



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 275 OF 1998

DHANJI JADRA RAMJI.....PLAINTIFF

VERSUS

COMMISSIONER OF PRISONS.....1ST DEFENDANT

ATTORNEY GENERAL.....2ND DEFENDANT

JUDGMENT

I. Introduction and claim

The Plaintiff, Dhanji Jadra Ramji, was allocated a parcel of land, which upon registration became known as Title Number Nakuru Municipality Block 21/514 in the year 1991 and was issued with a Certificate of Lease therefor on 20th December 1995, together with a Lease for a term of 99 years with effect from 11th April 1991. The suit land comprised 2.006 Hectares equivalent to approximately five acres.

The suit land was however also claimed by the Prisons Department from the year 1970 or thereabouts, and had in fact erected on part thereof a huge stone house, which served as the official residence of the Prison Commandant for the vast Rift Valley Province and other timber structures with corrugated iron sheets to house its staff.

After protracted correspondence between the Plaintiffs' Advocates and the Prisons Department without resolving the dispute over ownership of the suit land, the plaintiff sued the Prisons Department as 1st Defendant and the Attorney-General as 2nd Defendant and prayed for -

(a) *a declaration that the plaintiff is the lawful owner of the suit land;*

(b) *a declaration that the 1st defendant through its officers in Nakuru G. K. Prison has unlawfully trespassed the plaintiff's suit land and an order of eviction and demolition of all unlawful structures built thereon and removal of the trespassers;*

(c) *a perpetual injunction to restrain the first Defendant, his agents and/or servants from Nakuru G. K. Prison from trespassing on the plaintiff's suit land;*

(d) *general damages, mesne profits and costs of the suit.*

2. The Defence & Counterclaim

In a Defence dated 3rd November 1998 and filed on 18th November 1998, the Defendants

contended inter alia that the suit land was duly gazetted in 1961, under Gazette Notice Number 603 of 1961 (by one G. J. Ellerton, Secretary of Defence) as **Prisons Land** and a **restricted area**, and that the plaintiff is illegally encroaching and trespassing into the Prisons Department Land.

3. Reply to Defence

In a Reply to Defence and Counterclaim dated 27th November 1998 and filed on 30th November 1998, the plaintiff denied the Defendants' counterclaim concerning any encroachment on the suit land, but admitted that the plaintiff had not made demand to the Defendants by way of a notice to the Attorney-General, concerning the suit land.

4. The Hearing Ex Parte and Subsequent Orders

The matter proceeded to hearing ex parte on 9th February 2001 and the plaintiff was granted the orders prayed for, and a decree was issued on 19th February 2001. The Defendants' application dated and filed on 21st May 2001 to set aside the ex parte judgment and the consequential orders was dismissed on 2nd November 2001, and the Defendants filed a Notice of Appeal dated 2nd November 2001. In the meantime, the Plaintiff proceeded and had his costs taxed, and a Certificate of Costs at Shs 253,210/= was issued on 13th June 2002 and an eviction order was drawn and issued on 26th July 2002. The Defendants however filed an application for stay of execution dated 29th July 2002. That application was allowed by a Ruling dated 17th December 2001 which stayed execution of the decree for eviction pending the appeal. The plaintiff in turn filed a Notice of Appeal against the Ruling on a stay of execution.

5. The Compromise

The Plaintiff's application to the Court of Appeal against the court's ruling staying execution of the decree for eviction was in turn compromised by consent of the parties (*through their counsel*), and adopted as an order of the Court of Appeal made at Nakuru on 1st October 2003.

Although I found no record in the file formally setting aside the judgment made on 9th February 2001, and the consequential decree issued on 19th February 2001, the parties proceeded to treat the judgment and decree as having been set aside under the compromise recorded before the Court of Appeal Ordered, and fixed the case for hearing on 1st July 2008. The matter proceeded to hearing before the Hon. Lady Justice Mugo on that date. Testimony was received and taken from the plaintiff and one defence witness.

6. The Evidence

(a) The Plaintiff's Evidence

Although I did summarise the case at the beginning of this judgment by setting out the rival claims in the pleadings it is necessary to set out both the plaintiff's and the Defendants' evidence.

In support of his claim to ownership of the suit land, and prayers for a declaration to that effect, and eviction of the 1st Defendant therefrom, Mr. Dhanji Jadra Ramji, the plaintiff produced in evidence, not only the Allotment Letter, but also the Lease and Certificate of Lease issued to him by the Commissioner of Lands.

