



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**LAND AND ENVIRONMENTAL DIVISION**  
**ELC CIVIL SUIT NO. 826 OF 2012**

**IN THE MATTER OF: Articles 19, 20, 22, 23, 24, 40, 47, 165, 258 and 259 of the  
Constitution of the Republic of Kenya**

**AND**

**IN THE MATTER OF: The Contravention of Articles 40 and 47 of the Constitution of the  
Republic of Kenya**

**AND**

**IN THE MATTER OF: Section 3, 9 and 12 of the Government Lands Act (Cap. 280) of the  
Laws of Kenya and sections, 12, 13 and 106 (3)(a) of the Land Registration Act, NO. 3 of  
2012.**

**BUBAKI INVESTMENT COMPANY LTD..... PETTIONER**

**VERSUS**

**NATIONAL LAND COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**CHIEF LAND REGISTRAR ..... 2<sup>ND</sup> RESPONDENT**

**KIRITKUMAR H. DAVE ..... 3<sup>RD</sup> RESPONDENT**

**J U D G M E N T**

The Petitioner, Bubaki Investments Company Limited, is a limited liability company incorporated in Kenya under the Companies Act, Cap 486 of the Laws of Kenya. The 1<sup>st</sup> Respondent is the National Land Commission established under article 67 of the Constitution and is the Successor of the Commissioner of Lands. The 2<sup>nd</sup> Respondent is the Chief Land Registrar appointed under sections 12 and 13 of the Land Registration Act NO. 3 of 2012 and is the successor of the Registrar of Titles. The 3<sup>rd</sup> respondent is the registered proprietor of **L.R. NO. 209/9329**.

The petitioner claims that sometime on or about 30<sup>th</sup> May 1997 it was vide a letter of allotment annexed and marked “EMK1” offered a grant of plot **L.R. NO. 209/9329 – Parklands Nairobi** by the 1<sup>st</sup>

Respondent on the terms and conditions attached to the letter of offer which included payment of the requisite stand premium, land rent, conveyancing fees, stamp duty, survey fees, allocation fees and value of developments thereon all amounting to Kshs.305,590.00. The petitioner states despite satisfying all the conditions attendant to the allotment the 1<sup>st</sup> Respondent did not process the title documents in its name and instead processed a title in favour of a 3<sup>rd</sup> party. The petitioner further states that inspite of sustained follow up to have the title issued in its favour, the 1<sup>st</sup> Respondent failed to fulfill their obligation and cause a title to be issued to the petitioner and in that regard the 1<sup>st</sup> and 2<sup>nd</sup> Respondents breached the petitioner's legitimate expectation that it would be issued with a title to the subject property having fully complied with the conditions of allotment.

The petitioner contends that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents acted fraudulently in allocating the subject property to a third party and the acts of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were illegal, administratively flawed and contravened the petitioner's fundamental and constitutional rights as particularized under paragraph 24 of the amended petition and as a consequence the petitioner has suffered loss and damage. The petitioner seeks the following reliefs:-

- i. The court be pleased to declare that the petitioner's rights either individually or in association with others to acquire and own the parcel of land registered as **L.R.NO.209/9329** Parklands, Nairobi or any other property of any description and in any part of Kenya have been violated by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents contrary to article 40(1) of the Constitution of Kenya.
- ii. The court be pleased to declare the acts of the 1<sup>st</sup> Respondent to be an abuse of office and ultra vires the delegated powers conferred on his office by section 3, 9 and 12 of the Government Lands Act Cap 280 of the Laws of Kenya (now repealed).
- iii. The Court be pleased to order a cancellation/revocation of the fraudulent title issued to the third party with regard to **L.R.NO.209/9329** Parklands Nairobi and declare the same as void for being issued in breach of the due process.
- iv. The Court be pleased to order the 2<sup>nd</sup> Respondent to issue a title to the petitioner in respect of the aforesaid parcel of land.
- v. In the alternative to prayer (iv) above, the court be pleased to order that the petitioner be compensated with liquidated damages being the present market value of **L.R.NO.209/9329** Parklands Nairobi as may be determined by a registered Government Valuer.
- vi. Costs of the suit.
- vii. Interest on item (vi) above at court rates.
- viii. Any other relief that the court deems fit to grant.

