



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENT AND LAND COURT CASE NO. 700 OF 2007

FRANCIS MWAURA KUNGU PLAINTIFF

VERSUS

BERNARD MUCEKE 1ST DEFENDANT

NAIROBI CITY COUNCIL 2ND DEFENDANT

JUDGMENT

1. The plaintiff initially filed this suit against one Bernard Muceke vide the plaint dated 27th May 2007 seeking an order of injunction against the defendant restraining him from trespassing or building on **Plot No. 193 Jamhuri Estate Phase II** in Nairobi which the plaintiff claimed had been allocated to him. The plaintiff further claimed damages for trespass and costs of the suit.

2. Following a response to the application for injunction by the defendant to the effect that he had been allocated Plot No. 193 Jamhuri Estate Phase II by the Nairobi City Council vide a letter of allotment dated 16th April 1998 and that he had become registered as the owner of the parcel of land and issued with a certificate of lease over the subject parcel of land being title number **Nairobi/Block 63/562** on 17th October 2001, the plaintiff applied and was granted leave to amend his plaint enjoining the Nairobi City Council as the 2nd defendant.

3. The plaintiff filed the amended plaint dated 10th July 2003 on 11th July 2003 where he pleaded fraud on the part of the City Council of Nairobi in purporting to allocate the suit Plot to the 1st defendant when the same plot had been allocated to the plaintiff by the same City Council of Nairobi in 1992. In the amended plaint the plaintiff prayed for an order that the ownership of the 1st defendant of land parcel **Nairobi/Block 63/562** was fraudulent and prayed for cancellation of the certificate of lease issued to the 1st defendant in respect of the plot on 17th October 2001.

4. The 1st defendant filed a defence to the amended plaint and so did the 2nd defendant. The 2nd defendant in its defence denied that it officially sanctioned the alleged fraud as pleaded and particularized in paragraph 4 (1) of the amended plaint. Curiously the 2nd defendant under paragraph 6 of its defence pleaded thus:-

6. “Further to and without prejudice to the foregoing paragraph the 2nd defendant pleads that it is also a victim of the alleged fraud respecting the said premises and generally the “Jamhuri II allocation” which fraud was orchestrated by third parties such as the first defendant in the instant case in collusion with certain criminal element within its employment otherwise the second defendant recognizes the plaintiff’s allotment vis-à-vis the first

defendant.”

5. The court record shows that the case was listed for hearing before **Hon. Lady Justice Ang’awa** on 9th July 2009 when by consent the following facts were recorded as admitted:-

- 1. The 1st defendant is the registered owner of the suit premises LR Nairobi Block 63/562.**
- 2. That the said suit premises LR Nairobi Block 63/562 was allocated by the 2nd defendant to the plaintiff and 1st defendant.**
- 3. That the 1st defendant is in physical possession of the suit premises.”**

On the same day before the same judge the parties recorded the following agreed issues by consent:-

- 1. Whether the plaintiff is entitled to damages as against the 2nd defendant upon being deprived of ownership of the suit premises Nairobi Block 63/562 as a result of double allocation by the 2nd defendant; if so how much damages is he entitled to?**
- 2. That who should bear the costs?**

On the same date judgment was recorded in favour of the 1st defendant by consent in the following terms:-

“By consent judgment be and is hereby entered in favour of the 1st defendant on the terms that the suit against him (1st defendant) be and is hereby dismissed.

By further consent the 1st defendant be and is hereby declared registered owner of the suit premises LR Nairobi Block 63/562 and is in sole physical possession. That this judgment herein is subject to the trial between the plaintiff and the 2nd defendant on the issue of costs.”

6. The plaintiff obtained leave to further amend his plaint and on 13th November 2009 filed his further amended plaint where he basically particularized his claim for special damages of kshs. 25,800/= and pleaded damages for loss of bargain for losing out in the suit property in the sum of kshs. 2,000,000/= following the 1st defendant being decreed the owner of the suit property as per the consent judgment recorded before Hon. Lady Justice Ang’awa.

7. The hearing of the suit was relisted on 24th October 2011 when only the plaintiff and his advocate attended. The 2nd defendant though served with a hearing notice did not attend and the hearing proceeded ex parte by way of formal proof. The plaintiff testified that he purchased **Plot No. 193 Jamhuri II** from one Crispus Mbici who had been allocated the plot by the 2nd defendant. The plaintiff stated he paid kshs. 250,000/= for the plot as per the agreement of sale dated 8th January 1996 included in the plaintiff’s bundle of documents collectively marked as P.Ex1. The plaintiff testified that he verified the ownership documents before he purchased the plot and was satisfied that indeed the said Crispus Mbici had been allocated the plot and that he had paid the requisite sums required under the letter of allotment. The plaintiff stated that the seller introduced him as the new owner of the plot to the City Council and henceforth the plaintiff continued to pay the plot rent to the City Council as the owner until 2002 June/July when the plaintiff was notified that there was another person who had commenced putting up a building on the plot which prompted the plaintiff to institute the present suit seeking injunctive orders against the 1st defendant who was the person carrying on the construction.

