



Mariachana v Nairobi City Council & another (Environment & Land Case 565 of 2002) [2024] KEELC 1790 (KLR) (14 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1790 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 565 OF 2002**

MD MWANGI, J

MARCH 14, 2024

BETWEEN

BENSON OKIOGA MARIACHANA PLAINTIFF

AND

NAIROBI CITY COUNCIL 1ST DEFENDANT

SALLY KENDI GITONGA 2ND DEFENDANT

JUDGMENT

Background

1. This is a case that was filed way back in the year 2002. It was first filed in the High Court before eventually finding its way to this court.
2. The Plaintiff's claim was initially stated in his Plaint dated 18th March, 2002. The said Plaint was amended on the 27th January, 2003. The Amended Plaint was further orally amended on 1st March, 2022 during the hearing of the suit replacing the term 3rd Defendant with 2nd Defendant wherever it appears in the Amended Plaint.
3. It was the Plaintiff's case as stated in the Amended Plaint of 27th January, 2003, that he bought the Plot known as Plot No. 435, Jamhuri Phase II from one Jedidah Muriu its previous owner on 28th June, 1995 for a consideration of Kshs. 300,000/=. Jedidah Muriu had allegedly been allotted the Plot by the then Nairobi City Council vide an Allotment Letter dated 31st August, 1994. Subsequently, the Plaintiff was issued with a Letter of Allotment by the 1st Defendant dated 31st October, 1997 for the same Plot. There were terms and conditions set out in the Letter of Allotment.
4. The Plaintiff averred that he duly complied with the terms and conditions in the Letter of Allotment aforesaid particularly payment of the Stand Premium, Survey and Architectural fees and has since been paying the annual ground rent.



5. The Plaintiff alleged that on a visit to the suit property, he was surprised to find the 2nd Defendant therein. The 2nd Defendant had also started developing the suit property. An official search commissioned by the Plaintiff confirmed that the suit property had indeed been transferred to the 2nd Defendant and a Certificate of Lease issued to her.
6. The Plaintiff accused the 1st Defendant of fraud as particularized in the Plaint. The particulars of the illegality and fraud were;
 - a. Allocating the plot twice
 - b. Corruptly issuing the 2nd Defendant with a parallel letter of allotment and further issuing the 2nd Defendant with a certificate of lease while knowing that the Plaintiff had a proprietary interest on the same plot No. 345 Jamhuri Phase II.
 - c. Fraudulently demanding and accepting ground rent from the Plaintiff having issued a certificate of lease to the 2nd Defendant.
 - d. Fraudulently allocating the subject property to the 2nd Defendant when it had earlier allocated the same to the Plaintiff.
 - e. Causing the Plaintiff to pay monies on the grounds that it was preparing the lease documents whereas it was busy issuing another certificate of lease.
 - f. Registering or causing to be registered the lease agreement in the name of the 2nd Defendant.
 - g. Colluding and conspiring to defraud the Plaintiff and or disentitle him of the suit property.
7. The Plaintiff prayed for Judgement against the Defendants for;
 - a. A declaration that the purported allocation and registration of the Lease in the name of Sally Kendi Gitonga was illegal, void and fraudulent.
 - b. A prohibitory injunction to restrain the 1st and 2nd Defendants jointly and severally by themselves, their agents or servants or otherwise howsoever from transferring, leasing, disposing, attempting to dispose or in any other way dealing with the Property-Plot No. 435, Jamhuri Phase II until the final determination of this suit.
 - c. General damages.
 - d. Costs of the suit with interest at commercial rates.
 - e. Any other or further order or relief as the court may think just and expedient to grant.