The petition was served on the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. The Attorney General filed grounds of opposition to the petition on behalf of the 2<sup>nd</sup> Respondent dated 7<sup>th</sup> October 2014 on 23<sup>rd</sup> October 2014. The petition was served on the 3<sup>rd</sup> Respondent by way of substituted service following leave granted by the court on 17<sup>th</sup> September 2013. The 3<sup>rd</sup> Respondent did not appear and filed no pleadings in answer to the petition.

The 2<sup>nd</sup> Respondent set out the following grounds in opposition to the petition:-

1. That the petitioner did not comply with the terms of offer as contained in the allotment letter. Specifically the petitioner failed to **“accept and make the requisite payment within 30 days (thirty) days from the date of the letter of allotment”**.
2. Further that the letter of offer, being a typical contract offer letter, lapsed by dint of effluxion of

- time. It ceased to have legal effect on 01/06/1997, the said date being the 31<sup>st</sup> day of the letter of allotment,
3. That it is trite law that a letter of Allotment does not give rise a proprietary interest in land to the allotment in this case the petitioner. The petitioner's claim to a right to property under Article 40 of the Constitution does not arise. This was held by the Court of Appeal in **Wreck Motors enterprises –vs- The Commissioner of Lands and 3 others Nairobi Civil Appeal NO. 71 of 1997** (unreported and in **Joseph Arap Ng'ok –vs- Justice Moijo Ole Keiwua NAI Civil Application NO.60 of 1997**, where the court succinctly stated that, **“Title to landed property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of a title document”**.
  4. That the petition, as filed, lacks a cause of action and it ought to be disallowed.

### **The Petitioner's case:**

The case of the petitioner as I understand from the pleadings is that the petitioner was vide a letter of 30<sup>th</sup> May 1997 by the letter of allotment of even date allocated plot **L.R. NO. 209/9329 Parklands Nairobi**. It is noteworthy that no part Development plan (PDP) is attached to the letter of allotment to identify the parcel of land and further no letter of application for allotment by the petitioner is exhibited. The letter of allotment required the petitioner to make a formal acceptance of the conditions of the allotment and to effect payment of the requisite charges thereof within thirty (30) days. It is my understanding that acceptance needed to be in writing for it to be capable of being received. The letter of allotment further provided that

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

The petitioner made payment of the requisite charges of Kshs.305,590.00 on 8<sup>th</sup> September 1997. The petitioner states that the government was after payment of the requisite charges to facilitate the preparation and issuance of the title documentation to the parcel of land to the petitioner but the government failed to do so. The petitioner states that for over 10 years since being allocated the property it made follow up with the Lands office to have the title documentation for the property undertaken but the relative file was unavailable prompting the petitioner to write severally to the Ministry vide letters dated 14<sup>th</sup> June 2007, 7<sup>th</sup> September 2007, 19<sup>th</sup> October 2007, 22<sup>nd</sup> November 2007 and 21<sup>st</sup> January 2008 seeking intervention by the Permanent Secretary Ministry of Lands.

The Commissioner of Lands vide a letter dated 1<sup>st</sup> February 2008 in response to the petitioner's advocates letter dated 21<sup>st</sup> January 2008 inter alia wrote:-

**“The allocation of L.R.209/9329 to Bubaki Investment Company Limited was erroneous as the said land is privately owned. I therefore regret to inform you that this office will not be in a position to process a Grant in respect of the same.**

**Kindly advise your clients to make a formal application for refund of the amounts paid to this office attaching the original letter of allotment and payment receipt”**.

This letter made it clear that the property allocated to the petitioner was already in the hands of a third party and a grant could therefore not be processed.

Faced with the above scenario the petitioner avers that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent breached the terms of the allotment to it when they failed to process a title for the subject property to it after it had accepted and paid the requisite fees as per the letter of offer. The Petitioner claims that the allotment of the same property to a third party when the same had been allocated to the petitioner was in abuse of the powers conferred by law upon the 1<sup>st</sup> and 2<sup>nd</sup> Respondent and was in violation of the petitioner's legitimate expectation for which the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are liable.

The petitioner further avers that having been legitimately allocated the parcel of land the 1<sup>st</sup> and 2<sup>nd</sup> Respondents acted fraudulently in allocating the subject property to a 3<sup>rd</sup> party and issuing a grant to such 3<sup>rd</sup> party. The petitioner's point is that the allocation to the 3<sup>rd</sup> party was illegal since the land had already been allocated to the petitioner and was not available for allocation to the 3<sup>rd</sup> party.

