



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL CASE 320 OF 2009

ELIJA SYEKEIPLAINTIFF

VERSUS

THE HEADMASTER AFRAHA HIGH SCHOOLDEFENDANT

JUDGMENT

THE PLEADINGS:

1. By an Amended Complaint dated 9th December, 2008, and filed on 15th December, 2009, Elijah Syekei claimed that he was the lawful owner of all that parcel of land known as Title Number Nakuru Municipality Block 2/898 (*the suit land*), and consequently prayed for:

(a) a permanent injunction to restrain the Defendant, its pupils, teachers staff and others claiming by or through him, from entering, remaining in the suit land or in any manner whatsoever interfering with the plaintiff's possession of the suit land,

(b) Costs

(c) Interest on (b) at court rates.

2. The Defendant in this suit is the Board of Governors of Afraha High School (*the Board*), and in its amended Defence dated 9th February and filed on 10th February 2009, **firstly**, denied the plaintiff's claim to the suit land and in paragraph 4 of the Defence the Board claimed that if the plaintiff is the registered proprietor as leasee for a term of 1998, of the suit land then such registration was illegal, irregular and of no legal effect as the suit land was allocated to the Board's School under an Allotment Letter No. 111382/11 dated 1/9/1992 to be used for educational purposes and accommodation of the School's Headmaster/Principal.

The Board also set out particulars of illegality fraud and mistake and also finally averred that the Board was legally in possession of the suit land and no permanent injunction is available and prayed for dismissal of the plaintiff's suit.

In his prompt Reply to Defence dated 11th February 2009 but filed on 18th February 2009, the plaintiff denied Board's allegations of illegality, fraud or mistake and reiterated his claim that he acquired the suit land lawfully and that he be granted the orders prayed for in the Amended Complaint.

DISCOVERY

Before the commencement of the hearing of the case, counsel for both the plaintiff and the Board filed

their respective texts of documents. The Plaintiff's text of documents (dated 20th November 2009) and filed on 3rd December 2009) included:

- (1) Letter from the District Lands Officer dated 22/5/1997.
- (2) Letter from the Commissioner of Lands dated 20th May, 1997.
- (3) Lease for Nakuru Municipality Block 2/898 issued to Elijah Syekei on the 1st July 1997.
- (4) Certificate of official Search for Nakuru Municipality Block 2/898 dated 29th November, 2000.
- (5) Certificate of Lease for Nakuru Municipality Block 2/898 issued to Elijah Syekei on 7th July, 1998
- (6) Map for Nakuru Municipality Block 2
- (7) Fee Receipts from the Department of Lands date 25th June, 1997, and July 1997 respectively
- (8) Demand Notice issued by the Municipal council of Nakuru for cases in respect of Nakuru Municipality/Block 2/898 on 10th June 2009.
- (9) Miscellaneous Receipt.

The Defendants – list of Documents comprised:

- (1) Certificate of Registration of Schools Nbi GOSA(2021) 2001 dated 4th January, 2002
- (2) Application letter for agriculture Demonstration Land dated 3rd April, 1991
- (3) Application for school Land dated 18th October 1991 and Sketch Plan
- (4) Letter by Commissioner of Lands dated 21st August 1991
- (5) Letter by the Municipal Council of Nakuru to Commissioner of Lands dated 21st October 1991
- (6) Commissioner of Lands Internal Memo dated 1st April, 1992
- (7) Commissioner of Lands Internal Memo dated 1st April, 1992
- (8) Letter dated 14th May 1992 by Commissioner of Lands to Afraha High School approving application for land.
- (9) Allotment Letter Reference 111383/34 dated 18th August, 1992 for unsurveyed extension to Block 2/488.
- (10) Commissioner of Lands internal Memo dated 18th August, 1992
- (11) Letter dated 28th August 1992 by Afraha High School to Commissioner of Lands accepting allotment letter and forwarding a Bankers Cheque for Kshs.16,440/-
- (12) Department of Lands Receipt Number C 479566 for Kshs.16,440/-
- (13) Letter dated 4th May 1992 giving provisional approval for sub-division of Nakuru Municipality Block/2/488
- (14) Letter dated 5th May 1992 giving final approval for sub- division of Nakuru Municipality Block 2/488

