



REPUBLIC OF KENYA



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Too & another (Suing as the Administrators of the Estate of Mark Too) v Commissioner of Lands & 2 others (Environment & Land Case 547B of 2012) [2024] KEELC 13846 (KLR) (16 December 2024) (Judgment)

Neutral citation: [2024] KEELC 13846 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 547B OF 2012
EO OBAGA, J
DECEMBER 16, 2024

BETWEEN

MARY JEPKEMBOI TOO 1ST PLAINTIFF

SOPHIA JELIMO 2ND PLAINTIFF

SUING AS THE ADMINISTRATORS OF THE ESTATE OF MARK TOO

AND

COMMISSIONER OF LANDS 1ST DEFENDANT

DISTRICT LANDS REGISTRAR, UASIN GISHU 2ND DEFENDANT

ATTORNEY GENERAL 3RD DEFENDANT

JUDGMENT

1. The Plaintiff instituted the suit herein vide a Plaint dated 28.07.2009 and amended on 23rd November, 2018, against the Defendants herein seeking the following orders; -
 - i. The sum of Kshs.5,422,848.60/= as outlined under paragraph 13; being fees, charges and/or premiums paid to the Government through the 1st Defendant.
 - ii. Costs of this suit.
 - iii. Interest on (a) and (b) above at court rates.
 - iv. Any other and further relief that this honourable court may deem fit, just and expedient to grant.



Plaintiff's Case;

2. The Plaintiffs aver that sometimes around 23.05.1985; the 1st Defendant on behalf of the Government of Kenya allotted the deceased 3 plots as unsurveyed plots number 1,2 and 3 within Eldoret Municipality through a letter of allotment dated 23/5/1985. Consequently, the deceased accepted the offer vide a letter dated 26/6/1985, he duly paid to the 1st Defendant the requisite charges, rent, rates and all other relevant premiums amounting Kshs.5, 422,848/= in respect of the 3 portions of land.
3. It is his claim that the 2nd Defendant in conspiracy with the 1st Defendant fraudulently, unilaterally and unjustifiably went ahead and issued certificates of lease of the 3 suit plots to third parties despite having initially issued letters of allotment in respect to the suit plot to the deceased. He outlined the particulars of fraud thereof on the part of the 1st and 2nd defendants.
4. The 3 unsurveyed plots 1,2 and 3 later became ELDORET MUNICIPALITY BLOCK 6/431, 6432 and 6/433 respectively and were registered in the names of Gypsum Development Co. Ltd, Kenneth Kipkorir Kibet and Bokoboko Investment Ltd respectively.
5. The plaintiffs therefore urged the court to find merit in their claim and order the defendants to jointly and severally refund the amounts paid by the deceased in respect to the suit land together with interest.
6. In their Reply to Defence dated 26/01/2010; wherein they denied the allegations made by the defendants particularly on fraud and negligence and put them to strict proof thereof. Further, they dismissed the claims that the suit is time barred and maintained that the suit was filed within the statutory period.
7. They reiterated that the deceased was regularly and legally allotted the suit properties by the 1st Defendant on behalf of the government of Kenya. On the claims that they are to blame for any loss occasioned as a result of the transaction; it was their assertion that the 1st and 2nd Defendants were at all material times at the center of the transactions leading to the dispute giving rise to this suit, and thus maintained that the defendants are liable to refund them all the payments made in consideration of the allotment of the suit plots.
8. The Plaintiff's case proceeded for hearing on 3/10/2022, Sophia Jelimo testified as PW1 and did not call any other witness to testify in their support. PW1 adopted her witness statement dated 24/6/2019 as his evidence in chief.
9. She further testified that the deceased, Hon. Mark Too, was not issued with the title documents of the suit properties; instead, the defendants issued the titles thereto to third parties, to wit, Gypsum Development Co. Ltd, Kenneth Kipkorir Kibet and Bokoboko Investment Ltd respectively, and who have since taken possession of the said suit properties. She added that the money that was paid by the deceased, in respect of the said plots was never refunded.
10. She also produced the documents in her List of Documents as Pexh1 – 17 as follows; copy of the death certificate as Pexh1a, copy of limited grant Ad litem as Pexh1b, copy of allotment letter dated 23/5/1985 as Pexh2. Letter of acceptance dated 26/6/1985 as Pexh3, copy of letter forwarding cheque dated 6/10/1989 as Pexh4, copy of cheque dated 5/10/1989 as Pexh5, copy of money order for Kshs. 35,838 as Pexh6, copy of receipt dated 16/10/1989 as Pexh7a, copy of receipts dated 8/4/1990 as Pexh7b, land rate dated 26/4/1990 as Pexh8, copy of letter dated 24/5/2006 by the Land Registrar as Pexh9, copy of letter dated 22/09/2004 as Pexh10, copy of caution notice dated 14/10/2004 as Pexh11, copy of letter dated 17/11/2004 as Pexh12, copy of caution hearing notice dated 1/8/2008 as Pexh13, copy of caution proceedings as Pexh14, copy of Caution Ruling as Pexh15, copy of Demand Letter



dated 23/2/2009 as Pexh16 and copy of the Statutory Notice dated 14/4/2009 as Pexh17 in support of their case.

