



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI

ELC NO. 1341 OF 2007

SATIMA ENTERPRISES LIMITED.....PLAINTIFF

=VERSUS=

KENYA REVENUE AUTHORITY..... 1ST DEFENDANT

COMMISSIONER OF LANDS.....2ND DEFENDANT

JUDGEMENT

BACKGROUND

1. The Plaintiff instituted this suit by way of a plaint dated the 22nd June, 2004 and filed in court on the same day. The matter was initially filed in the High Court, Civil Division but was later transferred to this Court and allocated its current case number. The Plaintiff is the registered owner of all that parcel of land known as Land Reference Number MN/1/6230 situated in Mombasa (hereinafter known as the "Suit property"). The Plaintiff holds a Grant in respect of the suit property issued under the Registration of Titles Act (RTA), Cap. 281 of the Laws of Kenya (now repealed).

2. The Plaintiff's claim is that he was allocated the suit property by the 2nd Defendant after complying with the conditions of offer. The suit property was surveyed and came to be known as Land Reference Number MN/1/6230. The Plaintiff was issued with the grant under the RTA in March 1990. It however transpired that the suit property had earlier been allocated to the then Department of Customs and Excise which had already built some houses on the suit property.

3. The Plaintiff claim that on discovering the status of the suit property, it sought an alternative plot from the 2nd Defendant. Though the 2nd Defendant in principle agreed to the proposition, it did not provide the alternative plot. It declined to offer the Plaintiff an adjoining vacant plot that the Plaintiff had identified as the most suitable compensation. The Plaintiff therefore retained the title and grant of the suit property. That was the reason why the Plaintiff filed this suit against the Defendants seeking amongst other things for an order of eviction against the 1st Defendant.

4. The 1st Defendant is the successor in title to the Customs and Excise department.

5. The 1st Defendant in its Amended statement of Defence and Counter-claim denied the allegations by the Plaintiff. The 1st Defendant's contention was that the purported allocation of the suit property to the Plaintiff was null and void for the reason that at the time of the purported allocation to the Plaintiff, the 1st Defendant already had proprietary interests in the suit property. The suit property was not available for allocation to any other entity.

6. The history of the suit property was that, in 1975 it was allocated to the then East African Community (EAC) who built some ten (10) bungalows and six (6) maisonettes for housing of its senior staff members. This was done with the approval of the then Department of Lands. The EAC had not been issued with a title to the suit property. It was the 1st Defendant's case that the Government of Kenya therefore, through the 2nd Defendant held the legal title to the suit property in trust for the 1st Defendant as the beneficial owner, possessor and occupier of the suit property.

7. The 1st Defendant averred that at around 1996, the suit property was valued at Kshs. 179,000,000/=. The Plaintiff's claim of having paid a paltry Kshs. 454,556.30 as consideration for a developed property of such magnitude cannot stand. The 1st defendant affirms that the purported issuance of title to the Plaintiff, Grant No. C.R. 20023 was therefore unlawful and illegal. The purported title cannot confer any proprietary rights on the Plaintiff.

8. The 1st Defendant categorically stated that it could not have surrendered the proposed alternative land too to compensate the Plaintiff because the same was lawfully in its possession and it had reserved it for future expansion plans. The proposed alternative parcel of land is the property on which Kenya Revenue Authority Training Trading Institute stands today. Therefore, neither the suit property nor the suggested alternative land was available for allocation to the Plaintiff. The claim for damages by the Plaintiff was also disputed being contrary to public interest and amounting to unjust enrichment.

9. The 1st Defendant accused the 2nd Defendant of irregular allocation of the suit property.

1ST DEFENDANT'S COUNTER-CLAIM

10. In its Counter-claim, the 1st Defendant claimed that it is the absolute and lawful owner of the suit property. Therefore, the Title, Grant No. C.R.20023 issued to the Plaintiff was irregular, unlawfully, null and void and should accordingly be quashed and/or revoked.

11. The 1st Defendant prayer was that the Plaintiff's suit be dismissed with costs. It counter-claimed for a declaration that it is the absolute, lawful, exclusive and bona fide owner of the Suit Property and that the Letter of Allotment dated 7th December, 1989 and Grant No. 200023/1 issued to the Plaintiff were null and void. The 1st Defendant also prayed for rectification of the Register and cancellation of the title in the name of the Plaintiff.

PLAINTIFF'S CASE DISMISSED

12. On the 1st November, 2021, when the matter came up for hearing, the Plaintiff despite having been served did not attend court. Accordingly, the Plaintiff's case was dismissed with costs to the 1st Defendant for non-attendance.

