



Pink Properties Limited v National Land Commission & 2 others (Environment & Land Case 43 of 2018) [2022] KEELC 3940 (KLR) (28 July 2022) (Judgment)

Neutral citation: [2022] KEELC 3940 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 43 OF 2018**

**JO OLOLA, J
JULY 28, 2022**

BETWEEN

PINK PROPERTIES LIMITED PLAINTIFF

AND

NATIONAL LAND COMMISSION 1ST DEFENDANT

CHIEF LAND REGISTRAR 2ND DEFENDANT

ELIZABETH MUTHONI RITHO 3RD DEFENDANT

JUDGMENT

Background

1. By their Plaint dated 19th February, 2018 as filed herein on 20th February 2018, Pink Properties Limited (the Plaintiff) prays for Judgment against the Defendants for:
 - (a) A declaration that the Plaintiff is the legal and equitable proprietor of LR No. Chembe Kibabamshe/272;
 - (b) An order of permanent injunction (to) be issued against the Defendants to restrain them jointly and severally whether by themselves, servants, agents, employees and/or officers from vesting the property to (the) 3rd Defendant or any other person, revoking the title of the Plaintiff, entering, trespassing, taking possession, wasting, damaging or in any other way interfering with the Plaintiff's quiet possession of LR No. Chembe/Kibabamshe/272 including the entire improvements within the said property.
 - (c) Costs of this suit; and
 - (d) Any other remedy the Court deems fit to grant to meet the ends of justice.



2. Those prayers arise from the Plaintiff's contention that it is the bonafide registered proprietor of the said land parcel No. Chembe/Kibabamshe/272 (the suit property). On 17th July 2017, the National Land Commission (the 1st Defendant) vide Gazette Notice No. 6866 (Vol. CXIX No. 97) directed the Chief Land Registrar (the 2nd Defendant) to proceed and vest the suit property to Elizabeth Muthoni Ritho (the 3rd Defendant) allegedly pursuant to the powers granted to the 1st Defendant under Section 14(5) of the [National Land Commission Act](#).
3. The Plaintiff avers that the 1st Defendant's actions aforesaid was illegal, made in bad faith and without jurisdiction. The Plaintiff accused the 1st Defendant of wrongly exercising its discretion and making inconsistent findings on the property in that while it had clearly indicated and written to the 2nd Defendant to the effect that one Simon Patrick Hinzano was the original allottee of the suit property, the 1st Defendant had now changed its position and was now giving instructions to have the property "regularised" to the 3rd Defendant as the "first allottee."
4. The Plaintiff avers that on 3rd June 2011, it did purchase the property from one Masumbuko Mwanzoya Kufanyiza who had purchased the property from the person to whom the original allottee Simon Patrick Hinzano had sold the land. It asserts that the entire process and procedure to acquire the property was legal, procedural and reasonable and it is therefore entitled to protection against arbitrary deprivation of title.
5. The 1st Defendant is opposed to the grant of the orders sought. In its Statement of Defence dated 18th June, 2018 as filed herein on 4th July 2018, the 1st Defendant denies that it lacked jurisdiction to deal with the matter and or that its decision was illegal and/or made in bad faith. The 1st Defendant asserts that it is clothed with constitutional and statutory powers to conduct a review in order to establish the legality of any grant or interest in land as it did in the instant case.
6. The 1st Defendant denies the contention by the Plaintiff that it was bonafide purchaser of the suit property and avers that the said contention was ably displaced by the evidence tendered before it at the review proceedings in which the Plaintiff participated and from which it was clear that the Plaintiff was aware of the defects and/or disputes relating to the suit property before it purchased the same.
7. The 1st Defendant avers that the suit as filed is bad for want of form as the decision having been rendered, the Plaintiff could only approach this Court by way of an appeal and not through a fresh suit.
8. On 2nd March 2020 when the matter went for pre-trial before the Deputy Registrar of the Court, it did transpire that the 3rd Defendant was yet to file a Statement of Defence. The matter was however certified for hearing with the 3rd Defendant being granted 30 days within which to file her Statement of Defence. No such statement was filed or served until one year later on 19th March, 2021 and the same was served upon the Plaintiff on 22nd March, 2021 when the suit came up for hearing. Following an application by the Plaintiff, the 3rd Defendant's Defence and counterclaim filed on 19th March, 2021 were expunged from the record and as all the Defendants were absent, the hearing proceeded with the Plaintiff's sole evidence.

The Plaintiff's Case

9. The Plaintiff company called one witness who testified in support of its case at the trial.
10. PW1 – Paola Catani is a Director of the Plaintiff. She testified that the Plaintiff is the bonafide registered proprietor of LR No. Chembe/Kibabamshe/272. She told the Court the Company had acquired the property after acquiring the same from one Masumbuko Mwanzoya on 4th June, 2011. PW1 testified



that before purchasing the suit property, they did due diligence and carried out an official search on 25th May, 2021 which revealed that the said Masumbuko was the registered proprietor of the land.

