



**Charu Investments v National social Security Fund Board of Trustees (Environment & Land Case 77 of 2019) [2024] KEELC 6169 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6169 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 77 OF 2019  
OA ANGOTE, J  
SEPTEMBER 26, 2024**

**BETWEEN**

**CHARU INVESTMENTS ..... PLAINTIFF**

**AND**

**NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES . DEFENDANT**

**JUDGMENT**

1. Before the Court for determination is a Complaint dated 28<sup>th</sup> February 2019 in which the Plaintiff is seeking for the following orders:
  - a. Kshs. 26,000,000 as the current market value of the suit property.
  - b. Interest at Court rates.
  - c. Costs of the suit.
2. In the Complaint, the Plaintiff averred that around 2004, the Defendant came up with a plan to resettle squatters on its land known as Tassia II Resettlement Scheme and that the Defendant allocated plots to the squatters who were required to pay for infrastructural developments, survey and physical planning fees so that they could be issued with title deeds.
3. It was averred in the Complaint that one of the members of the scheme, Wilfred Ndolo (hereinafter ‘Mr. Ndolo’) sold plot number 218-37318741 (hereinafter ‘the suit property’) to the Plaintiff for Kshs. 350,000 on 20<sup>th</sup> April 2007 and that the said Mr. Ndolo notified the Defendant and asked that the monies he had previously paid the Defendant for the suit property be credited to the Plaintiff for the processing of a title deed in its favour.
4. The Plaintiff further averred that despite completion of the sale of the suit property, the Defendant failed to issue it with a title deed and that on 9<sup>th</sup> November 2018, its advocates wrote to the Defendant seeking to find out the status of the title deed.



5. It was averred that the Defendant responded on 14<sup>th</sup> December 2018 enclosing a backdated letter dated 3<sup>rd</sup> April 2012 and that the Plaintiff never received that said letter dated 3<sup>rd</sup> April 2012 whose contents were to the effect that the Defendant had carried out a survey and realized that the suit property was part of Land Reference Number NBI/BLK 97/1389/218 which belonged to a third party.
6. The Plaintiff further denied that it was informed by the Defendant that it could not go through with an erroneous transaction and asked the Plaintiff to forfeit all original receipts and seek a refund.
7. The Plaintiff averred that as at 3<sup>rd</sup> April 2012, it had put up a residential three storey building on the suit property and that the same was fully occupied. It was further stated that the Plaintiff had notified the Defendant when it later sought to add two storeys to the said building and that by a letter dated 15<sup>th</sup> January 2019, it had demanded that the Defendant produce an acknowledged copy of the letter dated 3<sup>rd</sup> April 2012 which it failed to do.
8. The Plaintiff stated that it invested on the suit property on account of the certificates of ownership issued by the Defendant; that the Defendant was negligent on account of its failure to ensure that the plots on paper matched those on the ground and that the Defendant was negligent in issuing a certificate of ownership for plot number 218-37318741 that did not exist on the ground.
9. The other particular of fraud included allegedly receiving money in respect of plot number 218-37318741 in the guise of processing a title deed; and failure to inform the Plaintiff on the status of the suit property despite numerous follow ups. In conclusion the Plaintiff stated that it had suffered loss as a result of the said negligence.
10. The Defendant filed a defence on 9<sup>th</sup> September 2019. It denied the Plaintiff's assertions and stated that it informed the Plaintiff that the suit property did not belong to it (the Defendant) and that it could therefore not continue with an erroneous transaction. The Defendant also denied that the letter dated 3<sup>rd</sup> April 2022 was backdated.
11. The Plaintiff filed a reply to defence reiterating the contents of the Plaintiff.

