



REPUBLIC OF KENYA



**Meenye v Attorney General (Environment & Land Case 47 of 2008)
[2023] KEELC 16292 (KLR) (15 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16292 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 47 OF 2008**

CK YANO, J

MARCH 15, 2023

BETWEEN

GEDION K MEENYE PLAINTIFF

AND

THE HON. ATTORNEY GENERAL DEFENDANT

JUDGMENT

1. In this case, I am required to write a judgment based on the evidence that was taken by Hon. L. Mbugua J. who was seized of the matter before she was transferred. The learned Judge took the evidence of the plaintiff and that of the defendant's witness. Pursuant to the provisions of order 18 rule 8 (1) of the Civil Procedure Rules, I proceeded with the matter.
2. By a plaint dated 15th April 2008 and filed in court on 18th April 2008, the plaintiff seeks for the following orders-;
 - a. An order directing the Chief Land Registrar and Imenti North (formerly Meru Central) Land Registrar to forthwith cancel and remove the restriction registered as entry No. 3 against title No. Meru Municipality/Block 1/2013.
 - b. Costs of this suit.
3. The gist of the claim by the plaintiff is that despite being the registered owner of the property known as Title No. Meru Municipality/Block 1/2013, on or about 11th August 2005, the Chief Registrar without any legal basis registered a restriction against the suit land alleging the same to be public utility land and reserved for government compound. The plaintiff disputes that basis and asserted that the suit land was acquired for valuable consideration from a previous allottee without any notice.
4. The defendant filed a statement of defence dated 22nd June 2009 admitting that indeed a restriction was placed on the suit land as the same was among illegally allocated government property as per the



Ndungu Report and that the government never surrendered the title to the suit parcel of land to Meru County Council for re-allocation. That if the said council did allocate the land, the same was illegal and fraudulent as there was no proprietary rights conferred upon them as the said parcel of land has a government house standing on it.

5. During the hearing, the plaintiff adopted his witness statement dated 5th March 2012 as his evidence in chief. He testified that he was the registered owner of the suit property and explained comprehensively of how he came to be the registered proprietor of the suit land. The plaintiff produced documents in his list filed on 27th October, 2009 as P exhibits 1 – 13 respectively. These are the allotment letter dated 23rd November, 1992, Part Development Plan (PDP) No. NRB/157/92/7, letter dated 5th February, 1993, PDP MRU/167/94/12, Sale Agreement cum acknowledgement dated 10th March, 1993, informal transfer and consent thereto by the commissioner of lands dated 23rd July, 1993, consent to transfer by the commissioner of lands dated 20/4/1995, letter dated 2nd August, 2001, lease dated 3rd August, 2001, certificate of lease dated 3rd August, 2001 in the plaintiff's name, certificate of official search dated 5th December, 2002, Green Card, and copy of statutory notice/demand dated 24th January, 2008.
6. The plaintiff was cross-examined by Mr. Kiongo state counsel for the Attorney General and re-examined by Mr. Siagi, Advocate for the plaintiff.
7. The plaintiff testified that they never prepared any formal agreement under the *law of Contract Act*, but prepared a document titled "Acknowledgment of payment" after he had been offered the plot. He denied that the allotment was to lapse after 30 days, adding that the Commissioner of Lands can waive the special conditions normally written at the back of the letter of allotment. The plaintiff testified that the plot was transferred to him by James Anampiu who was allocated the plot on 5th February, 1993 and accepted the offer. He further stated that the commissioner of lands gave his consent to transfer dated 20th April, 1995 upon payment of consent fees.
8. The defendant called George Njoroge, the Land Registrar Meru Central who produced the statement of one Harrison Musumia his colleague attached to the list of documents dated 28th September, 2015. He also produced letter dated 15th August, 2008, Letter dated 17th May, 2005, white/lease register dated 3rd August 2001 and extract of the Ndungu report as D. exhibits 1 -4 respectively.
9. On cross examination, the Land Registrar stated that he was not aware whether the plaintiff had been notified of the restriction, adding that according to the law, the notice is not mandatory. He testified that he was not aware that the original allottee obtained consent to transfer the land to the plaintiff. He, however, acknowledged that the plaintiff had a certificate of lease dating back to the year 2001 and which was issued on 3rd August, 2006. That from 2001 – 2005, the plaintiff exclusively utilized the land and was not aware if there was any building owned by government on that land.
10. According to the evidence of the Land Registrar, the restriction was registered in the suit land on orders of the Chief Land Registrar based on the Ndungu Commission Report.
11. The court made a scene visit on 3rd November, 2020 in the presence of the parties and their advocates. The Land Registrar (Meru Central) was also present. The court made the following observation.