1st Defendant's case

8. The Plaintiff's suit was defended by the Defendants. The 1st Defendant's Statement of Defence to the Amended Plaint is dated 8th November, 2021. The 1st Defendant denies the Plaintiff's assertions and avers that at no given time was it notified of the existence of the Sale Agreement dated 28th June, 1995. The 1st Defendant avers that the purported allocation to Jedidah Muriu was illegal, null and void for lack of requisite consent from the then Minister for Local Government. Consequently, the said Jedidah Muriu did not acquire any title capable of being transferred. As such, the Plaintiff should seek redress from the said Jedidah Muriu for a refund of the purchase price and or other reliefs.
9. The 1st Defendant argues that the Plaintiff's suit is time barred by virtue of Section 3(1) of the *Public Authorities Limitation Act*, Cap. 39 Laws of Kenya.



10. It is further stated that the Plaintiff's claim is devoid of any truth and fact as it is not practical for an owner of a parcel of land to allow someone else to develop it in their presence without commencing any action. Further, that the Letters of Allotment contained strict terms which required compliance within the specified period. In the instant case, a certified search shows the correct names of persons who complied with the terms in their respective Letter of Allotment.
11. The 1st Defendant particularly denies double allocating the said Plot No. 435 Jamhuri Phase II as alleged. As such, all the purported particulars of fraud and illegality are denied. In response thereof, the 1st Defendant avers that it has never transacted with the Plaintiff in relation to the suit property. The 1st Defendant avers that all land payments are done through a general bill of lading and anyone can pay for any plot. Payment should not therefore be construed as an acknowledgement of allocation or validation of an otherwise irregular allocation.
12. The 1st Defendant further contends that the suit contravenes Section 13A of the Government Proceedings Act, Chapter 40 Laws of Kenya as no notice for intention to sue was ever served upon it. As such, the 1st Defendant prays for dismissal of the Plaintiff's case with costs.

2nd Defendant's case

13. The 2nd Defendant in her Statement of Defence dated 8th August, 2002 denied all the accusations levelled against her. She avers that she was the lawful allottee and registered owner of Land parcel Nairobi/ Block 63/363 formerly plot No. 435 Jamhuri Phase 11.
14. She further avers that the Plaintiff's suit is non-suited as the person from whom he purportedly purchased the suit premises from had no registrable interest in the land and could therefore not validly transfer any legal rights to him.
15. The 2nd Defendant contends that she is in lawful occupation of the suit premises and her user has been open and without hindrance since July 2011 when construction of house units thereon commenced. She therefore prays that the Plaintiff's suit be dismissed with costs.

Evidence adduced by the Parties

16. During the hearing of the matter, the Plaintiff herein, Benson Okioga Mariachana testified as PW1. He adopted his Witness Statement dated 2nd September, 2013 as his evidence in-chief. He further produced the document in the Plaintiff's List of Documents dated 14th February, 2022 as Plaintiff's exhibits save for documents number 5, 7, 8 and 13 which were marked for identification.
17. PW1 further stated that he purchased the suit property from Jedidah Muriu vide the Sale Agreement dated 28th June, 1995. He informed the court that Jediddah had a Letter of Allotment dated 31st August, 1994 from the defunct City Council of Nairobi. He stated that he received a demand for ground rent from the then City Council of Nairobi.
18. It was his testimony that when he decided to process a Lease, the City Council of Nairobi referred him to its then Advocates; Mbesa & Kitur Advocates. He avers that he paid the said Advocates a sum of Kshs. 5,000/= for legal fees and a sum of Kshs. 10,000 to commence the process. However, he never got the Lease.
19. PW1 testified that when he went to visit the suit property sometime in February, 2002, he found some building materials on the suit property indicating an invasion thereon. It is on that basis that he moved court for the orders herein.



