Murakaru v Kirera & 2 others (Environment & Land Case 265 of 2012) [2025] KEELC 302 (KLR) (30 January 2025) (Judgment)

Neutral citation: [2025] KEELC 302 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 265 OF 2012

OA ANGOTE, J

JANUARY 30, 2025

BETWEEN

HAMPTON IRERI MURAKARU ..... PLAINTIFF

AND

MERCY W KIRERA ..... 1ST DEFENDANT

THE CITY COUNCIL OF NAIROBI ..... 2ND DEFENDANT

DANIEL WAITITU MAINA ..... 3RD DEFENDANT

JUDGMENT

Background

1. Vide an Amended Plaint dated the 11th March, 2015, the Plaintiff seeks as against the Defendants jointly and severally:

    i. A declaration that the Plaintiff is the rightful owner of Plot Number 297-Kariobangi River Bank.

    ii. An order directing the cancellation of any documents of Title that may have been issued by the 2nd Defendant to the 1st Defendant, her agent and/or servants or any person acting through her.

    iii. A permanent injunction to issue against the 1st, 2nd and 3rd Defendants either by themselves, their agents, servants, employees, accomplices and/or anyone claiming under them or on their behalf from doing the following acts or any of them that is to say from further encroachments, occupation, trespassing upon, fencing, developing, continuing with development, selling or disposing off the parcel of land known as Plot No 297-Kariobangi River Bank.

    iv. An order directing that the sale of Plot No 297-Kariobangi River Bank was illegal and void.

    v. General Damages for trespass.

vi. Costs of the suit and interest at court rates until payment in full.

2. It is the Plaintiff's case that he is the lawful owner of Plot No 297-Kariobangi River Bank measuring about 0.02Ha or thereabouts (hereinafter the suit property) having been allotted the same by the 2nd Defendant on the 24th February, 1992 and that since his acquisition, he has paid the 2nd Defendant rates as and when they fall due up to and including for the month of December, 2009.

3. According to the Plaintiff, upon his visit to the suit property sometime in July, 2011, he discovered that there was a stranger thereon who had started developing permanent structures; that he severally visited the 2nd Defendant's offices to inquire about the same and that it is then that he discovered that the plot had been illegally allocated to the 2nd Defendant's employee who had then sold the property to the 3rd Defendant on or about the 4th November, 2010.

4. According to the Plaintiff, the letters to the Town Clerk and the Director of City Planning and Architecture Department over the issue have yielded no fruits.

5. The Plaintiff contends that the allocation of the suit property by the 2nd Defendant to the 1st Defendant was done fraudulently, maliciously and without justifiable reason, and that the particulars of fraud and malice include, the 1st Defendant using her position as an employee of the 2nd Defendant to illegally allocate herself the suit property, and the 2nd Defendant illegally sanctioning the allocation of the suit property to the 1st Defendant despite him having fully paid up the rates.

6. The 1st and 2nd Defendants filed a joint Defence on the 1st August, 2013. Vide their Defence, they conceded that the Plaintiff was allocated the suit property on the dates indicated in the Plaint. However, they averred, the allocation was subject to a number of conditions inter-alia, payment of requisite fees within 30 days, which condition he did not meet.

7. It was averred that the Plaintiff purported to make payments from the year 2009, more than 15 years from the date of allocation which payments were erroneously received by the 2nd Defendant.

8. According to the Defendants, as a consequence of the Plaintiff's breach, the 2nd Defendant exercised its discretion by revoking the allocation which action was preceded by a public notice placed in the Daily Nation of 15th August, 2006 notifying the Plaintiff of its intention to effect the revocation among others and that the Plaintiff was given 30 days to cure the breach which it did not.

9. The Defendants state that after the revocation, the property was allocated to the 1st Defendant on the 22nd August, 2007 who paid all the requisite fees; that the 1st Defendant has since sold the property to the 3rd Defendant which sale was effected on the 4th November, 2010 and that no cause of action has been established against the Defendants and the Plaintiff is put to strict proof of allegations to the contrary.

10. In response to the Amended Plaint, the 3rd Defendant filed a Defence on the 27th October, 2016. Vide the Defence, he denied the assertions as set out in the Amended Plaint stating that he is the legitimate proprietor of the suit property having purchased the same from the 1st Defendant on or about the 4th November, 2010 for the sum of Kshs 650,000, and that he has indeed put up permanent structures on the suit property.

11. He asserts that he is a bona fide purchaser for value not privy to any fraud with respect to the sale of the suit property; that he purchased the property adjacent to the suit property being parcel 296 and had the two parcels amalgamated for purposes of development and that the permanent structure complained off sits on both parcels which structure he put up at the cost of Kshs 4,000,000/=.

Hearing and Evidence

12. The Plaintiff, PW1, adopted his witness statement dated 2nd May, 2017 as his evidence in chief and produced the documents filed on the 2nd November, 2021 as PEXHB1. [Except the letter dated the 17th July, 2007].