11. On cross-examination; she averred that after the allotment in favor of the deceased, they took possession and fenced the 3 allotted properties using a chain link; however, she reiterated that the three properties have since been taken over by the third parties. It was her testimony that the said third parties were not enjoined into the proceedings as their claim is mainly for the refund of the monies paid to the defendants.
12. She reiterated that the deceased accepted the allotment offer from the 1st defendant; paid the required charges and continued to pay rent and land rates.
13. When referred to Pexh. 5 and MFI 7 (a) being the Cheque No. 117276 for Kshs. 3,932,208.60/= and receipt no. 718112. She confirmed that the cheque no. indicated below the said receipt was no. 117276. She however conceded that the amount indicated on the same receipt was for Kshs. 1,193,610/=. Thus, the amount indicated on the cheque did not tally the one indicated on the receipt. She also conceded that the receipt did not make any reference to plot number.
14. The Plaintiffs thereafter closed their case and urged the court to allow the suit as prayed.

Defendant's Case;

15. The Defendant Entered Appearance on 10/8/2009 and filed a joint Statement of Defence dated 20th January, 2010, wherein they denied all the allegations made by the plaintiffs. It was their claim that the plots referred to by the Plaintiff in paragraph 5 of the plaint and presently known as ELDORET/ MUNICIPALITY BLOCK 6/431, 6/432 & 6/433, were never available for allocation to the Plaintiff as alleged.
16. Further, it was their contention that any transaction by the Plaintiff relating to the said premises and purporting to affect the status of the suit premises was irregular and not premised on the laid procedure; that the registry records indicate that Consent to proceed with the alleged transaction was neither sought nor obtained from the office of the 1st defendant and/or any other office duly mandated under law to acquiescence to such transaction and that if any such Consent was obtained, then the same was deceptive and cannot therefore hold in law.
17. The defendants denied being parties or accomplices in the process that may have culminated in the alleged allocation to the Plaintiff and maintained that at no time did the Defendants or any Government agency, duly mandated under law, expressly and/ or impliedly hold to the Plaintiff and/ or any person acting at his behest that the plots were available for alienation and maintained that they do not owe the plaintiffs the alleged sum of Kshs. 5,422,848.60/- as claimed.
18. It was their claim that any transaction purporting to affect the status of the suit premises in favour of the Plaintiff was executed negligently and without due diligence. He outlined the particulars of negligence and lack of due diligence on the part of the plaintiff. They accused the plaintiff for having failed to seek and obtain permission, guidance and approval from the relevant Government Authorities hence making the transaction and/ or any payments made there-under void ab initio and any loss if fully attributed to the Plaintiff.
19. They denied the particulars of fraud leveled against them and urged the court to dismiss the plaintiff's suit with costs.
20. Despite being served with the hearing notice, the defendants failed to attend court to prosecute their case.



21. Having been satisfied that service was duly effected to the Defendant and the return of office duly filed to that effect. Further, this court issued a last adjournment to the defendant on 13/5/2024. I therefore ordered that the Defence be closed. The Plaintiff case was thus deemed uncontroverted and the evidence adduced unchallenged.
22. Upon closing of the Defence case, I issued directions on the filing of final submissions. The plaintiffs filed their submissions dated 14/11/2024 together with authorities, which I have read and considered.