THE 1ST DEFENDANT'S CASE

12. The matter proceeded to hearing with the 1st Defendant calling one (1) witness, Mr. Simon Mutua Mwaniki, an employee of the 1st Defendant and the Estate officer for the Southern Region. The 2nd Defendant too called one (1) witness, Mr. Gordon Ochieng, the Land Administration Officer in the Ministry of Lands and Physical Planning.

13. The witness largely reiterated the 1st Defendant's case as stated in the statement of Defence and Counter-claim. The 1st Defendant explained that the 1st Defendant did not have a claim against the 2nd Defendant because the 2nd Defendant had admitted the mistake and acknowledged the 1st Defendant's claim over the suit property.

14. Although the 1st Defendant had never been issued with a title to the suit property, it has a Part Development Plan (PDP) which was approved by the Commissioner of Lands and it has an approval No. 170. He further stated that it was not possible to alienate the land as it was not available having already been developed with the maisonettes and bungalows. The development itself was evidence that the suit property was already alienated. He further confirmed that the alternative land offered to the Plaintiff was also a public utility land allocated to KRA hence not available for allocation as well.

15. DW2 who is a land administrator with the Ministry of Lands and Physical Planning identified the Part Development Plan (PDP) which was approved on 28th January, 1977. It was his testimony that the PDP acts as a guide but does not confer ownership to the property. It precedes alienation, survey and titling. It was irregular to allocate the property after the houses were built hence the Plaintiff's allocation in 1989 and subsequent title were a mistake. The Title issued to the Plaintiff should therefore be cancelled and registered in favour of the 1st Defendant. He confirmed that the allocation made to the Plaintiff was on the basis of misrepresentation as the land was not available for allocation.

DIRECTIONS BY THE COURT

16. After the hearing, the Court directed the Defendants to file their written submissions within 21 days. Both Defendants complied and filed their respective submissions.

SUBMISSIONS BY THE 1ST DEFENDANT

18. The 1st Defendant identified 6 issues for determination. It submitted on the issues as follows;

a) Whether the suit Property was available for allocation to the Plaintiff.

19. The 1st Defendant submits that the suit property was not available for allocation. At the time of alienating the suit property to the Plaintiff, the same was not an, '***un-alienated***' land within the meaning of Section 2 of the Government Land Act, Cap. 280 Laws of Kenya. The fact that the land was occupied by a Government entity with an approved PDP, meant that the land was alienated. Counsel cited a number of authorities including the case of, **Kenya Anti-Corruption Commission v Sindo Distributors Limited & 27 others [2020] eKLR** among others to support his submission on that issue.

b) Whether the 2nd Defendant had power to allot the Suit Property to the Plaintiff.

20. Counsel submits that the 2nd Defendant, the Commissioner of Lands, did not have power to allot the Suit Property to a private

developer. Such powers were a reserve of the President of the Republic of Kenya. He submitted that since the land was already being utilized by the 1st Defendant's predecessor, the 2nd Defendant only held it as a trustee for the 1st Defendant and could therefore not allot it to another person.

c) **Whether the Plaintiff's Title is irregular and should be cancelled.**

21. The 1st Defendant's maintains that since the suit property was not available for allocation in the first place; the fact that the 2nd Defendant lacked the power to allot; and on the admission of the 2nd Defendant through its witness DW2, that the allocation was illegal and irregular, the title should be cancelled.

d) **Who the true and rightful owner of the suit property is.**

22. It is the 1st Defendant's submission that based on the submissions above, it is the true and rightful owner of the property. The witness for the 2nd Defendant, DW2 was emphatic that the suit property belongs to the 1st Defendant.

e) **Where does the Public Interest lie?**

23. It is the 1st Defendant's submission that being a public entity, its mandate and/or interest in the suit property supersedes the interests of the Plaintiff which is a private entity with private interest. The order of cancellation of title should therefore issue in its favour. The 1st Defendant urges the court to uphold public interest.

f) **Whether the 1st Defendant is entitled to the reliefs sought**

24. Finally, the 1st Defendant submits that having demonstrated that the 1st Defendant's case is merited, the reliefs sought ought to be granted as prayed for in the Counter Claim.

SUMBISSIONS BY THE 2ND DEFENDANT

25. The 2nd Defendant was represented by the office of the Attorney General. The 2nd Defendant submits that the suit property MN/1/6230 located in Nyali Mombasa County was allocated to the East African Community (EAC) in the year 1975. The EAC undertook construction of bungalows and maisonettes for its senior staff members. After the dissolution of the EAC in 1977, the suit property was taken over by the Customs Department. In 1995, vide gazette supplement notice No. 36 (Act No. 3 of 1995), Kenya Revenue Authority (KRA), the 1st Defendant took over all the properties including the suit property from the Customs & Excise Department.