13. PW1 stated that he was allocated the suit property by the 2nd Defendant in the year 1992 at which time he worked for the 2nd Defendant as a draughtsman/records officer; that he has been duly paying rates, paid the premium and has no arrears having paid up to and including December, 2009; that the 2nd Defendant duly acknowledged receipt of the amounts paid, and that further, he was recorded as the first registered owner in the 2nd Defendant's ledger book.

14. It was his testimony that in 2011, when he visited the suit property, he discovered that a stranger was constructing permanent buildings thereon and that upon inquiring from the 2nd Defendant, he was informed that the property had been allocated to the 1st Defendant.

15. According to PW1, he has written several letters to the Town Clerk and the Director of City Planning and Architecture over the issue of the illegal allocation but has received no response and that the property could not have legally been re-possessed by the 2nd Defendant in 2007 because he was in possession of the property having duly paid up for the same and being an employee of the 2nd Defendant at the time.

16. It was the evidence of PW1 that on or about the 4th November, 2010, the 1st Defendant fraudulently transferred the property to the 3rd Defendant who has since been developing it to his detriment.

17. In cross-examination, he stated that he wrote a letter accepting the terms in the letter of allotment which he has not adduced; that whereas he paid all the requisite fees, he did not do so within the requisite 30 days; that when he retired and went to the village in 2007, the property was still intact and that the public notice dated 15th August, 2006 stated that the allocation would be revoked if the payments were not done within the given time.

18. It was his further evidence on cross-examination that he was aware of the public notice; that he realized there was a problem on the ground in 2011 and that at the time he filed the suit in 2012, he was not aware of the sale agreement between the 1st and 3rd Defendants neither was he privy to the issue of amalgamation.

19. It was his evidence on re-examination that he paid for his plot after being allocated; that he paid continuously and the last payments were in December, 2009; that the 2nd Defendant accepted the payments; that he has never received a notice for re-possession of the plot from the 2nd Defendant and discovered the change of ownership later and that the 2nd allottee can only pay for the property if it is lawfully re-possessed.

20. He stated that as at the 26th July, 2005, before the issuance of the public notice, he had paid the requisite sums of Kshs 1,440/= and 7,200/=; that the subsequent amounts were annual rent and that the 1st Defendant equally did not pay the requisite sums set out in the allotment letter within the 30 days stated therein.

21. PW2 was Patrick Mbogo, an accountant working for the 2nd Defendant as the CEC for mobility and works. He testified that at the time in question, he worked as a service revenue officer and dealt with issues to do with properties.

22. It was his evidence that the letter dated 22nd August, 2007 was to be attached to all the documents; that it was an authority to pay for any dues that had been allocated by the County; that it was submitted by the City Planning and Directorate to the Chief Revenue Officer and that he was the head of sundry debtors and was responsible for processing payments for all the allotments.

23. It was his testimony that once submitted to the section, he marked it to the revenue officer in charge of the particular scheme; that he indicated that the same should be processed; that the entry appears in the document as entry number 3; that when it was checked, it was noted that it had been fully paid for until 2009; that the payments had been made by the initial allottee and that they refused to take other dues in respect of the same plot because the original allottee had already.

24. He testified that in 2009, the Acting Director of City Planning directed that they should accept payments; that subsequent thereto, he marked it for processing; that the amount payable was computed at Kshs 26,520 which is what was recommended for payment and that the money was paid.

25. It was his evidence on cross-examination that the letter came through the Director of City Planning; that the 1st Defendant is shown as the allottee of the land; that the City Planning indicated that this is the right record and that plot 297 should not have been re-possessed. According to the witness, the suit property was not mentioned in the advertisement.

26. He further indicated on cross-examination that stand premium is the critical payment while ground rent is paid annually; that as at 2009, the Plaintiff had paid the stand premium and ground rent, the same having been paid in 2005 and that the public notice was to notify all the members who had not paid ground rent and stand premiums to make payments.

27. According to PW2, there was a list of respective plots in the advertisement but the suit property was not amongst them; that there is a receipt dated the 16th August, 2005 for ground rent by the Plaintiff; that there is also a receipt dated the 26th July, 2005 for stand premium by the Plaintiff and that the Plaintiff paid all the dues in respect of the property and any purported re-possession was wrong.

28. DW1 was Mercy Kirera, the secretary of the 2nd Defendant. She adopted her witness statement dated the 1st August, 2013 as her evidence in chief and produced the documents of an even date as DEXHB1.

29. She testified that she saw an advert in the newspaper for re-possession of plots and applied for the same on the 15th August, 2006; that she was allocated the land and received a letter of allotment on 22nd August, 2007; that she was thereafter given a beacon certificate after she paid for the plot and that she sold the plot three years after acquiring it to one Daniel Waititu vide an agreement dated the 4th November, 2010.

30. It was her evidence that she has lawful documents in respect of the property; that the City Planning Department which was in charge of the allotment cleared her and that the revenue department had no role in plot allocation.

