% deposit on 7th March, 2003 and accepted the offer in writing on 10th March, 2003.
 - 24.PW3 stated that once one clears the SFT loan, he is given a discharge of charge and then the Registrar issues to the allottee the title deed.
 - 25.In cross-examination, PW3 admitted that there was no evidence that the 1st Defendant was ever served with the letter asking him to remedy the breach or the letter canceling his letter of offer.

The Defendants' case:

- 26.The Defendant, DW1, informed the court that he was allocated the suit property in 1987; that he paid the requisite 10% of the required amount to the Settlement Fund Trustees and that he was issued with a letter of offer.
- 27.DW1 stated that he was subsequently issued with a title deed in respect to the suit property.
- 28.DW1 denied that he was served with a letter canceling his letter of offer.
- 29.According to DW1, he is the one who has been in possession of the suit property.
- 30.Although the 1st Defendant admitted that the discharge was required before the title deed could be issued, DW1 stated that the title deed was issued to him after the former president directed the Ministry of Lands to release the title deeds that they were holding.
- 31.The area Chief, DW4, informed the court that he knows both the Plaintiff and the 1st Defendant; that it is the 1st Defendant who was allocated the suit property and that the 1st Defendant has a house and mature trees on the land.
- 32.According to DW4, the officials from the Land Adjudication and Settlement office used to grab land that had already been allocated and then re-allocate the same.

Submissions:

33. The Plaintiff's counsel submitted that the 1st and 3rd Defendants were aware of the mistake that occurred in the title document as the 1st Defendant received the letter cancelling his offer; that the 1st Defendant did not pay the required 10% deposit and that the 1st Defendant does not qualify to own the suit property notwithstanding the issuance of the title deed in his name.
34. Counsel submitted that the 1st Defendant acquired the title deed unlawfully and the same is not protected by Article 40(1) of the Constitution.
35. The Plaintiff's counsel submitted that once a parcel of land is allocated, the same becomes private property and cannot be allocated to another person.
36. The 1st Defendant's counsel submitted that an allotment letter *per se* does not confer title to its holder; that the letter of allotment cannot override a title deed and that the Plaintiff has not proved fraud or mistake on the part of the 1st Defendant.
37. Counsel submitted that in any event, the Plaintiff did not plead the particulars of fraud, misrepresentation or mistake which are relevant before a title deed can be impeached.

Analysis and findings:

38. It is not in dispute that parcel of land known as Lake Kenyatta II Settlement Scheme/452 was initially allotted to the 1st Defendant and a title deed was subsequently issued to him.
39. The Plaintiff is seeking for the rectification of the register and the cancellation of the the 1st Defendant's title on the ground that the suit property was subsequently allocated to him by the Settlement Fund Trustees (SFT) and that the Title Deed that was issued to the 1st Defendant should have been issued to him.
40. The documents that were produced by the Lamu County Land Registrar, PW3, shows that on 31st January, 1997, the Director of Land Adjudication and Settlement allocated to the 1st Defendant the suit property vide his letter dated 31st January, 1997.
41. The 1st Defendant was required to pay 10% deposit for the plot within 90 days. From the records produced by PW3, it appears the 1st Defendant never paid the money that he was required to pay to the Settlement Fund Trustees.
42. The non-payment of the 10% deposit notwithstanding, a charge in the name of the 1st Defendant dated 28th October 1999 was prepared in favour of the SFT for Kshs.38,138. The charge document was duly registered on 5th June, 2001 after the same was signed by the 1st Defendant.
43. The documents produced by the County Land Adjudication and Settlement Officer further shows that the 1st Defendant accepted the offer in writing on 5th June 2001 and his signature was duly witnessed. All these documents were then forwarded to the Director of Land Adjudication and Settlement by the Lamu Office.
44. PW3 informed the court that on 4th March, 2002, the 1st Defendant was informed that he was in breach of the conditions of the letter of offer and he was required to remedy the breach within 45 days.
45. The record produced by PW3 shows that on 5th August 2002, Mr. T.N. Mburu for the Director cancelled the 1st Defendant's letter of offer for failure to comply with the conditions.
46. The 1st Defendant denied that he ever received the letter of 4th March, 2002 and 5th August 2002.
47. After the purported cancellation of the letter of offer, PW3 informed the court that a fresh offer was mad to the Plaintiff vide a letter dated 19th September 2002. Just like in the first letter of offer, the Plaintiff was also required to make a deposit for the plot within 90 days.
48. The Plaintiff did not make the payments requested in the letter of offer until 7th March, 2003.
49. Just like what had happened to the 1st Defendant, the Plaintiff was served with "the notice to remedy breach of condition" by the Director vide a letter dated 7th February, 2003 before he rushed to make the payments of Kshs.4,312.50 on 7th March, 2003.
50. It would appear from the documents held by the Land Adjudication and Settlement Office that a ground report in respect of the suit property was required, which report was given on 15th March, 2003.
51. It is not clear what happened between the year 2003 and 2006, because the 1st Defendant is the

