



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL CASE NO. 1464 OF 2002**

**ELISIUS MURANGA.....PLAINTIFF**

**VERSUS**

**ANDREW MWANGI CHUI.....1<sup>ST</sup> DEFENDANT**

**JENNIFFER WANJIRU.....2<sup>ND</sup> DEFENDANT**

**THE CIYT COUNCIL OF NAIROBI.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

The suit was instituted vide a Plaint dated 11<sup>th</sup> September 2002 wherein the Plaintiff averred that he is the registered owner of the property known as LR. No. Nairobi/Block 63/434. He claimed that in July 2002, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, without any title to the property wrongfully and illegally entered the property and commenced development of a building without his consent. It is his averment that the 1<sup>st</sup> Defendant claims to have been allocated the property by the 3<sup>rd</sup> Defendant whereas, the latter had no capacity to allocate private property and therefore could not pass title that already belonged to him. The Plaintiff further averred that the Defendants' continued trespass over his property is detrimental and prejudicial and therefore prayed for Judgment against the Defendants for orders that:

1. A permanent injunction restraining the Defendants, their agents, contractors, workers or any other persons from excavating, developing, building, erecting or continuing with any excavation, development and erection of any permanent and or temporary structures on the said parcel of land whatsoever and howsoever.
2. An order revoking the alleged allocation of the suit premises to the 1<sup>st</sup> Defendant by the 2<sup>nd</sup> Defendant.
3. The Defendant, his servants and/or his agents be evicted from the suit premises and vacant possession be granted to the Plaintiff forthwith.
4. General damages for trespass.
5. Costs of this suit.
6. Interest on (d) and (e) above
7. Any other relief deemed fit by this court.

The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed an Amended Defence and Counter-Claim dated 2<sup>nd</sup> July 2010 wherein they averred that by a letter of allotment dated 10<sup>th</sup> February 1992 (Ref. CP & ARCH/000883) – C.V. 113/S/7/19/1) the 3<sup>rd</sup> Defendant allotted Residential Plot No. 291 Jamuhuri Phase II to the 1<sup>st</sup> Defendant.

Thereafter, by assignment, the 1<sup>st</sup> Defendant on 4<sup>th</sup> February 2000 assigned and transferred all his interests and rights in the said property to the 2<sup>nd</sup> Defendant. It was their contention that they were regularly and properly allocated the property by the 3<sup>rd</sup> Defendant and averred that the Certificate of Title in favour of the Plaintiff dated 24<sup>th</sup> September 2001, was irregularly, wrongfully and fraudulently issued.

In the counter-claim, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants averred that the purported allocation of the suit property and subsequent issuance of a Certificate of Lease to the Plaintiff was wrongful, irregular and fraudulent. This contention was on the basis that the Plaintiff was issued a Certificate of Lease based on a suspected forged and/or questionable letter of allotment and despite there being a caution on the land. It was their contention that the Plaintiff does not possess a good title to the property. On the foregoing, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants prayed for Judgment to be entered against the Plaintiff for orders that:

- a. A declaration that the allocation of Plot 291 (Nairobi/Block 63/434) Jamuhuri Phase II to the Plaintiff is wrongful, fraudulent, null and void.
- b. A declaration that the issue of a certificate of lease on 24<sup>th</sup> September 2001 to the Plaintiff by the Land Registrar was fraudulent, irregular, null and void.
- c. An order for rectification of the Register in respect of LR. No. Nairobi/Block 63/434 Jamuhuri Estate, Nairobi.
- d. The costs of this suit and interest thereon.

The 3<sup>rd</sup> Defendant filed a Defence dated 24<sup>th</sup> September 2002 wherein it denied in toto the allegations stated against it in the Plaint. The 3<sup>rd</sup> Defendant averred that in the event that LR. No. Nairobi/Block 63/434 is the same as Plot No. 291 Jamuhuri Phase II then the same was allotted to the 1<sup>st</sup> Defendant on 10<sup>th</sup> February 1992. Further that as at 10<sup>th</sup> February 1992, Plot No. 291 Jamuhuri Phase II was unallocated land belonging to the 3<sup>rd</sup> Defendant. It contended that the documents of title in the Plaintiff's possession are questionable as the 3<sup>rd</sup> Defendant could not have possibly allotted the same plot twice without recalling or cancelling the first allotment. The 3<sup>rd</sup> Defendant urged the Court to dismiss the suit with costs.

