



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

ELC. CASE NO. 822 OF 2012

PETER BUTALI 1ST PLAINTIFF

JACKSON MUNGAI MWAURA.....2ND PLAINTIFF

PAUL NGUGI MUCHAI.....3RD PLAINTIFF

VERSUS

THE DISTRICT LAND REGISTRAR1ST DEFENDANT

THE CHIEF REGISTRAR OF TITLES2ND DEFENDANT

THE PERMANENT SECRETARY,

MINISTRY OF ROADS AND PUBLIC WORKS.....3RD DEFENDANT

THE HONOURABLE ATTORNEY GENERAL.....4TH DEFENDANT

VIEWLAND INVESTMENTS COMPANY LIMITED.....5TH DEFENDANT

RULING

Coming up before me for determination is the Chamber Summons application dated 24th August 2010 in which the Applicants sought orders prohibiting the 3rd Respondent from trespassing and interfering with the Applicant's parcel of land identified as L.R. No. 12840 pending the hearing and determination of this application and of the main suit.

The application was based upon the grounds appearing on the face of the Application and the Affidavit of Peter Butali sworn on 24th August 2010 in which he swore that he and 34 other plot owners of L.R. No. 12840 (hereinafter referred to as the "Suit Property") bought the said plots from the 5th Respondent. He stated further that on 31st July 2010 certain persons from the 3rd Respondent started erecting beacons on the Suit Property without the Applicant's prior approval or authority. He further stated that the said persons marked some developed properties on the Suit Property for demolition. He further averred that those actions were wrongful and unlawful exercise of statutory power and denied the Applicants protection of the law and due process guaranteed by Sections 70, 74, 75, 76 and 77 of the Constitution of Kenya. They produced copies of their Certificates of Title.

The Application is contested. The 1st – 4th Respondents filed their Replying Affidavit sworn by Thomas

Gicira Gacoki dated 23rd May 2012 in which he stated that in the 1970s, the Government acquired 44.14 acres out of 85.7 acres of land parcel L.R. No. 7705/2 owned by Colorado Estates Ltd for purposes of constructing Nairobi-Thika road dual carriageway through negotiation and that full compensation was paid to the said company. He further stated that the 44.14 acres which was acquired by the Government included 10.32 acres of “severed” land which was renamed L.R. No. 12840 which is the Suit Property where the Applicants occupy. He further stated that L.R. No. 7705/2 changed hands to Gatumaini Farmers Company Ltd who transferred the same to Central Kenya Ltd in 1985 on condition that the Government had acquired 44.14 acres thereof and that the purchaser, its successors and assigns would transfer the acquired portion to the Government. He further indicated that the Respondents have not trespassed on the Suit Property as it is the Applicants who have unlawfully occupied the Suit Property which had been acquired by the Government for public utility purposes. He stated further that the titles and letters produced by the Applicants were acquired fraudulently and the same were illegal and unconstitutional.

The 5th Respondent filed the Further Affidavit of Jacinta Mary Wanjiru, a director, sworn on 6th June 2012 in which she stated that Mr. Thomas Gicira Gacoki was referring to a different property from the one they bought from Gatheca Family Company Ltd. She stated that Mr. Gacoki was referring to some 44.14 acres on L. R. No. 7705/2. She indicated that the land 5th Respondent bought was the Suit Property measuring 4.936 Hectares with a separate title number I.R. 35361. She further indicated that the Suit Property was allocated by the Commissioner of Lands to Gatumaini Company Ltd for a term of 72 years and 6 months commencing from 1st July 1979 under Grant No. 35361. She further stated that Gatumaini Company Ltd sold the Suit Property to Gatheca family Company Ltd on 22nd July 1986 as I.R. 35361/4. She then stated that Gatheca Family Company Ltd sold the Suit Property to the 5th Respondent on 16th December 1998 as I.R. 35361/5. She stated that all the above transactions were conducted above board and the Government gave its consent to the transfers. She indicated further that the 5th Respondent applied for and obtained consent to sub-divide the Suit Property which was granted on 18th June 1999. She stated further that the 5th Respondent then proceeded to transfer the plots to the new owners and titles were issued to them. She stated further that there were no encumbrances on the Suit Property from the date of allocation to the subsequent sale to the current registered owners.

The Applicant’s filed their Supplementary Affidavit sworn by Peter Butali on 5th June 2012 in which he stated that the Applicants acquired clean title from the 5th Respondent which were issued by the 1st Respondent. He also stated that in 1998, the 2nd Respondent approved the subdivision of the Suit Property in favour of the then owners Gatheca Family Company Limited. He also stated that the Applicants were innocent purchasers for value. He also stated that the registered proprietors of the Suit Property had absolute proprietorship over the Suit Property. He also stated that the Government continued to levy them rents and rates over the Suit Property which they dutifully paid.

The Petitioners, 1st – 4th Respondents and 5th Respondents all filed their submissions which have been read and taken into consideration by this court.

Based on the affidavit evidence submitted to this court, it emerges quite clearly that there are two distinct parcels of land the subject matter of this suit. The first is L.R. No. 7705/2 and the second is L.R. No. 12840. According to the evidence, the transactions on these two parcels of land were distinct and should not be intermingled. Firstly, L.R. No. 7705/2 which was 85.7 acres in size was owned by Colorado Estates Ltd. We are told that the Government acquired 44.14 acres out of the 85.7 acres of this parcel of land in the 1970s and fully compensated Colorado Estates Ltd for this acquisition. We were further told that this parcel of land was further sold to Gatumaini Farmers Company Ltd and then to Central Kenya Ltd in 1985. It is the contention of the 1st – 4th Respondent that the Suit Property was hived out of this parcel of land.

Other evidence adduced before this court is to the effect that the Suit Property which measures 4.936 hectares was allocated by the Commissioner of Lands to Gatumaini Co. Ltd who sold the same to Gatheca Family Company Ltd who later sold to the 5th Respondent who in turn sold to the Applicants.

The point being made here is that the Suit Property is not to be confused as forming part of L.R. No. 7705/2 as was being alleged.

The main issue for determination at this point is whether or not the Suit Property formed part of the portion acquired by the Government out of L.R. No. 7705/2. Have the Applicants proved on a prima facie basis that it is not, thereby warranting granting them the interlocutory injunction they seek herein?

At this juncture, there is no question in my mind that the two parcels of land are distinct and have separate titles. There is sufficient documentary evidence produced to support the assertion that the Government acquired 44.14 acres of land out of the 85.7 acres comprising L.R. No. 7705/2. However, no evidence has been produced to convince me that the Suit Property was part of that portion. Documentary evidence produced points to fact that the Suit Property was and still is a distinct parcel of land which was not acquired by the Government. Accordingly, to that extent, I find that the Applicants have established a prima facie case with a probability of success at the main trial.

Will the Applicants suffer irreparable injury which cannot be compensated with damages? I find in the affirmative arising from the fact that the Applicants have developed their various plots. Further, land is unique and no one parcel can be equated in value with another. To that extent, I find that they have satisfied this requirement.

In whose favour does the balance of convenience tilt? The same tilts in favour of the Applicants who are in occupation and have heavily invested in the Suit Property.

In light of the foregoing, I hereby allow the application with costs to the Applicants.

It is so ordered.

SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF JULY 2013.

MARY M. GITUMBI

JUDGE