8. Although no orders stopping the construction had been issued the plaintiff stated that the 1st defendant stopped the construction upon being served with the suit papers. The plaintiff conceded that on 9th July 2007 an agreement was reached amongst the parties resulting in the recording of

the consent judgment granting the 1st defendant the suit premises as he had been registered as the owner. The plaintiff stated that the 2nd defendant admitted having made a double allocation of the suit premises to the plaintiff and the 1st defendant. The plaintiff in the circumstances testified that as a consequence of the double allocation of the suit premises by the 2nd defendant he lost out in the ownership of the plot yet he had done whatever he was required to do to own the plot. The plaintiff testified that he honestly believed he owned the plot and his intention was to develop the property to generate income therefrom but the 2nd defendant's conduct in double allocating the plot rendered it impossible on the part of the plaintiff to reap the benefits of his investment. The plaintiff averred that he was entitled to compensation by the 2nd defendant for loss of bargain based on the market value of the property and further was entitled to damages relating to the stand premium of kshs. 9,000/=, annual rent of kshs. 1,800/= and valuation charges of kshs. 15,000/=. The plaintiff stated that the value given to the vacant plot as per the valuation carried out on 8th February 2007 was kshs. 2,000,000/=.

9. The plaintiff called the valuer, Benjamin Kogi Kimani, who testified as PW2 who confirmed that he carried a valuation of the suit premises in February 2007 and returned a valuation of kshs. 2.0million as per the valuation report dated 8th February 2007 produced as PEX1(e). The valuer indicated the current market value of the same property would be about kshs. 6.5million.

10. The parties filed written submissions to ventilate their positions. The plaintiff's submissions are dated 27th April 2015 and were filed on the same date. The 1st defendant's submissions dated 4th June 2015 were filed on 9th June 2015 while the 2nd defendant's submissions also dated 4th June 2015 were filed on 15th June 2015.

11. Following the consents recorded in court on 9th July 2007 before Hon. Lady Justice Ang'awa there are really no disputed facts in this matter. The issue of ownership of the suit premises was disposed of and a consent judgment entered in favour of the 1st defendant awarding the suit premises to him. The 2nd defendant admitted having made a double allocation of the suit premises to both the plaintiff and the 1st defendant. The only issues for determination is as framed before Hon. Lady Justice Ang'awa on 9th July, 2007 thus:-

1. Whether the plaintiff is entitled to damages as against the 2nd defendant upon being deprived of ownership of the suit premises Nairobi Block 63/562 as a result of double allocation by the 2nd defendant, if so how much damages is he entitled to?

2. Who should bear the costs.

12. The plaintiff has testified how he purchased the suit premises from the previous allottee of the 2nd defendant who had been allocated the plot vide a letter of allotment dated 21st February 1992. The original allottee following the sale of the Plot vide a letter dated 8th January 1996 notified the City Council of Nairobi that he had sold the plot to the plaintiff. The City Council effected changes of ownership in their records and the plaintiff on 3rd January 2002 paid the ground rent for the plot in his name. On the other hand the 2nd defendant on 16th April 1998 allocated the very same plot to the 1st defendant who paid the stand premium and had title processed in his name culminating in him being issued with a certificate of lease in respect of the suit premises on 17th October 2001.

13. The responsibility to ensure the integrity of their records rested with the 2nd defendant. Once the 2nd defendant allocated the suit premises to the plaintiff and/or the original allottee and the terms of allotment were satisfied the allottee had a legitimate expectation that a title in respect of the plot would be issued to him. Once the terms of the allotment had been satisfied and the evidence shows they were a binding contract came into force and the 2nd defendant was bound to process the title of the suit premises in favour of the original allottee and/or his nominee who in the instant suit is the plaintiff. As the 2nd

defendant had the title of the suit plot processed in favour of the 1st defendant it follows that the 2nd defendant cannot escape liability in damages to the plaintiff.

14. In the case of **Dr. Joseph N. K Arap Ngok –vs- Justice Moiwo Ole Keiera & 4 Others CA No. NAI 60 of 1997** the Court of Appeal considered the position of a letter of allotment vis-à-vis title to land when the court held:-

“Title to landed property normally comes into existence after issuance of a letter of allotment, meeting the stated in such a letter of allotment and actual issuance thereafter of title document pursuant to provisions held.”

The appeal court in the same case considered the issue of double allocations and held that in cases of double allotment, a party who has been issued a good title takes precedence over all other alleged equitable rights to the title. The consent judgment in favour of the 1st defendant no doubt was influenced by the fact that he had already acquired a title to the suit premises and hence had acquired a superior interest to the suit premises compared with the plaintiff.

