



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC SUIT NO. 60 OF 2008**

**NAHASHON KARIUKI.....PLAINTIFF**

**VERSUS**

**LUCY MARGARET BOGONKO OGETO (sued as the administrator**

**of the Estate of SILAS OGETO).....DEFENDANT**

**JUDGMENT**

The plaintiff instituted this suit through a plaint dated 27<sup>th</sup> February 2008. The plaint was amended on 14<sup>th</sup> July, 2011. In his amended plaint, the plaintiff sought a declaration that he was the lawful allottee and/or owner of Plot No. 162 Kimathi River Bank Shopping Centre (hereinafter referred to as “the suit property”) and an order for the eviction of the defendant from the suit property.

The plaintiff averred that on 4<sup>th</sup> April, 1997, he was allocated the suit property by the City Council of Nairobi through a letter of allotment Ref No. CP&ARCH/001773 of the same date. The plaintiff averred that he paid the stand premium and continued to pay the annual land rent to the City Council of Nairobi. The plaintiff averred that in June 2006, Silas Ogeto, deceased (hereinafter referred to only as “the deceased”) entered the suit property without any lawful justification and commenced construction of a commercial building thereon. The plaintiff averred that despite his protests, the defendant had continued to unlawfully occupy and trespass on the suit property claiming to be the owner thereof.

The defendant filed amended statement of defence on 15<sup>th</sup> September, 2017. The defendant denied that the suit property had been allocated to the plaintiff as claimed in the plaint. The defendant averred that the suit property was allocated to the deceased on 7<sup>th</sup> September, 1992 through a letter of allotment Ref. No. CP&ARCH/001733. The defendant averred that the deceased paid stand premium and ground rent and took possession of the property immediately. The defendant averred further that the deceased sought and obtained an approval from the City Council of Nairobi on 4<sup>th</sup> October 2006 to put a domestic building on the suit property. The defendant averred that following that approval, the deceased put up a residential/commercial building on the suit property. The defendant averred that the suit property together with the developments thereon were owned by the estate of the deceased and that the City Council of Nairobi had confirmed the deceased’s title over the property.

The suit was heard on 4<sup>th</sup> April, 2018. The plaintiff’s wife, Magdalene Wanjiru Kamathi (PW1) gave evidence on his behalf as he was said to be residing outside the country. PW1 adopted her witness statement dated 10<sup>th</sup> April, 2017 as her evidence in chief and produced an agreement for sale dated 19<sup>th</sup> April, 1996 and a letter of allotment dated 4<sup>th</sup> April, 1997 as plaintiff’s Exh. 1 and Exh. 2 respectively. PW1 stated that the suit property was initially allocated by the City Council of Nairobi (hereinafter referred to as “the council”) to one, Lucy Wanjiru Mburu on 23<sup>rd</sup> February, 1992. She stated that the council had in a letter dated 14<sup>th</sup> February, 2008 confirmed that the suit property was transferred by the said original allottee to the plaintiff. She produced the said letter as plaintiff’s Exh. 3. PW1 also produced in evidence receipts that were issued to Lucy Wanjiru Mburu by the council for the payments that she made for stand premium and ground rent on 23<sup>rd</sup> February, 1992 and 6<sup>th</sup> December 1995 as plaintiff’s Exh. 4 (a) and (b) respectively.

PW1 stated that in the year 2006, someone encroached on the suit property and started putting up a structure thereon. She stated

that upon investigation, they learnt that the culprit was the deceased. PW1 stated that the plaintiff wrote demand letters on 29<sup>th</sup> July, 2008 and 20<sup>th</sup> July, 2009 to the tenants who were occupying the suit property demanding that they vacate the same. She produced the letters in evidence as plaintiff's Exh. 5 (a) and (b) respectively. PW1 stated the plaintiff wrote to the council on 26<sup>th</sup> June, 2006 and 2<sup>nd</sup> May, 2007 asking it to confirm ownership of the suit property. She produced the letters in evidence as plaintiff's Exh. 6 and Exh.7 respectively. PW1 stated that they were shown the suit property when they purchased the same and a year later, a surveyor fixed the beacons for the suit property and issued them with a beacon certificate dated 4<sup>th</sup> April, 1997.

In cross examination, PW1 stated that the sale agreement between the plaintiff and Lucy Kimani Mburu was signed by James Kimani Mburu as vendor on behalf of Lucy Wanjiru Mburu who was his mother and on whose authority he was selling the suit property. PW1 contended that the suit property was owned by Lucy Wanjiru Mburu as evidenced by the receipts she produced in evidence. PW1 stated that the plaintiff visited the suit property in the year 2007 and found construction being undertaken thereon under the supervision of the council.

