



**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CIVIL CASE NO. 171 OF 2012**

**CECILIA WANJIKU NGANGA.....PLAINTIFF**

**=VERSUS=**

**FRANCIS GITAU MUNGAI.....DEFENDANT**

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

**Introduction**

1. The Plaintiff commenced this suit by way of a Plaint dated 6<sup>th</sup> November 2012. In the Plaint, the Plaintiff has averred that she bought land known as Witu/Tana Settlement Scheme/460/19 (the suit property) from Koricha Tutata Adego for kshs.40,000; that she has been residing on the said land since the year 2000 and that she has substantially developed the suit property.
2. The Plaintiff has averred that when the Director of Land Adjudication and Settlement issued the letter of offer in Witu/Tana Settlement Scheme, he erroneously offered the suit property to the Defendant; that after investigations, it was directed that the suit property be allocated to her and that the title deed was erroneously issued in favour of the Defendant.
3. The Plaintiff is seeking for an order of rectification of the register by cancellation of the existing title deed and for a title deed to be issued in her name.
4. In his Defence, the Defendant averred that he is the registered owner of the suit property and that he was issued with a genuine title deed on 11<sup>th</sup> August 2006.
5. The Defendant further averred that if the Plaintiff has been residing on the suit property, she has been doing so as a trespasser and that any structures put up by her on the suit property are illegal.

**The Plaintiff's case**

6. The Plaintiff, PW1, informed the court that she bought the suit property from Mr. Koricha Tutata in the year 2000 vide an agreement dated 9<sup>th</sup> January 2000 and another one dated 20<sup>th</sup> January 2000 for Kshs.40,000.
7. It was the evidence of PW1 that after purchasing the land, she went to see the Land Adjudication and Settlement Officers who informed her that they were still working on the documentations in respect to the suit property.
8. However, she later on realised that the property had been allocated to the Defendant when she received a letter from his advocate directing her to vacate the property.
9. The agreements that the Plaintiff entered into with Mr. Tutata were produced as PEXB 2 and 3.
10. It was the evidence of PW1 that later on, she was arrested by the police and charged with the offence of forceful detainer.

- 11.PW1 informed the court that the Defendant did not obtain the title deed in respect to the suit property lawfully and that after buying the land, she planted coconuts, blue gum trees among other crops.
- 12.The Plaintiff produced in evidence a letter dated 29<sup>th</sup> June 2006 authored by an official from the Ministry of Lands. The letter shows the status of the land and further states that it is the Plaintiff who is in occupation of the land.
- 13.The Plaintiff informed the court that she has always been willing to pay for the plot and that the Defendant owns another plot known as 169 in the same scheme. The Plaintiff produced a search in respect of plot number 169 as PEXB 5.
- 14.PW1 stated that although she has another piece of land being plot number 87, she was not allocated the said plot but purchased it.
- 15.In cross examination, PW1, stated that the agreement dated 9<sup>th</sup> January 2000 is in respect of a debt that Mr. Tutata owed her and that Mr. Tutata agreed to sell to her the suit property.
- 16.According to PW1, Mr. Tutata did not show her any documents to support his ownership of the suit property because all his documents had been burnt down in his house.
- 17.It was the evidence of PW1 that an officer from the Ministry of Lands informed her that indeed the land in question belonged to Mr. Tutata. PW1 however confirmed that the file at the Ministry of Lands did not have documents confirming that it is Mr. Tutata who had been allocated the suit property.
- 18.PW1 informed the court that she has never been given a letter of offer and that she was informed that it is the Defendant who had been issued with the title deed.
- 19.PW2 stated that the Plaintiff purchased the suit property on 9<sup>th</sup> January 2000 from Mr. Tutata and that he was a witness during the said sale.
- 20.According to PW2, it is the Plaintiff who has been in possession of the suit property from the date of the agreement and that she has substantially developed the plot.
- 21.In cross-examination, PW2 stated that the Plaintiff paid Mr. Tutata Kshs.40,000 for the suit property. It was his evidence that the title was erroneously issued to the Defendant.
- 22.Another witness to the agreement between the Plaintiff and Mr. Tutata was PW3. PW3 informed the court that indeed the Plaintiff purchased the suit property from Mr. Tutata for Kshs.40,000.
- 23.After the said purchase, it was the evidence of PW3 that the Plaintiff took possession of the said land and has since developed it.
- 24.Voscolin Mwasambu Polle, PW4, informed the court that he was the Lands Adjudication and Settlement Officer, Witu division. It was the evidence of PW4 that he was in charge of Witu/Tana River between the year 2000 and 2006.
- 25.PW4 informed the court that he was informed by one of his colleagues that the suit property had a dispute and that the same was pending re-allocation. A decision had to be made by their office on who should be allocated the land. A ground report was then commissioned and prepared by him.
- 26.It was the evidence of PW4 that when he went to the ground, he found that the land had been cleared and was fully developed by the Plaintiff. PW4 prepared the ground report which he produced as PEXB4. It was his evidence that he recommended that the suit property should be allocated to the Plaintiff because she had developed it.
- 27.In cross-examination, PW4 admitted that indeed the letter of offer had been issued to someone else and not the Plaintiff. PW4 denied any knowledge of Mr. Karicha Tutata.