- one who was issued with a Title Deed on 28th August, 2006 and not the Plaintiff.
52. Indeed, no evidence was placed before me to show that before the title deed was issued to the 1st Defendant, the Plaintiff had paid off the entire amount that was required to be paid to the SFT to enable the SFT to discharge the property and issue the Plaintiff with a Title Deed.
53. The evidence before this court shows that by the year 2006, the only charge document that had been executed by the SFT on 28th October 1999 in respect to the suit property was the one that was in favour of the 1st Defendant.
54. Before the title deed was issued in the year 2006, the Plaintiff had neither executed a charge nor a discharge in respect of the suit property.
55. The 1st Defendant informed the court that he was issued with the Title Deed despite having not settled the loan that was due to the SFT after the former President directed that people should be issued with Title Deeds.
56. If that is so, and I have no reason to doubt, the SFT could only issue Title Deeds to people who had already executed charge documents, notwithstanding the fact that they had not paid up the outstanding amount.
57. The issuance of the Title Deed to the 1st Defendant, in my view, was not by mistake considering that the records held by the Director of Lands Adjudication and Settlement still indicated that it is the 1st Defendant who was the chargor by 28th August, 2006 and not the Plaintiff.
58. Indeed, the Plaintiff cannot be heard to complain that he is the one who should have been issued with the Title Deed considering that he also never complied with the letter of offer that was issued to him until after the filing of this suit, by which time the SFT had already issued the Title Deed to the 1st Defendant.
59. Having not complied with the letter of offer, and having not signed the charge document until 30th September, 2008, the Plaintiff's right to claim the suit property had not crystallised by the time the Title Deed was issued to the 1st Defendant. The SFT was entitled to issue the title deed to the person who was still in its records as the chargor, the non-payment of the loaned amount notwithstanding.
60. In any event, the Plaintiff can only defeat the 1st Defendant's title deed if he proves that the same was either issued fraudulently or by mistake (**see Section 143 (2) of the repealed RLA**).
61. It has been held by the Court of Appeal and this court that once a party has particularized fraud, he is required to prove the issue on a standard beyond a mere balance of probability (**See Ratal Gordhanbhai Patel Vs Halfi Makanji (1953) EA 314, Eva Kimea & Another Vs Nawal Abdulrahman, Abdalla C.A No. 52 of 2014 Malindi and Malindi C.A No. 26 of 2013 Kalume Karisa Mbithe & Another Vs Bromine Investment Ltd**).
62. The Plaintiff has neither pleaded the particulars of fraud or mistake in his Pleint, nor proved that the 1st Defendant obtained the Title Deed in the year 2006 fraudulently or by mistake.
63. Consequently, the Plaintiff's claim that the Title Deed that was issued to the 1st Defendant on 28th August, 2006 should be cancelled by this court cannot succeed.
64. It is for those reasons that I dismiss the Plaintiff's Pleint dated 17th October, 2011 with costs.

Dated signed and delivered in Malindi this 15th day of April, 2016.

O. A. Angote

Judge