31. It was her evidence on cross-examination that she was allocated the land in 2007; that she was cleared to make part payments; that she made the part payment and was given the clearance certificate; that the letter of 22nd August, 2007 is proof of her clearance; that she was only given the documents adduced; that she applied for the allocation but did not have the application; that as at 2006, she was in the planning department; that this was the department that made the recommendation that she pays for the property and that she paid after she received the clearances.

32. DW2 was Daniel Waititu Maina. He adopted his witness statement dated 27th October, 2016 as his evidence in chief and produced the documents of an even date as DEXHB2-8.

33. It was his evidence that the land in issue is plot 297; that he acquired the land in 2010 through a friend and he has a sale agreement to that effect and that before purchasing the property, he carried out a search at the City Council offices and was satisfied that the land belonged to the 1st Defendant.

34. He testified that he equally bought the adjoining land being plot 296 and amalgamated the two plots; that he was issued with a beacon certificate; that he went to the City Council and applied for amalgamation which was approved; that the 2nd Defendant issued him with letters of allotment in respect of the two plots and that he was given approvals to develop the plots.

35. According to DW2, he started construction in 2011 and in 2012 he received a notice to stop construction; that the land is valued at approximately Kshs 8-10million; that he has made all the relevant payments to the 2nd Defendant which he has adduced into evidence; that he is an innocent investor and followed all the processes and received all the approvals and that the suit should be dismissed with costs.

36. In cross-examination, he testified that he paid Kshs 650,000 for the suit property but does not have the receipts; that he doesn't have the search results on a document; that none of the receipts are for plot 297; that there is no beacon certificate for plot no 297 in his name; that the letter of 27th August, 2007 was in the name of Francis for plot 296; that he has the letter of allotment and that his documents were with the deceased Advocate and are not before the Court.

37. DW1 stated that he has no approvals from other institutions apart from the 2nd Defendant; that he is aware that plot 296 was also repossessed; that there has been no complaint as regards plot no 296; that the transfer was from Francis to him and that the letter of allotment refers to the transfer of both plots 296 and 297.

38. DW3 was Samson Kungu Nd'ungu, an administrator and officer in charge of records at the 2nd Defendant having been there since 1998. It was his evidence that document no 3 is an approval for amalgamation issued on the 21st March, 2011 for plots 296 and 297.

39. He testified that Daniel Waititu made an application for development of 24 flats and an approval was issued on the 13th April, 2011 after it was confirmed that Daniel was the owner of both plots; that an approval is also subject to confirmation of the beacon certificate which was also confirmed; that a gazzette notice had been issued to those who had not cleared their dues and they were given 30 days to do so and that the properties were re-possessed by the County after one year and re-allocated.

40. It was his evidence on cross-examination that a plot whose rates have been paid cannot be re-possessed; that there is a receipt for payment in the Plaintiff's documents for the year 2005; that the notice was made in the year 2006; that the Plaintiff has a clearance form for plot 297 indicating that it was paid until 2009; that if this is the position, it cannot be re-allocated; that a previous allottee cannot pay after the land has been re-allocated and that he cannot tell if the Plaintiff made payments in 2009.

41. It was his evidence on re-examination that none of the payments by the Plaintiff were made within 30 days as per the letter of allotment; that they did not need to notify him that the letter of allotment had lapsed; that the planning department has no control over payments; that payments can be made even for non-existent plots; that in 2009/2010, the plots had been re-allocated; that there were clearances for the 1st Defendant to make payments meaning that payments from her should be accepted; that the allotment letter is dated 22nd August, 2007 and that as per their records, the 3rd Defendant is the owner of the suit property.

Submissions

42. The Plaintiff filed submissions on the 22nd February, 2024. Counsel submitted that the Plaintiff has provided evidence to show that he acquired legal interest in the property in the year 1992 being the first allottee and having met the requisite conditions and made all the relevant payments and that as stated in Rukaya Ali Mohammed vs David Gikonyo & Anor, Kisumu HCCA No 90 of 2014, once an allotment letter is issued and the allottee meets the conditions therein, the land is no longer available for allotment since the allotment confers absolute proprietary rights therein. Reliance was also placed on the case of Republic vs County Council of Nairobi & 3 Others [2014] eKLR.

43. Counsel submitted that the alleged revocation of the allotment by the 2nd Defendant was not procedural, the Plaintiff not having been personally informed of the same and that as expressed in Republic vs County Council of Nairobi [2014] eKLR, persons who are likely to be adversely affected by an administrative action should be afforded an opportunity to be heard.

44. Counsel noted that in the circumstances, not only was the Plaintiff not served with the notice of revocation despite being an employee of the 2nd Defendant, but there was no basis for the revocation as the Plaintiff had made all the relevant payments.

45. It was submitted that the allocation of the suit property to the 1st Defendant was actuated by fraud and that the Plaintiff has demonstrated his assertion in this respect making it clear that the 1st Defendant used her influence in the 2nd Defendant to influence the 2nd Defendant's employees to accept payments un procedurally.

46. Counsel submitted that in Hubert L Martin & 2 Ors vs Margaret J Kamar & 5 Others [2016] eKLR, the Court noted that where there are two or more titles over the same property, each party is obligated to show that their title has a good foundation and passed properly to the current owner.