26. The 2nd Defendant's firm position was that the suit property was public property having been reserved for a specific purpose. It was not available for allocation. The grant issued to the Plaintiff being grant No. CR 20023 is therefore not only irregular but illegal. The 2nd Defendant cites the case of **Nelson Kazungu Chai & 9 Others Vs Pwani University (2014) eKLR**. In the said case, the court held that the Commissioner of Lands, under the repealed Government Lands Act could not allocate Government land reserved for public purpose to individuals for their private use.

27. The court observed that under Section 3 of the repealed law, it was only the President who was empowered, but subject to the law, to make grants and dispositions in or over un-alienated government land.

28. The Attorney General reiterates the position that all the documents allegedly issued to the plaintiff are a nullity. He reinforces his position with the holding in the case of **Republic Vs Minister for Transport & Communications & 5 Others** ex-parte **Waa Ship garbage Collector & 15 Others (Mombasa HCMCA No. 617 of 2003 (2006) 1 KLR (E&L) 563**. The Court in the above case stated that courts should nullify titles by land grabbers who, "*....stare at your face and wave to you a title of the land grabbed and loudly plead the principle of indefeasibility of title deed*".

29. The Attorney General is of the view that the Plaintiff's claim of the suit property cannot be protected in law since the same was acquired irregularly and or through a corrupt scheme. He cites the case of **Henry Muthee Kathurima Vs Commissioner of Lands & Another (2015) eKLR** where the court categorically held that once a trial court finds that the suit property was unlawfully acquired, then the doctrine of legitimate expectation cannot be used to protect property that has been unlawfully acquired. The court stated that, "*the appellant cannot rely on this doctrine to circumvent the provisions of Article 40(6) of the Constitution. Further, the doctrine of legitimate expectation cannot oust clear statutory provisions of the Government land Act on how to alienate Public Land.....Sections 3,7,9 and 12 of the Government Land Act cannot be ousted by estoppel and the doctrine of legitimate expectation. There cannot be legitimate expectation without adherence to statutory or constitutional provisions*".

30. The Attorney General urges the court to cancel the Plaintiff's title to the suit property. In that regard, he relies on the case of **MOSES OKATA OWUOR & ANOTHER VS A.G & ANOTHER (2017) eKLR** where the court held that:

"This court having found that the Plaintiff's title was obtained irregularly, the court finds it null and void and further, this court finds that it has no option but to cancel the certificate of title issued to the Plaintiff herein".

31. The Court found that section 80(1) of the Land Registration Act grants the Court the discretion to direct that the register be rectified by cancellation of any title if it is satisfied that the registration was obtained by fraud or mistake.

32. The Attorney General urges the court not to give its seal of approval to an illegality. He urges the court to allow the 1st Defendant's counter claim.

Analysis and Determination

33. I must begin by thanking the Advocates for the 1st Respondent and the 2nd Respondent for their elaborate submissions with very relevant authorities. I have considered the authorities in arriving at the decision in this matter though I may not be in a position to make reference to all in the judgement.

34. It is settled law that a court should decide a case on its merits even if the suit is undefended as is the case here. I agree with the 1st Defendant's Counsel on the issues for determination before this Court. However, I will narrow them down as follows:

A. Whether the suit property (all that parcel of land known as Land Reference Number Mainland North/1/6230 situated in Mombasa) was available for alienation.

B. Whether the 2nd Defendant had the power to allocate the suit property to the Plaintiff.

C. Whether the 1st Defendant is entitled to the orders sought in the Counterclaim.

35. I proceed to look at the issues in the said order.

Whether the suit property (all that parcel of land known as Land Reference Number Mainland North/1/6230 situated in Mombasa) was available for alienation.

36. Section 2 of the Government Land Act, Cap 286 Laws of Kenya (now repealed), defines un-alienated land as;

“Un-alienated Government land” means Government land which is not for the time being leased to any other person, or in respect of which the Commissioner has not issued any letter of allotment.”

37. Section 3 of the Physical Planning Act Cap 286 of the Laws of Kenya (now repealed) also defines un-alienated land in similar terms. The section describes un-alienated Government Land as;

“un-alienated Government land” means Government land which is not for the time being leased to any person, or in respect of which the Commissioner of Lands has not issued any letter of allotment or reservation.”

38. Section 3 of the Government Land Act (Repealed), gave the power to make grants or dispositions in or over un-alienated government land to the President. The act limited the delegation of the powers given to the President to the Commissioner on specified purposes only, being;

‘(a) for religious, charitable, educational or sports purposes on terms and conditions in accordance with the general policy of the Government and the terms prescribed for such purpose by the President;’

39. In the case of James Joram Nyaga & Another v the Hon. Attorney General & Another [2007] eKLR, the court, in reference to sections 3 and 7 of the Government Lands Act stated;

“The above section clearly limits the power of the Commissioner to executing leases or, conveyances on behalf of the President and the proviso to the section specifically limits the power to alienate un-alienated land to the President. We find and hold that the Commissioner of Lands had no authority to alienate the disputed plot to the Applicants as he purported to do vide the letter of 18th December, 1997. That was the preserve of the President. It follows that the Commissioner of Lands could not have made any grant under the Government Lands Act Cap 280 Laws of Kenya nor could he pass any registerable title under the Registration of Titles Act, Cap 281 Laws of Kenya.”

