Ng'ang'a v Gaski Investment Limited & 2 others (Civil Appeal 519 of 2019) [2025] KECA 987 (KLR) (30 May 2025) (Judgment)

Neutral citation: [2025] KECA 987 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 519 OF 2019

FA OCHIENG, LA ACHODE & AO MUCHELULE, JJA

MAY 30, 2025

BETWEEN

GEORGE GATHUKI NG'ANG'A ..... APPELLANT

AND

GASKI INVESTMENT LIMITED ..... 1ST RESPONDENT

THE CHIEF LAND REGISTRAR ..... 2ND RESPONDENT

THE REGISTRAR OF TITLES ..... 3RD RESPONDENT

(Being an appeal from the judgment and decree of the Environment and Land Court at Thika (G.M.A Ong'ondo, J) dated 14th June, 201 9in ELC No. 813 of 2013)

JUDGMENT

1. Before the Environment and Land Court (ELC) at Thika (G.M.A. Ongondo, J.) was an ownership dispute over Thika Municipality Block 6/1062 ("the suit property") between the appellant, George Gathuki Ng'ang'a, and the 1st respondent, Gaski Investment Limited. Each claimed to have been allocated the suit property by the Commissioner of Lands, and had gone on to obtain a certificate of lease. In the suit filed by the appellant against the 1st respondent, a declaration was sought that the certificate of lease registered on 3rd January 2012 and issued on 10th April 2012 was the valid title issued by the Commissioner of Lands; and a declaration that the certificate of lease registered on 13th September 2011 and issued on 14th September 2011 by the Commissioner of Lands was fraudulent, invalid and should be cancelled and revoked. Permanent and mandatory injunctions were sought against the 1st respondent. Then general damages and costs.

2. The 1st respondent filed a statement of defence to deny the appellant's claims. It was pleaded that the 1st respondent was the bona fide owner of the said property, in which it had an absolute and indefeasible

claim. The claims that it had obtained its title fraudulently and/or improperly, was denied. Also denied was the plea that the appellant had a good title to the said property.

3. The learned Judge received the evidence of the appellant, Land Registrar Francis Kenyaru Orioki (PW2) and Janet Oluoch Orego (PW3) who was the Chief Land Administration Officer. The evidence of the 1st respondent was given by its director, Silas Kiogora Mburugu (DW1) who was a Principal Administrator at the National Land Commission. The other defence evidence was by Gordon Odera Ochieng (DW2), the Senior Assistant Director, Lands Administration in the Ministry of Lands and Physical Planning.

4. In the judgment delivered on 14th June 2019, the learned Judge found that the appellant had been issued with a letter of offer in respect of the suit property by the Commissioner of Lands, but that he had neither accepted the offer nor paid the required consideration in the letter of offer. This had been followed by the withdrawal of the letter of offer by the Commissioner of Lands, and the subsequent reallocation of the property to DW1 and his wife as directors of the 1st respondent. That, the respondent had duly accepted the offer and paid for the suit property which had led to the issuance of the certificate of lease. It was found that the appellant's certificate of lease was not validly obtained, while that of the 1st respondent had been obtained following due process. The learned Judge dismissed the appellant's claim that there was fraud in regard to the 1st respondent's acquisition of its title to the suit property.

5. These are the findings that led the appellant to come before this Court on appeal, basically complaining that the learned Judge had not properly evaluated the evidence before him, and had been wrong in the finding that he was not the bona fide registered owner of the suit property.

6. This is a first appeal. We are required to reconsider the record afresh, evaluate the evidence contained therein and draw our own independent conclusions thereon. In doing this, we have to recall that the trial court had the benefit of seeing and hearing the witnesses who testified before it. We caution ourselves that we should not interfere with the findings of fact by the trial court unless they were based on no evidence or on a misapprehension of the evidence or the trial Judge is shown demonstrably to have acted on wrong principles in reaching his findings (see Ephantus Mwangi & Another v Duncan Mwangi Wambugu [1982-99] IKAR 278).

7. There was no dispute that the suit property was originally Government land. Over it, the appellant has a certificate of lease registered on 3rd January 2012 and issued on 10th April 2012. On its part, the 1st respondent has a certificate of lease registered on 13th September 2011 and issued on 14th September 2011. The trial court traced the history leading to the two certificates of lease, and concluded that the 1st respondent's certificate was procedurally and validly acquired but that the appellant's was not. The question for our determination is whether the learned Judge erred in his findings on the issue of who had a valid claim to the suit property.

8. In dealing with the rival claims over the suit property, we bear in mind what this Court said in Munyu Maina v Hiram Gathiha Maina [2003] eKLR as follows:

> "We state that when a registered proprietor's root of title is under challenge, it is not enough to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register."

This decision is important because either side claims to be the bona fide owner of the suit property, and also because learned counsel Mr. Mwenesi for the appellant and learned counsel Mr. Muriuki for the 1st respondent each made references to it in written submissions to support their respective clients' cases.

9. Learned counsel Mr. Mwenesi's submission was that the learned Judge did not properly consider all the evidence on record; and did not take account of the law, procedures and formalities related to the acquisition of title; and therefore, had come to the wrong conclusion that the 1st respondent's title was valid. Secondly, that the learned Judge had erred in finding for the 1st respondent on the basis that it is the first title in time that counts. According to learned counsel, the evidence on record revealed that the 1st respondent's title did not go through a legal and formal process unlike the appellant's title which had been properly and procedurally issued.

