



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL AND LAND DIVISION
ELC CIVIL NO. 1291 OF 2013

**JOB KIBIWOT MUTAI T/A LUDI INVESTEMENTS1ST
 PLAINTIFF**

**JUDY WAMUIYA MUKOMA T/A JUKOMA ENTERPRISES2ND
 PLAINTIFF**

**JOHNSON HOMEGICHUHI T/A JOHNSON PROPERTY CARES COMPANY....3RD
 PLAINTIFF**

RUTH CHEPNGETICH 4TH PLAINTIFF

VERSUS

HEBATULLA INVESTMENT LIMITED.....1ST DEFENDANT

HEBATULLA PROPERTIES LIMITED.....2ND DEFENDANT

GOD’S HOUSE OF MIRACLES.....3RD DEFENDANT

COMMISSIONER OF LANDS.....4TH DEFENDANT

NATIONAL LAND COMMISSION.....5TH DEFENDANT

HON. ATTORNEY GENERAL6TH DEFENDANT

RULING

The plaintiffs by a Notice of Motion dated 29th October 2013 seek an order of injunction restraining the defendants and/or their agents or servants from dealing with or interfering with the plaintiff’s claim over the suit property and further from trespassing, re-alienating, transferring, charging, developing or in any manner dealing with L.R. NO.209/20208. The plaintiffs predicate the application on the several grounds set out on the face of the application and on the supporting and further affidavits sworn in support of the application by one **Job Kibiwot Mutai** on 29/10/2013 and 20/2/2014 respectively.

Interalia the plaintiff Applicants set out the following grounds in support of the application:-

- a. The plaintiff is the rightful owner of the suit property.
- b. The 4th & 5th Defendants have neglected, refused or failed to issue the plaintiff with a grant and/or certificate of lease.
- c. The 1st to 3rd Defendants have no color of right or legitimate claim over the suit property.
- d. The 4th and 5th Defendants did not have any title/grant to issue to the 1st, 2nd and 3rd Defendants over the suit property after already alienating and issuing the same to the plaintiffs.
- e. The 4th and 5th Defendants acted irregularly, illegally and fraudulently by purporting to issue a grant/title to the 1st and 2nd Defendants which overlaps the plaintiffs title.
- f. The 4th and 5th Defendants acted irregularly, illegally and fraudulently in purporting to convey the suit property to the 1st, 2nd and 3rd Defendants without the consent and or knowledge of the plaintiffs.
- g. The plaintiff has an irresistible claim to the title and will suffer irreparable loss, damage and/or detriment should the orders herein not be issued.

The plaintiffs aver that they were allotted the suit property measuring 1.2 hectares vide a letter of allotment dated 18.9.1995 annexed and marked "JKMI" to the plaintiffs affidavit. The plaintiffs state they accepted the terms of the offer and had the suit property subdivided into 25 subplots with the consent of the 4th Defendant as particularized in paragraph 6 of the supporting affidavit. The plaintiffs further aver that they were issued by the 4th Defendant with a letter of allotment in respect of each subplot and consequently grants/titles were processed by the 4th Defendant in respect of subplots being **L.R. NOS.209/13347** to **209/13351** leaving 20 subplots without titles.

The plaintiffs further state that following a directive of the then minister for Environment that any property touching or abutting the Nairobi river must provide a riparian reserve of 30 metres the plaintiffs surrendered the 30 metres strip of the suit property touching the Nairobi river which meant the earlier subdivision undertaken was fundamentally affected as some of the subplots were lost while others were rendered unviable for the purposes earlier intended. This prompted the plaintiffs to apply to the 4th Defendant co consolidate the remaining subplots into one title and approval was granted by both City Council of Nairobi and the 4th Defendant resulting in the amalgamated plot **L.R.NO.209/20208** measuring 0.5742 hectares. The plaintiffs were issued with a fresh letter of allotment to the amalgamated plot dated 29/12/2011 marked "JKM9". The plaintiffs state that they in fulfillment of the terms and conditions of the new allotment paid the sum of **Kshs.2,962,720/00** on account of stand premium, rent, conveyancing fees, registration fees, stamp duty, survey fees, approval fees and planning fees.