40. It is evident from the evidence adduced before this Court that the Suit property was already alienated to the 1st Defendant's predecessor prior to the purported alienation to the Plaintiff by the 2nd Defendant. DW 2 confirmed that the Part Development Plan (PDP) was approved by the 2nd Defendant. The houses were approved in 1977 as Part Development Number 170. The PDP indicates that there are houses on the Suit property for EAC housing.

41. I find that the suit property was public land with public property and therefore not available for allocation for private purposes.

Whether the 2nd Defendant had the power to allocate the suit property to the Plaintiff.

42. In the case of Milankumarn Shah & Two others –vs- City Council of Nairobi & Others, Nairobi HCCC No. 1024 of 2005 as cited by Justice M.A. Odeny in Kenya Anti-Corruption Commission v Online Enterprises Limited & 4 others [2019] eKLR, the court stated that the Commissioner of Lands did not have authority under Section 3 of the Government Lands Act to make any grant or disposition of any estate, interest or right in or over a portion that was a part of a public road and therefore not unalienated Government Land.

43. In *Paul Nderitu Ndung'u & 20 Others –V- Pashito Holdings Limited & Another (Nairobi HCCC No. 3063 of 1996)* the court held that the Commissioner of Lands had no legal authority to allocate two pieces of land which had been reserved for a Police Post and a Water Reservoir as they had already been alienated. Justice Mbogholi Msagha stated that,

‘In the instant case, the two parcels of land among others had been alienated and designated for particular purposes. It was not open for the Commissioner of Lands to re-alienate the same. So the alienation was void ab initio.’

44. Even if I was to find that the Suit property was un-alienated hence available for allocation, the Commissioner of Lands still had no authority to alienate the suit property as Section 3 of the GLA vested the power to alienate un-alienated Government land in the President. The power to alienate is delegated to the Commissioner of Lands in limited circumstances for educational, charitable, sports and other purposes as set out in the GLA. None of the exceptions set out there in apply in this case.

45. In *James Joram Nyaga & Another –v- Attorney General & Another*(Supra) the court referring to section 3 and 7 of the GLA observed thus:

“The above section clearly limits the power of the Commissioner to executing leases or, conveyances on behalf of the President and the proviso to the section specifically limits the power to alienate unalienated land to the President. We find and hold that the Commissioner of Lands had no authority to alienate the disputed plot to the Applicants as he purported to do vide the letter of 18th December, 1997. That was the preserve of the president. It follows that the Commissioner of Lands could not have made any grant under the Government Land Act Cap. 280 Laws of Kenya nor could he pass any registerable title under the Registration of Titles Act Cap. 281 of the Laws of Kenya.”

46. From the foregoing, the Commissioner of Lands had no power whatsoever to allocate the Suit Property to the Plaintiff or confer any title. The purported allocation was therefore null and void. The Suit Property is and has been in use by a public entity and for public purposes.

Whether the 1st Defendant is entitled to the orders sought in the Counterclaim.

47. As stated above, the Suit Property was already alienated for public purposes and was fully developed with houses for the then East African Community. Therefore, it was not un-alienated. Having declared the purported alienation null and void, the Plaintiff’s title which also arose from that process cannot be good title.

48. Section 26 of the Land Registration Act provides for cancellation of a title obtained under certain circumstances. The section states as follows;

“(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, procedurally or through a corrupt scheme.

49. Having found that the Plaintiff’s title was acquired unprocedurally and illegally, the same must be cancelled. This court agrees with the pronouncement of the court in *MOSES OKATA OWUOR & ANOTHER VS A.G & ANOTHER (2017) eKLR* where the court held that:

“This court having found that the Plaintiff’s title was obtained irregularly, the court finds it null and void and further, this court finds that it has no option but to cancel the certificate of title issued to the Plaintiff herein”.

50. Accordingly, this court finds that the 1st Defendant has proved his case as required by the law. The Court therefore allows the 1st Defendant’s case as prayed for in the 1st Defendant’s Amended Defence and Counter-claim dated 4th July 2007 in terms of prayers number (b), (c), (d) & (e). Prayer (a) had already been allowed.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JANUARY 2022.

M.D. MWANGI

JUDGE

In the Virtual Presence of:-

No Appearance for the Plaintiff

Mr. Thuo for the 1st Defendant

Mr. Allan Kamau for the 2nd Defendant

Court Assistant: Hilda

M.D. MWANGI

JUDGE