15. **Hon. Lady Justice Nyamweya** in the case of **James P. Maina Muriuki –vs- Moses Maina Ngugi & Another [2012] eKLR** while considering a somewhat similar case where there was double allocation observed:-

“Therefore so long as parties meet the conditions of an allocation, then that allocation is valid. Both the plaintiff and the 1st defendant have brought evidence to show payments made and allocation of the suit plot by the 2nd defendant. The plaintiff’s certificate of allocation was issued by the 2nd defendant on 30th September 1994, while that of the 1st defendant was issued on 8th March 2006. It is therefore the finding of this court that this was a case of double allocation and both allocations were valid.”

16. In the above case the judge held that the 2nd defendant had made a mistake in making the double allocation and as the 2nd defendant had shown a willingness to allocate an alternative plot to remedy the situation the court ordered the 2nd defendant to compensate the plaintiff by allocating to the plaintiff a similar plot of equivalent size in the same locality. In the present case before me the 2nd defendant has admitted there was double allocation and that mistake can only be attributed to the 2nd defendant who was the custodian of all the necessary records. It is my finding that the 2nd defendant would be liable to compensate the plaintiff.

17. The plaintiff has claimed damages for loss of bargain special and exemplary damages against the 2nd defendant. As relates to quantum of damages the plaintiff has referred the court to the cases of **Fremar Construction Co. Ltd –vs- Minakshi Navin Shah [HC Milimani Commercial Case No. 206 of 2001]** and **Samuel Mbugua Gachuhi –vs- City Council of Nairobi & 2 Others [2008] eKLR**. In the case of **Fremar Construction Co. Ltd [Supra] Kasango, J.** while considering the quantum of damages available on a breach of contract cited the case of **Njoroge –vs- Kenya Commercial Bank Ltd [1992] LLR 2357** where it was held:-

“It means that the appellant is entitled to, in terms of money, to be put in the same position as he was immediately before he was wrongfully deprived of his land and the development being and erected thereon. Since he cannot now, have the return of his land, this court can only deal with the matter in terms of money.”

18. In the case of **Samuel Mbugua Gachuki –vs- City Council of Nairobi & 2 Others [Supra] Hon. Lady Justice Ang’awa** held the plaintiff to have been a lawful allottee of the plot the subject of the suit and ordered the cancellation of the title registered in the name of the 3rd defendant for having been fraudulently obtained and awarded the plaintiff kshs. 500,000/= as general damages.

19. Although the 2nd defendant admitted there was double allocation of the suit premises to both the plaintiff and the 1st defendant there is no evidence of how the double allocation occurred. The plaintiff pleaded fraud on the part of the 1st and 2nd defendant but clearly no evidence of any fraud has been tendered. The double allotment could have been innocent and/or inadvertent. Exemplary damages would be awardable if there was aggravating circumstances and any malicious conduct and/or acts. I am not persuaded there has been any evidence of malice and/or unbecoming conduct on the part of the 2nd defendant to invite an award of exemplary damages and I decline to award any damage under this end. The special damages of kshs. 25,800/= is documented and was not contested and I find the same proven and I award the same.

20. On damages for loss of bargain my position is that as at the time a consent judgment was entered awarding the 1st defendant the suit premises, the plaintiff became aware that he could not stake any claim to the suit premises and hence his compensation ought to be pegged to the value of the land at the time the land was decreed to the 1st defendant. There can be no basis to compensate the plaintiff the current value of the land today when he was adjudged not entitled to the land in 2007. I accept the valuation report by PW2 which placed the value of the suit property at kshs. 2,000,000/= as at 2007. The claim for damages for trespass on the suit property would not be sustainable. The 1st defendant was not in trespass as he was occupying the suit land as owner and was vindicated by being acknowledged as the registered owner and judgment entered in his favour. The 1st defendant having been enjoined as a party to the suit and he having been successful in resisting the claim against him by the plaintiff would be entitled to the costs of the suit.

21. In the result, I find and hold the plaintiff has on a balance of probabilities proved his case against the 2nd defendant to the extent outlined above and I enter judgment in favour of the plaintiff in the following terms:-

(a) Kshs. 2,000,000/= being damages for loss of bargain with interest at court rates from 13th November 2009 until payment is made in full.

(b) Kshs. 25,800/= being special damages together with interest at court rates from 13th November 2009 until payment is made in full.

(c) The 2nd defendant to pay the costs of the suit together with interest to the plaintiff and the 1st defendant.

Judgment dated and signed at Kisii this 15th day of February 2016.

J. M MUTUNGI

JUDGE

Judgment delivered at Nairobi this 17th day of March 2016.

S. OKONG'O

JUDGE

In the presence of:

Ms. Akonga for the plaintiff

N/A for the 1st defendant

N/A for the 2nd defendant

Kajuju Court Assistant

S. OKONG'O

JUDGE