20. He stated that he still pays ground rent to the 1st Defendant through the Integrated system which is still under his name. He averred that the 2nd Defendant is in occupation of the suit property and has built thereon despite the temporary injunction issued herein.
21. In cross-examination by Counsel for the 1st Defendant, PW1 reiterated that he bought the Plot from Jediddah and paid her the purchase price not the defunct City Council of Nairobi. That the said Jediddah only had a Letter of Allotment but not a Lease; which she gave him.
22. He stated that on 31st October, 1997, he was also issued with a Letter of Allotment. At that time, the Plot had not been developed. He however, stated that he never wrote an acceptance as required by the Letter of Allotment. He confirmed that he understands that if acceptance and payment was not received within 30 days, the offer would lapse.
23. In reference to the Demand Letter at Page 16 of his bundle of documents, he confirmed that the same is not dated. Further, the Letter is neither on a Letterhead of the then defunct City Council of Nairobi neither does it contain a reference. In addition, the Letter was demanding for arrears of rent for the period between 1998 to 2001.
24. It was PW1's evidence that he has no document called Application for Lease. He confirmed effecting the payments to Mbesa & Kitur Advocates as instructed by the defunct City Council of Nairobi. However, he did not have the Letter or any evidence confirming the assertion.
25. The witness further stated that although he has made allegations of fraud against the 1st Defendant, he has not lodged a criminal case against the 1st Defendant. He informed the court that Jediddah was not a 1st allottee. He prays for compensation and the land.
26. In cross-examination by Counsel for the 2nd Defendant, PW1 restated that he bought the suit property from Jediddah Muriu who only had a Letter of Allotment. He stated that Jediddah was not the original allottee as she had also bought the Plot from Isaac Mungai though he was not shown the Agreement between them.
27. PW1 further stated that he did not confirm whether Jediddah had fulfilled all the requirements/conditions in the allotment letter. He confirmed that the title to the land; Nairobi/Block 63/363 issued on 17th October, 2001, is part of his documents at Page 21. The title is in the name of the 2nd Defendant. He stated that it is evident from the title that the 2nd Defendant bought the land from someone else, whom he had not joined in the proceedings herein. He further confirmed that he has not been paying rates. He never took possession hence he has not built on the suit property.
28. It was his further testimony that he did not sign any document with Mbesa & Kitur Advocates. The receipts issued by the Advocates were for Legal Fees and disbursements. He further confirmed that his prayers in the Plaint do not mention the 2nd Defendant's Title No. Nairobi/Block 63/363.
29. In re-examination, PW1 stated that he made payments to Jediddah Muriu who was the owner of the suit property vide the Letter of Allotment. He confirmed that his Letter of Allotment was from City Council of Nairobi to whom he made payments. That the demand on his bundle of documents at page 39 is addressed to him.
30. Mrs. Jediddah Muriu testified as PW2. She adopted her Witness Statement dated 10th March, 2021 as her evidence in-chief. She stated that she sold the suit property to the Plaintiff. It was her evidence that she had bought it from one Isaac Kimani Mungai who had transferred his Allotment Letter to her. It was her assertion that having bought the plot legally and having sold it legally to the Plaintiff herein, the Plaintiff should be granted the prayers sought in his Plaint.



31. In cross-examination by Counsel for the 1st Defendant, PW2 averred that she has no reason to sue Isaac Kimani Mungai. She stated that she had never stayed on the suit property neither had she developed it. She had taken a loan to purchase it and intended to develop it once she completed the loan re-payment.
32. With regard to the Letter of Allotment dated 31st August, 1994, it was PW 2's evidence that it required a written acceptance which she did not have. The offer was to lapse if not accepted in writing within 30 days. She stated that she sold the land after the lapse of the 30 days. She further had no letter confirming payment of the standard premium or rent in 1994.
33. She testified that the receipt on Page 17 of the Plaintiff's documents was in regard to ground rent for the year 1993 to 1995. She confirmed that at the time of purchase in 1993, there were no arrears. She stated that she had no claim against the County Government of Nairobi having paid the purchase price to Isaac Kimani Mungai.
34. During cross-examination by Counsel for the 2nd Defendant, PW2 confirmed that she bought the land from Isaac Mungai on the basis of the Letter of Allotment. She could not remember if Isaac had receipts proving payment of Standard Premium and the annual rent.
35. She stated that she did not know the process that was to be taken before being issued with a title. She could not tell if she received the Letter of Acceptance from Isaac. Further, she confirmed that the Letter of Allotment was not accompanied by a Partial Development Plan (PDP) although the Plot was surveyed.
36. In re-examination, PW2 averred that she has no claim against Isaac Mungai as the case herein relates to ownership. She made referred to the receipts on the Plaintiff's bundle of documents at Page 17 confirming payment of ground rent. She further confirmed that her Allotment was from City Council of Nairobi and that the letter confirms that it was a transfer from Isaac Mungai.

