



IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 66 OF 2007

PATRICK K. LEPARLEEN.....PLAINTIFF
VERSUS
YARE SAFARIS LTD.....1ST DEFENDANT
MARALAL TOWN COUNCIL.....2ND DEFENDANT

JUDGMENT

Patrick K. Leparleen filed this suit on 22/3/07 against Yare Safaris Ltd and Maralal Town Council (1st and 2nd defendants respectively). He sought one main relief:-

(a) A declaration against both defendants that he plaintiff is the lawful owner of all that piece of land comprised in Grant No. I.R.M. 6185 and an order of vacant possession against the 1st defendant.

The 1st defendant filed a defence on 28/4/07 while the 2nd defendant filed a defence and counter claim. In the counter claim, the 2nd defendant sought the following prayers:-

(a) A declaration that the 2nd defendant (now plaintiff) is the proprietor of all that land comprised in the Grant I.R.M. 6185 and an order canceling the Grant (if any) issued to the plaintiff and all that land known as I.R.M. 6185 Maralal Township.

(b) Costs of this counter claim and any other relief that this court may deem fit to grant.

The plaintiff's case is that in 1987, he applied to the 2nd defendant for allocation of 25 acres of land. The 2nd defendant discussed the matter and resolved to give him 30 acres in the minutes of 14/9/1987 (Minute 15/87) The plaintiff was to be given 3 acres of land at Rankau near his current Manyatta for a temporary camp site whose lease was to be renewed every two (2) years. The camp site was supposed to be used by the 1st defendant in which he was a director. He produced the certificate of registration of the 1st defendant dated 19/8/1988. The directors were, the plaintiff Malcolm John Gascoigne and Liira Cerere each holding 1500 shares. Since the business had picked up, he applied for more land (17 acres) in 1995 and was issued with a letter of allotment dated 28/5/96 (PEX.4). The letter of allotment contained conditions that he had to make some payments and he did comply with them as per receipts (PEX.5 & 6). Upon collection of the letter of allotment the plaintiff saw two letters from the 2nd defendant stating that the Council did not object to the proposed campsite and lodge. A surveyor was dispatched to the area and prepared the Part Development Plan (PDP) for which he paid (Exh.8(a) & (b). It was approved by Director of Physical Planning (Exh.9) and he was ultimately issued with the title (PEX.10).

The plaintiff also told the court that the Company used to pay him Kshs.8,600/- for rent of the Campsite and Kshs.2,000/- as director's allowance per month, but when Malcolm died, the other directors refused

to pay him claiming that the land belonged to the Council and that is why he seeks that the 1st respondent be ordered to vacate the said premises.

Anthony Leaduma, the Town clerk of the 2nd defendant testified that the plaintiff was a director of the 1st defendant who were their tenants pursuant to a lease agreement entered into in 1989 for 20 years and it expired in 2008. The 1st defendant was then removed through the court process (DEx.1). DW1 also testified that during the lease the 1st defendant used to pay fees (DEx.2) and guest levy and service charge to the 2nd defendant (DEx.3). According to DW1, the plaintiff applied for allocation of a residential plot near Yare Safaris Camp Site and it was approved under letter dated 6/11/95 (DEx.6). By minute 4/95 of 23/2/1995, the appreciation by the plaintiff was postponed till the intents of the plaintiff was known (DEx.7). The issue was resolved on 6/9/95 (DEx.8) but was deferred till the committee visited the land. The resolution to allocate the plaintiff a residential plot was made on 28/9/95 (DEx.9) at minute 10/95 (b). By the meeting of 23/11/95, Town Planning committee at minute 15/95 complained that the plaintiff had taken up more area than was demarcated to him by the 2nd defendant (DEx.11). At minute 18/95 of 8/12/95 it was resolved that the plaintiff should not interfere with the 3 acres of the land, the subject of the lease with Yare Safaris and that his plot be outside the Yare Campsite. DW1 further said that the letter of allotment from the Commissioner of Lands did not go through the Council. He said that once an allocation is approved, it is demarcated by the surveyor, PDP is drawn and availed to the Council for comments or objections and if it passes all stages, it is sent to the Commissioner of Lands for approval. He denied that 17 acres were ever allocated to the plaintiff by the council. He urged the court to revoke the said title and reduce it to 3 acres. It was his contention that the plaintiff used fraudulent means to obtain the 25 acres of land from the 2nd defendant.