The plaintiffs aver that their title to **L.R. NO.209/20208** was not processed by the 4th Defendant and state that they recently established that the 1st and 2nd Defendants have obtained title **NO. IR.141430** dated 23/11/2012 over property known as **L.R.NO.209/20567** which property the 1st and 2nd Defendants transferred to the 3rd Defendant on 28/5/2013. The plaintiffs aver that their enquiries and investigations have revealed that **L.R. NO.209/20567** overlaps **L.R.NO.209/20208** and it is their contention that the transactions resulting in the 1st, and 2nd and 3rd Defendants being registered as the owners of **L.R.NO.209/20567** were irregular, illegal and fraudulent as the 4th and 5th Defendants did not have the right to confer the ownership of the suit property on the 1st, 2nd and 3rd Defendants when the plaintiffs were the rightful owners.

The plaintiffs contend they have demonstrated a prima facie case with a probability of success and that the Defendants have acted in utter disregard of the law and that they in the circumstances are deserving and should be granted the order of temporary injunction sought.

In opposition to the plaintiffs application for injunction the 1st, 2nd and 3rd Defendants, firstly, filed preliminary objections and grounds of opposition dated 6th November 2013 and, secondly, one **Mohammed Fidaali Mulla Hebatullah** a director and shareholder of the 1st and 2nd Defendants filed a replying affidavit sworn on 31st January 2014. One **Pastor Morrison Kareithi** swore a replying affidavit

on 31st January 2014 on behalf of the 3rd Defendant. The 4th, 5th and 6th Defendants filed grounds of opposition dated 20th January 2014 and did not file any replying affidavit.

The 1st, 2nd and 3rd Defendants by their grounds of opposition contend that the 4th Defendant's purported allocation to the plaintiffs of the suit land was irregular and of no consequence since the suit land was at the time owned by the 1st and 2nd Defendants and could not have been available for allocation to anybody. The allocations were therefore null and void. The 1st, 2nd and 3rd Defendants further aver that at all material times they were in possession and entitled to the property known as **L.R.NO.209/20567** and the 3rd Defendant has a church building erected thereon and hence the restrictive order of injunction applied for by the plaintiffs cannot be available. That the plaintiffs are guilty of material nondisclosure of information which disentitles them to the grant of the equitable remedy of injunction.

The 4th, 5th and 6th Defendants by their grounds of opposition contend that:-

- i. The plaintiffs application offends the mandatory provisions of section 16 of the Government proceedings Act Cap 40 Laws of Kenya.
- ii. The whole suit is fatally defective, frivolous and vexatious and an abuse of the court process.
- iii. The plaintiffs are entities lacking juridical status capable of owning land hence not entitled to the reliefs sought in the interim.
- iv. The reliefs sought are not available against the Government.
- v. The suit as drawn is defective for misjoinder of the 4th Defendant.

The replying affidavit sworn by **Mohammed Fidaali Mulla Hebatullah** on behalf of the 1st and 2nd Defendants on 31/1/2014 and filed in court on 5/2/2014 sets out in detail the history attaching to the suit property. The deponent deposes that the suit property formed part of the lands transferred to **Ahmedali Mulla Hepatulla** and **Fidaali Mulla Hepatullah** by **Ewart Scot Grogan**. By the Assignment (transfer) made on 21st March 1960 between **Ewart Scott Grogan** and the latter the property transferred was:-

“ALL THAT piece or parcel of land in the city of Nairobi in the Nairobi Area of the Republic of Kenya comprising sixty-eight acres or thereabouts that is to say Land Reference Number 209/136/239 of Meridional District South A 371 which said piece or parcel of land is a portion of the G // d premises comprised in and demised by the lease and is more particularly delineated and described on Plan Number 74461 annexed to the Assignment dated the 21st March 1960 (registered at the Government Lands Registry at Nairobi in Volume N.44 folio 165/1)”.

Thus pursuant to this conveyance of 21st March 1960 the 1st and 2nd Defendants through **Ahmedali Mula Heptulla** and **Fidaali Mulla Heptulla** became seized of **L.R. NO. 209/136/239** out of which the suit property was derived. It is however unclear from the pleadings when the 1st and 2nd Defendant actually got registered as the owners of **L.R.NO.209/136/239**. The fact however is that their ownership of the property prior to the purported allocation is not disputed.