The petitioner contends that the acts by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to issue title to a 3<sup>rd</sup> party in the circumstances were unlawful, unjust and in contravention of the petitioner's, constitutional rights. The Petitioner argues that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents contravened articles 27, 40, 47 and 60 of the Constitution and that the title issued to the 3<sup>rd</sup> party to the extent that it was issued in contravention of the Constitution is null and void and should be so declared.

The petitioner following directions by the court filed written submissions dated 19<sup>th</sup> January 2015 on the same date. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents did not file any submissions inspite of having been afforded the opportunity to do so. The petitioner in the filed submissions reiterates the facts of the matter as outlined in the petition and further identifies the issues that call for determination as follows:-

1. Whether the petitioner complied with the conditions in the letter of allotment,
2. Whether the offer to grant the suit premises to the petitioner had elapsed at the time when the petitioner met the conditions in the letter of allotment.
3. Whether the petitioner had a proprietary interest in the suit property by the time the 1<sup>st</sup> Respondent allotted the same to a third party,
4. Whether the 1<sup>st</sup> Respondent and 2<sup>nd</sup> Respondents actions amount to fraud?
5. Who bears the costs of the proceedings?

#### **Whether petitioner complied with the conditions in the letter of allotment.**

The petitioner submits that it complied with the terms of allotment and states that acceptance and payment of the charges as per the allotment letter condition (2) was required to be within thirty (30) days of the postmark denoting 30 days from the date when the allotment letter was posted. The proviso on page 2 of the letter of allotment contradicts condition (2) as it provides that:-

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

The net effect of these provisions is that the offer of allotment had to be accepted within a specified period otherwise it would lapse by effluxion of time. The Petitioner does not state when it received the letter of offer and/or when it was post marked. The petitioner merely contents itself by stating that by the time it made payment in terms of the letter of allotment the offer had not lapsed. The Petitioner further submits that at the time payment was made the suit premises had not been allocated to any other person and neither had the allotment to it been revoked by the 1<sup>st</sup> or the 2<sup>nd</sup> Respondent. The petitioner argues that revocation is ineffective unless it has been communicated to the offeree and refers the court to extracts from Cheshire, Fifoot and Furmstons Law of Contract, 6<sup>th</sup> Edition P.75 where the authors stated thus:-

**“The revocation of an offer is ineffective unless it has been communicated to the offeree. It is not enough for the offeror to change his mind. For some years, it is true, observed with the theory of consensus, the judges were content with the mere alteration of intention, But business necessity, in this instance no less than in the definition of acceptance, overbore deductions from a priori conception of contract and required some overt act from which the intention might be inferred. Convenience, indeed demanded a more stringent rule for revocation than for acceptance, To post a letter was a sufficient act of acceptance, since the offeree was entitled to assume that he thereby satisfied the expectations of the offeror the offer when he decided to revoke could rely on no such assumption”.**

If the offer is open and is not specific within what period it has to be accepted, I would agree with the authors that the revocation of the offer would have to be communicated to the offeree. However, where an offer has a specified time within which it has to be accepted, no communication of the revocation would be necessary as it simply would stand revoked on the expiry of the specified period. A time extension and/or a fresh offer would be necessary to reactivate the offer.

### **Whether the allotment offer lapsed by effluxion of time**

In the present case the letter of allotment carried a specific time frame within which a written acceptance of the offer and payment of the charges thereto were to be made. The petitioner has not demonstrated it made a written acceptance of the offer and/or made payment within 30 days of the posting of the letter of offer or within 30 days of the date of the offer letter. It is incumbent on the petitioner to satisfy the court that it in fact accepted the allotment and made payment within the specified period. The import of that is because the letter of allotment provided that the offer would lapse within 30 days from the date of the offer. While the petitioner has argued that by virtue of condition (2) of the offer letter the period would run from the date the offer letter was posted, the petitioner has not shown that the letter was indeed posted and if so the date of posting noting that the letter could also have been hand collected and/or hand delivered. Even assuming the letter was posted, it would be expected that the letter would be posted within say 7 days of being signed to allow for any bureaucratic processes within the Ministry of Lands and hence the letter ought to have been at any rate posted by 6<sup>th</sup> June 1997 so that the latest date by which the petitioner could have accepted and effected payment was by 6<sup>th</sup> July 1997.