Evidence adduced by the 2nd Defendant

37. Mr. Morris Gitonga Njue testified on behalf of the 2nd Defendant as DW1. He stated that the 2nd Defendant herein is his daughter. He adopted his Witness Statement dated 22nd November, 2021 as his evidence in-chief. He further adduced the documents on the 2nd Defendant's List of Documents dated 23rd June, 2008 which were marked as DE 1-3 in the order in which they are listed.
38. In cross-examination by Counsel for the Plaintiff, DW1 stated that the initial allottee of the suit property was Japhet Mukuru Riunga who was allocated the land in 1992. He averred that the said Japhet must have complied with the conditions since no issue was raised by the City Council when he went to process the title.
39. He averred that the size of the suit property is 7.5 metres x 25 metres. The title to the suit property was issued to his daughter, the 2nd Defendant, Sally Kendi Gitonga.
40. It was his evidence that he bought the Plot from the initial allottee in the year 2001. 'DE 2' is the Sale Agreement of 7th June, 2001 confirming the purchase. He involved the City Council of Nairobi at the time. She has not attached any documents to confirm the involvement of the City Council of Nairobi. He states that he reported to the City Council of Nairobi that he intended to purchase the Plot.
41. He affirmed that it is the City Council of Nairobi which invited him to sign a Lease Agreement. The Lease is at Page 32 of the Plaintiff's bundle. The Lease was signed on 17th October, 2001. He stated that he paid stamp duty and all monies payable to the City Council of Nairobi. He however had no recollection of the specific dates he effected the payments. On the face of the Lease, stamp duty is stated



to have been paid on 15th October, 2011 yet the document shows that the document was signed on the 17th October, 2001.

42. He asserted that eventually a Certificate of Lease was issued to him on the 17th October, 2001, in the name of Sally Kendi Gitanga, who was a minor of 8 years old. He avers that he bought the plot for her. He denied knowledge the Plaintiff or having interacted with him previously. He confirmed that he has constructed a building on the suit property in the year 2003 and has been paying all the rates and rent to the County Government of Nairobi.
43. During cross-examination by counsel for the 1st Defendant, DW1 stated that the Vendor gave him his Original Letter of Allotment and some receipts. He confirmed that he has been paying all the rates and rents owing to the City Council of Nairobi. He further confirmed signing the Lease Agreement on behalf of his daughter, the 2nd Defendant herein. He reiterated his assertion that he paid a lump sum amount to the City Council of Nairobi although he could not recall how much it was. He asserted that he obtained development approvals before commencing the construction. He has enjoyed quiet and peaceful possession ever since he took possession of the land.
44. In re-examination, DW1 averred that he was given the Lease document at the Legal Department of the City Council of Nairobi. He signed it and returned it without dating it. That the initial allotment was done in 1992. That no one ever challenged the allotment or the Lease issued to the 2nd Defendant herein.
45. The 1st Defendant did not call any witness.

Court's directions

46. At the close of the hearing, the Court directed parties to file written submissions. The Plaintiff's submissions are dated 28th September, 2023, the 1st Defendant's submissions are dated 24th November, 2023 whereas the 2nd Defendant's submissions are dated 7th November, 2023. The Court has had a chance to read the submissions and considered them accordingly.

Issues for Determination

47. The Court has read and considered the pleadings by the parties and the evidence adduced and finds that the issues for determination are;
 - A. Whether the Plaintiff has proved ownership of the suit property
 - B. Whether the 2nd Defendant holds a valid title to the suit property
 - C. Whether the Plaintiff is entitled to the orders sought.