The deponent further deposes that the Commissioner of Lands by a letter dated 22nd February 1982 agreed to extend the original lease that was due to expire in 2003 to make the total unexpired term of 99 years with effect from 1st July 1989. The 1st and 2nd Defendants state that in the 1990s the office of the Commissioner of Lands apparently had made some illegal and irregular allocations of the defendants said land and wished to regularize the said allocations by getting the 1st and 2nd Defendants to surrender their title which they declined to do and refers to Commissioner of Lands letter dated 4th July 1997 annexed and marked **“MFMH2”** where the Principal Registrar of Titles was urging them to execute and return the document of surrender for registration. By a further letter of 5th December 1997 from the Principal Registrar of Titles addressed to the 1st and 2nd Defendants annexed and marked **“MFMH3”** the Lands office wrote thus:-

Dear Sirs,

Re: Surrender of L.R.NO.209/136/239/25 swamp Estate - Nairobi

“Please refer to my two letters on the above matter ref. 67314/111/22 dated 5th June 1997 and 67314/111/27 dated 4th July, 1997 requesting you to execute the document of surrender of the above property and to return the same for registration”

This is to advise that you should treat both letters as cancelled and instead return the document of surrender un-executed for destruction

Signed

F.R.S.ONYANGO

PRINCIPAL REGISTRAR OF TITLES

The import of the correspondence with the Commissioner of Lands is that there is acknowledgement that the 1st and 2nd Defendants were the owners of the subject suit property and that no surrender of ownership was actualized.

The Defendants depone that following the illegal and irregular allocations, various individual titles carved out portions of **L.R.NO.209/136/239** (referred to as (“**Swamp Estate**”)) were made but were later cancelled. The Defendants state that arising from the irregular and illegal allocations notably where **Ngara Girls Secondary School** claimed **L.R.NOS.209/13371** and **L.R.209/11372** the High Court in **HCCC NO.346 of 2005** held that the said titles formed part of **L.R.NO.209/136/239** and that the bonafide proprietor of **L.R.NO.209/136/239** was **Hebatulla Investments Ltd** the 1st Defendant herein. The 1st and 2nd Defendant aver that during the year 2003 they entered into negotiations to sell to the 3rd Defendant the remainder of **L.R.NO.209/136/239** having regard to the portions that had been transferred out of the original **L.R.NO.209/136/239** and that following the resurvey of **L.R.209/136/239 R** a deed plan NO. 343189 was issued and the remainder was given a parcel number **L.R.NO.209/20567** which is the parcel that the 1st and 2nd Defendant conveyed to the 3rd Defendant. The 1st and 2nd Defendants contend that the plaintiffs have no proprietary interest in the suit property as no valid allotment could be made to them when the property was owned by and registered in favour of the 1st and 2nd Defendants.

The 3rd Defendant states it purchased the suit property from the 1st and 2nd Defendants in 2003 and they were granted lawful occupation and possession in 2003 and have constructed there at a church. The formal transfer of the property was effected to the 3rd Defendant on 28th May 2013 and the 3rd Defendant is now the indefeasible owner of **L.R. NO.209/20567**. The copy of title in respect of **L.R.NO.209/20567** dated 23rd November 2012 is annexed and marked “**PMK1**”.

The Applicants filed a supplementary affidavit sworn on 20th February 2014 to respond to the 1st, 2nd and 3rd Respondents replying affidavits. The relevant paragraph of the supplementary affidavit is paragraph 9 which goes to show that there were negotiations between the Government and the 1st and 2nd Defendants for the purchase of **L.R.NO.209/136/239** by the Government from the 1st and 2nd defendants, renewal of lease in favour of the 1st and 2nd Defendants and approval of developments the 1st and 2nd Defendants intended to undertake. The correspondences annexed as “**JKM 13**” illustrate the nature of the negotiations.