The petitioner did not effect payment until 8<sup>th</sup> September 1997 and there is no evidence that a formal written acceptance of the allotment was made as none has been exhibited. My view is that no acceptance and/or payment was made in accordance with the letter of allotment and therefore there was no compliance with the conditions of the letter of allotment. The petitioner acknowledges that allotment of the same property was made to a 3<sup>rd</sup> party presumably who is the 3<sup>rd</sup> Respondent but contends that this allotment to the 3<sup>rd</sup> party was made after the allocation to the petitioner. The petitioner has not furnished any evidence to show that the allotment to the 3<sup>rd</sup> party was made after the allocation to it. Indeed not even a search has been exhibited to show the current status of the property and the court is being asked to be presumptuous and accept that the 3<sup>rd</sup> Respondent is the registered proprietor of the suit property and that his allocation was after the property had already been allocated to the petitioner. **Where is the evidence to support this?** The cardinal rule of evidence is that he who asserts and/or alleges must prove. I do not think the petitioner has proved its allocation of the suit property was earlier in time than the allocation to the 3<sup>rd</sup> Respondent and I hold that the petitioner has not proved that fact.

Thus in my view the petitioner did not comply with the terms and conditions of the letter of allotment dated 30<sup>th</sup> May 1997 and that as at the time the petitioner made payment of the charges stipulated under the letter of allotment the offer had lapsed and was therefore ineffectual.

Having held that the petitioner did not comply with the terms and conditions of the letter of allotment it follows that the petitioner could not and did not acquire any proprietary interest in the suit property notwithstanding the payment it made. The offer extended through the letter of allotment having lapsed by effluxion of time, there was no offer to accept at the time the petitioner made the payment. The petitioner ought to have sought and obtained a renewal of the offer and/or extension of the period within which to accept the offer. This was not done and thus there is no basis upon which the petitioner can be taken to have complied with the terms of the offer of 30<sup>th</sup> May 1997. The Commissioner of Lands in my view was entitled after the expiry of 30 days from the date of the letter of allotment and provided there was no acceptance of the offer from the petitioner to treat the allotment as having lapsed and could re-allocate the property to any other person. Payment of the charges alone cannot connote acceptance of the terms of the allotment as a written acceptance was required under the letter of allotment.

As observed earlier in this judgment the allocation of the suit property to the 3<sup>rd</sup> Respondent could either have been earlier than the allotment to the petitioner or later after the allotment to the petitioner had

lapsed. Whatever the time of allocation I am not satisfied that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents acted in any fraudulent manner in allocating the suit property to the 3<sup>rd</sup> Respondent. No fraud in my view has been established and/or proved by the petitioner as against the Respondent. It is not enough for a party to allege fraud in any matters and leave it at that for the court to look for the evidence. Fraud is a serious matter which borders on criminality and must be specifically pleaded and proved. The burden of proof where fraud is alleged is on higher threshold than on a balance of probability and is on such scale as is normally required in criminal cases though the standard is not as high as to be beyond any reasonable doubt but is close there. The petitioner did not in my view tender any evidence that would prove the 1<sup>st</sup> and 2<sup>nd</sup> Respondents acted fraudulently and find no fraud was proved and/or established.

In the present case I have held that the petitioner failed to comply with the terms of the letter of allotment and thus any acts by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent in dealing with the suit property could not be fraudulent since the petitioner did not acquire any proprietary interest in the suit property, he having not complied with the terms of the allotment. In the result it is my view that the petitioner lacks any cause of action to sustain this petition and it is my holding that no fundamental rights and/or other constitution rights of the petitioner have been violated and/or infringed as alleged by the Petitioner. The petition lacks any merit and the same is ordered dismissed with no orders as to costs.

Judgment dated, signed and delivered this 17<sup>th</sup> day of April 2015.

**J. M. MUTUNGI**

**JUDGE**

**In presence of:**

Njenga..... For the Petitioners

N/A..... For the 1<sup>st</sup> and 2<sup>nd</sup> Respondents

N/A..... For the 3<sup>rd</sup> Respondent