- (15) Letter of Commissioner of Lands dated 23rd September 1992 advising the District Land Officer Nakuru that the Extension Sub-division Nakuru Principality Block 2/488 was not to be sub-divided as per Special Condition No. 7 attached to the Letter of Allotment
- (16) Director of Surveys letter Ref. CT/307/14/1411 dated 30th June 1992 amending R.I.M to reflect parcels 695 (1.214 Ha.) and 696 (4.856 Ha.).
- (17) Director of Surveys letter Ref. CT/307Vol.14/1412 dated 30th June 1992 amending R.I.M. For parcels 697 0 718.
- (18) Commissioner of Lands Internal Memo dated 17th November 1993 confirming a mistake by the Field Officer, allocating the suit land to the Defendant
- (19) Letter to the Commissioner of Lands dated 29th March 1993 forwarding a cheque for Shs.24,045/- in payment of the sub-Division Scheme approval for Block 2/488, and also referring the Original Title deed to the Defendants and fo surrender of Kshs.420-.
- (20) Department of Lands Receipt Number C5937I for Kshs.430/-
- (21) Commissioner of Lands letter to Afraha High School dated 27th April, 1993
- (22) Certificate of Stamp Duty No. 19490 on Surrender of Lease for Nakuru Municipality Block 2/488
- (23) Survey Plan Folio 238 Register No. 61 for Parcel No. Nakuru Municipality Block 2/755/Original No. 696 and 754.
- (24) Director of Surveys Letter Ref. CT/307/Vol.15/1467 dated 30th March 1993 forwarding a R.I.M. Amendment to Nakuru Block 11/755
- (25) Commissioner of Lands Internal Memo approving the lease to the Defendant for Execution
- (26) Commissioner of Lands Internal Memo dated 19th April, 1994 seeking authorization of payment of stamp duty of kshs.160/-
- (27) Department of Lands Receipt Number C 852348 for Kshs.160/-
- (28) Certificate of Lease for Nalkuru Municipality Block 2/755
- (29) Commissioner of Lands Internal Memo dated 9th November 1993 being Instruction to prepare a lease/grant to the Respondent
- (30) Commissioner of Lands Internal Memo dated 10th November 1993 certifying the Lease/Grant to th Defendant of a total area if 5.273 Ha. for the school
- (31) Commissioner of Lands letter Ref.111382/96 dated 11th May,1993 forwarding a Lease duly signed and stamped for Nakuru Block 2/755 to Land Registrar Nakuru (for registration)
- (32) Letter dated 3rd August,1994 by the District Land Registrar, Nakuru to Muritu Associates granting provisional approval for Sub-Division of Nakuru Municipality Block 2/755
- (33) Letter dated 3rd August 1994 by the District Land Registrar granting Final Approval for sub-Division of Nakuru Municipality Block 2/755
- (34)Director of Surveys letter Ref. CT/307 and 15/1458 dated 25th august 1994 amending RIM to reflect parcel No. 791 (2.026 Ha.) and 792 (3.248 Ha.) formerly parcel number 2/55

The plaintiff's and the Defendant's list of documents were by consent of counsel admitted in evidence in respect of the respective claims at the beginning of the plaintiff's evidence on 27th July, 2010.

THE PLAINTIFF'S EVIDENCE

In his evidence in- chief, the plaintiff testified that he is a former Civil Servant and used to work for Ministry of Roads and Public Works as that Ministry was known in those days. He narrated how he was allocated the suit land and he produced a copy of the certificate of lease (Pexh. 1) issued on 7th July 1998. He had carried out a search and found the suit land was not part of the school land, but that it was part of a road reserve which was later allocated to various people, including the plaintiff. Among the allottees were the Deliverance Church and others and that a the District Land Officer, Nakuru had by his letter dated 22nd May 1997 confirmed that the suit land was available for alienation.