The counsel for all parties identified different issues for determination and I will condense them as follows:-

- 1. Whether there was a lease agreement between the plaintiff and 1st defendant;**
- 2. Whether the plaintiff acted fraudulently in the acquisition of the suit land;**
- 3. Whether the title issued to the plaintiff can be cancelled and register rectified to revert to the 2nd defendant.**

From an analysis of the evidence on record it seems there are three pieces of land or three allocations of land to the plaintiff. In respect of the 1st application for 25 acres, vide Resolution 1/87 of 1987, the plaintiff was allocated 3 acres of land near his Manyatta for a temporary camp whose lease was to be reviewed every two years. The land was to be used as a campsite by Yare Safaris Ltd in which the plaintiff was a director and shareholder (PEx.1). There is no evidence that that lease was ever reduced in to writing or that the plaintiff applied for its renewal after two years. The Resolution to allocate the plaintiff the 3 acres was made on 14/9/87 and it follows that the lease was set to expire on 13/9/89. The lease was never renewed.

The plaintiff denied that there existed any lease agreement between the defendants. The lease document DEx.10 was a copy of the lease purportedly entered into between the defendants over the three acres where the campsite stood. DW1 produced a copy of a lease agreement (DEx.1) it was entered into in 1989. The letter dated 19/7/1989 to the Town Clerk from Malcolm, a director of the 1st defendant, forwarded the draft lease agreement to the 2nd defendant. It is a copy and the date on the lease is not visible save for the year 1989. It bears a revenue stamp meaning that it was duly registered. It was a lease in favour of the 1st defendant for 20 years. In the absence of any evidence that the plaintiff ever renewed his lease with the 2nd defendant over the three acres in 1989, I find that the 1st defendant took over the lease which expired in 2008. The existence of a lease between the defendants is further fortified by the exhibits produced by the 2nd defendant i.e. returns of the service charge in respect of the 1st defendant's employees, guest levy charged by the 2nd defendant. According to DW1 the lease expired in 2008 and the

land reverted back to the 2nd defendant. It was clear that the plaintiff was not aware of that fact or that the 1st defendant had already been evicted from those premises. I find that the three acres that were leased to the plaintiff in 1987 reverted back to the 2nd defendant in 1989 when the two year lease expired and it was then leased to the 1st defendant for 20 years. The plaintiff cannot lay claim on the three acres on which the campsite stood.

The plaintiff did not avail the application he made in 1995 for 17 acres but he relied on the allotment letter dated 18/5/96. The plaintiff complied with the conditions set out in the allotment letter and the said allotment was supported by the letter of the Town Clerk to the Commissioner of Lands (PEx.7A) confirming that the Council had no objection to the proposal made by the plaintiff. Another letter was authored by the then District Commissioner, James Nyandoro indicating that the office did not object to the plaintiff's project. The plaintiff made the necessary payments the Part Development Plan was prepared (Ex.9) as a result of which the titles was issued (PEx.10). Although the payments were made much later in 2006, they were accepted and a title was issued. The acreage of the plot is 8.097 Ha. The 2nd defendant contends that due process was not followed in allocating land to the plaintiff and that the plaintiff presented forged documents to the Land Registrar in Nairobi and caused himself to be registered as the proprietor of the suit land. The law applicable to Trust Land was the **Constitution** (repealed) and the **Trust Lands Act Cap 285 Laws of Kenya. Section 115(1)** of the **Constitution** (old) provided that:-

“all Trust Land shall vest in the County Council within whose area of jurisdiction it is situated.”

Section 116 then provided for the manner in which land could be alienated. It reads:-

“A Country Council may in such manner and subject to such conditions as may be prescribed by or under an Act of Parliament, request that any law to which this subsection applies shall apply to an area of Trust Land vested in that County Council, and when the title to any parcel of land within that area is registered under any such law otherwise than in the name of the County council, it shall cease to be Trust Land.”

From the above provision it is clear that Trust Land can be alienated and registered on other law. The 2nd respondent's submission that the land could not be registered under **Registration of Titles Act** is not therefore correct.

