



**Mwakala v Kilonzo & 5 others (Environment and Land Case 17 of 2023)
[2024] KEELC 1654 (KLR) (Environment and Land) (20 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1654 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VOI
ENVIRONMENT AND LAND
ENVIRONMENT AND LAND CASE 17 OF 2023**

NA MATHEKA, J

MARCH 20, 2024

BETWEEN

JAPHET MWAKALA PLAINTIFF

AND

LINDA WAVINYA KILONZO 1ST DEFENDANT

HASSAN HURI 2ND DEFENDANT

ABDULRAZAK HURI IBRAHIM 3RD DEFENDANT

CHIEF LAND REGISTRAR 4TH DEFENDANT

PETER MBOGHO MWANG'OMBE 5TH DEFENDANT

ATTORNEY GENERAL 6TH DEFENDANT

JUDGMENT

1. The claim is that by a letter of allotment referenced TP/11/1/1X/76 dated 6.11.98 the Commissioner of Lands ("the Commissioner") under power conferred upon him by the Government Lands Act (Cap 280) offered to the Plaintiff the property known as plot number 1956/348 situate at Voi. The Plaintiff subsequently paid to the Commissioner of Lands the sum of Kshs. 12,615/= requisite under the letter of allotment aforesaid. The Plaintiff avers that by receipt of the aforesaid payment there was a binding contract between the Plaintiff and the Commissioner of Lands or a legitimate expectation on the part of the Plaintiff that the suit property would devolve to him. Sometime in July, 2013 the Plaintiff tiring of the continual assurances from officials at the Lands office at Nairobi to the effect that his title was still being processed went to the survey office at Ruaraka and discovered that a deed plan in respect of the property had since been processed as far back as the year 2002. Subsequent follow up revealed that a title had been created in favour of the 1st Defendant pursuant to a letter of allotment dated 6th



November 98 bearing the self-same reference as that issued to the Plaintiff and that the requisite stand premium and charges in respect of the letter of allotment had been paid on the 7th October 2002 vide receipt number F 109717 issued by the Commissioner of Lands. Further investigation of the title has revealed that the same has subsequently been transferred successively to the 2nd and 3rd defendants and ultimately during the pendency of suit to the 5th defendant who has at all times had knowledge of the dispute over the property. The transfer to the said 5th defendant is therefore in contravention of the doctrine of lis pendens and therefore ineffectual.

2. The Plaintiffs claim is therefore for a declaration that the title issued and subsisting in respect of the suit property is illegal, unlawful and or a nullity, an order for the cancellation thereof and registration in favour of the Plaintiff and a further order restraining the 2nd and 3rd and 5th defendants and or anybody claiming under them interfering with the suit property, constructing thereupon or otherwise dealing therewith. In the alternative the Plaintiff seeks compensation for the current value of the property from the 6th Defendant The Plaintiff prays for judgment as follows;
 1. A declaration that the title issued and subsisting in respect of Plot No. 1956/348 Voi is illegal, null and void as contravening the provisions of the Government Lands Act (now repealed) and that all subsequent transfers in respect thereof are null and void by reason thereof and for want of adherence to the terms of the grant of lease.
 2. An order for cancellation of the aforesaid title and registration of the Plaintiff as proprietor issuance thereof in favour of the Plaintiff.
 3. An injunction permanently restraining the 3rd defendant or anybody claiming under him from interfering with constructing upon or otherwise dealing with the suit property.
 4. In the alternative compensation from the 6th Defendant in the sum of Kshs. 8,000,000/=.
 5. Costs and interest.
3. The 2nd and 3rd the defendants state that pursuant to grant Number C.R 36423 the suit property had been granted to the 1st Defendant as at 1st November 1998 long before the Plaintiff's alleged letter of allotment. That the subsequent transfer to the 2nd defendant and ultimately to the 3rd defendant is similarly valid and lawful. The 3rd Defendant is a bona fide Purchaser who cannot be subjected to the Plaintiff's claims. The question of ownership and occupation of the suit property was considered in HCCC NO. 384 of 2009 (Mombasa) Hassan Huri v Venance Mwashigadi & Jasper Mwashena. In a judgment delivered on 26th July 2012, the court found in favour of the 2nd Defendant herein and granted him vacant possession. Being dissatisfied with the court's decision, the Plaintiffs in the said suit have appealed to the Court of Appeal vide Civil Appeal No. 34 of 2013 and the appeal is still pending. The Plaintiff herein is a resident of Voi and knows the Plaintiffs in HCCC NO. 384 of 2009. He similarly knows about the existence of the said suit as well as its outcome.
4. The 5th defendant avers that he is the legal registered owner of all that suit property known as L. R. No. 1956/348 (Grant No. 36423) Voi subcounty measuring approximately 0.0465ha. The 5th Defendant avers that he is a bona fide purchaser for value without notice of the defect of the title. Further, that there was no court order and/ or restriction of any nature indicative that the suit premises was subject to a case pending in court and/ or barring any sale and/or transfer of the suit property. Therefore, the doctrine of lis pendens does not apply in the present case.
5. This court has considered the evidence and the submissions therein. The Plaintiff has two letters of allotment for LR No. 1956/348, both dated 6th November 1998 of Reference No. TP11/1/IX/76, one is in the name of the Plaintiff, while the second is in the name of the Plaintiff and Daniel Nyakala.