The plaintiff had also paid the required fees before the issue of the title to him, and has thereafter paid rates and ground rent for the suit land. The plaintiff also contended that the suit land was allocated to him procedurally and that there was no fraud at all. He asked the court to order the Defendant to vacate the suit land so that he could develop it.

In cross-examination, the Plaintiff testified that he applied for the land but did not have a copy of the application. He was unaware the land had been allocated to the Defendant, and was also unaware that the title thereto had also been issued.

When shown the Defendant's application for allotment of the land, the plaintiff confirmed that it was indeed the same land as the one he was allocated, and further confirmed the correspondence in the Defendant's list of exhibits, including the letter of allotment aforesaid, the letter of acceptance and forwarding a cheque for Shs.16.440/-, the receipt thereof and D.Exh.16, a letter from the director of surveys was a sub-division of the Defendant's land, not the plaintiff's land and also D.Exh. 34 – in the sub-division of the defendant's land, not the plaintiff, and it was not correct that the defendant had been allocated with title by the time he was allocated the land.

In re-examination, the plaintiff testified that the two sub-divisions, DGEK. 33 – 34 are not part of his land and that his land is shown in P.ex.6, (Map of Nakuru Municipality Block 2). The Plaintiff contended that site inspection was carried out and that the Commissioner of Lands was unable to issue the Defendant with title because there were two schools on the same land, as per exhibit 22, and finally being the first lessee of the suit land his title is impeachable, and that his suit should succeed.

The plaintiff called no other witness and with that evidence, he closed his case.

The Plaintiff's evidence aforesaid was heard and taken down by my brother Hon. Mr. Justice Maraga, (now Judge of Appeal). I took the defendants evidence.

THE DEFENCE EVIDENCE

Like the Plaintiff, the Board called one witness, Mr. Silas Kiogora Mburugu, a Chief Lands and Administration Officer with the Ministry of Lands and Settlement. His duties include processing of allocation of land, grants and leases and development Plans.

He testified that he was aware of the allocation of the suit land to the Defendant and that the Defendant is situate in Nakuru Municipality Block 2/488. He testified that this parcel of land was sub-divided into two to give rise to Nakuru – Municipality Block 2/695 and 696 and that later Block 2/696 was amalgamated with a portion which had been given to the school as an extension as per letter of Ref. No. III/382/34 of 18th August, 1992 (D.exh.4) and that upon amalgamation with the extended area, Block 2/96 became Nakuru Municipality Block 2/755.

DW1 testified that the Defendant had applied for the extension of its land area in 1991, and is shown in Defendant's documents 5-8, and it is this extension which is the dispute in this case.

On the Plaintiff's behalf, DW1 testified that the plaintiff was allocated a parcel of land on 18/6/1997, an area of 0.35 Ha. And on survey, it was realized that a small portion was remaining, and that the plaintiff applied for the small portion was about 0.04 Ha. This portion was amalgamated with the initial allotment of 0.35 Ha. And upon amalgamation was issued with a Letter of Allotment dated 11th June, 1998. This is the same area allocated to the defendant per letter dated 18th August, 1992 and is 0.90 Ha. The allocation was disputed by the Defendant per letter of 28th August, 1992 and the School also made payment therefor.

DW1 Also contended that Block 2/488 was sub-divided to create plots 695 and 696 measuring 1.214 Ha and 4.856 Ha. respectively as per D.exh. 27. Subsequently the extension was amalgamated as per plan of 29/3/1993 (p.34 of the defendant's list of documents), and title was issued following the amalgamations. Thereafter, lease documents were prepared and forwarded to the Nakuru District Land Registrar by letter Ref. III/382/96 of 11th May 1994 to prepare and issue a Certificate of Lease.

DW1 also testified that Block 2/755 was sub-divided into two on 25th August, 1994 and given numbers 791 and 792 of 2.026 Ha. and 3.246 Ha.

When questioned by Defence Counsel on the later allocations to the plaintiff, DW1 testified that from their records, the allocation was procedurally done, but that the survey done before was ignored, the land was not available for allocation in 1998. In any event, DW1 testified that from the Plaintiffs own document, (letter of 22nd May, 1998), the area was a road reserve, and although the District Land Registrar recommended the application for allotment, it was only a recommendation and the area was not available for allotment. DW1 testified further that the Director of Surveys letter of 1st July 1998 failed to notice an overlap of survey.