Section 117(1) provides:-

“subject to this section, an act of parliament may empower a County Council to set apart an area of Trust Land vested in that County Council for use and occupation –

(a);

(b);

(c) by any person or persons for a purpose which in the opinion of the County council is likely to benefit the person ordinarily resident in that area or any other area of Trust Land vested in that County council, either by reason of the use to which the area so set apart is to be put or by reason of the revenue, to be derived from rent therefrom.”

It is the submission of the 2nd defendant that it never set aside land under **Section 117(c)** of the **Constitution**. However, a look at the letter from the Town Clerk (PEx.7A) discloses that the land was being set aside for a specific purpose i.e. Safari Lodge and Campsite. The letter dated 16/2/96 (PEx.7B) also addressed to the Commissioner of Lands and copied to the 2nd defendant indicated that the District Commissioner's office had no objection to the proposal of allocating land for a Safari Lodge and Campsite. I believe this is one of the purposes for which land would be alienated, that is, for the benefit of the Council or for bringing in revenue.

I am in agreement with the 2nd defendant's submissions that **Section 13(1)** and **(2)** of the Trust Land Act

provide the procedure for the alienation of Trust Land. **Section 13(1)** of the **Trust Land Act** is that it gives the Council the power to set aside Trust Land for its own use and occupation.

Section 13(c) echoes the provisions of **Section 117(c)** of the **Constitution** (old) which I have set out above. Land can be alienated to persons for use that is beneficial to the Council or the residents of the area. A lodge or campsite would bring in revenue and would provide employment of the local people. It was evident from DW1's evidence that the council was benefiting from the campsite which had been built on the three acres leased to the plaintiff in terms of rents, revenue and I believe employment for the local people. DW1 did accept that the letter by the Town Clerk to the Commissioner of Lands (PEX.7A) emanated from the 2nd defendant. If any resolutions were made that culminated on the writing of that letter, it is only the 2nd defendant who would have custody of all the proceedings. The 2nd defendant has not called any evidence to support its allegations that the plaintiff presented forged documents to the Land Registrar. An allegation of fraud is very serious and the 2nd defendant should have adduced cogent evidence to prove it. The allotment letter and title were issued by the Ministry of Lands. Under **Section 2** of the **Trust Land Act Cap 288 Laws of Kenya**; '**Council**' in relation to Trust Land means the local authority in which the Trust Land is vested. The power to administer Trust Land is vested in the Commissioner of Lands by virtue of **Section 53** of the **Trust Land Act, Cap 285** of the **Laws of Kenya**. The said section reads as follows:-

“S.53. The Commissioner of Lands shall administer the Trust Land of each council as agent for the council, and for that purpose may –

- (a) exercise on behalf of the council, personally or by a public officer, any of the powers conferred by this Act on the council, other than that conferred by section 13(2)(d) of this Act; and**
- (b) execute on behalf of the council such grants, leases, licences and other documents relating to its Trust land as may be necessary or expedient;**

Provided that –

- (i) the Commissioner of Lands shall act in compliance with such general or special directions as the council may give him; and**
- (ii) the Minister may, by notice in the Gazette, terminate the commissioner of Land's power to act under this section in relation to the Trust land of any particular council, where the Minister is satisfied that the council has made satisfactory arrangements to administer its Trust land itself.”**

Section 13(2) sets out the procedure for setting apart land culminating in the Divisional Board making the recommendations under Section 13(2)(d). The above provision vests in the Commissioner of Lands the mandate to execute grants, leases and licenses etc on behalf of the council. My understanding of **Section 53** and **13(2)(d)** read together is that for the Commissioner to act as an agent of the Council, he must have in writing a resolution approved by all members of the Council where such setting apart of land has been approved by the Divisional Board. Where the Divisional Board has not approved the setting apart of the land, then three quarters of the members of the Council must pass a resolution to that effect. Where the above procedures have not been followed, the Commissioner's acts will be ultra vires the **Act**. Counsel for the 2nd defendant also went into detail on the provisions of the Local Government Act Cap 265 of the Laws of Kenya on how allocation of such land by resolutions passed and kept in their records. The plaintiff does not work for the 2nd respondent. It would be impossible for him to obtain such records from the 2nd defendant to prove that due process was followed. The letter written by the Town Clerk of the Council (DEX.7A) was responding to the Commissioner of Lands in respect of the plaintiff's application. I find that the defendant has not demonstrated that the plaintiff acted fraudulently in order to obtain the letter (PEX.7A) and the 2nd defendant should have verified how the then Town Clerk came to write it. The Commissioner is the Council's agent and in this regard, there are documents to show that the 2nd respondent Council had approved the plaintiff's application for allocation of land and the Commissioner was hereby carrying out the Council's mandate.

