



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CIVIL SUIT NO. 13 OF 2006

CHURCH COMMISSIONERS FOR KENYA1ST PLAINTIFF

FORTUNTAS KARENJU MUGWIMI.....2ND PLAINTIFF

RUTHANJI & NJIRUINI COMPANY3RD PLAINTIFF

VERSUS

THE HON. ATTORNEY GENERAL1ST DEFENDANT

COMMISSIONER OF LANDS2ND DEFENDANT

SUNDOWN PROPERTIES LTD.....3RD DEFENDANT

JUDGMENT

Church Commissioners for Kenya, Ruthanji and Njiruini Company and Fortuntas Karenju Mugwimi Wachira, being the 1st, 2nd and 3rd Plaintiffs respectively filed the **Plaint** dated 28th February, 2006 against the **Attorney General, Commissioner of Lands and Sundown Properties Ltd**, the 1st, 2nd and 3rd Defendants respectively. In the **Plaint**, the Plaintiffs sought for judgment against the defendants in the following terms:

- a. **That the allotment of plots No. Nyeri/Municipality/Block 1/29 and 214 and the subsequent registration of the same be revoked and the same to revert to its intended position as a car park access of a sewer line.**
- b. **That the 3rd defendant do remove its building material that it has put on the site.**
- c. **That the defendant do pay the costs of this case to the plaintiffs.**
- d. **That any other relief that this court deems fit to grant.**

The Defendants each filed a defence to deny the Plaintiffs' claim.

The Plaintiffs' case appear to be short and straightforward. It is the case for the Plaintiffs that being owners of plots **Nos. Nyeri/Municipality Block 1/32,31 and 30** that the disputed plots i.e. plots **No. Nyeri/Municipality Block 1/29 and 214** have been reserved as a Car Park and are in such use up-to date. They claimed that the plots were illegally acquired by the 3rd Defendant through its Directors because the mandatory provisions of the **Government Lands Act** were not followed. The Plaintiffs further argued that there is a sewer line which serves their plots and unless the same is preserved those sewer lines are likely to be interfered with. They also aver that the plots serve as a frontage and if the

Defendants are allowed to put up buildings they will have no parking nor adequate sunlight and that they will lack access to their properties. The Plaintiff summoned the evidence of one **Patrick Muro** (PW1) who stated that the plots in dispute were reserved as a Public Car Park but were grabbed. **Adeline Auma** (PW2) told this court that her mandate as a Physical Planner was to prepare plans, advertise and circulate them to the relevant departments. PW2 stated that all plots must have access at the front and at the back. It is also PW2's evidence that the plot owner should only develop 75% of the plot leaving free 25%. PW2 further stated that her department did not approve the development plan of the disputed plot.

I have already stated that the Defendants denied the Plaintiffs' claim. They state that the disputed plots were allocated to the 3rd Defendant for a leasehold term of 99 years. The Defendants summoned **Silas Kiogora Mburugu**(DW1), the Chief Lands Officer whose duties include preparation of leases, grants and allocations. He told this court that the Commissioner of Lands had stopped any developments on the suit plots. DW1 Further stated the the Director of Physical Planning had proposed for the plots to be a parking space but the proposal was never approved. There is also evidence presented by the defence showing that the Commissioner of Lands directed a restriction be placed on the plots until a solution to the dispute is resolved and also state that the plots had been allocated to the 3rd Defendant. It is the evidence of the Defendants that investigations by the Director of Physical Planning confirmed that the land was not an open space. It was also stated that the plan by the allocation committee to make the plots in dispute as a car parking was not approved. This prompted the Commissioner of Lands to write to the District Land Registrar, Nyeri to remove the restrictions stating that the plans to make the plots in dispute as a parking lot was not approved. It is further the submission of the Defendants that the restrictions placed on the titles having been removed meant that the owners were allowed to deal with the land as they deemed fit. **Agnes Mugo** (DW2) a Director of Sundown properties, the 3rd Defendant, told this court that the disputed plots were registered in the name of the 3rd Defendant after paying the required premiums after which titles were issued. DW2 also stated that the 3rd Defendant used to deposit building materials on the suit plots until August, 2005 when it started developing the same. The Defendants submitted that the plaintiffs have failed to present evidence showing that the plots were designated as a Car Park and that the evidence tendered indicate that there were mere proposals to have the suit plots made a parking lot.