The Applicants aver that the Government purchased 27.18 acres from the 1st and 2nd Defendants which was part of **L.R.NO.209/136/239R** for purposes of canalization of Nairobi River, dual carriage way, school fields and other purposes. The applicants contend that the government paid **Kshs.800,000/-** being the full consideration and approved the extension of the lease and the development plans by the 1st and 2nd Defendants. The applicants depone the land purchased by the Government from the 1st and 2nd Defendants vested in the Government and some of it was allocated to **Muranga Road Primary School**,

River Bank Primary School, and Ngara Secondary school. The Applicants contend the land that was allocated to them was the remainder of the 27.18 acres sold to the Government by the 1st and 2nd defendants after the allocation to the above mentioned entities. The Applicants claim they were legitimately allocated the land and are entitled to have their property rights protected under the law.

The parties filed written submissions as directed by the court. The plaintiff/Applicants filed their submissions dated 3rd April 2014 on 7th April 2014 where they reiterate the facts of the case as set out in the applicants supporting affidavit and the supplementary affidavit. The 1st, 2nd and 3rd Defendants filed their submissions dated 12th May 2014 on 15th May 2014 in which they highlight and reiterate the facts of the case as set out in the replying affidavits filed on behalf of the 1st, 2nd and 3rd Defendants. The 4th, 5th and 6th Defendants filed their submissions dated 22nd May 2014 on the same date where they principally argued that the plaintiffs application as against the 4th, 5th and 6th Defendants offends the provisions of section 16 of the Government proceedings Act Cap 40 Laws of Kenya in so far as it sought injunctive reliefs against the Government. Further the 4th, 5th and 6th Defendants submitted that the plaintiffs being merely business outfits registered under the Registration of Business Names Act, Cap 499 Laws of Kenya lack the legal capacity to own land and cannot therefore be entitled to the reliefs sought in the application.

I have carefully reviewed and considered the application, the affidavits in support and in opposition, and the parties filed submissions and the issue that stands out to be determined by the court at this interlocutory stage is whether the plaintiff have established and/or demonstrated they have a prima facie case with a probability of success to warrant the court to grant an interlocutory order of injunction as prayed for in the application. The courts in an application for a temporary injunction are guided by the principles/conditions for grant of injunction as enunciated in the case of **GIELLA –VS- CASSMAN BROWN & COMPANY LIMITED (1973) EA 358** where the court held that:-

- (i) An applicant has to establish and/or demonstrate a prima facie case with a probability of success,
- (ii) That damages would not be an adequate remedy and that the applicant stands to suffer harm unless the injunction is granted,
- (iii) where the court entertains any doubt in regard to the first two conditions the court can determine the matter by considering the balance of convenience.

The Applicants submit that they are lawful allottees of the suit property by the Government and that they have met and satisfied the terms and conditions of allotment entitling them to be granted a certificate of title to the suit property. The Applicants submit that the 1st and 2nd Defendants surrendered the suit property to the Government and that a consideration of **Kshs.800,000/-** was paid by the Government to the 1st and 2nd Defendants and that the suit property vested in the Government way back in 1982. The plaintiffs argue the 4th and 5th Defendants having alienated the suit property to the Applicants could not purport to issue any title/grant to the 1st and 2nd Defendant's as there was no property to alienate to the 1st and 2nd Defendants. The Applicants contend the issue of title to the 1st and 2nd Defendants was fraudulent and irregular and was in violation of the plaintiffs property rights.

The 1st and 2nd Defendants for their part submit that they have ever since **1960** when **L.R.NO.209/136/239** was transferred to **Ahmed Hepatulla** and **Fidaali Heptullah** been the beneficial owners of the suit property and that on 6th December 2012 the 1st and 2nd Defendants were issued by the Commissioner of Lands with title documents in respect of **L.R.NO.209/20567** which was the remainder of **L.R.NO.209/136/239** which they transferred to the 3rd Defendant on 28/5/2013. The 1st and 2nd Defendants submit that the allocations made to the plaintiffs were irregular and fraudulent since the 1st and 2nd Defendants were still the owners of the suit property and they had not surrendered the same. The 1st and 2nd Defendants submit that the plaintiffs are but **"land grabbers"** who cannot be entitled to the prayers sought and the court ought not to aid and facilitate an illegality.