The Plaintiff averred that he paid Kshs 12,615 for the suit property and was issued with a fee receipt No. E 74946 on 8th September 2000. The 1st defendant similarly presented a letter of allotment dated 6th November 1998 Reference No. TP 11/1/IX/76 for LR No. 1956/348 alongside a fee receipt F 223922 on 7th October 2002. The Ministry of Lands and Settlement on 2nd October 2002 issued a Confirmation of Allotment Letter to the effect that an allotment letter reference number TP11/1/IX/76 was issued to the 1st defendant. The letter was followed by the surveying of the suit property on 20th November 2002. The 1st defendant was then issued with a Certificate of Grant No. CR 36423 for LR No. 1956/348 on 24th December 2002. On 26th August 2008 the suit property was transferred to Hassan Huri, who on 18th March 2013 transferred the same to Abdulrazak Huri Ibrahim and later on 7th August 2015 transferred the same to Peter Mbogho Mwamgombe the current registered owner of the suit property.

6. The Plaintiff is challenging the 1st defendant's title and subsequently the title passed to the 2nd, 3rd and 5th defendants, on the ground that the letter of allotment held by the 1st defendant was fraudulently obtained and as such had no title passed to the 2nd, 3rd and 5th defendants. The Plaintiff has maintained that he had a legitimate expectation from the Commissioner of Lands to register him as the proprietor of the suit property after being issued with the letter of allotment and paying the prerequisite payments. The court takes cognizance of the fact that the Plaintiff presented two letters of allotment, one in his name while the other one his name together with that of Daniel Nyakala. The Plaintiff's letters of allotment as well as the 1st defendant's letter of allotment are both dated 6th November 1998, the only difference is that the Plaintiff paid the fee on 8th September 2000 while the 1st defendant paid on 7th October 2002.
7. The evidence before the court is that it is the 1st defendant who duly complied with the requisite conditions that led to her being allotted the suit property. The Plaintiff has not presented evidence before this court that he satisfied the terms of the letter of allotment for him to be allocated the suit property. The Plaintiff had two conflicting letters of allotment, one in his name alone while the other in his name and that of Daniel Nyakala, however during his testimony, the Plaintiff could not satisfactorily explain to the court why the two contradicted each other. He simply stated there were two allotment letters but he made payment and was issued a receipt only in his name. The Plaintiff did not give any explanation to the court of any step that he undertook to mitigate the effect of having two allotment letters neither did he state whether he took any step to ensure that the allotment letter in his name and that of Daniel Nyakala was cancelled or annulled.
8. The 1st defendant was issued with an allotment letter and later a certificate of title which conferred her with absolute rights of ownership of the suit property. The Plaintiff challenges the 1st defendant's title to the suit property on the premise that the same was acquired through fraud and outright illegality. A certificate of title was issued to the 1st defendant and the subsequent defendants is conclusive evidence that such a proprietor is the absolute and indefeasible owner, such a title can be challenged if the same was acquired illegally, unprocedurally or through fraud. Section 26(1) of the [Land Registration Act](#), provides as follows;
 - (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.

9. To oust the defendants' title, the Plaintiff has accused the 1st defendant of fraud. It is trite law that fraud is a serious accusation that has to be pleaded and proved to a standard above the balance of probabilities but not beyond a reasonable doubt. The Plaintiff was required to demonstrate clear and distinct fraud by leading evidence, however, the Plaintiff did not adduce any evidence in respect of the allegations of fraud he had levelled against the 1st defendant. Despite claiming to have been allocated the suit property back in 1998, the Plaintiff has presented evidence of letters sent out to the National Land Commission in 2013 demanding an explanation of the allocation of the suit property to the 1st defendant. Yet, by 2013 when the Plaintiff was making a follow-up with the National Land Commission, the suit property had already exchanged hands from the 1st defendant to the 2nd defendant. The title was issued in favour of the 2nd defendant on 26th August 2008. The National Land Commission confirmed vide a letter dated 10th Jul 2014 to the Directorate of Criminal Investigation that the suit property was allotted to the 1st defendant on 6th November 1998, the payment received on 7th October 2002. Further to that the National Land Commission indicated that they did not issue the letter of allotment alongside the receipt held by the Plaintiff.
10. It is the finding of this court that the Plaintiff has not presented any evidence that would support his claim over the suit property and that would lead this court to find that the 1st defendant's title was fraudulently acquired hence should be cancelled alongside the title she passed to the subsequent defendants. The court in *Lucy Nchebeere v Rose Ndululu Musee & another* [2021] eKLR held that;
11. The Plaintiff did not adduce any evidence in respect of the allegations of fraud levelled against the defendant. I agree with the defendants' submissions that the fact she worked with the Ministry of Lands is not conclusive proof of fraud. No evidence was led to confirm that the records in respect of the suit land were missing from the Land Registry when the Plaintiff went to follow up. He who alleges must prove. Evidence of fraud must be proved beyond a balance of probabilities.
12. In the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & Another* [2000] eKLR Tunoi JA stated that:-
- “It is well established that fraud must be specifically pleaded and that the particulars of fraud must be specifically pleaded and that the particulars alleged must be stated on the face of the pleadings. The acts alleged to be fraudulent must of course be set out and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved and it is not allowable to leave fraud to be inferred from the facts”
13. The Plaintiff has failed to discharge his burden of proving fraud on the part of the 1st, 2nd, 3rd or 5th defendants. The burden of proof of fraud that the Plaintiff was required to discharge was higher than the ordinary standard of proof in civil cases. He was required to not only plead fraud in his pleadings but to go a step forward and prove through evidence that the 1st defendant's title was tainted with fraud from its inception. Which in this case was the letter of allotment, payment of prerequisite fees, as well as the whole process of surveying, transfer and registration of title. Consequently, the Plaintiff's claim to the suit property fails and he is not entitled to the reliefs sought in his re-amended plaint dated 28th October 2020. The suit is hereby found unmerited and is dismissed with costs to 2nd, 3rd, 4th and 5th defendants.

It is so ordered.



DELIVERED, DATED AND SIGNED VIA EMAIL THIS 20TH DAY OF MARCH 2024.

N.A. MATHEKA

JUDGE