Analysis and Determination;

23. Having reviewed the pleadings herein, the respective exhibits and the plaintiff's submissions in totality, it is my considered view that the main issue arising for determination is: -
 - a. Whether the Plaintiffs have proved their claim to the required standard to warrant the grant of the orders sought;
24. Before delving into the merits of the suit, I must address the issue on whether the suit as filed is time barred as alleged by the defendant. It is the plaintiffs claim that the cause of action herein arose sometimes around 20th August, 2008, when the deceased found out about the registration and issuance of certificates of lease in favor of third parties and is hinged on an allegation of fraud. The instant suit was filed on 28.07.2009.
25. Further, I wish to point out that there is nothing to show when the third parties were registered and issued with the certificates of lease to the suit properties. Even though the defendants stated that the suit is time barred, they did not provide the exact timelines when the cause of action arose for purposes of commuting time.
26. In the absence of any contrary allegation to that of the plaintiffs on when they found out about the registration, it is my finding that the cause of action arose on 20/8/2008 and the same was filed within the statutory timelines of filing claims founded on fraud.
27. The plaintiffs' claim is that vide an Offer letter dated 23/5/1985 and produced as Pexh. 2, the 1st defendant offered to allocate to the deceased plots 1,2 and 3. The deceased accepted the said offer vide a letter dated 26/6/1985 and produced as Pexh 3. Following the said acceptance, the deceased started making payments in respect to the said properties with the view that after finalizing payments he would be issued with the certificate of lease thereto. The said properties were later registered in the names of third parties, however that is not an issue for determination in the instant suit; and the plaintiffs now seek a refund of the amounts paid.
28. The defendants allege that the said properties were not available for allotment and further that they did not follow the outlined procedure. They thus blamed the plaintiffs for fraud and negligence and urged the court to find them liable for the loss they incurred.
29. Respectfully, I disagree with the position taken by the defendants; Pexh. 2 is a clear demonstration that the process was initiated by the 1st defendant, no evidence was adduced to show that the said letter was not genuine, a forgery or as a result of fraud or that it did not originate from them. They cannot now be seen to shift the blame to the plaintiffs for negligence or claim that due process was not followed. That would be akin to benefiting from their own wrong doing. Moreover, they did not prosecute their claim to prove the said allegations of fraud and/or negligence to the required standard. This court will therefore disregard the same as unsubstantiated claims.



30. It is my considered opinion that Pexh. 2 and 3 clearly demonstrates the purpose of the said payments. The next question is to determine how much was paid by the deceased and received by the defendants to warrant the grant of compensation sought.
31. The test to be applied is whether there is evidence upon which a court, applying its mind to such evidence, could or might find for the plaintiff. This implies that the plaintiff has to make out a prima facie case, in the sense that there is evidence relating to all the elements of their claim; that a total of Kshs. 5,422,848.60/- was paid by the deceased and there are receipts issued by the defendants as evidence that the said amount was duly received by them in respect of the suit properties.
32. The law as pertains to pleading and proof of liquidated damages is well established and trite; the same must be specifically pleaded and strictly proved. The plaintiffs' claim in this suit is for a liquidated sum which they claim was paid pursuant to an allotment letter and now ought to be compensated, it is therefore needless to say that the payment of the said amount must be strictly proved.
33. The plaintiffs produced a total of 17 exhibits in support of their case and in particular; Allotment letter, letter dated 6/10/1989 from the Advocate forwarding the cheque, Cheque dated 5/10/1989, receipt dated 16/10/1989, receipt dated 8/4/1990 and cheque/money order dated 26/4/1990 and produced as Pexh. 2,4,5, 7 (a), 7(b) and 8 respectively as proof of the sums paid by the deceased to the defendants and which I seek to critically analyze for the purposes of the claim herein.

Pexh. 4 and 5;

34. The plaintiffs produced the Cheque dated 5/10/1989 as Pexh. 5. From a cursory look at the said cheque, the same has simply been addressed to the commissioner for lands. The qualifying letter forwarding the said cheque is dated 6/10/1989 (pexh.4).
35. The said letter was addressed to the Commissioner of Lands (1st defendant). For ease of reference, I wish to reproduce the contents of the said letter in part as follows: -

“ ... We attach herewith a schedule of the plots allocated to Mr. Mark Too or his organizations. We further enclose a banker's cheque for Kshs. 3,932,200.60/= being the balance of the required charges due to you...”
36. It is important to point out that the said schedule of plots was neither included in the said letter nor adduced into evidence. It is therefore not clear whether the said payment as per the cheque was in relation to the 3 suit parcels only or the same included other properties which are not subject to the instant suit.
37. In my opinion, it would not be a far-fetched idea that the payment could be with regards to other properties not included in this suit. As seen in Pexh. 7(b); the receipt dated 8/4/1990, the same clearly indicates that the payment was in relation to the plots 1,2,3 and Diani property.
38. Without proper and sufficient evidence; this court cannot automatically find that Pexh. 5, albeit forwarded to the 1st defendant was strictly with regards to the 3 suit properties herein.

Pexh. 2 and 7(a);

39. The receipt dated 16/10/1989 (pexh. 7a) is contentious for various reasons; other than the fact that the total amount indicated does not tally with the amount on the cheque from which it is generated; I wish to point out a few item heads which this court has taken issue with.