#### **The Defendant's case:**

- 28.The Defendant, DW1, informed the court that during the creation of the Settlement Scheme in Witu/Tana River in 1991, he applied for land within the scheme and was issued with a letter of offer which he produced as D EXB2.
- 29.It was the evidence of DW1 that when he went to the settlement office to make the payment of the requisite 10% for the suit property, PW 4 refused to receive the money on the ground that he was still awaiting confirmation from Nairobi as to the person who had been allocated the suit property. However, he was allowed to make the payments by a different officer at the Land Adjudication and Settlement Office on 27<sup>th</sup> November 2009, which was after the title deed had been prepared and issued. The Defendant produced the title deed as DEXB1.
- 30.After he was issued with the title deed, it was the evidence of DW1 that he found the Plaintiff on

- the suit property and he made a complaint to the police. The police later on arrested the Plaintiff and charged her for forceful detainer.
- 31.The Defendant produced a search which shows that he is the registered owner of the suit property as DEXB 4.
  - 32.In cross-examination, the Defendant stated that he has another piece of land which he bought within the same settlement scheme which is plot number 169 and that the Plaintiff has been using the land since the year 2002.
  - 33.It was the evidence of DW1 that as at the time he was allocated the suit property, the Plaintiff was not in occupation.

### **Submissions:**

- 34.The Plaintiff's advocate submitted that the title deed held by the Defendant was issued on 15<sup>th</sup> August, 2006, which was only three months after the Settlement Officer had recommended that the Plaintiff should be allocated the plot because of the developments she had on the suit property. Considering that the Defendant has another plot, the Plaintiff's counsel submitted, it would not have been possible for the Government to allocate two plots to one person and that the Defendant was issued with a title deed for the suit property fraudulently.
- 35.Counsel submitted that although the Defendant was to make payments within 90 days from the date he received the letter of offer, he never made the payments within the said period. Consequently it was submitted, that the Defendant's title was acquired unlawfully and should be cancelled by this court.
- 36.On the other hand, the Defendant's counsel submitted that the Plaintiff does not have any document to enable her lay any claim to the suit property. Counsel submitted that the registration of a person as the proprietor of land vests in the person the absolute ownership of such property.
- 37.The Defendant's counsel finally submitted that the records at the Land Adjudication and Settlement office do not show the person who is said to have sold the suit property to the Plaintiff having been the proprietor of the suit property. Therefore, it was submitted, the said Koricha Tutata Adeso did not have a good title to pass to the Plaintiff.

### **Analysis and findings:**

- 38.The Plaintiff's case is that she bought the suit property from one Koricha Tutata. The Plaintiff produced in evidence agreements dated 9<sup>th</sup> January 2000 and 20<sup>th</sup> January 2000 as PEXB 2 and 3 respectively.
39. In the first agreement, which is in Kiswahili and not translated, the said Koricha Tutata acknowledged owing the Plaintiff Kshs.4,000. Because of his inability to repay the said debt, he agreed to "give" to the Plaintiff the suit property. The agreement was witnessed by six people, including PW2 and PW3.
- 40.In the agreement dated 20<sup>th</sup> January, 2000, Mr. Tutata acknowledged receipt of a sum of Kshs.40,000 from the Plaintiff "for the work he had done on the land".
- 41.It would appear that the Plaintiff did not pay to Mr. Tutata the entire amount of Kshs.40,000 because on the agreement, a schedule has been annexed showing that out of the said Kshs.40,000, the Plaintiff only paid to Mr. Tutata Kshs.12,050 leaving a balance of Kshs.27,950.
- 42.It was the evidence of the Plaintiff that after those agreements, she took over the suit property and started developing it.
- 43.The Plaintiff admitted that Mr. Tutata did not give her any document to show his proprietary interest in the suit property. She just purchased the land from him believing that the land was his and started developing it.
- 44.The developments on the suit property are captured in the letter of PW4 which was produced as PEXB 4. The penultimate paragraph of the letter by PW4 dated 29<sup>th</sup> June 2006 and addressed to the Director of Lands Adjudication and Settlement states as follows:

**"Since she has been occupying the plot for all those years (since 2000), and has done substantial developments, it is my request that she be recommended for the plot so that she can pay for the plot and be documented."**

45. This was the first time that a recommendation was being made by an officer in the Land Adjudication and Settlement Office for the plot to be allocated to the Plaintiff.
46. The letter, without stating so, acknowledged the fact that the plot had never been allocated to either Mr. Tutata or the Plaintiff. In fact, the letter states that the plot was initially allocated to Musa Nahori in 1995 who did not take interest in taking it up.
47. The Plaintiff's effort to develop the plot before the same could be allocated to her was a leap of faith. Considering that Mr. Tutata had no proprietary interest over the suit property, he could not pass any interest in the land to the Plaintiff in the year 2000.
48. When PW4 was writing a letter to the Director to have the suit property registered in favour of the Plaintiff, the Defendant had already been allocated the suit property vide a letter of allotment dated 30<sup>th</sup> August 2002, probably after Mr. Musa Nahori declined to take up the offer.
49. A title deed was then issued to the Defendant on 15<sup>th</sup> June 2006.
50. Although there is no evidence that the Defendant paid the requisite 10% within 90 days, the Settlement Fund Trustees proceeded to issue to the Defendant a title deed.
51. It is only the Government, or the SFT, that can complain that the title deed should not have been issued before the requisite fees had been paid, and not the Plaintiff. This court is aware of instances where, through a presidential directive, title deeds have been issued to allottees within settlement schemes without any payments being made for them. As long as the Government or SFT waives the requirement for the payment of such fees, and proceeds to issue a title, such a title remains valid for all intents and purpose.
52. The acts of the Plaintiff or Mr. Tutata to develop the suit property can only amount to trespass on the land that was initially owned by the Government and now the Defendant. Indeed the tendency of individuals occupying government before following the requisite procedure is unlawful.
53. In the case of **Michale Githinji Kimotho -Vs- Nicholas Murathe Mugo, Nairobi Civil Appeal No. 53 of 1995** the Court of Appeal held as follows:

**“If the appellant had been in occupation of the suit land as a squatter without any right or title to the suit land in his favour, he was obviously in no position to resist the respondent's claim. Though the appellant had for a long time been in occupation of the suit land which was government land before it was allocated to the respondent, this could not have helped him in resisting the respondent's claim where the latter is registered as owner of the land. Similarly, if he, the appellant, had carried out any development on the suit land, he did so at his own peril and he could not expect any compensation in that respect. Even if for argument sake the suit land had been erroneously allocated to the respondent the appellant as a squatter in the suit land had no locus standi and the so called erroneous allocation could not be an answer to the respondent's claim for his eviction. His position as a trespasser could not have given him any protection against the respondent's claim for possession as the registered owner of the suit land.**”

54. In the case of **Mombasa Technical & Training Institute Vs Agnes Nyevu Charo and others, Mombasa Civil Appeal No. 282 of 2010**, the Court of Appeal stated as follows:

**“Regardless of the length of time the respondents remained on the suit property, their status remained that of illegal squatters....to create a precedent that a legitimate expectation for allocation of government land can arise out of an occupation declared illegal by statute would be opening a pandoras box which would compound the problem of land by encouraging squatters invasion of government land. Further it would be tantamount to introducing the doctrine of adverse possession in government land. This would be inimical to the public policy of maintaining law and order.”**

55. Where an individual occupies and develops government land without the requisite documentation, then he is bound to give way when the registered proprietor shows up, unless it is shown that the title document was obtained fraudulently. The Plaintiff has not proved to the required standard

that the Defendant acquired the title deed in respect to the suit property fraudulently, her being on the suit property notwithstanding.

56. This court can do nothing about the Plaintiff's situation. The Defendant's rights over the suit property overrides the Plaintiff's proprietary rights.

57. For the reasons I have given, I dismiss the Plaintiff's suit with costs and allow the Defendant's counterclaim with costs. I shall however not allow the prayer for general damages.

Dated and delivered in Malindi this **24<sup>th</sup>** day of **October** 2014.

**O. A. Angote**

**Judge**