10. In the submission by learned counsel, the appellant had by letter dated 18th May1992 applied to the Commissioner of Lands for the allocation of the suit property, and had by letter of allotment dated 10th September 1992 under reference No. 23136/xxxII/103 been allocated the property; had paid Kshs.181,516.60 on 26th November1997, and had on 28th July 1999 paid Kshs.277,760/= in rents to the Ministry of Lands. On 11th August 2010 a surveyor had been appointed to authenticate the allotment letter, and, upon survey, what was initialed unsurveyed part was registered in the amended Registry Index Map as Thika Municipality Block 6/1062 (the suit property). On 3rdJanuary 2012 the appellant was registered as the proprietor only to learn on 16th November 2012 that the same property had been registered in the name of the 1st respondent to whom a certificate of lease had been issued. The appellant complained to police. Based on this evidence, it was submitted, the title to the appellant could not be impeached.

11. Learned counsel Mr. Muriuki supported the findings by the learned Judge who had found that his client's title was the valid one. Learned counsel submitted that, according to the evidence, the letter of offer that had been issued to the appellant had not been accepted and payment had not been made on time, which had led to the letter being withdrawn. That was when the 1st respondent applied for, and was allocated, the suit property. The letter of offer was duly accepted and payment made, and that was when it became the registered owner of the property to whom the certificate was issued.

12. According to learned counsel, and based on the decisions in Pius Kimaiyo Langat –vs- The Cooperative Bank of Kenya, Civil Appeal No. 48 of 2015 and William Muthee Muthami –vs- Bank of Baroda [2014]eKLR, once the appellant did not abide by the terms and conditions contained in the letter of allotment regarding offer, acceptance and consideration, there was no contract between him and the Commissioner of Lands that could have formed the basis of the title that he was holding.

13. Learned counsel Ms. Mwalozi, of the Attorney General's Chambers, represented the 2nd respondent (The Registrar of Titles and the Chief Land Registrar, respectively). In her submissions, the learned Judge had properly evaluated all the evidence and had come to the correct decision in the matter.

14. We consider that, when the appellant was cross examined by counsel for the 2nd and 3rd respondents, he admitted that he did not formally accept the offer contained in the letter of allotment. The acceptance was supposed to be in writing, and within 21 days. He stated that he accepted verbally. The letter of allotment was dated 10th September 1992. He paid Kshs.181,516.60 to the Commissioner of Lands on 26th April 1997. That was about five (5) years later. According to the evidence on record, the appellant was requested to make payment within 30 days of the acceptance of the offer. He did into accept the offer in writing within 21 days and did not make payment within 30 days thereof.

15. In Joseph arap Ngok v Justice Moijo ole Keiwua, Nairobi Civil Application No. 60 of 1997, this Court stated as follows:

> " 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."

16. In considering the appellant's claim, the learned Judge observed as follows:

> "It is quite clear that the plaintiff's claim is grounded on a conditional letter of offer (P Exhibit A2). Does it constitute a contract between PW1 and the government of Kenya through the Commissioner of Lands? The answer is in the negative going by the evidence of PW1, PW2, PW3 and DW2. I agree with the 1st defendnt's counsel that the transaction is not valid as there was an offer (P Exhibit 2A) but there was no acceptance and consideration thereof. See William Muthee Muthami v Bank of Baroda [2014] eKLR....."

17. PW2 and PW3 were the appellant's witnesses.PW2 authored the letter dated 9th March 2010 addressed to the appellant notifying him of the withdrawal of the letter of allotment on the basis that its terms had not been honoured.

18. The evidence of DW1 was that, once there was no contract between the appellant and the Commissioner of Lands, the suit property was available for re-allocation. It was on that basis that he and his wife applied for allocation. They were issued with a letter of allotment. They formally accepted on time and made payment on time. Following that, a lease was registered in their favour in the name of the 1st respondent. The registration and issuance of certificate of lease came before the appellant had been registered or issued with the certificate of lease. The 1st respondent's evidence regarding the letter of offer, its acceptance and payment was not challenged. This was the basis of the registration and issuance of the certificate of lease. This is what the learned Judge said:

> " 34. 1st D Exhibit 2 and 12 show that the 1st defendant was issued with a certificate of lease on 13th September, 2011.P Exhibit A 26, B 41 and P Exhibit 8 reveal that PW1 was issued with a certificate of lease on 10th April, 2012. On that basis, the first in time must be prevailed bearing in mind the decision in Gitwany case (supra) and the principles of equity entrenched under Article 10(2)(b) of *the Constitution* of Kenya, 2010.
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> 35. .....
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> 36 .....
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> 37. I further find that the 1st defendant has demonstrated that the certificate of lease as shown by 1st D Exhibit 2 and 12 was acquired through a process which was legal, formal and free from encumbrances. This court hereby upholds the certificate of lease issued to the 1st defendant who is the sole bonafide registered owner of the suit property. The 1st defendant is entitled to the absolute ownership of the suit property under Article 40(1) of *the Constitution* (supra). The orders sought in the plaint are not merited in the circumstances."

19. The learned Judge had found that the allegations made by the appellant that the 1st respondent was guilty of fraud in the acquisition of its title had not been substantiated.

20. On our part, after re-evaluating the evidence on record, it is clear that, once the appellant did not comply with the conditions in the letter of offer, there was no contract over the said property between him and the Commissioner of Lands. The suit property thereafter became available for reallocation. It was allocated to the 1st respondent who complied with the conditions and became registered as the absolute owner of the suit property. After the suit property was registered in its name on 13th September 2011, any subsequent registration, including the registration to the appellant on 3rd January 2012, were not valid and were null and void.

21. These are the reasons why we agree with the findings by the learned Judge. Consequently, the appeal lacks merit and is dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF MAY 2025.

F. OCHIENG

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

A. O. MUCHELULE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.