The Plaintiff swore a Witness Statement on 18<sup>th</sup> April 2012, and gave oral evidence and stated that through a letter of allotment dated 6<sup>th</sup> May 1998, the 3<sup>rd</sup> Defendant allotted him Residential Plot No. 291 Jamuhuri Phase II. That on 19<sup>th</sup> August 2002, he paid Stand Premium of Kshs. 13,925/- and Kshs. 6,600/- for ground rent and provisional valuation fee when after he was issued with a clearance dated 28<sup>th</sup> August 2002. It was his evidence that the 3<sup>rd</sup> Defendant's advocates prepared the lease which he signed in the presence of the Council's Legal Officer, Ms. Mary Ngethe. He then forwarded the lease to the Lands Office which was registered on 24<sup>th</sup> September 2001 and was issued with a Certificate of Lease after making the requisite payments.

The Plaintiff testified that as at the time the property was allocated to him, it was vacant with no developments thereon. It was his evidence that in 2002 when the 1<sup>st</sup> and 2<sup>nd</sup> Defendants encroached on his property, he undertook a search on 17<sup>th</sup> October 2002 and learnt that the 2<sup>nd</sup> Defendant had placed a caution against his title. In support of his evidence, the Plaintiff produced a copy of the Letter of Allotment dated 6<sup>th</sup> May 1998; Copies of receipts acknowledging payment of stand premium, annual rent, valuation fees, and rates; Rates clearance certificate issued on 28<sup>th</sup> August 2002; Copy of undated Lease signed by the Mayor, Town Clerk and the Plaintiff in the presence of an Advocate M.N. Ngethe; Certificate of Lease dated 24<sup>th</sup> September 2001; Copy of Official Search conducted on 17<sup>th</sup> October 2002 revealing that the title was issued to the Plaintiff on 24<sup>th</sup> September 2001 and a caution registered by the 2<sup>nd</sup> Defendant on 12<sup>th</sup> July 2002.

On cross-examination, the Plaintiff admitted that the lease is undated and did not specify who drafted it. He testified however that the Council undertook to prepare the lease which he was given on 24<sup>th</sup> September 2001. It was his evidence that he has always made payments to the Council but was advised to

stop further payments pending the determination of the case.

On re-examination, the Plaintiff testified that the Green Card to his title was opened on 24<sup>th</sup> September 2001 and that a true copy of the original was certified by the Registrar on 14<sup>th</sup> January 2002 on which date no caution had been registered. He testified that the caution placed by the 2<sup>nd</sup> Defendant on 12<sup>th</sup> July 2002 was registered after he was issued with the Certificate of Lease.

The 1<sup>st</sup> Defendant (DW1) swore a Witness Statement dated 28<sup>th</sup> February 2012 and gave oral evidence that he was allocated the suit property through an allotment letter dated 10<sup>th</sup> February 1992, which he later assigned to the 2<sup>nd</sup> Defendant on 4<sup>th</sup> February 2000. It was his testimony that he was allocated the plot by virtue of his position as Commissioner of the 3<sup>rd</sup> Defendant's predecessor in 1992 and that at no time was it repossessed.

In support of his defence, DW1 produced the following documents: a copy of Letter of Allotment dated 10<sup>th</sup> February 1992 in favour of the 1<sup>st</sup> Defendant; copies of receipts showing part payment of ground rent dated 20<sup>th</sup> February 1992 and 11<sup>th</sup> January 2002 for payment of ground rent for the years 1993 – 2002; copy of receipt for payment of inspection fee of a domestic building; a copy of a valuation report indicating that the suit property comprises of a Maisonette of five bedrooms; and an undated notice of registration of caution addressed to the Plaintiff.

On cross-examination, the DW1 reiterated that he was allocated by virtue of being a Commissioner but admitted that he had no record to prove that claim. He testified that the fees required upon allotment was a total of Kshs. 15,180/- but that he made a part payment of Kshs. 14,000/- leaving a balance of Kshs. 1,180/-. He also testified that though he was required to accept in writing the offer made in the allotment letter, he accepted the offer but failed to do the acceptance letter. DW1 admitted that he had not taken any steps to obtain the title to the property. It was his evidence that he put up a house sometime in 2002 after he got wind that someone was interfering with the property. On re-examination, DW1 stated that acceptance letters were not a necessary requirement.

The 2<sup>nd</sup> Defendant (DW2) filed a Witness Statement dated 28<sup>th</sup> February 2012 and gave sworn evidence that she is DW1's daughter. She testified that DW1, through an assignment witnessed by Z.M. Wandera, Advocate of the 3<sup>rd</sup> Defendant, transferred the property to her. It was her evidence that sometime in 2001 they got to learn that there was interference with the Council's records in respect to ownership of plots in Jamuhuri Phase II. On that premise, they started constructing a residential house, completed construction in 2002 and had moved in by the time she was served with summons. DW2 testified that she had registered a caution in the Lands Office against the property but did not know how the same was removed and title issued in the name of the Plaintiff.