### **Hearing and Evidence**

12. Charles Ndeto testified as PW1. He adopted his witness statement as his evidence-in-chief and produced his bundle of documents as exhibits. His testimony reiterated the Plaintiff's case as set out in the preceding sections.
13. On cross examination, PW1 stated that he paid some fees to NSSF, the Defendant. He further clarified that he did not pay NSSF any monies for the purchase price; that that was done by the seller (Mr. Ndolo) who in turn gave him the original receipts and that he only paid Kshs. 1000 to the Defendant for a change of name and was issued with a receipt.
14. PW1 testified that the seller was issued with a certificate of ownership but the same was not available for production in Court; that he conducted due diligence by visiting NSSF offices and that he did not have any documents showing that the suit property was affiliated with the Defendant.
15. PW1 stated that NSSF did not issue him with a letter acknowledging that the suit property had been sold to him and that he was aware that other people had been issued with title deeds but he had never written a demand letter to NSSF requesting for his title deed.
16. The witness testified that he was not aware of the following; that the Defendant had placed a notice in the newspaper concerning its land; that as at 2013, the land had not been surveyed; that there was



grabbing of the Defendant's land in 2013; and, that there was a restriction barring construction on the Defendant's land.

17. According to PW1, the suit property's number was evidence of it having been surveyed; that the NSSF does not authorize construction activities and that construction approvals are issued by City Hall but he did not have any documents supporting the construction that he was undertaking on the suit property.
18. On the question of the address, he stated that when he filled the change of name forms, he listed his address as P.O. Box 74, Kikima; that the address belonged to a church and that he did not receive the letter dated 3<sup>rd</sup> April 2012 that was sent to the said address.
19. In conclusion the witness stated that NSSF received money from him and from the seller; that this was a confirmation that NSSF owned the land and should therefore issue him with a title deed; that he has suffered loss having put up a structure on the suit property and that tenants have moved out of the suit property because of the ongoing dispute.
20. On re-examination, the witness referred to the notice that was part of the Defendant's exhibits. He stated that as per that notice, NSSF had advised members that it owned the land. Concerning the ownership of the suit property, PW1 stated that his involvement started after he bought the same from Mr. Ndolo and that Mr. Ndolo paid NSSF for the suit property and was issued with a certificate of ownership by Tassia Resettlement Scheme.
21. Julius Baragu testified as PW2. He adopted his witness statement as his evidence-in-chief. In his statement, he stated that he is a foreman with more than 20 years of experience and was engaged by the Plaintiff to put up a two-storey building on the suit property and that as at 2016, the building had four storeys comprising of eight two-bedroom units each being rented out for Kshs. 15,000 per month.
22. On cross-examination, the witness testified that he is a foreman and did not know anything about approvals of the building plans; that there was an architect on site and that he started constructing the building in the year 2008.
23. Obulo Albert testified as PW3. He adopted his witness statement as his evidence-in-chief and produced a valuation report as an exhibit. In his witness statement, he stated that he received instructions from the Plaintiff to inspect and value the suit property and that he prepared a valuation report that placed the market value of the suit property at Kshs. 26,000,000.
24. On cross-examination, he stated that he is a registered valuer with nine years of experience; that he had attached the documents he used in conducting the valuation; that approvals from NCA, Nairobi City County and NSSF were not part of the attached documents; that he conducted the inspection in 2021 and that at the time, only the ground and first floor of the building were complete. It was his evidence that the suit property was neither registered nor surveyed.
25. Tobias Otieno Ombando testified as DW1. He adopted his witness statement as his evidence-in-chief and produced the Defendant's two bundles of documents as exhibits. In his witness statement, he stated that he is a Loans Officer in the defendant's department of capital and money market and that the department is in charge of sales involving land in Tassia II and III.
26. DW1 stated that in the early 2000s, the said land was invaded by squatters who formed self-help groups and sold plots to unsuspecting buyers and that the Defendant sought the intervention of the Court in 2004 and obtained eviction orders.