Upon cross-examination, by counsel for the Plaintiff, DW1, explained that it is the defendant who first applied for the extension of their title to the land in dispute. He also explained the familiar regime for registration of leases. Once the land lease is prepared by the Commissioner of Lands and is accepted by the Lessee the Commissioner sends the Head Lease to the respective District Land Registrars for registration and issue of Certificate of Lease or Title Deed, in this case, subject to the regime of the Registered Land Act (Cap 3090, Laws of Kenya). No such Certificate of Lease was issued to the defendant, but one was issued to the Plaintiff and so far as the plaintiff was concerned, there was a first registration.

On re-examination DW1 testified that the suit land was Government land and was subject to the Government Lands Act, (Cap 280, Laws of Kenya), and that once it was allocated, it could not be alienated again. DW1 testified that the contents of the District Land Registrar's letter dated 22th May 1997 that the land was a road reserve is not correct, the land had already been alienated and amalgamated and became Nakuru Municipality Block 2/755 (Langalanga and Afraha High School).

ANALYSIS OF EVIDENCE AND SUBMISSIONS

The facts in this case are not in dispute. It was common Government ground that the plaintiff received an allocation from the Commissioner of Lands of the suit land some 6 years after the suit land had been allocated to the defendant's school. The Plaintiff also obtained title to the said land,. For that reason counsel for the Plaintiff contended that since the Plaintiff obtained title prior to the registration of the Defendant's Lease, and issue of title to the same land, his title to the land was indefeasible except on the grounds of fraud or mistake to which the Plaintiff may have been a party.

In this regard counsel for the Plaintiff relied on the cases of **(1) OBIERO -VS- OPIYO & OTHERS [1972] E.A 227** – that even if fraud had been proved the plaintiff's title was indefeasible as it was the first registration **(2) ESUROYO -VS- ESIROYO and ANOTHER [1973] E.A 388** – that rights under customary law are not overriding interests

(3) AMBALE -VS- MASOLIA [1986] K.L.R 241 – that on a proper construction of Section 143 of the Registered Land Act. (Cap 300, Laws of Kenya), even if the alleged fraud or mistake was shown the title

of the church was infeasible.

Counsel also followed the case of **SALVATION ARMY -VS- PETER NJUGUNA GITUA (NAKURU HCCC NO. 83 OF 2007), IN WHICH THE COURT CAME TO THE SAME CONCLUSION ON THE GROUND THAT “TITLE TO LAND AND PROPERTY NORMALLY COMES INTO EXISTENCE AFTER ISSUANCE OF A LETTER OF ALLOTMENT, MEETING THE CONDITIONS STATED IN SUCH A LETTER AND ACTUAL ISSUANCE THEREAFTER OF THE TITLE DOCUMENT.”**

And for those reasons counsel for the Plaintiff sought the court to grant the plaintiff the orders it first sought in the Amended Plaintiff.

The Defendant's counsel did not share that view of the matter. The Defendant's counsel raised five issues:-

- (a) Whether the plaintiff was lawfully allocated and issued with title to the suit land;
- (b) Whether the plaintiff was a first registration
- (c) Whether the Defendant is lawfully in possession of the suit land
- (d) Whether the plaintiff' or the Defendant is entitled to the prayers sought in the plaintiff and the counter claim respectively.

I will consider each of these issues in turn:-

Whether the Plaintiff was lawfully allocated and issued with a title to the suit land.

It was the contention of counsel for the Defendant that a lawful title can only issue from a lawful allocation. Counsel contended that there was no such lawful allocation. Counsel relied on the provisions of Section 3 of the Government Lands Act (Cap 280, Laws of Kenya) which states:-

Section 3 – the President, in addition to, but without limiting, any other right, powers or authority vested in him under this Act may:-

- (a) subject to any other written law, make grants or disposition of any estates, interests or rights in or unalienated Government land
- (b) ...
- (c) ...”