On cross-examination, DW2 testified that her building plans were approved by the 3<sup>rd</sup> Defendant in the year 2000 when after she started construction immediately. She testified that she lodged a caution against the title as a beneficiary and not an owner of the property.

Benson Ndegwa (DW3) on behalf of the 3<sup>rd</sup> Defendant swore a Witness Statement dated 25<sup>th</sup> September 2013. He stated thereunder that he is an Administrator in the City Planning Department of the 3<sup>rd</sup> Defendant. It was his evidence that the 3<sup>rd</sup> Defendant's records show that the original allottee of the suit property is the 1<sup>st</sup> Defendant and that the planning and allocation of Jamuhuri Phase II was done in 1992 and not 1997. DW3 testified further that no reallocation or repossession of the property had been done thus no other person had been allocated the suit property and therefore that the Plaintiff's title was fraudulent.

On cross-examination, DW3 testified that he joined the 3<sup>rd</sup> Defendant in 1991 as a clerk and rose the ranks to the In-charge of records, where he manages allotment letters and ledger books. DW3 reiterated that the records show that the property was allotted to DW1 and not the Plaintiff but failed to provide any

records in support of his evidence testifying however that the records were available. It was his evidence that the allotment letter in favour of the Plaintiff dated 6<sup>th</sup> May 1998 did not emanate from the 3<sup>rd</sup> Defendant since the allocation in Jamuhuri were done in 1992 and not 1998. Further, that the address of the allottee was never included and that the particulars as to the measurements of the property were not correct.

On procedural aspects, DW3 testified that once a letter of allotment is issued, the clearance of payment for the requisite fees is done by Directorate of Planning and Chief Revenue Officer when after a Clearance Certificate is handed by the Chief Revenue Officer and City Treasurer. DW3 testified that the 3<sup>rd</sup> Defendant is supposed to draw a lease which is signed by the Mayor and Town Clerk and that these leases are kept with the Director of Legal Services. Thereafter, that the leases are taken to DW3's office for purposes of authentication. Further that it would be irregular for the leases to be signed before the authentication process.

On re-examination, DW3 reiterated that the allotment letter in the 1<sup>st</sup> Defendant's possession was the genuine which contained the correct measurement of the property. He also reiterated that there is only one record for Jamuhuri Estate which shows that allocations of plots were done in 1992.

The suit was further canvassed by way of written submissions. T. K. Kariba Mbabu & Co. Advocates for the Plaintiff filed submissions and a list of authorities dated 22<sup>nd</sup> May 2014. It was submitted for the Plaintiff that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' claim is based on a letter of allotment allegedly held since 1992 but that they had not taken any steps to advance the said letter to a formal lease or title. Counsel relied on the case of **Dorothy Wacera Macharia & Another v The Attorney General & Another ELC Nai. No. 353 of 2007** a letter of allotment is only transient right and not a good title to the property and cannot rank higher than a title.

Counsel submitted that the Plaintiff's title is protected under Section 26(1) of the Land Registration Act that such title is taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner. Further that such title can only be challenged on grounds of (a) fraud or misrepresentation to which the person is proved to be a party or (b) where the certificate of title has been acquired illegally, un-procedurally or through corrupt scheme. In regards to the allegations of fraud pleaded by the Defendants' in their counter-claim, counsel submitted that no particulars of fraud had been pleaded specifically against the Plaintiff neither did not offer any evidence to prove the allegations and therefore the Court could not be asked to rectify the Certificate of Lease on account of fraud. Consequently, counsel submitted, that the title held by the Plaintiff is indefeasible.

Counsel urged the court to grant an order of eviction against the Defendants who have been in occupation of the suit property. Further that since the Plaintiff had been kept out of the property and prevented from developing the same over the years an award of general damages for trespass would serve.

Kanyi & Koge Advocates for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed submissions dated 16<sup>th</sup> June 2014 wherein counsel submitted that even where the Plaintiff's registration is the first registration, Section 26(1) (b) of the Land Registration Act qualifies absolute rights conferred upon registration in circumstances where registration is illegal or procured through fraud. It was counsel's submission that there was no requirement under Section 26(1) (b) of the Land Registration Act that fraud must be proved against a party for title to be challenged. Counsel heavily relied on the evidence of the 3<sup>rd</sup> Defendant who testified that the property was allotted to the 1<sup>st</sup> Defendant and also that allocations in Jamuhuri were done in 1992 and not 1998. It was also submitted that the payment of the stand premium and other charges way after registration was of the lease and issue of Certificate of Lease further confirmed the Defendants' position that title held by the Plaintiff was obtained in an irregular, unlawful and fraudulent manner.