47. According to Counsel, the 1st Defendant not having any legitimate interest in the property, could not pass any title to the 3rd Defendant and ultimately, the 3rd Defendant's title is void. Reliance in this respect was placed on the cases of *Munyu Maina vs Hiram Gathitha Maina, Civil Appeal 239 of 2009* and Alice Chemutai Too vs Nickson Kipkirui Korir & 2 Others [2015] eKLR.

48. It was submitted that the Plaintiff having been deprived of his property from 2008 is entitled to damages and that as expressed in Park Tower Ltd vs John Mithako Njika & 7 Others[2014]eKLR, where trespass is proved, a party need not prove that he suffered any specific damages.

49. Counsel urged the Court to be guided by the decision in John Chumia Ng'anga vs Attorney General & Another [2019] eKLR in assessing the quantum of damages noting that considering that the Defendants have been in occupation for a period of close to 16 years to the exclusion of the Plaintiff, the sum of Kshs 20,000,000 will suffice as damages and that the Plaintiff, having established his case is entitled to costs.

50. The 1st and 3rd Defendants filed submissions on the 15th August, 2024. Counsel submitted that it is well settled in law, as espoused in Lagat vs Kebut (Environment and Land Appeal E021 of 2022) [2023] KEELC 18432 (KLR) (26 June 2023) (Judgment) 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. Reliance in this respect was also placed on the case of Mbau Saw Mills Ltd v Attorney General for and on behalf of the Commissioner of Lands) & 2 others [2014]eKLR.

51. Counsel submitted that in the circumstances, the Plaintiff did not comply with the letter of allotment dated the 24th February, 1992; that a perusal of the documents adduced by the Plaintiff in this respect show that he purported to make payments of accumulated dues owed more than fifteen (15) years from the date of allocation whereas the allotment letter required them to pay annual rent religiously from the date of allocation.

52. According to Counsel, the evidence adduced by the 1st Defendant shows that the 2nd Defendant published a public notice in the Daily Nation Newspaper of 15th August, 2006 notifying the Plaintiff among others, of its intention to effect revocations due to default of the requisite payments and granting the affected persons thirty (30) days to cure the default and/or breach of the terms of allotment.

53. Despite the advertisement, it was submitted, the Plaintiff did not make payments and that upon the default by the Plaintiff to settle the necessary dues in line with the terms contained in the allotment letter, the property was free to be allotted to someone else and this is exactly what happened.

54. Counsel for the Defendant submitted that the Plaintiff confirmed during cross examination that he was well aware that the 1st and 3rd Defendants have been in occupation of the suit property. The 2nd Defendant did not file submissions.

Analysis and Determination

55. By way of a brief background, the Plaintiff instituted this suit seeking inter-alia, a declaration that he is the rightful owner of Plot Number 297-Kariobangi River Bank and permanent injunctive orders restraining interference by the Defendants thereto. He also seeks an order cancelling any title documents issued by the 2nd Defendant to the 1st Defendant, and a declaration that the sale of Plot No 297-Kariobangi River Bank was illegal and void.

56. It is the Plaintiff's case that he was allotted the suit property sometime in 1993; that he duly accepted the allotment and paid all the requisite fees; that however, he discovered in 2007, the property had been illegally re-allocated to the 1st Defendant who thereafter sold the property to the 3rd Defendant and that the re-allocation and subsequent sale of the suit property to the 3rd Defendant was illegal, null and void.

57. The Plaintiff adduced into evidence the allotment letter dated 24th February, 1992; acknowledgement of payment of ground rent dated 19th June, 2009 for the sum of Kshs 13,000; demand for council allocation dues addressed to the Plaintiff dated 19th June, 2009; payment receipt for ground rent dated 16th August, 2005 and for stand premium on the 26th July, 2005 and bills for ground rent for the years 2010-2011.

58. On her part, the 1st Defendant maintains that she was duly allocated the suit property after its re-possession from the Plaintiff; that she complied with the terms of the allotment and was granted the property which she thereafter sold to the 3rd Defendant being unable to develop the same.

59. She adduced into evidence the public notice dated the 15th August, 2006; letter of allotment dated the 22nd August, 2007; beacon certificate dated the 22nd August, 2007; ground rent, stand premium and survey fees bills and receipts for Kshs 4, 320 and Kshs 7, 200 dated 16th November, 2009; stand premium receipt for Kshs 7, 200 and survey fees receipt for Kshs 15,000 dated 16th November, 2009.

60. She further adduced into evidence the ground rent bill and receipt for Kshs 1, 440 dated 4th June, 2010; beacon certificate and survey fee bill and receipt for Kshs 10, 300 and sale agreement dated 4th November, 2010.

61. The 2nd Defendant, while conceding to have initially allotted the suit property to the Plaintiff, states that the Plaintiff failed to abide by the terms of the allotment within the requisite timelines; that they granted the Plaintiff another opportunity to rectify the default which he failed to do leading to the ultimate lapse of the allotment and their re-possession of the suit property and that after they re-possessed the same, they allocated it to the 1st Defendant.