11. PW1 told the Court that after the purchase and transfer of the property into the Plaintiff's name, they commenced construction of a twin-villa thereon in the year 2013. Before then they had applied to the Municipal Council and the National Environment Management Authority who gave permission to construct on the land which was previously unoccupied.
12. PW1 further told the Court that on 13th February, 2018 while conducting a routine supervision of the Plaintiff's constructions on the suit property, the Plaintiff's contractor on site brought to her attention Gazette Notice No. 6866 dated 17th July, 2017. Upon perusal of the same, it became clear that the 1st Defendant had on the said 17th July, 2017 directed the 2nd Defendant vide the Gazette Notice to proceed and vest the suit property upon the 3rd Defendant.
13. PW1 testified that the Plaintiff was registered as the proprietor of the suit property on 11th May, 2011 and its title has never been under any challenge until the 1st Defendant released and Gazetted their determinations requiring the same to be vested in the 3rd Defendant. On 13th June 2012, the Plaintiff had placed an advertisement in a local daily newspaper seeking change of user of the suit property and no objection was received.
14. PW1 testified that subsequently, the Plaintiff did on 24th March, 2014 enter into a building contract with Messrs Texline Construction Limited which commenced construction of a residential twin house wherein the Plaintiff has since spent an amount in excess of Kshs.60,000,000/-.
15. PW1 told the Court that sometime in December 2015, they were served with a letter dated 9th December, 2015 from the 1st Defendant indicating that the suit property belonged to one Simon Patrick Hinzano. Subsequently the Plaintiff wrote back to the 1st Defendant indicating that the complainant had sold the subject land to one Staslaus Ngala Mwangandi who in turn sold it to Masumbuko Mwanzoya Kufanyiza. The Plaintiff further informed the 1st Defendant that they acquired the property from the said Masumbuko after following all due and lawful processes.
16. PW1 testified that the Plaintiff was a bonafide purchaser and that it stood to suffer irreparable loss and damage unless the prayers sought in the Plaintiff were granted.

Analysis and Determination

17. I have carefully perused and considered the pleadings filed herein, the testimony of the Plaintiff's sole witness as well as the evidence adduced at the trial. I have similarly considered the submissions and authorities placed before me by the Plaintiff's Learned Advocates on record. The three Defendants neither participated at the hearing hereof nor did they file any closing submissions.
18. In their prayers before this Court, the Plaintiff Company is seeking a declaration that it is the legal and equitable proprietor of all that parcel of land known as LR No. Chembe/Kibabamshe/272. In addition, the Plaintiff craves a permanent order of injunction to issue restraining the Defendants from vesting the suit property to the 3rd Defendant or any other person, and from revoking the Plaintiff's title. The Plaintiff also wants the Defendants to be restrained from entering, trespassing, taking possession of or in any manner whatsoever dealing with and/or interfering with the suit property.
19. It was the Plaintiff's case that it did acquire the suit property after conducting due diligence from the previously registered owner thereof by the name Masumbuko Mwanzoya Kufanyiza. Having established the ownership of the land, the Plaintiff told the Court it did execute a sale agreement with the registered proprietor of the land on 3rd June, 2011.



20. It was further the Plaintiff's case that having completed the purchase and after the suit was transferred to its name, it did sometime in the year 2014 commence construction of a multimillion shilling residential twin house on the suit property which was nearing completion when on 13th February 2018, its attention was drawn to a Gazette Notice No. 6866 dated 17th July 2017 emanating from the 1st Defendant. Upon perusal of the Notice, the Plaintiff came to learn that the 1st Defendant had by the said Notice directed the 2nd Defendant to proceed and vest the suit property upon the 3rd Defendant.
21. The Plaintiff told the Court that the 1st Defendant's decision to vest the property on the 3rd Defendant was illegal, made in bad faith and without the requisite jurisdiction. The Plaintiff further accused the 1st Defendant of wrongfully exercising its discretion and making inconsistent findings in that while it had earlier written to the 2nd Defendant indicating that one Simon Patrick Hinzano was the original allottee of the land, it had now changed its position and was now giving instructions that the land be "regularised" to the 3rd Defendant as the "first allottee."
22. In support of their case, the Plaintiff Company produced through its Director Paola Catani a bundle of documents indicating how they came to acquire the property. From the material placed before me, it was apparent that the suit property was initially registered in the name of one Simon Patrick Hinzano following a Court order issued on 21st December, 2007 in Mombasa High Court Judicial Review Application No. 2 of 2007; Republic v Chief Land Registrar Exparte Simon Patrick Hinzano. Arising from the said case, the Court did grant an order of Mandamus directing and compelling the Respondents to process and register the Transfer and Discharge of Charge and issue a Certificate of Title in favour of the Ex-parte Applicant for the suit property.
23. It was further evident that subsequently, the said Simon Patrick Hinzano sold the land to one Stanslaus Ngala Mwangandi who in turn sold the land to Masumbuko Mwanzoya Kufanyiza. A title deed was issued to Masumbuko for the land on 4th February, 2011. Some four (4) months later on 3rd June 2011, Masumbuko sold the land to the Plaintiffs herein for a consideration of Kshs.15,000,000/-.
24. It was further apparent that at some point in time, the original proprietor of the land, Simon Patrick Hinzano filed a complaint with the 1st Defendant herein complaining that his land had been taken from him. Having conducted some hearings in regard to the ownership of the suit property, the Commission wrote to the 2nd Defendant herein on 9th December, 2015. In the penultimate Paragraph of the said letter the 1st Defendant's Chairman Professor Muhammad Swazuri states and directs as follows:

"In view of the foregoing, the Commissioner notes that there are multiple titles in respect of this property. However it is imperative to note that Simon Patrick Hinzano being the first allottee and title holder enjoyed proprietorship rights over the property. Although there seems to have been an agreement for informal sale of the property, it is evident that no consideration has ever been paid to Simon Patrick Hinzano and it is likely to be the case that the property was fraudulently taken away from the legal allottee as there is no sufficient proof of his voluntary consent to sale (sic) the land despite being the owner of the same. It is also noteworthy that the allottee has not been paid consideration to-date despite the property allegedly having been sold by him.

In view of the foregoing, the commission finds that the property legally belongs (to) Simon Patrick Hinzano ID/No. xxxxxxx who was the original allottee and a local of the area."
25. Armed with the said letter, Simon Patrick Hinzano apparently went back to the suit land and declared himself as the proprietor thereof. Alarmed by the turn of events, the Plaintiff wrote what it termed as "Submissions" on the Suit Property dated 8th February, 2016 to the 1st Defendant giving the history of



- the matter and explaining how the said Simon relinquished his ownership of the land upon payments deposited in a Bank account and after signing a Sale Agreement and an Indemnity with Stanslaus Ngala Mwangandi. A stamp on the face of the said “Submissions” reveals that the same was received by the Vice Chair of the 1st Defendant on 16th February, 2016.
26. It would appear that after the Plaintiff explained itself to the 1st Defendant, the said Simon Hinzango ceased any further claims to ownership of the land. That was not the end of the matter however. A complaint appears to have been made over the same parcel of land by the 3rd Defendant herein.
 27. Perhaps forgetting that it had made a determination as communicated in its letter of 9th December 2015, the 1st Defendant in the Gazette Notice of 17th July, 2017 has now directed the 2nd Defendant to “regularize” the title to the “first allottee Samuel Ritho” and to vest the same on his daughter Elizabeth Muthoni Ritho (the 3rd Defendant) on account that she holds a limited grant of letters of administration.
 28. As I understood it, the mandate of the 1st Defendant under Article 68(c)(1) of *the Constitution* and Section 14 of the *National Land Commission Act* is to look into the procedures that were followed (or not followed) in the allocation of the public land to individuals both before and after the promulgation of *the Constitution* of Kenya 2010. Where the correct procedure was not followed in the allocation of public land, then the 1st Defendant is mandated to make a recommendation for the revocation of such grants.
 29. It follows therefore that for the 1st Defendant to recommend to the 2nd Defendant to revoke any title, there must be a specific finding that there was an illegality or irregularity in the first allocation of public land to individuals. Where there existed no illegality or irregularity at the time of allocation of the land from public into private hands, the 1st Defendant would have no basis to intervene
 30. In the matter before me, it was apparent that what the 1st Defendant did was to recognize the father of the 3rd Defendant as the “first allottee” and on that basis they now sought to revoke the titles of all subsequent allottees including the Plaintiff herein. As Angote J stated in *Republic v National Land Commission Ex-parte Helborn Properties Limited* [2016] eKLR:

“The recommendation to the Registrar to revoke title which it finds was illegally issued is only in respect to the initial allottee. However, where the initial allottee of public land has transferred land to a bonafide purchaser for value without notice of defect in the title, the Registrar does not have the jurisdiction to revoke such a title (see Section 14(7) of the *National Land Commission Act*).
 31. Indeed, there was even no evidence that the suit property was public land to warrant the 1st Defendant’s intervention in the first instance. From a perusal of the impugned Gazette Notice No. 6866, it is apparent that the 1st Defendant was cognisant of the fact that the suit property was not public land. That much is clear from a reading of the penultimate paragraph in the Gazette Notice where the 1st Defendant remarks as follows:

“... The tenure system that the Chembe Kibabamshe area falls is trust land and not Government land and therefore the adjudication regime should be upheld It is on the basis of public interest that the Commission initiated the public hearings in a view of uplifting the embargo.”
 32. With respect, I did not think the 1st Defendant is clothed with the mandate to review grants and dispositions on the basis of what it termed “public interest.” Having established that the suit property



was a result of a land adjudication process arising from what was previously trust land, the 1st Defendant had no jurisdiction to review the documents that emanated from the adjudication process and should have downed its tools there and then.

33. Arising from the foregoing, this Court was persuaded that the Plaintiff is indeed entitled to its protection under the law from the arbitrary and unlawful determinations of the 1st Defendant. Accordingly, I am persuaded that the Plaintiff has proved its case to the required standard and I allow the Plaintiff's suit as prayed with costs.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NYERI VIA MICROSOFT TEAMS THIS 28TH JULY, 2022.

In the presence of:

No appearance for the Plaintiff

No appearance for the Defendants

Court assistant – Kendi

J. O. OLOLA

JUDGE