Counsel submitted that even in the event that this was a matter of double allocation, the Plaintiff's title would still be open to challenge on the ground that once the property was allotted to the 1<sup>st</sup> Defendant, it was not available for allocation to the Plaintiff without following the laid down procedure of reallocating the property. In support of this submission, counsel relied on the Court of Appeal decision in **M'Ikiara**

**M'Rinkaya & Another v Gilbert Kabeere M'mbijiwe (1982 – 1988) 1 KAR 196** and **Rukaya Ali Mohamed v David Gikonyo Nambacha & another HCCA Kisumu No. 9 of 2004.** Counsel urged the Court to allow the counter-claim as prayed and to cancel the Plaintiff's title having been obtained in a fraudulent manner. Counsel also urged the court to consider the level of development undertaken on the property by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants on the legitimate expectation that title to the property would be issued to them compared to the stand premium of Kshs. 13,925 and Kshs. 6,600 paid by the Plaintiff.

Submissions on behalf of the 3<sup>rd</sup> Defendant were filed by W.S. Ogola Advocate on 30<sup>th</sup> April 2014. Counsel relied on evidence by the 3<sup>rd</sup> Defendant's witness that the allotment letter in the Plaintiff's possession did not emanate from the 3<sup>rd</sup> Defendant on the basis that the measurement of plots in Jamhuri Phase II are 0.03 hectares not 0.2 hectares as indicated in the Plaintiff's letter. Further that the records at the 3<sup>rd</sup> Defendant's Planning Department show that the 1<sup>st</sup> Defendant is the allottee of the said property.

I have carefully considered the evidence and examined the documentary evidence availed by both parties. Title to this property emanates from an allotment letter issued by the 3<sup>rd</sup> Defendant. The Plaintiff and Defendant hold allotment letters, the former issued in 1998 and the later 1992. The 1<sup>st</sup> Defendant however maintains that the letter of allotment and lease in favour of the Plaintiff are forgeries and therefore the Certificate of Lease issued to the Plaintiff was obtained by fraudulent means. The 1<sup>st</sup> Defendant relied heavily on the evidence of the 3<sup>rd</sup> Defendant's witness, who inopportunately, did not avail any document or extracts of records in support of his evidence. The said witness also filed a witness statement but failed to annex any supporting document. His evidence was thus barren to say the least. Nevertheless, allegations of fraud have been made against the Plaintiff. It is the Plaintiff's submission that the Defendant did not specifically make specific allegations of fraud against him in their Defence and Counter-Claim. Further that the said allegations were made against the Land Registrar, who was not made a party to the suit herein. The Defendants in their submission however rely on the provision of Section 26(1) (b) of the Land Registration Act and urged the court to look at the manner in which the certificate of title has been acquired.

As stated hereinabove, the Certificate of Title herein stems from a Letter of Allotment issued by the 3<sup>rd</sup> Defendant. The letters of allotment have conditions that must be met thereunder. One of the requirements thereunder is that the payment specified therein (Stand Premium, Annual Ground Rent, Survey Fees, Architectural Fees/Approval Fees etc) must be paid within 30 days from the date of the offer else it will be considered to have lapsed without further reference to the allottee. On perusal of DW1's bundle of documents, the 3<sup>rd</sup> Defendant made an offer on 10<sup>th</sup> February 1992 on condition that the allottee pays a sum of Kshs. 15,180/-. DW1 testified and produced a copy of a receipt that he made a part payment of Kshs. 14,000/- on 20<sup>th</sup> February 1992, which was within the 30 day period. On cross-examination, DW1 admitted that the balance of Kshs. 1,180/- was left unpaid. Evidently, DW1 did not make full payment, but it is my view, that he made substantial payment towards meeting the said condition. The 3<sup>rd</sup> Defendant having received the substantial part payment made by the 1<sup>st</sup> Defendant, it is my considered view that the 3<sup>rd</sup> Defendant would have to formally cancel the 1<sup>st</sup> Defendant's allotment prior to issuing another allotment letter. I am guided by the decisions in **M'Ikiara M'Rinkaya & Another v Gilbert Kabeere M'mbijiwe (1982 – 1988) 1 KAR 196** and **Rukaya Ali Mohamed v David Gikonyo Nambacha & another HCCA Kisumu No. 9 of 2004** where the Courts held that once a parcel of land is allocated, the same becomes private property and is no longer available for allocation to another person unless the first allocation is validly and lawfully cancelled.