62. The 3rd Defendant maintains that he is a bona fide purchaser for value, having duly purchased the same from the 1st Defendant. He maintains that he is not privy to any fraud or irregularities pertaining to the suit property.

63. The 3rd Defendant adduced into evidence the sale agreement between himself and the 1st Defendant dated 4th November, 2010; the sale agreement in respect of plot 296 dated 5th November, 2010; approval for amalgamation of plots 296 and 297; beacon certificates for plots 296 and 297; letter of allotments in respect of plots 296 and 297 and valuation report for plots 296 and 297 dated 10th April, 2016.

64. In view of the foregoing, and in consideration of the pleadings and submissions, the issues that arise for determination are:

    i. Whether the suit property was allocated to the Plaintiff and if so, whether the allotment lapsed?

    ii. Whether the allotment of the suit property to the 1st Defendant was regular?

    iii. Whether the 3rd Defendant was a bona fide purchaser for value?

    iv. What are the appropriate reliefs to issue?

65. The dispute herein revolves around ownership of land. Both the Plaintiff and the Defendants have conflicting claims in this regard and the outcome will depend on which party meets the required standard of proof. This finds footing in the elementary principle that he who alleges must prove as set out in Sections 107, 108, 109, and 112 of the *Evidence Act*. Section 107 provides as follows:

> " (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

66. Whereas section 108 states:

> " The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

67. Section 109 provides:

> " 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

68. Finally, it is provided under Section 112:

> " 112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

69. The Plaintiff's claim to the suit property is on the basis of an allotment to him from the Nairobi County Government (then the Nairobi City Commission). It is now well settled that a letter of allotment is not a title but an offer to take up a title. This was persuasively stated by the Court in Stephen Mburu & 4 Others vs Comat Merchants Ltd & Another (2012) eKLR thus:

> " ...from a legal stand point a letter of allotment is not a title to property. It is a transient and [is] often a right or offer to take property."

70. It is only once a letter of allotment has been issued and the terms thereon accepted, that title comes into existence. This was the holding by the Court of Appeal in the case of Wreck Motor Enterprises vs Commissioner of Lands & 3 others [1997] eKLR, which expressed itself thus:

> " 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 pursuant to the provisions held."

71. A similar decision was made in the case of Joseph Arap Ngok vs Justice Moyo Ole Keiwa, Nairobi HCCA, APPL. No. 60 of 1997 (unreported) where it was observed as follows:

> " It is trite that such title to landed properly can only come into existence after issuance of letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of title document pursuant to provisions in the Act under which the property is held."

72. The Plaintiff has adduced into evidence a letter of allotment dated the 24th February, 1992. Pursuant to the same, the Plaintiff was offered plot 297 measuring approximately 0.02Ha for a term of 99 years at the stand premium of Kshs 7,200 and annual rent of Kshs 1, 440.

73. It was further noted in the allotment letter as follows:

> " If these conditions are acceptable to you, I would be obliged to receive your written acceptance together with the cash payment for the amount set out below.....
>
> If acceptance and payment is not received within 30 days from the date hereof, the offer herein contained will be considered to have lapsed without further reference to yourself"

74. Despite the clear and unequivocal terms of the allotment letter, it is conceded by the Plaintiff that he did not make any payments within the requisite 30-day period. The evidence adduced by him shows the stand premium was received on the 26th July, 2005 whereas the first annual ground rent was received on the 16th August, 2005 approximately 13 years later.

75. As regards the letter of acceptance, despite his contention that he wrote the same, it was not adduced into evidence. So, what then was the consequence of his failure to abide by the timelines set out in the letter of allotment?

76. Dealing with a similar question, the Court of Appeal in Waterfront Holdings Limited vs Kandie & 2 others (Civil Appeal 88 of 2019) [2023] KECA 1223 (KLR) (6 October 2023) (Judgment) noted:

> " The question however is whether the failure to comply with the requirement for payment of stand premium automatically cancels the offer or something more is required to be done by the allotting authority to denote that cancellation. To answer this question, we need to interrogate the legal status of the letter of allotment. The Supreme Court in Torino Enterprises Limited v Attorney General (Petition 5 (E006) of 2022) [2023] KESC 79 (KLR) (22 September 2023) (Judgment), while dealing with the issue, expressed itself as hereunder: "[58] So, can an allotment Letter pass good title? It is settled law that an Allotment Letter is incapable of conferring interest in land, being nothing more than an offer, awaiting the fulfillment of conditions stipulated therein...
>
> 60. Suffice it to say that an allottee, in whose name the allotment letter is issued, must perfect the same by fulfilling the conditions therein. These conditions include but are 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 cannot pass valid title to a third party unless and until he acquires title to the land through registration under the applicable law. It is the act of registration that confers a transferable title to the registered proprietor, and not the possession of an Allotment Letter....
>
> 61. ...We must reiterate the fact that an allotment letter in and by itself, is incapable of conferring a transferable title to an allottee. Put differently, the holder of an allotment letter is incapable of transferring or passing valid title to a third party on the basis of the allotment letter unless and until he becomes the registered proprietor of the land consequent upon the perfection of the Allotment Letter. It matters not therefore that the allotment letter has not lapsed.
>
> 62. Back to the facts of this case, the Allotment Letter issued to Renton Company Limited was subject to payment of stand premium of Kshs. 2,400,000.00 annual rent of Kshs. 480,000.00 amongst others. Moreover, the letter was granted on condition that Renton Company Limited would accept it within thirty (30) days from the date of the offer, failure to which it would be considered to have lapsed.
>
> 63 While the allotment letter is dated 19th December 1999, Renton Company Limited made the specified payments on 24th April 2001, one hundred and twenty seven (127) days from the date of the offer. It is not in question that Renton had not complied with the terms and conditions of the Allotment Letter. Therefore, the letter ought to have been deemed as lapsed at the time it purported to transfer the same to the appellant. The respondent submitted that a Letter of allotment does not confer any property rights unless it is perfected, failure to which it is rendered inoperative and of no legal import. We have already declared that an Allotment Letter, even if perfected, cannot by and in itself confer transferable title to the allottee, unless the latter completes the process by registration. Therefore, the grim reality is that all transactions between Renton Company Limited and the appellant were a nullity in law."

77. It is apparent from the foregoing that a natural consequence of the Plaintiff's failure to abide by the terms of the letter of allotment would be that the same lapses.

78. However, the issue is not so clear cut in this circumstance. This is because of the public notice of 15th August, 2006. Vide the aforesaid notice, the 2nd Defendant notified members of the public who had been allotted land in various schemes including Kariobangi River Bank and who had outstanding dues, to make the requisite payments within 30 days thereof being on or about the 15th September, 2006.

79. The notice read:

> " This is to notify all members of the public who have been allocated land by the City Council and have not paid the requisite fees, ie. stand premium, ground rent and survey fees etc are required to make the payments within a period of 30 days effective from the date of this notice. The schemes affected include and are not limited to.....If no payments will have been made within the time given, the City Council will revoke the individual allocations without further reference to the affected owners."

80. By this notice, the 2nd Defendant was essentially extending the timelines set out in the respective letters of allotments and giving allotees whose allotments would otherwise be deemed as having lapsed on account of none payment, a lifeline. As stated by the 1st and 2nd Defendants, this was an opportunity for the Plaintiff and other allottees to "cure the breach".

81. The 2nd Defendant contends that the re-possession of the Plaintiff's property was preceded by this notice. Its assertion in this regard being that even after being granted a lifeline, the Plaintiff did not rectify the situation.

82. The Plaintiff concedes that he was aware of the notice. Indeed, it was his evidence that he prepared the notice and as such his claim that he required personal notice has no basis. Critically, however, the Plaintiff states that as at the time of the notice, he had duly paid the required fees and the notice could not be the basis of the revocation of his allotment.

83. Considering the evidence, it is indeed apparent that the stand premium and ground rent having been paid by August, 2005 had been paid before the notice of August 2006. This is conceded to by both PW2 and DW3, employees of the 2nd Defendant. There is no allegation of none payment of any other fees as at this time.

84. Whereas the Plaintiff had not complied with the timelines set out in the allotment letter, by the time of its extension, viz the public notice, he was in compliance and was in the same position as those who had seen the public notice and complied with the timelines therein.

85. It would be absurd to argue that a party who received his allotment on the same day as the Plaintiff and who had heeded to the public notice and had paid his dues by 15th September, 2006 has a legitimate allotment whereas the Plaintiff who had complied earlier on in 2005 did not. Indeed, PW2 spoke of their reluctance to accept dues from the 1st Defendant over the suit property as the same had been duly paid for.

86. In view of the foregoing, the Court finds that the Plaintiff was duly allotted the suit property and at the time of its purported re-allocation, his allotment had not lapsed. The purported rescission was irregular.

87. Having found that the Plaintiff's allotment was not validly rescinded, the suit property was not available to be re-allocated to the 1st Defendant. As expressed by the Court in Republic vs City Council of Nairobi & 3 Others [2014] eKLR:

> " once an allotment letter is issued and the allottee meets the conditions therein, the land in question is no longer available for allotment since a letter of allotment confers absolute right of ownership unless it is challenged by the allotting authority or is acquired through fraud, mistake or misrepresentation or that the allotment was out rightly illegal or it was against public interest. In other words, where land has been allocated, the same land cannot be reallocated unless the first allocation is validly and lawfully cancelled."

88. The situation created by the act of allotting the property to the 1st Defendant was that there was double allocation. In the case of Cecilia Nyambura Nd'ungu vs Ol'kalou Farmers Co-operative Society [2018] eKLR, the Court held that:

> " In essence therefore, I find that there was double allotment of the suit land and the blame therefore lay squarely on the Settlement Fund Trustee. This notwithstanding, in the case of M'Ikiara M'Rinkanya & Another v Gilbert Kabeere M'Mbijiwe, [1982-1988] 1KAR 196, the court held that where there was a double allocation of land, the first allotment would prevail. That therefore there was no power to allot the same property again. (See also Kariuki v Kariuki [1982-88] KAR 26/79 and Otieno and Matsanga, [2003] KLR 210)."