- “1. The plot is between St. Daniel's Interdenominational Church and Hindu Temple. National Youth Service is on the upper part but there is a road separating the institution and the suit plot. On the down part there is a former Officer of the Attorney General but separated by a road.



2. The plot is not developed and there are no structures at all on the site.”
12. The record indicates that Ms Soi learned counsel for the plaintiff informed the court her client informs her that it appears that it was not the suit land. Mr. Kiongo for the Attorney General requested for another scene visit so that they would avail a surveyor to identify plot No. Meru Municipality/Block 1/2013. The court then ordered and gave directions that-;
 - “ 1. The current scene visit is hereby considered as aborted due to uncertainty regarding the suit plot.
 2. The next scene visit to be conducted in the presence of the District Surveyor Meru Central who will identify the plot Meru Municipality block 1/213.
 3. Other persons to be present are the parties or their appointed representatives and the land registrar.
 4. Scene visit to be on 19th January, 2021.
 5. Today’s orders to be extracted by Ms Soi while Mr. Kiongo will serve the same upon the District Surveyor.
 6. The District Surveyor is expected to have identified the plot in advance for ease of reference on the day of scene visit”
13. Although several scene visits were scheduled the same never took place. Indeed the parties, through their advocates on record applied for the scene visit exercise to be abandoned and the application was allowed. Thereafter, the parties in this matter, through their advocates filed written submissions.

Plaintiff’s Submissions

14. The plaintiff submitted that there was sufficient evidence adduced by him that demonstrated that he had conducted his due diligence before obtaining the suit land and found no encumbrances thereon that would prevent him from acquiring the same. That the plaintiff’s evidence was corroborated by the evidence of the defendant who noted that they had no evidence that the suit land had been obtained fraudulently by the plaintiff. That the defendant also did not plead any fraud on the part of the plaintiff and the plaintiff submitted that the defence was full of mere denials that remain unsubstantiated.
15. It is the plaintiff’s submissions that he did not acquire the suit property through fraud and hence there was no basis for the defendant to place restrictions on the suit land, adding that the defendant did not follow the laid down procedure in the circumstances. The plaintiff’s counsel cited Section 136 – 138 of the *Registered Land Act* Cap 300 (repealed) and submitted that it is trite law that before a registrar of lands registers any restriction on any land, he must direct that such inquiries be made and notices issued and served and to hear the affected persons. The plaintiff relied on the case of *Matoya v Standard Chartered Bank (K) Ltd & others* (2003) 1 EA 140.
16. It is the plaintiff’s submissions that the Ndungu report relied on by the defendant to put restriction on the suit land contained only recommendations and not binding resolutions as was purported by the defendant in this case. That the gist of the recommendation contained in the report was primarily on revocation and repossession of titles, investigations as well as policy developments. That a restriction falls under investigations and it was therefore the defendant’s onus to commence investigations as to whether the land in question indeed was public land or not. The plaintiff submitted that the defendant did not avail any evidence to illustrate that they carried out any investigations and hence the



recommendations of the report that were meant to be implemented within the existing legal structures were not done contrary to the applicable law.

17. It was also submitted that the defendant herein acted arbitrarily contrary to the set out law and principles of natural justice in the manner in which they lodged the subject restriction. It is also the plaintiff's submissions that the sanctity of his title to the suit land was infringed by the defendant whereas the role of the defendant is to protect the said title since they issued it in the first place. The plaintiff cited the provisions of Article 40 (3) of the Constitution and urged the court to protect his interest over the suit land under Section 24 of the Land Registration Act on the rights of a registered proprietor of land.
18. It is submitted that the plaintiff has proved his case on a balance of probability and is worthy of the prayers sought. The plaintiff relied on the case of Geoffrey Kiriimi Itania v Chief Land Registrar & 3 others [2018] eKLR.