27. According to DW1, the area MP appealed to the Defendant not to evict the occupants but instead initiate a process of regularizing their ownership; that the regularization was done based on information provided by the leaders of the self-help groups and not by NSSF and that the entire area comprising the plots had not been resurveyed to determine the extent of the Defendant's land.
28. DW1 informed the court that amongst the people who had been allocated a plot was Mr. Ndolo; that Mr. Ndolo was allocated the plot by Tassia Resettlement Scheme and presented with an acknowledgement of ownership around 30<sup>th</sup> August 2005 and that around 25<sup>th</sup> November 2005, the Defendant registered him as the owner of the suit property on the basis of the documents he presented from Tassia Resettlement Scheme and upon payment of the requisite fees.
29. The witness stated that this was in no way an acknowledgement that the Defendant owned the suit land; that sometime in July 2007, Mr. Ndolo instructed the Defendant to transfer his interest in the land to the Plaintiff on the basis of an attached sale agreement and that the Defendant purported to effect the said transfer as it believed the land belonged to it.
30. However, this was found not to be the case when the Defendant consulted an independent Physical Planner to help it map out its land for planning and infrastructural development purposes and that the planner was guided by the Defendant's title documents and maps obtained from the Survey of Kenya.
31. It was the evidence of DW1 that it was established that the suit property did not form part of the Defendant's property and that by a letter dated 3<sup>rd</sup> April 2012, the Defendant contacted the Plaintiff informing him of the ownership issue and asking him to present receipts so that he could be refunded any monies that were paid.
32. The Defendant stated that it was not responsible for any losses occasioned to the Plaintiff; that it does not have title to the suit property; that it did not approve any developments on the suit property that it did not allocate the suit property to the Plaintiff and was not privy to the allocation process; that it did not receive any money from the Plaintiff to process a title deed and that it promptly communicated with the Plaintiff once it established that the suit property did not belong to it.
33. On cross-examination, the witness stated that he has been working for the Defendant since 2014 and was not in the relevant department in 2000. With reference to the case instituted by the Defendant in 2004 (HCCC No. 529 of 2002), the witness stated that the suit property was not part of plots referred to in the decree.
34. According to DW1, when the regularization process started, they took the Plaintiff through the verification process but never gave him an offer nor entered into any agreement with him and that there was a fee to be paid before a resurveying and granting of offers was done. It was averred that the Plaintiff only paid a deposit of the required fee.
35. In conclusion, DW1 testified that the Defendant was willing to refund what was paid; that he has never been on the suit property which does not belong to the Defendant and that he is not aware of any developments on the suit property.
36. On re-examination, DW1 stated that the Defendant did not give the Plaintiff authority to develop the suit property and that the Defendant was willing to refund the Kshs. 327,000 it had received for registration.

### **Submissions**

37. The Plaintiff's advocate submitted that the Defendant owed a duty of care to the Plaintiff because the Defendant owns most plots in Tassia I and II and that the Defendant held itself out as the owner of the



suit property and received money for it and for the change of name from Mr. Ndolo and the Plaintiff respectively.

38. The Plaintiff's advocate submitted that the Defendant was negligent in failing to ascertain its ownership of the suit property before accepting the monies; that the Defendant was also negligent in failing to keep accurate records that reflected the situation on the ground and that the duty of care was breached when the Defendant stated that it was not the owner of the suit property and could therefore not issue the Plaintiff with a title.
39. The Plaintiff's advocate stated that the breach was compounded by the fact that the Defendant did not inform the Plaintiff of the ownership status of the suit property promptly and that the Plaintiff suffered damage having made a colossal investment in the suit property based on the certificate of ownership issued by the Defendant.
40. The Plaintiff's advocates submitted that having demonstrated that the Defendant owed it a duty of care, that duty was breached and the Plaintiff suffered damages as a result of that breach, and the Plaintiff is entitled to damages amounting to Kshs. 26,000,000 (the market value of the suit property). The cases of Kenya National Highway Authority vs Shalien Masood Mughal & 5 Others [2017] eKLR and Cotecna Inspection S.A vs Hems Group Trading Company Ltd [2007] eKLR were relied upon.
41. As at 15<sup>th</sup> August 2024, the Defendant had not filed submissions.

### **Analysis and Determination**

42. The gravamen of the Plaintiff's case is that it has suffered loss as a result of the Defendant's negligence. The Defendant has denied any negligence on its part. In the case of Spin Knit Limited vs Benard Kiplangat Cheruiyot [2022] eKLR, Matheka J relied on Halsbury's Laws of England to define a claim of negligence as follows:

“With regard to an action in negligence it is stated in Halsbury's Laws of England, 4th Edition at paragraph 662 at page 476 as follows with respect to what is required to be proved in an action such as the Appellant's:-

“The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the proof of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which and the breach of duty a causal connection must be established.”