Analysis and Determination

A. Whether the Plaintiff has proved ownership of the suit property

48. The Supreme Court decision in *Torino Enterprises Limited v Attorney General* (Petition 5 (E006) of 2022) (2023) eKLR, directly and conclusively addresses this issue. In the said decision, the Supreme Court categorically stated that:-

“An allotment letter was incapable of conferring interest in land, being nothing more than an offer, awaiting the fulfilment of conditions stipulated. An allottee, in whose name the allotment letter was issued, had to perfect the same by fulfilling the conditions therein. Those conditions included but were not limited to, the payment of a stand premium and



ground rent within prescribed timelines. But even after the perfection of an allotment letter through the fulfillment of the conditions stipulated therein, an allottee could not pass valid title to a third party unless and until he acquired title to the land through registration under the applicable law. It was the act of registration that conferred a transferable title to the registered proprietor, and not the possession of an allotment letter.”

49. The Plaintiff alleges that he purchased the suit property from Jedidah Muriu vide the Sale Agreement dated 28th June, 1995. He informed the court that the said Jediddah Muriu only had a Letter of Allotment dated 31st August, 1994 from the defunct City Council of Nairobi. Jediddah Muriu who testified as PW 2, stated that she had on her part also bought it from one Isaac K. Mungai who had been issued with an Allotment Letter dated 18th February, 1992. The Plaintiff also produced a receipt for payment of the rent and the stand premium.
50. Although the Plaintiff alleges that the Original Allottee, Isaac Mwangi complied with the terms of the Allotment, I beg to differ. No receipts were adduced in his name. Save for the note on Jediddah’s Letter of Allotment indicated as ‘Paid receipt No. Misc. 200 TA26154 of 20/11/92’. Even if this court was to assume that in deed the receipt was in compliance with the terms of the Allotment Letter, the payment was effected in November, 1992 way after the lapse of the 30 days’ compliance period.
51. To add insult to injury, though Jediddah alleged that she complied with the terms of the Letter of Allotment dated 31st August, 1994, no evidence of compliance was adduced to that effect. The only receipt on record in her name is that of 14th June, 1995 shown to be rent for the period between 1993 to 1995, which receipt was only marked for identification due to the objections from the Defendants’ counsel. The Plaintiff was to call the maker of the Document but none was called. The receipt having not been produced as an exhibit, the court cannot and shall not rely on it.
52. In an adversarial system like ours, the burden of proof is always on he who alleges to prove. This position is well captured under Section 107 of the *Evidence Act* which provides that: -
“Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”
53. *Halsbury’s Law of England* 4th Edition, Volume 17 puts it so well that:-
“The legal burden of proof is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus, a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect to a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case.”
54. The legal burden is discharged by way of evidence. The Plaintiff has not adduced evidence before the court to prove his ownership of the suit property.
55. In the case of *Kirugi and Another – v- Kabiya & 3 others* (1987) KLR 347, the Court of Appeal held that;
“The burden was always on the Plaintiff to prove his case on a balance of probabilities even if the case was heard as formal proof.”
56. It is settled law as affirmed by the above Supreme Court decision that an allotment letter is not capable of conferring an interest in land, being nothing more than an offer, awaiting the fulfilment of the



conditions stipulated therein by the offeree. The Court of Appeal in *Dr. Joseph N.K. Arap Ng'ok - v- Justice Moiwo Ole Keiyua & 4 Others* C.A.60/1997 had made a similar decision when it stated that as follows:

“It has been held severally that a letter of allotment per se is nothing but invitation to treat. It does not constitute a contract between the offered and the offeree and does not confer interest in land at all. It cannot thus be used to defeat a title of a person who is the registered proprietor of the said parcel of land.”

57. It is therefore my finding that the Plaintiff did not acquire any proprietary interests in the suit property. Jediddah Muriu, whom the Plaintiff alleges to have bought the land from had no transferrable interest in the land.