I have considered the evidence presented by both sides in detail. I have further considered the rival submissions plus the authorities relied upon . There is no dispute that the plaintiffs are the owners of:

- i. **Nyeri/Municipality Block 1/32**
- ii. **Nyeri/Municipality Block 1/31 and**
- iii. **Nyeri/Municipality Block 1/30**

respectively. It is also not in dispute that the 3rd Defendant is the registered proprietor of

- i. **Nyeri/Municipality Block 1/29 and**
- ii. **Nyeri/Municipality Block 1/214**

There were no agreed issues filed in this case but I will use those drawn in the 3rd Defendant's submissions as a guide.

The first question is whether plots **Nyeri/Municipality 1/29 and 214** were designated as a Public Parking Space. The Plaintiffs presented evidence in a bid to show that the plots in dispute had been reserved as a parking. However, the Defendants summoned the evidence of **Silas Kiogora Mburugu**(DW1) the Chief Lands Officer in the Ministry of Lands. This witness stated that he was aware of the dispute over the plots. DW1 produced documents and correspondences showing that the Commissioner of Lands had placed restrictions on titles to the disputed plots pending investigation. DW1 further produced a copy of a report prepared by the Director of Physical Planning which was to the effect that the plots were initially proposed to be a parking space but the proposal was never approved. DW1 was also able to produce correspondences showing that the Commissioner of Lands had vacated the restrictions placed on the titles and a report to the effect that the plots had been allocated to the 3rd Defendant. In short the plan by the plot Allocation Committee for the plots to be reserved as a parking

was not approved by the relevant authorities. I am convinced that the Plaintiffs have failed to prove on a balance of probabilities that plots **No. Nyeri/Municipality Block 1/29 and 214** were designated as a Public Parking Space.

The second question which this court must grapple with is whether the allocations and subsequent registration of the suit plots in favour of the 3rd Defendant were lawfully done! The Plaintiff has stated that the 2nd Defendant did not follow the procedure laid down under **Sections 9,12,13,14, and 15** of the **Government Lands Act** in allocating the 3rd Defendant the suit plots hence the title documents should be revoked. A careful perusal of the aforesaid provisions will reveal that before allocating Public land, the following procedure must be adhered to:

- i. **Advertised:**
- ii. **Notification of Sale must be made**
- iii. **Sale must be gazetted**
- iv. **Plots must be auctioned.**

It is the Plaintiff's submission that the aforesaid procedure was not followed hence the alleged sale was improper and unlawful. The Defendants admitted the above procedures were never done in this matter. The Defendants have urged this court to find that the failure to adhere to the above guidelines was not fatal because the 3rd defendant acquired the plots in dispute under **Section 35** of the **Government Lands Act**. A careful examination of **Section 35** of the **Government Lands Act** will show that the Commissioner of Lands was given power to allocate government land without following the procedure set out under **Sections 9,12,13,14 and 15** of the same Act. This provision authorized the Commissioner of Lands to allocate Government Land for special purposes. DW1 stated that in a case where a plot is one or two, the developer approaches the Government with a request for allocation for certain developments, the proposal is made to the Chairman allocation committee who in turn requests for plans to be prepared and to thereafter make recommendations to the Commissioner of Lands to allocate the plot. It is said this procedure was followed in this case. It is stated that the procedure in Section 35 is followed in small schemes whereas the procedure alluded by the Plaintiff is only applicable in big schemes. I am satisfied that the plots in dispute were lawfully allocated to the 3rd Defendant in accordance with the law. For the above reasons, I think this suit must fail.

The 3rd Defendant has sought for damages for the loss it incurred as a result of the filing of this suit and the restriction imposed on the property. To be fair in the circumstances, I do not think the 3rd Defendant is entitled to any compensation. I say so because what the 3rd Defendant is alleged to have lost are building materials which were stolen on site. The 3rd Defendant had not obtained the necessary approvals for its building plans hence it cannot claim it was either stopped from putting on site its buildings neither can it state that it lost buildings due to the Plaintiff's acquiescence. I dismiss the counter-claim with cost.

In the end, the suit is dismissed with costs to the Defendants.

Dated, signed and delivered this 23rd day of August, 2013.

J.K. SERGON

JUDGE

In open court in the presence of Mr. Ombongi for Plaintiff

Miss Munyi for 1st and 2nd Defendant

Wanyonyi for 3rd Defendant