“land which is not for the time being leased to any other person, or in respect of which the Commissioner has not issued a letter of allotment”.

The position in this case is that the Commissioner of Lands allocated the suit land to the Defendant's School first. The Defendant met all the conditions of the letter of allotment, and a lease was duly prepared and it was sent to the Nakuru District Registrar for the registration and issue of a Title Deed or Certificate of Lease to the Defendant's School. It is at that stage that the gerrymandering commenced. The plaintiff a civil servant, working with the Ministry of Public Works and Roads, identified the suit land as a **“road reserve”** approached the Nakuru District Land Registrar with a proposal to have the land allocated to him. The Land Registrar completely ignoring the Commissioner of Lands letter Ref.111382/96 – dated 11th May, 1993 forwarding a lease for the same land for the registration and collection of the Lease by the Defendant. According to the handwritten endorsement in that letter, the lease was collected by the chairman of the Defendant in 11th May. 1994.

Notwithstanding this the Land Registrar still managed to write a letter “commendation” to the Commissioner of Lands that the area applied for was not part of Afraha Secondary School and DW1, Silas Kiogara Murigu, testified that the original survey indicating the suit land was part of school land was “**ignored**”. Was it ignored deliberately or by mistake? Whichever, the subsequent allocation of alienated land was an illegality being contrary to Section 3 of the Government Lands Act. As it was held in a different context in the case of **PARAMOUNT BANK LTD -VS- MOHAMMED GHIAS QUREISHI AND ANOTHER [2005] KLR” Courts do not sanction illegality”.**

Strictly having come to this conclusion, it is not necessary to consider other issues raised by the Defendant. I will, however, for completeness consider the other issues raised in this matter.

WHETHER THE PLAINTIFF TITLE BEING A FIRST REGISTRATIONS INDEFEASIBLE

The Plaintiff's title cannot have been a first registration. It was deliberately and fraudulently made so. Having been sent the Defendant's Lease on 11th May, 1993 for registration the Registrar was bound to register the Defendant's Lease on basis of priority, and also issue title. There is no explanation for failure to do so. In the case of **MILANKUMAR SHAH AND 2 OTHERS -VS- CITY COUNCIL OF NAIROBI & ATTORNEY GENERAL (Nairobi HCC SUIT NO. 1024 of 2005 (05))** the court held:-

“We hold that the registration of title to land is absolute and indefeasible to the extent, firstly, that the creation of such title was in accordance with th applicable law, and secondly where it is demonstrated to a degree higher than the balance of probability that such registration was procured thorough persons or a body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law and the public interest.”

To this extent the decisions in such cases as **OBIERO -vs- OPIYO & OTHERS [1972] EA 227. ESIROYO -VS- ESIROYO AND ANOTHER [1973] ES. 388 and AMBANE -VS- MASOLIA [1986] K.L.R 24**, that title to land of obtained on first registration even if procured by fraud or mistake, is indefeasible cannot be good law and should be departed from.

In this case the District Land Registrar, as well as the Director of Surveys ignored the existence of an earlier survey and an earlier land lease and allocated and issued title to the plaintiff. I think it was both fraudulent and it is kind to say, it was a mistake. These grounds defeat the question of a first registration and indefeasibility of title.

The answer therefore to the Plaintiff's claim is that he does not have a good title to the suit land. His claim for a permanent injunction is therefore dismissed with costs to the Defendant.

On the counter-claim, I declare that the Defendant is lawfully in possession of the suit land contained in Title Number Nakuru Municipality Block 2/898, and is entitled to the prayers in the Amended Defence and Counter claim.

In the premises therefore, I direct that Title Number Nakuru Municipality Block 2/898 be canceled forthwith by the Nakuru Land Registrar and in lieu thereof, the Defendant be issued with Title or Certificate of Lease in terms of the Head Lease forwarded to the Land Registrar Nakuru by the Commissioner of Lands Letter Ref. No. 111382/96 dated 14th May, 1994.

The Plaintiff's suit is therefore dismissed with costs to the Defendant.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 12th day of October, 2012

M. J. ANYARA EMUKULE
JUDGE