40. On cross-examination; the defence counsel took issue with Pexh. 5 and 7 (a). It was their contention that the amounts indicated on pexh. 5 indicates Kshs. 3,932,208/= while that indicated on pexh. 7(a) and which was referring to the same cheque is Kshs. 1,193,610/=. PW1 conceded and confirmed that the two amounts were indeed different.
41. It is not in dispute that the amounts on the 2 exhibits are significantly different. No explanation has been tendered by either party and this court is therefore at a loss on which amount was actually received by the defendants in respect to the said cheque.
42. From the face of pexh. 7(a); it is not clear on what account the said payments had been received. From a cursory look, one cannot tell whether the payment/ receipt thereof was in respect to the suit properties.
43. Secondly, this court has taken the liberty to keenly look at the various heads and the apportionment thereto vis a vis the amounts outlined in the Allotment letter (pexh. 2) and what stands out for me is the Stand Premium charged on pexh. 7a, of Kshs. 750,000/-. From pexh. 2; the Stand Premium chargeable in respect to the suit properties 1,2 and 3 was Kshs. 30,000/-. No other Letter of Allotment was produced and it is therefore taken that the Pex.2 was in respect to all the three suit properties.
44. The receipt having been issued within a span of 4 years from the date of the Allotment Letter; I find that the said amount of Kshs. 750,000/- is astronomically high when the amount chargeable from the Letter of Allotment for all the 3 plots was Kshs. 30,000/-.
45. It is therefore the opinion of this court that there is a high likelihood that pexh. 7a was/is in respect to other properties not subject to this suit. There was no explanation tendered by PW1 in justifying the said amounts and connecting the same to the subject matters of the instant suit. I am therefore not convinced that the said receipt and the amounts indicated thereon were made with regards to the subject properties.

Pexh. 7(b);

46. The plaintiffs also produced the official receipt No. 645473 dated 30/4/1990 for the amount of Kshs. 219,200/- in support of the amounts paid to defendants. It is imperative to point out that from the said receipt, the payment is in respect to/or on account of several properties; Eldoret One Comm. 1,2, 3 and Diani property.
47. Having established that payment was made in respect to a number of properties some of which are not subject matters in the instant suit. It is impossible to apportion and ascertain how much was paid in respect of the suit properties and how much was paid in respect to the other properties.
48. I have also noted that the said receipt was generated from Cheque No. 551167, which has not been adduced into evidence in this case.

Pexh. 8;

49. The plaintiffs also produced a copy of a cheque/money order dated 26/4/1990 in support of their claim. I wish to point out that the cheque as attached; the date and the cheque no. are not clearly ascertainable. However, I must point out that the said amount is the same as the amount indicated on the Letter of Allotment, being the amount chargeable on the 3 plots.
50. Be that as it may, the plaintiffs did not adduce any receipt for the said amount. The fact that a cheque was drawn in favor of the 1st defendant is not an automatic indication that the same was indeed received by the defendants. It is trite that proof of receipt of funds would be by an official government receipt, duly acknowledging the receipt of the said funds and stating the purpose of the same.



51. In the absence of an official receipt from the defendants, duly acknowledging the receipt of the said amounts; this court, being a court record cannot therefore assume and find the same was indeed received and the payment was made in relation to the suit properties herein.
52. Section 107 of the Evidence Act is clear on this regard; he who alleges must prove. The onus was on the plaintiffs to prove that the deceased indeed paid a sum of Kshs. 5,422,848/- in favor of the defendants whether their evidence was challenged by the defendants or not. This was not done to the legal standard.
53. In view of the foregoing, I find that the Plaintiffs have not sufficiently proved their claim to the required threshold. They failed to specifically demonstrate that sums of money pleaded were paid by the deceased to the 1st defendant for the acquisition of the suit properties and the same duly received and receipted by the defendants.

Costs;

54. It is well settled that costs follow the event. Having held that the Plaintiff have not proved their claim against the Defendants to the required standard, I find that the defendants are entitled to costs for defending the suit.

Conclusion;

55. The upshot of the above is that the Plaintiffs' claim is not merited and I accordingly dismiss the Amended Plaint dated 23rd November, 2018 with costs to the Defendants.

It is so ordered

DATED, SIGNED AND DELIVERED IN ELDORET THIS 16TH DAY OF DECEMBER, 2024.

E. OBAGA

JUDGE

In virtual presence of: -

M/s Chesoo for the Plaintiff.

Court Assistant – Laban

E. OBAGA

JUDGE

16TH DECEMBER, 2024