As regards the 3rd allocation, DW1 told the court that the plaintiff had made an application for a residential plot next to Yare Safaris and by letter of 6/11/95 (EEx.6), the application was approved. After several deliberations, the council revoked the bill and full General Meeting of 28/9/95, the allocation was approved (DEx.9). By a letter dated 6/11/95, the plaintiff was informed of the allocation. The area of the plot was not specified. It was not demonstrated by evidence whether the said residential area is part of the 25 acres DW1 was referring to. DW1 insisted that the respondent was only allocated 3 acres of residential land but the acreage was not captured in the resolution of the Council. What is clear in my mind, however, is that the residential plot is not part of the land allocated to the plaintiff under the title issued by the Commissioner of Lands.

Having found that the defendant has failed to prove any fraud against the plaintiff, the question is what happens to the title? The land herein is registered under the **Registration of Titles Act Cap 281 Laws of Kenya. Section 116** of the **Constitution** (old) allowed the registration of land in a different regime and it ceases to be Trust Land. **Section 23** of that **Act** provides that a certificate of title is conclusive proof of ownership or proprietorship. **Section 24** then goes on to provide that if it is proved that the title was obtained through fraud, or error, then a party can sustain an action against the other party for fraud or an action for damages. **Section 23** and **24** provide as hereunder:-

“S.23. (1) The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.”

(2)

24. Any person deprived of land or of any interest in land in consequence of fraud or through the bringing of that land under the operation of this Act, or by the registration of any other person as proprietor of the land or interest, or in consequence of any error or misdescription in any grant or certificate of title or any entry or memorial in the register, or any certificate of search, may bring and prosecute an action at law for the recovery of damages against the person upon whose application the land was brought under the operation of this Act, or the erroneous registration was made, or who acquired title to the interest through the fraud, error or misdescription:

Provided that –

(i) except in the case of fraud or of error occasioned by any omission, misrepresentation or misdescription in the application of a person to bring the land under the operation of this Act, or to be registered as proprietor of the land or interest, or in any instrument signed by him, that person shall upon a transfer of the land bona fide for value cease to be liable for the payment of any damages, which, but for that transfer, might have been recovered from him under the provisions herein contained; and in the last-mentioned case, also in case the person against whom the action for damages is directed to be brought is dead or has been adjudged insolvent or cannot be found within the jurisdiction of the court, then the damages with costs of action may be recovered out of the public funds of Kenya by action against the registrar as nominal defendant;

(ii) in estimating the damages, the value of all buildings and other improvements erected or made subsequently to the deprivation shall be excluded;

(iii) no such damages may be recovered out of public funds for any loss, damage or deprivation occasioned by the improper or irregular exercise of the mortgagee's statutory power of sale conferred by the Transfer of Property Act, 1882, of India, in its application to Kenya.”

Even if fraud was proved against the plaintiff, the only recourse that the 2nd defendant has is to bring an action for damages against the plaintiff but the title cannot be revoked. The above provision is different

from **Section 143** of the **Registered Land Act 300** which provides for cancellation or rectification of a title upon fraud or mistake being proved.

There is evidence that the 1st defendant has already vacated the plot which it had leased from the 2nd defendant. The court cannot issue an order of vacant possession against the 1st defendant. The court therefore declares that the plaintiff is the lawful owner of the parcel Grant I.R.M. 6185 and if there be any occupant, then they must give vacant possession to the plaintiff forthwith. I hereby dismiss the counter claim with costs to the plaintiff. Since I find that there was a lease between the 1st and 2nd defendants for 3 acres where Yare Campsite stood, the plaintiff wrongly joined the 1st defendant to this suit and the plaintiff will bear the 1st defendant's costs. The 2nd defendant will bear costs of the suit.

DATED and DELIVERED this 24th day of February, 2012.

R.P.V. WENDOH
JUDGE

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PRESENT:

Mr. Githui for the plaintiff.

Mrs Keye for 1st defendants.

N/A for 2nd defendant.

Kennedy – Court Clerk.