89. This was the position held by the Court of Appeal in Waterfront Holdings Limited vs Kandie & 2 Others (supra) where it was held that:

> " In that case what was in issue was whether a second allotment can validly be made in circumstances where an earlier allotment had been made. That Court found that that was not possible. That was the position this Court adopted in the case of Kenya Ihenya Company Limited & Another v Njeri Kiribi [2019] eKLR where it was again stated;"... it was clear that the 1st appellant had allotted the suit land to both the respondent and the 2nd appellant hence the learned Judge's conclusion that there was a double allocation. That being the case, since the respondent was first in time, as the evidence is clear that she completed making payments in the year 1983 whilst the 2nd appellant claimed to have purchased the same on 24th June, 1997, she was the bonafide proprietor."

90. Ultimately, having upheld the Plaintiff's allotment, the Court finds that the suit property was not available for re-allotment to the 1st Defendant. The interest in the suit land still lay with the Plaintiff and could not be transferred to the 1st Defendant. The transfer was void for all intents and purposes.

91. The 3rd Defendant maintains that he is a bona fide purchaser for value without notice of any defect and that he duly purchased the suit property from the 1st Defendant. However, in view of the Court's finding on the legitimacy of the 1st Defendant's allotment, can the 3rd Defendants claim stand?

92. It is now firmly settled in jurisprudence, that the common law principle of nemo dat quod non habet (no one can give what they do not have), which is mostly used in sale of goods transactions, is also applicable to dispositions over land in Kenya.

93. This was well articulated by the Court of Appeal in the case of Arthi Highway Developers Limited vs West End Butchery Limited & 6 Others, [2015]eKLR where dealing with fraudulent transactions through which a title changed hands stated as follows:

> "It is our finding that as between West End and Arthi, no valid Title passed and the one exhibited by Arthi before the trial court was an irredeemable fake. It follows that Arthi had no Title to pass to subsequent purchasers, and therefore KMAH, Yamin and Gachoni cannot purport to have purchased the disputed land or portions thereof."

94. If the proprietor of the property in question is declared not to have acquired a good title, then he cannot have a good title to pass downstream. His title is not legalized by the fact that he has transferred it to someone else. The purchaser or transferee receives such a title with the same stain of illegality, and the title remains null and void ab initio.

95. The maxim holds true even with untitled property such as herein, where the Court, determining the question as to the proprietorship of untitled land, is mandated to establish whether the evidence adduced establishes an unbroken chain leading to the root of the title. This was persuasively stated in the case of Caroline Awinja Ochieng & another vs Jane Anne Mbithe Gitau & 2 Others [2015] eKLR as follows:

> "In determining the above issue it would perhaps be appropriate to first state that tracing ownership of unregistered land is dependent on tracing the root of title. Unlike registered land where ownership is domiciled and founded in the register of titles, ownership of unregistered land and the ascertainment or confirmation thereof involves the intricate journey of wading through documentary history...
>
> It is the delivery of deeds or documents which assist in proving not only dominion of unregistered land but also ownership. The deeds must establish an unbroken chain that leads to a good root of title or title paramount. A good compilation of the documents or deeds relating to the property and concerning the claimant as well as any previous owners leading to the title certainly proves ownership. It is such documents which are basically 'the essential indicia of title to unregistered land'': per Nourse LJ in Sen v Headley [1991] Ch 425 at 437.
>
> The documents in my view are limitless. It could be one, they could be several. They must however establish the claimant's beneficial interest in the property. Examples of the deed or documents include, at least in the Kenyan context: sale agreements, Plot cards, Lease agreements, allotment letters, payment receipts for outgoings, confirmations by the title paramount, notices, et al."

96. In this instance, the 3rd Defendant's root of its title, being from the 1st Defendant is tainted, the 1st Defendant not having any title to pass to him.

97. As to whether the doctrine of innocent purchase for value can come to the aid of the 3rd Defendant, the Court thinks not. It is key to note that the import and tenor of the doctrine of bona fide purchaser for value and in particular the decision in Katende vs Haridar & company Ltd (2008) 2 E.A 173, has since been reviewed as explained by the Court of Appeal in Mwangi James Njehia v Janetta Wanjiku Mwangi & another [2021] eKLR, where the Court stated as follows:

> "...In Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura v. Attorney General & 4 Others, Nairobi Civil Appeal No. 146 of 2014 this Court cited with approval the case

of Katende v. Haridar & Company Ltd (2008) 2 EA 173, where the Court of Appeal in Uganda held that:-

"For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly.

For a purchaser to successfully rely on the bona fide doctrine as was held in the case of Hannington Njuki v William Nyanzi High Court civil suit number 434 of 1996, must prove that:

1. he holds a certificate of title;
2. he purchased the property in good faith;
3. he had no knowledge of the fraud;
4. he purchased for valuable consideration;
5. the vendors had apparent valid title;
6. he purchased without notice of any fraud; and
7. he was not party to the fraud."