B. Whether the 2nd Defendant holds a valid title to the suit property

58. The 2nd Defendant's title deed was issued on 17th October 2001 under Registered Land Act Cap 300 (now repealed). Section 27 of the repealed Act gives the registered owner of the suit property absolute and indefeasible title to the land. Further Section 28 of the said Cap 300 (repealed) provides that the right of such registered owner can only be defeated by operation of law. It states as follows; -

“The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject –

- a. to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
- b. unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.”

59. The above position is replicated under Section 24 of the *Land Registration Act* which provides for the interest conferred by registration. It provides that;

“Subject to this Act the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all the rights and privileges belonging or apparent thereto.”

60. Section 26(1) of the *Land Registration Act* also provides as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission shall be taken by all the courts as prima facie evidence that the person named as the proprietor of the land is the absolute and indefeasible owner”

61. A title, as provided under section 26 may only be impeached on grounds of fraud or misrepresentation to which the person is proved to be a party or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. In the instant suit, the particulars of fraud were only



levelled against the 1st Defendant. No claim of fraud was levelled against the 2nd Defendant. In his submissions, the Plaintiff only faulted the 2nd Defendant for paying Stamp Duty before the issuance of the Certificate of Lease, and that the Title was registered in the name of a minor without indicating the guardian's name, in this case the father. The later is no reason enough to challenge a title as provided for under section 47 of the [Land Registration Act](#).

62. Section 47 of the Registered Land Act. Cap. 300 (repealed) which are *pari matiria* to the provisions of Section 47 of the [Land Registration Act](#) No. 3 of 2012 provides as follows:
1. The minors name of a person under the age of eighteen years may be entered in the register to enable the minor's interest to be held in trust and shall be registered under the name of the guardian either on first registration or as a transferee or on transmission.
 2. Nothing in this section enables a person under eighteen years of age to deal with land or any interest in land by virtue of such registration, and, if the Registrar knows a child has been registered, the Registrar shall enter a restriction accordingly.
 3. If a disposition by a minor whose minority has not been disclosed to the Registrar has been registered, that disposition may not be set aside only on the grounds of minority”.
63. The provision above is to the effect that non-disclosure of a disposition of a minor's right in the property to the Registrar cannot be the only reason of setting aside a minor's right in the property.
64. This Court having held that the 2nd Defendant is the owner of the suit property, it then follows that she is the absolute and indefeasible owner as provided by Section 26 (1) of the [Land Registration Act](#). Then she must be able to enjoy all the right and privileges appurtenant to her ownership of the land.

C. Whether the Plaintiff is entitled to the orders sought.

65. This Court has already held and found that the 2nd Defendant is the duly registered owner of the suit property and has a good title. She is therefore entitled to protection of her proprietary rights under the law. The Court therefore has no basis of issuing the prayers sought by the Plaintiff.
66. The Plaintiff had alleged fraud against the 2nd Defendant. From the evidence adduced before the court, the allegations of fraud were not proved at all. The Court of Appeal in the case of [Philemon L. Wambia -v- Gaitano Lusitsa Mukofu & 2 others](#) [2019] EKLK cited with approval the case of *Ndolo – v- Ndolo* (2008) 1 KLR (G & F) 742 where it was stated that;

“in cases where fraud is alleged, it is not enough to simply infer fraud from the facts. In this matter, the appellant has invited us to infer fraud from the fact that the 1st respondent was working at the land office. Allegations of fraud cannot be proved by inference. There is no evidence on record showing a fraudulent act of omission or commission on the part of the respondents. Specific evidence proving fraud must be distinctly alleged, tendered and proved in court.”

67. Consequently, the court finds and holds that the Prayers sought by the Plaintiff are not merited and his claim is therefore dismissed.
68. On the issue of costs, having considered the overall circumstances of this case, and exercising its discretion under section 27 of the [Civil Procedure Act](#), the court directs that each party bears its own costs.

It is so ordered



JUDGEMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 14TH DAY OF MARCH, 2024.

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Kiptoon h/b for Mr. Kiplagat for the Plaintiff

Mr. Njeru for the 1st Defendant

N/A for the 2nd Defendant

Court Assistant: Yvette