The defendant (DW1) adopted her witness statement filed in court on 6<sup>th</sup> October, 2017 as her evidence in chief. She stated that the suit property was allocated to her deceased husband, Silas Bogonko Ogeto (deceased) on 7<sup>th</sup> September, 1992. She stated that after the said allocation, a survey was carried out and a beacon certificate was issued to them on 7<sup>th</sup> September, 1997. DW1 stated that the deceased paid stand premium and annual rent on 23<sup>rd</sup> September, 1999. DW1 stated further that on 4<sup>th</sup> October, 2006, the deceased was given approval to carry out development on the suit property. She stated that the council issued her with a letter dated 17<sup>th</sup> May, 2010 confirming that the deceased was the owner of the suit property. DW1 stated that they had been paying ground rent for the suit property since the same was allocated to the deceased. DW1 stated that she had developed a 2 storey commercial building on the suit property. She produced documents attached to her list of documents dated 19<sup>th</sup> October, 2017 as defence Exh. 1.

In cross examination, DW1 stated that she could not tell whether Lucy Wanjiru Mburu was the owner of the suit property before her deceased husband acquired the same. She contended that the plaintiff went to the suit property after it had been developed and tenants were in occupation. She stated that the plaintiff threatened the tenants with eviction. She stated that they finished construction of the building on the suit property in 2007 and that there was no court injunction stopping them from continuing with construction.

After the close of evidence, the parties made closing submissions in writing. The plaintiff filed his submissions on 24<sup>th</sup> April, 2018 while the defendant filed her submissions in reply on 18<sup>th</sup> September, 2018. The plaintiff contended that Lucy Wanjiru Mburu was allocated the suit property on 23<sup>rd</sup> February, 1992 and that she paid the stand premium and ground rent in respect thereof. The plaintiff submitted that the suit property was not available for allocation to the deceased when the same was purportedly allocated to him on 7<sup>th</sup> September, 1992. The plaintiff submitted that the case before the court was not between the plaintiff and the said Lucy Wanjiru Mburu and as such whether or not the sale agreement between them was executed was immaterial.

In her submissions in reply, the defendant contended that the sale agreement dated 19<sup>th</sup> April, 1996 between the plaintiff and Lucy Wanjiru Mburu was invalid as both of them did not sign the same. The defendant submitted further that no evidence was produced in proof of the fact that the suit property was allocated to Lucy Wanjiru Mburu as the original allottee. The defendant submitted that the plaintiff failed to accept the offer and to meet the conditions that were set out in his alleged letter of allotment dated 4<sup>th</sup> April, 1997 within 30 days of the date of the said letter. She argued that in the circumstances, the offer lapsed and the plaintiff did therefore not acquire any legal interest in the suit property. The defendant submitted further that on the contrary, the deceased accepted the offer and complied with the conditions set out in his letter of allotment, obtained building approval and a confirmation from the council that he was the bonafide owner of the suit property. The defendant cited Article 40 of the Constitution and the case of Dr. Joseph M. K. Ngok v Moiyo Ole Keiuwa & 4 others, Civil Application No. NAI 60 OF 1997 and submitted that the suit property was lawfully allocated to the deceased.

The defendant submitted further that the purported allocation of the suit property to the plaintiff was irregular since the allotment of the said property to the deceased which was first in time had not been cancelled. In support of this submission, the defendant relied on the case of M'ikiara M' Rinkanya & Another v Gilbert Kabeere M' Mbijiwe (1982-1988) 1 KAR 196. Lastly, the defendant submitted that the plaintiff did not testify and did not also join the allocating authority namely, the County Government of Nairobi to the suit. The defendant contended that the plaintiff had failed to prove his case on a balance of probabilities.

Determination:

I have considered the plaintiff's case as pleaded and the evidence that was tendered in court in proof thereof. I have also considered

the defence and the evidence that was adduced by the defendant. Finally, I have considered the submissions of counsel and the authorities that were cited in support thereof. The parties did not agree on the issues for determination by the court. From the pleadings, the following in my view are the issues that arise for determination by the court in this suit:

1. Who is the owner of the suit property as between the plaintiff and the deceased"
2. Whether the plaintiff is entitled to the reliefs sought in the amended plaint"

Who is the lawful proprietor of the suit property as between the plaintiff and the deceased"

It was not in dispute that the suit property was at all material times owned by the City Council of Nairobi. Both the plaintiff and the defendant claimed to have acquired leasehold interest in the suit property from the City Council of Nairobi (the council) through allotment. The plaintiff's case was that he acquired his interest in the suit property from Lucy Wanjiru Mbugua (Lucy). The plaintiff led evidence that the suit property was allocated to Lucy on 23<sup>rd</sup> February, 1992 and that Lucy accepted the allotment and paid the stand premium and annual ground rent in the sum of Kshs. 12,140/- on the same date. The plaintiff averred that Lucy sold to him the suit property at a consideration of Kshs. 160,000/- on 19<sup>th</sup> April, 1996. The plaintiff averred that the sale of the suit property by Lucy to him was approved by the council which issued him with a fresh letter of allotment dated 4<sup>th</sup> April, 1997. The plaintiff contended that the said letter of allotment had endorsement to the effect that the suit property was transferred to him by Lucy to whom the property had been allocated through a letter of allotment Ref: CP& ARCH/003542. The plaintiff produced in evidence copies of, an agreement for sale dated 19<sup>th</sup> April, 1996 said to have been entered into between him and Lucy, his letter of allotment dated 4<sup>th</sup> April, 1997, receipt dated 23<sup>rd</sup> February, 1992 issued to Lucy by the council in respect of the payments for stand premium and annual ground rent, a receipt dated 6<sup>th</sup> December, 1995 issued to Lucy in respect of the payments that she made for ground rent for the suit property and a letter dated 14<sup>th</sup> February, 2008 from the council confirming that the suit property was originally allocated to Lucy who later transferred the same to the plaintiff.

