



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC. CASE NO. E040 OF 2021

TEJENDRA MOHANLAL MANDALIA.....1ST PLAINTIFF/APPLICANT

CHIMANLAL MOHANLAL MANDALIA.....2ND PLAINTIFF/APPLICANT

HARISH KUMAR MANDALIA.....3RD PLAINTIFF/APPLICANT

VERSUS

LANDS REGISTRAR, KISUMU EAST AND WEST DISTRICT.....1ST DEFENDANT/RESPONDENT

ATTORNEY GENERAL.....2ND DEFENDANT/RESPONDENT

JUDGEMENT

Tejendra Mohanlal Mandalia, Chimanlal Mohanlal Mandalia, Harish Kumar Mandalia (hereinafter referred to as Plaintiffs have come to court by way of plaint against the Land Registrar Kisumu East and West District, the Hon. Attorney General of Kenya and the Ethics and Anti-corruption Commission claiming that they are the registered proprietors of all that parcel of land known as Kisumu/Municipality Block 11/143 situated within Kisumu City. That the suit parcel of land was purchased from the previous registered proprietor known as Mr. Edwin Rakwar. That documents held by the Lands Office show that the previous registered owner Mr. Edwin Rakwar was originally allocated the suit land in accordance with the law following due process.

That the said Edwin Rakwar did make payments to Commissioner of Lands as demanded by bankers cheque for Kshs. 169,917/= dated 13.8.94 and certificate of lease issued to him. That plaintiffs did purchase the said parcel of land from the said Edwin Rakwar and did follow all the legal and due process to have the same transferred into their names. That the plaintiffs have been paying both land rates and land rent to both national and county governments when they fall due appropriately. When plaintiffs wanted to develop the plot, they did apply for change of user from residential to residential cum commercial to the relevant government agencies and the due process was followed with approval being granted by all agencies as mandated by law. The plaintiffs have repeatedly been leasing the said parcel of land where a communication mast has been erected and the leases have been duly registered and renewed with approval of the lands ministry.

That when the plaintiff's wanted to develop the parcel of land further for economic purposes they were surprised that the 1st Respondent had placed a restriction on the said parcel of land without the knowledge of the plaintiffs and any inquiries as who or why this has been done has not received any response. It is clear that the plaintiffs cannot be able to develop their land with the said restriction being placed on the land without any reason and whoever has placed such restriction has never taken any action to assert whatever claim of any nature to enable us deal with it. That in so far as the restriction is existing the plaintiffs shall not be able to develop their parcel of land further and any plans for approval will be declined until such restriction is removed.

That it is thus imperative that this court grants orders removing such restriction from the plaintiffs land as the plaintiffs are losing an opportunity to develop their land and have it make economic sense to them for the reason why they bought it in the first place.

Despite notice made, the defendants have neglected and/or refused to stop their illegal actions on the suit property. The plaintiff avers that there is no other pending suit or any other previous proceedings between the parties herein in any other court. The cause of action arose within the jurisdiction of this Honorable Court.

The Plaintiffs pray for an order directed at the 1st Defendant ordering him/her or his/her agents or persons acting under his/her directive removing the encumbrance in the form a restriction placed against Kisumu/Municipality Block 11/143 belonging to the plaintiffs.

The plaintiff further prays for a permanent injunction to restrain the defendants, their agents or servants or any other person acting through their direction or order from continued to place an encumbrance of any nature form on the property known as Kisumu/Municipality Block

11/143 belonging to the plaintiffs.

Lastly, they pray for General damages against the defendant for trespass and Costs of this suit and Interest from the date of filing this suit until payment in full.

The Attorney General for the 1st and 2nd Defendants filed a defence that was a mere denial of allegations by the plaintiffs and the Attorney General appeared to be a stranger to all allegations despite there being a restriction entered on record.

Moreover, the Attorney General sought the enjoining of the Ethics and Anti-corruption Commission and the Ministry of Housing and Urban Development. Ultimately, the Ethics and Anti-corruption Commission was enjoined as an Interested Party.

On 22/9/2021, this court made an order that this matter be dealt with by way of case stated. The Ethics and Anti-Corruption Commission to be enjoined as Interested Party and be served within 5 days. The Respondent and the Interested Party to file responses within 7 days of service. The Plaintiff to file their case stated with submissions within 7 days of service. The Defendant and Interested Party to file their case stated with submissions within 7 days of serve. Judgment on 20/1/2022.

The Plaintiff has filed his case statement but the defendant and the Interested Party have not filed their case statements. It is not disputed that the Plaintiffs are the current registered proprietors of parcel Number Kisumu/Municipality Block 11/143. There are restrictions placed by the 1st Defendant at the instigation of Ministry of Housing and the Interested party since 2009 and 2017 respectively. The plaintiff has not been able to develop the suit property due to the said restrictions. There has been no action by the Interested Party or Ministry of Housing since the placing the Restrictions on the suit property.

I have considered the plaint, defence, evidence on record and do find that the plaintiffs are the registered owners of the suit property.

Article 40 of the Constitution of Kenya 2010 provides that:-

“1. Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property-

a. of any description; and

b. in any part of Kenya.

2. Parliament shall not enact a law that permits the State or any person-

a. to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

b. to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).

3. The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation-

a. 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

b. is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that

i. requires prompt payment in full, of just compensation to the person; and

ii. allows any person who has an interest in, or right over, that property a right of access to a court of law.

4. Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.

5. The State shall support, promote and protect the intellectual property rights of the people of Kenya.

6. The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”

Section 24 of the Land Registration Act provides:-

a. 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; and

b. the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

Section 25 provides that:

1. The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

2. Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

Section 26 provides that:-

(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.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

The above provisions of law protect a land owner who holds a lawfully acquired title. In this matter, there is no evidence of any illegality adduced by the defendants and the Ethics and Anticorruption Commission against the plaintiffs and the Land Registrar.

I do find that the plaintiffs have proved their case on a balance of probabilities and I do grant orders that the 1st Defendant removes the restrictions placed against the plaintiffs' title number Kisumu/Municipality Block 11/143. I do decline to grant prayers for injunction and damages as no evidence has been placed before the court that there will be future restrictions and that the Plaintiffs have not demonstrated that they have suffered any damage. Costs of the suit to the Plaintiffs against the defendants. Orders accordingly.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 20th DAY OF JANUARY, 2022

ANTONY OMBWAYO

JUDGE

This Judgment has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.