We nonetheless wish to state that the law, including case law is not static and the above requirements which were crafted over twenty years ago cannot be said to have been cast in stone. We hold the view that (5) above will need to be revisited and the word "apparent" be done away with altogether.

We have no hesitation in concluding that the appellants do not fall in the category of innocent purchasers. Their appeal is destined to fail for two reasons. First, because as we have demonstrated in this judgment, the deceased had no good Title to pass to anybody; second because the appellants were not innocent purchasers for value without notice and they cannot call in aid the provisions of Section 26 (1) of the *Land Registration Act*."

98. The position as set out in Mwangi James Njenga(supra) is that before one can benefit from the doctrine for bona fide purchaser for value, he must establish that the vendor had a valid title, as opposed to apparent valid title. This position was further re-affirmed by the Supreme Court in the case of Dina Management Limited *vs County Government of Mombasa & 5 others (Petition 8 (E010 of 2021*) (2023) KESC 30 (KLR).

99. It is clear from the above jurisprudence that the doctrine of innocent purchaser for value in a land dispute is not applicable where the sale of land is tainted with illegality. Consequently, the Defendants' claim fails.

100. The Plaintiff seeks several reliefs, inter-alia, a declaration that he is the rightful owner of the suit property plot 297 Kariobangi River Bank, cancellation of any titles issued to the 2nd Defendant and permanent injunctive orders restraining interference with the suit property. He also seeks a declaration that the transfer of the suit property to plot 297 was null and void and general damages for trespass.

101. As the established proprietor of the suit property, the Plaintiff is entitled to all the rights appurtenant thereto, which include the rights to exclusive possession thereof. In light of the fact that the 3rd Defendant is currently in possession of the suit property, the prayer for permanent injunctive orders is warranted.

102. Moving to the question of cancellation of titles, there is no evidence to show that the title in respect of the suit property has been registered and issued in favour of any person. This prayer is therefore moot.

103. As regards general damages for trespass, the Plaintiff seeks the sum of Kshs 20,000,000. As a principle, trespass is actionable per see. This means no proof of harm is necessary before one is entitled to damages. In the case of Duncan Nderitu Ndegwa vs KP& LC Limited & Another [2013] eKLR, the Court noted:

> " ...once a trespass to land is established it is actionable per se, and indeed no proof of damage is necessary for the court to award general damages. This Court accordingly awards an amount of Kshs 100,000/= as compensation of the infringement of the Plaintiff's right to use and enjoy the suit property occasioned by the 1st and 2nd Defendants trespass"

104. In Halsbury Laws of England 4th Edition, Vol 45 at para 26, 1503, it is provided as follows:

> " (a) If the Plaintiff proves the trespass he is entitled to recover nominal damages, even if he has not suffered any actual loss.
>
> (b) If the trespass has caused the Plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.
>
> (c) Where the Defendant has made use of the Plaintiff's land, the Plaintiff is entitled to receive by way of damages such sum as would reasonably be paid for that use.
>
> (d) --
>
> (e) – ."

105. On the issue of general damages for trespass, the question that lends itself is what is the measure of it? This question was answered by E. Obaga J in the case of Philip Ayaya Aluchio vs Crispinus Ngayo [2014] eKLR thus:

> " The Plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage? It has been held that the measure of damages for trespass is the difference in the value of the plaintiff's property immediately after the trespass or the costs of restoration, whichever is less See Hostler – VS – Green Park Development Co. 986 S. W 2d 500 (No. App. 1999)."

106. From the evidence on record, the Plaintiff has proved trespass. Apart from his evidence on the time he has been deprived of the use of his property, there is nothing in his evidence that can be used to enable this Court determine the actual damage and/or measure of the damage or loss that he has suffered for him to be compensated for the loss.

107. Nonetheless, in relying on the above case law and the principles laid out, the Court finds the Plaintiff indeed suffered damages as a result of the Defendants continued acts of trespass. The Court will proceed and award him Kshs. 1,000,000 as damages.

108. In conclusion, the Court finds that the Plaintiff has established his case on a balance of probabilities and grants the following reliefs:

i. A declaration does hereby issue that the Plaintiff is the rightful owner of Plot Number 297-Kariobangi River Bank.

ii. A declaration does hereby issue that the sale of Plot No 297-Kariobangi River Bank was illegal and void.

iii. A permanent injunction does hereby issue restraining the Defendants either by themselves, their agents, servants, employees, and/or anyone claiming under them or on their behalf from further encroachments, occupation, trespassing upon, fencing, developing, continuing with development, selling or disposing off the parcel of land known as Plot No 297-Kariobangi River Bank.

iv. The Plaintiff is granted damages for trespass to the tune of Kshs 1,000,000 to be jointly borne by the Defendants.

v. The 1st and 2nd Defendants shall bear the costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 30TH DAY OF JANUARY, 2025.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Kuria for Plaintiff

Mr. Njugi for 1st and 3rd Defendants

Court Assistant: Tracy