On her part, the defendant who is the legal representative of the estate of the deceased contended that the deceased was the original allottee of the suit property. The defendant averred that the suit property was allocated to the deceased on 7<sup>th</sup> September, 1992 by the council. The defendant contended that the deceased paid the stand premium, ground rent and survey fees to the council after which he took possession of the suit property and commenced development thereon after receiving the necessary approvals. The defendant produced in evidence among others, copies of the deceased's letter of allotment dated 7<sup>th</sup> September, 1992, a receipt for Kshs. 12,140/- dated 23<sup>rd</sup> September, 1999 for the payment that was made by the deceased for stand premium and ground rent, a receipt for Kshs. 8,640/- dated 30<sup>th</sup> May, 2001 for the payment that was made by the deceased also for stand premium and annual ground rent, a receipt for Kshs. 15,000/- dated 27<sup>th</sup> July, 2005 for the payment that was made by the deceased for survey fees, a beacon certificate dated 19<sup>th</sup> September, 2005 and various receipts issued by the council for the payments made by the deceased on account of ground rent.

I have considered the evidence before the court concerning the parties' rival claims. The burden was upon the plaintiff to establish on a balance of probabilities that he was the proprietor of the suit property. I am not satisfied on the material before me that the plaintiff discharged that burden. The plaintiff who claimed to have purchased the suit property from Lucy did not place before the court any convincing evidence of Lucy's ownership of the suit property. No letter of allotment issued by the council in the name of Lucy in respect of the suit property was placed before the court. The plaintiff alleged that the suit property was allocated to Lucy on 23<sup>rd</sup> February, 1992 and in support of this allegation, the plaintiff referred the court to the endorsement at the top right hand corner of his letter of allotment dated 4<sup>th</sup> April, 1997 and to the receipt that was allegedly issued to Lucy by the council on 23<sup>rd</sup> February, 1992 for the payment that she made for stand premium and ground rent.

I have looked at the Calendar for 1992. I have noted that 23<sup>rd</sup> February, 1992 was a Sunday and as such a non-working day in Kenya. There is therefore no way in which the council could have issued Lucy with a letter of allotment on a Sunday and received payment from her on the same day. I am not surprised therefore that the plaintiff was unable to produce before the court the alleged letter of allotment. I am not convinced that Lucy was allocated the suit property. The evidence that was placed before the court in proof of the agreement between Lucy and the plaintiff in respect of the suit property was also hazy. The plaintiff produced in evidence a purported agreement between the plaintiff and Lucy dated 19<sup>th</sup> April, 1996. The agreement was not signed by the plaintiff or Lucy. It was only signed by one, James Kimani Mburu. No evidence was placed before the court as to the source of James Kimani Mburu's authority to sell a property which was allegedly owned by Lucy. What was placed before the court as an agreement between Lucy and the plaintiff was not an agreement at all for want of execution by the parties thereto.

From the foregoing, it is my finding that the plaintiff not only failed to establish that Lucy owned the suit property but also that he acquired the property from Lucy. The letter dated 14<sup>th</sup> February, 2008 from the council confirming that the property was owned by Lucy and that she transferred the same to the plaintiff (PEXh.3) adds no weight to the plaintiff's case. First, it is not clear as to the basis on which the said letter was written. My analysis of the documents of title that were allegedly issued to Lucy by the council finds them tainted with irregularities bordering on fraud. Secondly, the council issued a subsequent letter on 17<sup>th</sup> May, 2010 confirming that the suit property is owned by the deceased. The plaintiff did not join the council to the suit neither did he summon any of its officers to give evidence in support of his claim.

Although the defendant's documents also had some discrepancies such as the payment being made twice of different amounts for the allotment and beacon certificate being issued prior to the payment for the allotment, looking at the evidence before me as a whole, it is my finding that it is the defendant and not the plaintiff who is the proprietor of the suit property.

Whether the plaintiff is entitled to the reliefs sought the amended plaint:

From my findings above, it is clear that the plaintiff has failed to prove his claim against the defendant. The plaintiff is therefore not entitled to any of the reliefs sought in the amended plaint.

Conclusion:

In conclusion, I find no merit in the plaintiff's claim against the defendant. The suit is accordingly dismissed with costs to the defendant. It is so ordered.

**Delivered and Dated at Nairobi this 7<sup>th</sup> day of March 2019**

**S. OKONG'O**


**JUDGE**

**Judgment read in open court in the presence of:**

Mr. Kimani for the Plaintiff

Mr. Ongegu h/b for Mr. Nyakiangana for the Defendant

Catherine-Court Assistant

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