The Plaintiff on his part relied on the cases of **Wreck Motor Enterprise v Commissioner of Lands and Others Nairobi Civil Appeal No. 71 of 1997** and **Jaj Super Cash & Carry Limited v Nairobi City Council & Others Nairobi Civil Appeal No. 111 of 2002** where their Lordships held that a letter of allotment is a transient right and not a good title to the property. It was submitted that the Plaintiff does have title which is prima facie evidence of ownership and is protected under Section 26 of the Land Registration Act. Whilst the law is protective of titles, Sub-section 1(a) and (b) thereunder provides for instances when title can be challenged. Section 26 of the Land Registration Act provides:

## 26. Certificate of title to be held as conclusive evidence of proprietorship

1. **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.**
2. **A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.**

This provision, in my view, not only asks the court to determine whether fraud or misrepresentation against the title holder has been proved but also requires of this court to examine, based on the evidence before it, the manner in which the title was acquired. I associate myself with the reasoning Munyao J. in the case of **Elijah Makeri Nyangw'ra v Stephen Mungai Njuguna & another Eldoret Environmental & Land Case 609 (B) of 2012 [2013] eKLR**

**As may be observed, the law is extremely protective of title and provides only two instances for the challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.... Is the title impeachable by virtue of Section 26(1) (b) ? First, it needs to be appreciated that for Section 26 (1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions.**

I perused the Plaintiff's witness statement, wherein he averred that he paid the Stand Premium and Ground Rent on 19<sup>th</sup> August 2002 and was issued with a Clearance Certificate on 28<sup>th</sup> August 2002. Further that a Lease was prepared by the 3<sup>rd</sup> Defendant and issued to him when after he lodged the same for registration on 24<sup>th</sup> September 2001. Notably, the Certificate of Title was issued on the same date. There are receipts produced by the Plaintiff showing payments made in 2002. From the chronology of the events stated by the Plaintiff is evident that the Lease was prepared, registered and title issued (one) 1 year before he paid the Stand Premium and Annual Rent. It is thus clear that the process of obtaining title was un-procedural, illegal or through a corrupt scheme noting that an allottee must first satisfy the conditions of the offer in the allotment letter before a lease is prepared and title issued.

In evidence, the Plaintiff testified that the initial payment that he made to the 3<sup>rd</sup> Defendant was on 5<sup>th</sup> June 2001. There was a loose copy of a receipt within the Plaintiff's bundle of documents dated 5<sup>th</sup> June 2001 showing payment of Stand Premium and Annual Rent as specified in the Allotment Letter. Even if, this court were to find that the Plaintiff did make the requisite payments before title was issued, the fact that the Plaintiff made the requisite payments 3 years from the date of the offer was contrary to the express terms of the Allotment Letter. There was no explanation offered by the Plaintiff as to the delay in meeting the requirement. It is my finding that as at the date the Plaintiff made the payment, the letter of allotment had already expired by effluxion of time.

It is correct to assert that an allotment letter is a transient right and not as good as title. As discussed hereinabove, title can be challenged where it was obtained fraudulently, illegally, or un-procedurally. Mutungi J. in the case of **Esther Ndegi Njiru & another v Leonard Gatei Nairobi ELC Civil No. 128 OF 2011 [2014] eKLR** did find that indeed a title obtained irregularly could not supersede a share certificate of a true owner of a parcel of land. This court has made a finding that the property had already been allotted to the 1<sup>st</sup> Defendant and the same could not have been reallocated before being lawfully and validly cancelled. Secondly, that it was irregular for the Plaintiff to have executed a lease and acquired title before payment satisfying the conditions of the Allotment letter. Even if he did pay the requisite fees before acquiring title, such payment was made 3 years after the offer, at which point, the allotment had expired. I therefore find that since the Plaintiff's allotment letter was procured un-procedurally, the resultant title is of no consequence and the said title cannot supersede the 1<sup>st</sup> Defendant's letter of allotment.

The upshot of the foregoing is that the Plaintiff's suit is hereby dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. However, Judgment is hereby entered for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants as per their counterclaim. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants are hereby directed to take steps to secure title to the property.

It is so ordered

Dated, signed and delivered this 27<sup>th</sup> day of April 2015.

28 days Right of Appeal.

**L.N. GACHERU**

**JUDGE**

In the Presence of:-

Mr. Waigi Kamau holding brief for Mr. Mbabu for the Plaintiff

None Appearance for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants though notified

None Appearance for the 3<sup>rd</sup> Defendant

Hilda - Court Cler

**L.N. GACHERU**

**JUDGE**