Defendant's Submissions

19. It is the defendant's submissions that the plaintiff's title was acquired illegally, unprocedurally or through a corrupt scheme. The defendant relied on the case of Munyu Maina v Hiram Gathila Maina [2013] eKLR and Alice Chemutai Too v Nickson Kipkirui Korir & 2 others [2015] eKLR, and submitted that it has been demonstrated through evidence that the restriction was registered in the suit land on the orders of the Chief Land Registrar on the instruction of the Ndungu Commission of Inquiry on illegally and irregularly allocated public land. That the suit land was one of such land because it had been reserved as a government compound. Further, that there was no government Gazette offering the plot for alienation and no government valuation exists to show that the land had been sold for valuable consideration.
20. With regard to the plaintiff's claim that he had purchased the land for valuable consideration, the defendant submitted that no records exist to buttress that point. That Ndungu Report shows that the suit parcel was reserved for government compound.
21. The defendant also drew the court's attention to the observations made during the scene visit, and submitted that the plaintiff's title is clearly impeachable by virtue of the provisions of Section 26 (1) (a) of the Land Registration Act, and cannot be allowed to stand.
22. The defendant further submitted that the evidence by the plaintiff has not demonstrated that either the original allottee or the plaintiff had taken full possession of the suit land. That the plaintiff has equally not controverted the principle of buyer beware invoked by the defendant to demonstrate that the suit parcel was occupied by government being the original allottee by dint of a Part Development Plan and also being in occupation. Further, that no evidence by the plaintiff in the form of an application for allotment by James M'Anampiu or minutes of Municipal Council deliberating on the issue and endorsing the application for allotment. That the Part Development Plan procedure had neither been approved by the commission of lands nor issued with an approved part development plan number. That there was equally no evidence of payment of the requisite amounts on the alleged letter of allotment and no evidence was tendered on the acceptance within the stipulated period in the letter of allotment. The defendants submitted that the totality of these gaps in the process as well as the legality of the acquisition of the property only lead to the irresistible conclusion that the suit land was acquired illegally, unprocedurally and through a corrupt scheme.
23. The defendant submitted that the order sought by the plaintiff is in the nature of a mandatory injunction which cannot be granted against the Land Registrar by virtue of Section 16 (2) of the



Government Proceedings Act, adding that the order is being sought against a party not enjoined in the suit.

24. The defendant urged the court to find that the suit as filed lacks merit and should be dismissed with costs to the defendant.

Analysis and determination

25. The court has carefully considered the pleadings, the evidence on record and the submissions. The issue for determination is whether there was any justification to lodge the restriction against the suit property and whether the restriction should be removed.
26. It is not disputed that the plaintiff is the registered owner of the suit parcel of land Title No. Meru Municipality/Block 1/213. It is also not disputed that the Chief Land Registrar directed the Deputy Land Registrar to place a restriction on the said parcel of land. According to the defendant, the said land was illegally allocated government property as per the Ndungu Report.
27. At the time the restriction was lodged, the applicable law regarding placement of restrictions was the Registered Land Act (Cap, 300 Law of Kenya – repealed). Section 136-138 of the repealed Act provided that-;

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- (1) For the prevention of any fraud or improper dealing or for any other sufficient cause, the registrar may, either with or without the application of any person interested in the land, lease or charge, after directing such inquiries to be made and notices to be served and hearing such persons as he thinks fit, make an order (hereinafter referred to as a restriction) prohibiting or restricting dealings with any particular land, lease or charge.
- (2) A restriction may be expressed to endure-;
 - (a) For a particular period, or
 - (b) Until the occurrence of a particular event, or
 - (c) Until the making of a further order

And may prohibit or restrict all dealings or only such dealings as to not comply with specified conditions, and the restriction shall be registered in the appropriate register.

- (3) The Registrar shall make a restriction in any case where it appears to him that the power of the proprietor to deal with the land, lease or charge is restricted.
- (4) The Registrar shall make a restriction expressed to endure until the making of a further order when the Registrar is informed by the National Museums of Kenya that a declaration of heritage by the minister under the National Museums and Heritage Act has been applied for, or is about to be gazetted or has been gazetted affecting the property in question and upon gazettment the restriction shall take effect as a charge over the land.



- (1) the Registrar shall give notice in writing of a restriction to the proprietor affected thereby
- (2) So long as any restriction remains registered, no instrument which is inconsistent with it shall be registered except by order of the court or of the registrar.

- (1) the Registrar may at any time, upon application by any person interested or of his own motion, and after giving the parties affected thereby an opportunity of being heard, order the removal of variation of a restriction.
- (2) Upon the application of any proprietor affected by a restriction, and upon notice thereof, to the Registrar, the court may order a restriction to be removed or varied, or make such other order as it thinks fit, and may make an order as to costs”