The 3rd Defendant submits that they are the registered proprietors of the suit property having purchased the property in 2003 when they were granted possession. That transfer of the suit property was effected to the 3rd Defendant on 28th May 2013 and by virtue of sections 25 and 26 of the Land Registration Act NO. 3 of 2012 the 3rd Defendants rights over the suit property are absolute and indefeasible and are not liable to challenge save as provided under section 26 1(a) & (b) of the Land Registration Act on the ground of fraud or misrepresentation to which they are shown to be a party or if it is shown the title was acquired illegally, unprocedurally or through a corrupt scheme. The 3rd Defendant asserts they were bonafide purchasers for value without any notice of any defect in title and that their title is absolute and indefeasible.

On the basis of the evidence and material placed before the court, the court is not satisfied that the plaintiffs have established or demonstrated a prima facie case with any probability of success against the Defendants for the following reasons.

It is not disputed that the suit property was part of a larger parcel of land **L.R.NO.209/136/239** that was transferred to the predecessors of the 1st and 2nd Defendants in 1960. Whereas the Applicants have alluded to there having been a surrender by the 1st and 2nd Defendants of certain portions of **L.R.NO.209/136/239** there is no evidence to support such surrender. The correspondence the plaintiff rely on to show there was a surrender is not admitted by the Defendants. At any rate there is also correspondence emanating from the Commissioner of Lands to show that the proposed surrender was abandoned (see letters of 4th July 1997 and 5th December). A surrender in my view can only be evidenced by a duly executed instrument of surrender which must be registered in order to be effective. There was no such an instrument executed by the 1st and 2nd Defendant in the instant case and no surrender of the suit land was ever effected. It has not been suggested that the Government was compulsorily acquiring the identified parcel of land from the 1st and 2nd Defendants. If that were the case the provisions of the Land Acquisition Act, Cap 295 Laws of Kenya (now repealed) would have had to have been complied with whereby the intention to acquire the land would have needed to have been notified to the owners and gazetted following which an enquiry as to quantum of compensation would have been done and the Commissioner of Lands would have made an award for compensation the affected individual land owners. Thereafter a surrender of the acquired land would have been required and the land Registrar would have been notified whereupon the land would have vested in the Government who would then take possession. Thus in my view this was not a case of compulsory acquisition and as it was not then it ought to have been a case of willing seller and willing buyer. No agreement of sale has been exhibited between the Government and the 1st and 2nd Defendant to support any sale transaction as section 3 of the Law of Contract Act Cap 23 Laws of Kenya would have required that such a transaction be evidenced in writing.

Even if there was such a sale where the Government was purchasing the property for public purposes the issue would arise whether or not the Commissioner of Lands would have had the authority to alienate land purchased and reserved for public purposes to private investors or individuals such as the Applicants. The process the Commissioner of Lands used to make the allocations would also be put to question. The power of the Commissioner of Lands to alienate/allocate land was before the new regime of the Land Acts delegated by the President under section 3 of the repealed Government Lands Act Cap 280 of the Laws of Kenya. The Commissioner of Lands had to comply with **sections 9, 11, 12 and 13** of the repealed Government Lands Act which outlined the process and procedure of alienating unalienated Government land. The plaintiffs have not shown that the Commissioner of Lands adhered to these provisions in making the allocation to them and thus whether or not there was compliance would therefore be a matter for the trial court to satisfy itself.

Further if it is established that the Government indeed purchased the suit property as alleged for public purposes then the Commissioner of Lands would have lacked the capacity to make the allocations to the plaintiffs as he would have been constituted a trustee on behalf of the public in regard to the acquired land. The land would not be available for allocation to private individuals (see the cases of **John Peter Mureithi & 4 others (2006) eKLR**, **James Joram Nyaga & Another (2007) eKLR**, **Niaz Mohammed-vs- Commissioner of Lands & others HCCC NO. 423 of 1988**, **Commissioner of Lands**

–vs- Coastal Aquaculture Ltd. Civil Appeal NO.252 of 1996 and –vs- Misc Civil Appl. NO. 273 of 2007 Republic –VS- Commissioner of Lands & 3 others Exparte **Associated steel Ltd** where the courts considered and unequivocally upheld the doctrine of public trust in cases where the Government had compulsorily acquired land for public purpose maintaining that such land could only be used for the intended public purpose and that any allocation of land reserved for public purpose is illegal and unlawful and the Commissioner of Lands would have no power or authority to allocate such land.