43. In Caparo Industries PLC vs Dickman [1990] 1 ALL ER 568 the Court stated as follows concerning the duty of care and breach of the same:

“What emerges is that, in addition to the foreseeability of the damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterized by the Law as one of proximity or neighborhood, and that the situation should be one in which the Court considers it fair, just and reasonable that the Law should influence a duty of a given scope upon the one party for the benefit of the other. As regards the question of proof of a breach of the duty of care, there is equally no question that the onus of proof on a balance



of probabilities, that the defendant has been careless falls upon the claimant throughout the case.”

44. The Plaintiff has stated that the Defendant owed it a duty of care because, firstly, the Defendant owned most plots in Tassia I and II and secondly, that the Defendant held itself out as the owner of the suit property and accepted monies in that capacity. The question now turns to whether this created a relationship of proximity or a situation where the Court should presume that a duty of care existed.
45. Having perused the evidence on record, I am not convinced that this is the case. Firstly, while the Defendant admitted that it owns most plots in Tassia I and II, that did not automatically mean that it owned all the land in Tassia I and II including the suit property. The Plaintiff was therefore under an obligation to conduct due diligence to ascertain that the land he was buying indeed belonged to the Defendant.
46. When PW1 was questioned if he conducted any due diligence, he stated that the due diligence he conducted was visiting NSSF offices. The Plaintiff had no documents showing that he ascertained and satisfied himself as to the ownership of the suit property.
47. In my view, had he ascertained by way of documentary evidence if indeed the suit property belonged to the Defendant, then there would have been a relationship giving rise to a presumption of a duty of care. However, that is not the case.
48. Secondly, the Plaintiff acknowledged that he only paid Kshs. 1000 to the Defendant. That amount was for the change of name. He never paid the purchase price to the Defendant, which was paid by Mr. Ndolo. There was therefore no seller - purchaser relationship created between the Plaintiff and Defendant. A duty of care cannot therefore be presumed.
49. Thirdly, the Plaintiff has inferred that the Defendant failed to keep records that reflected the situation on the ground. However, evidence shows that the distribution of the plots owned by the Defendant started not from a survey/allocation process initiated by the Defendant but as a negotiated settlement between the Defendant and squatters on its land.
50. The evidence shows that Mr. Ndolo, from whom the Plaintiff bought the suit property from, presented the allocation documents/details issued by a self-help group to the Defendant. That is how he was entered in the register.
51. As per the procedure detailed above, the Defendant only entered the details presented to it. In the absence of the Plaintiff proving that the Defendant entered details different from those presented by Mr. Ndolo, the Plaintiff's argument that the Defendant owed it a duty of care to keep accurate records is moot.
52. The Plaintiff stated that the duty of care was breached when the Defendant stated that it was not the owner of the suit property and failed to promptly inform him of the same.
53. However, the evidence on record shows that when the Defendant realized that it did not own the suit property, it informed the Plaintiff by a letter dated 3<sup>rd</sup> April 2012 which was sent by post. PW1 denied receiving the letter but acknowledged that he had provided the postal address used.
54. Presuming that the Defendant owed the Plaintiff a duty of care to communicate all relevant information concerning the suit property, I am not convinced that the duty was breached because the Defendant communicated and informed the Plaintiff that it not own the property in a timely manner to an address provided by the Plaintiff.



55. The Plaintiff did not prove that there was a requirement that the Defendant should make a phone call instead of sending a letter by post.
56. In any event, it is trite that before one starts constructing, he must obtain approvals from the County Government. The said approvals cannot be granted without presenting to the county Government ownership documents. The Plaintiff herein did not get the requisite approvals from the Nairobi City County Government. That being so, it follows that any development made on the suit land is an illegality which cannot give rise to damages as claimed.
57. In view of the foregoing, the Plaintiff has failed to prove on a balance of probabilities that the Defendant owed him a duty of care. There is consequently no basis to anchor a determination for loss suffered by the Plaintiff in developing the suit property.
58. For those reasons, the suit is hereby dismissed with no order as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 26<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

**O. A. ANGOTE**

**JUDGE**

**In the Presence of;**

Mr. Mugenyu for Plaintiff

Mr. Onyango for Defendant

Court Assistant - Tracy