28. The plaintiff's case is that he is the registered owner as lessee of the suit parcel of land, a leasehold interest of 99 years from 1st November, 1992. The plaintiff testified and produced evidence as to how he obtained his certificate of lease. Among the exhibits produced is a letter of allotment dated 23rd November, 1992 that was issued to one James M'Anampiu who subsequently sold the suit land to the plaintiff. The plaintiff also produced an acceptance letter dated 5th February, 1993, a sale agreement – cum acknowledgement dated 10th March, 1993, consent to transfer dated 20th April 1995, a lease registered on 3rd August 2001 and a certificate of lease issued on 3rd August 2001 among other documents.
29. The plaintiff submitted he has demonstrated that he conducted diligence before acquiring the land and that he did not acquire the suit property through fraud and hence there was no basis for the defendant to place a restriction on the land. It is the plaintiff's submissions that the defendant acted arbitrarily contrary to the set out law and the principles of natural justice in the manner in which they lodged the subject restriction.
30. According to the defendant, the restriction was registered in the suit land on the orders of the Chief Land Registrar on the instructions of the Ndungu Commission of Inquiry Report on illegally and irregularly allocated Public land. That the suit land was one of such land because it had been reserved as a government compound. However despite these allegations the defendant did not demonstrate that it followed the law in lodging the restriction on the land.
31. To begin with, the Ndungu report contained only recommendations which did not amount to binding resolution. As stated in *Geoffrey Kirimi Itania v Chief Land Registrar & 3 others* [2018] eKLR, the court in a persuasive decision held that:-

“Firstly, the *Ndungu report* contained only recommendations and not binding resolutions. The raft of recommendations contained in the report were primarily on revocation and repossession of titles, investigations as well as policy developments. A restriction falls under investigations. The onus is upon the defendant to commence investigations as to whether the land in question indeed was public land or not. Defendants have not availed even the slightest evidence to show that they did any investigations. The applicable law then s. 138 of



the Registered Land Act envisaged a situation where investigations would be conducted. It follows that the Ndungu report was to be implemented within the existing legal structures. The directive issue by the Chief Land Registrar on 17th May 2005 (Defence exhibit 2) to the effect that the restriction was to be lodged on the land “Absolutely” was without justification and was against the applicable law”

32. Just like in the above case, in this case, there is no evidence that has been adduced by the defendant that they carried out investigations as to whether the suit land was public land or not. There is also no evidence to indicate that the plaintiff was ever notified of the placement of the restriction. Simply put, the plaintiff was never given an opportunity to be heard contrary to the rules of natural justice. The plaintiff is therefore right in stating that the restriction was lodged arbitrarily.
33. Further, there was a scene visit, which was however declared by the court with the concurrence of the parties to have aborted. This is because there appears to have been doubts regarding the location of the suit land since the District Surveyor was not present to identify the plot in question. Indeed, both parties closed their respective cases without any scene visit report which report could have assisted the court to determine whether the land was public land or not.
34. Whereas the defendant filed a defence in which they urged the court to order that the plaintiff’s leasehold title be cancelled and the property revert to the government, the court notes that there was no counterclaim filed to allow the court grant such orders. It is trite law that parties are bound by their pleadings. In the absence of a counterclaim, the court, in my view, would be acting in excess of its jurisdiction by granting orders that were not properly sought in the suit.
35. In this case, the plaintiff is the registered proprietor of the suit land. Article 40 (3) of the constitution provides that

“ the state shall not deprive a person of property of any description, or any interest in, or right over property of any description, unless the deprivation results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter five, or is for public purpose or in the public interest and is carried out in accordance with this constitution and any Act of parliament....”
36. In the absence of sufficient evidence that confirm that the title to the suit land was irregularly and illegally acquired, the plaintiff is entitled to enjoy his property as provided under section 24 of the Land Registration Act which provides that

“ the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto”
37. The defendant has pleaded fraud against the plaintiff. It is however, trite law that any allegations of fraud must be pleaded and strictly proved (See *Ndolo v Ndolo* (2008) KLR).
38. In addition, Sections 107 and 108 of the Evidence Act provide that the burden of proof lies on the person alleging fraud. In this case, the defendant had the onus to proof that the land in question was public land and was acquired fraudulently. However, the defendant has not produced any iota of evidence linking the plaintiff to any fraudulent dealings in the manner he acquired the suit land. Infact the defendant could not identify the said plot during the site visit. Besides alleging that the land is among those in the Ndungu report, the defendant totally failed to offer any evidence to prove



that the plaintiff obtained his title fraudulently and irregularly. Moreover, the defendant did not file a counterclaim to repossess the land which it says is public land.

39. From the evidence on record, I find that the plaintiff has proved his case against the defendant on a balance of probabilities. There was no justification to place a restriction on the suit land and more so without following the law.
40. The upshot is that judgment is hereby entered for the plaintiff against the defendant as follows-;
- a. An order is hereby issued directing the Chief Land Registrar and Imenti North (formerly Meru Central) Land Registrar to forthwith cancel and remove the restriction registered as entry No. 3 against title No. Meru Municipality/Block 1/213.
 - b. The defendant is condemned to pay costs of this suit.

DATED, SIGNED AND DELIVERED AT MERU THIS 15TH DAY OF MARCH 2023

In the presence of:-

Court Assistant - Kibagendi

No appearance for the plaintiff

No appearance for the defendant

C.K YANO

JUDGE