As I am not required to make any determination at this stage as to whether there was an acquisition by the Government or whether it was for some identified public purpose, I will not express any view so as not to prejudice the trial court and I will leave it at that.

I have considered the submissions by the 4th, 5th and 6th Defendants and I agree with the submission that the 4th and 6th Defendants as officers of the Government cannot be injuncted in the manner proposed by the Applicants by reason of section 16(2) of the Government proceedings Act which provides thus:

(2) The court shall not in any civil proceedings grant any injunction or make any order against an officer of the Government if the effect of granting the injunction or making the order would be to give any relief against the Government which would not have been obtained in proceedings against the Government.

This provision is clear and I need not belabour the point. However I do not agree that the National Land Commission cannot be injuncted. It can in appropriate cases. It is an institution that can sue and be sued and cannot in my view fall in the same category as the Government and its officers. It is a body established with mandate to carry out various functions. If in the execution of its mandate it offends any person such person can approach the court for a reprieve and if an injunction would be the best remedy given the circumstances then it should be available to the injured party.

On the question whether the plaintiffs have the juridical capacity to own the land that they claim or to sue I would only observe that there could be no issue in so far as the 4th plaintiff is concerned. The alleged letters of allotment of the suit plots were all made in the joint names of the 4th Defendant and four other business firms who have now been fronted by their proprietors in the present suit. The present suit has been brought through the names of perhaps the owners of the business firms and to that extent the suit is competent. Whether or not the allocations in the names of the business names were properly made is matter the trial court will decide. What is clear is that a business name would have no legal capacity to sue in its name and it is no wonder that the individuals behind the business names are the ones who have instituted the present suit. As submitted by counsel for the 4th, 5th and 6th Defendants the nature and manner of the allocations goes to cast doubt as to the competency of the suit and the likelihood of its success.

I have expressed my view that I am not persuaded that the plaintiffs have a prima facie case and I am neither persuaded that the plaintiffs would suffer any irreparable harm and/or damage that cannot be compensated by an award of damages. The 3rd Defendant has been in possession of the suit premises since 2003 when they negotiated the purchase with the 1st and 2nd Defendant and was let into occupation and have constructed a church in the suit premises which is in use. The suit property has been transferred in the name of the 3rd Defendant and they are now the registered owners. The balance of convenience would tilt in favour of the 3rd Defendant and in not granting an injunction in the terms sought. However, having regard to the facts and circumstances of this case I am persuaded to grant an order preserving the subject matter of the suit in the condition it is in until the suit is heard and determined in view of the fact that both the plaintiffs and the Defendants claim to be entitled as owners of the suit property.

In the premises I therefore make an order that the parties observe and maintain the existing status quo on the terms that:-

- 1. The 3rd Defendant shall be entitled to remain in possession and to use the suit premises as they have been using save that they will not be permitted to undertake any further**

developments of a permanent nature on the suit land unless with the leave of the court until the suit is heard and determined.

- 2. The parties shall within the next sixty (60) days from the date of this ruling prepare the suit for trial by complying with Order 11 of the Civil Procedure Rules 2010.**
- 3. After the expiry of 60 days from the date of this ruling any party who will have complied with order 11 of the Civil Procedure Rules shall be at liberty to fix the suit for a pre trial conference to take pretrial directions.**
- 4. The order for status quo shall remain in force for 12 months from the date of this ruling and shall lapse on expiry of the period unless the same is for reasons to be recorded extended by the court on the application of any party.**
- 5. Each party to bear their own costs of the application.**
- 6. Parties at liberty to apply.**

Ruling dated, signed and delivered at Nairobi this...**31st**...day of...**October**.....2014.

J.M. MUTUNGI

JUDGE

In the presence of:

Mr. Nyanga.....For the Plaintiffs

Mr. C.N. Kihara.....For the 1st 2nd, & 3rd Defendants

Mr. Motari..... For the 4th, 5th, & 6th Defendants