The Plaintiff also testified that although he is not a licensed surveyor, he is a skilled Cartographer and has knowledge of map reading, that the land in question was given to the Kenya Prisons (Dept.), by the British Imperial East Africa Co. (Ltd) in the year 1878, and it then measured 2000 acres, and that the map of the land was produced and given to the District Officer (Nakuru?) for custody.

The witness referred to a map which he had (*but did not produce in evidence*) which showed Prisons Department's Land as being L.R. No. 452/1/4 and denied that the suit land (*Block 21/514*)

belonged to the 1st Defendant. This witness also testified that the plot was gazetted in 1955 and that it had even been degazetted, that all the land situate from the Railway line upto Menengai Crater and the Forest Area, including Nakuru ASK showground, all belong to G.K. Prison and Block 21/514 is part of encroachment by the Municipal Council of Nakuru.

In cross-examination by Mr. Atanga, counsel for the Defendants, the plaintiff testified that the lands in question (*including the suit land*), belonged to the Prisons Department since 1878 and had never been degazetted, and that there was no need for the Prisons Department to seek an extension in the 1970s as the land was already theirs.

Despite this testimony the plaintiff in re-examination by his counsel, denied that he was a trespasser, and put the blame on the 1st Defendant (*the Prisons Department Authorities*) and the Commissioner of Lands for not taking action on time or notifying him of the ownership of the suit land.

(b) **The Defence Evidence**

Mr. Atanga, the Defendant's counsel called one witness, and I must say his evidence did not amount to much. Mr. Daudi Karani Kuria, the 1st Defendant's witness told the court he was in charge of properties belonging to the Ministry of Home Affairs to which the 1st Defendant (*Department*), belonged. His duties included erecting and maintaining beacons defining the area(s) of such properties. He did not give the vital testimony that the suit land belonged to the 1st Defendant.

This witness was apparently not cross-examined by Mr. Kahiga, counsel for the plaintiff. At the end of his testimony Mr. Atanga applied for and was granted an adjournment to enable him contact and bring other persons knowledgeable on the issues to testify. This he did not do and the Defence case was deemed closed.

7. **The Submissions**

The submission comprised the facts, the issues for determination, and the applicable law.

I have already stated the facts at the beginning of this judgment. The issues which counsel for the plaintiff asked the court to determine were six, and are whether -

- (1) *The plaintiff was lawfully allotted the suit land;*
- (2) *The suit land was gazetted in 1961 as Prison Land and a restricted area;*
- (3) *The plaintiff is the owner of the land or not;*
- (4) *The suit land should be delivered for prison extension;*
- (5) *Eviction order should issue, and*
- (6) *the plaintiff is entitled to general damages and mesne profits;*

On the law, counsel for the plaintiff made reference to Articles 22, 23 and 40 of the Constitution of the Second Republic promulgated on 27th August 2010, the Government Proceedings Act (*Cap. 40, Laws of Kenya*), the Land Acquisition Act, now (*Cap. 295, Laws of Kenya*).

I entirely agree with submission by counsel for the plaintiff that Article 40 of the Constitution of Kenya 2010, guarantees any person in Kenya the right either individually or in association with others, to acquire and own property of any description in any part of Kenya. I further, with respect, agree with counsel for the plaintiff that this court has the constitutional power to enforce any fundamental right of any person while in Kenya, and under Article 23(b) of the Constitution to grant any relief appropriate including -

- (a) *a declaration of rights*
- (b) *an injunction*
- (c) *a conservatory order*

I further agree with counsel for the plaintiff that under the Government Proceedings Act (S. 16 (1) (a), no order of injunction may be issued against the Government, and in lieu thereof a declaration may be issued. This provision may however be contrary to the express provision of Article 23(3) of the Constitution which empowers the court to issue the relief of injunction. Section 16(1)(a) may therefore be void to the extent of the inconsistency as the constitution is the supreme law.

I also agree with counsel for the plaintiff's submission that under the Land Acquisition Act, (*Cap. 295, Laws of Kenya*), the Government is required to compensate the owner of the land or property being acquired compulsorily by the Government.

8. Analysis of submissions, the Evidence and the Law

Although the plaintiff's counsel raised six issues for determination, in my respectful opinion, the plaintiff's claim to the suit land will be determined upon consideration of only one issue, namely, ***whether*** the suit land was gazetted ***as Prisons Land and a restricted area***. Once this issue is determined, the answers to the other five issues will fall into place.

The commencement point on determination of this issue is the Letter of Allotment dated 10th April 1991. The General Condition states as follows-

"GENERAL

This Letter of Allotment is subject to, and the Grant will be made under the provisions of the Government Lands Act, (Cap. 280, of the Revised Laws of Kenya) and title will be issued under the Registration of Titles Act, (Cap. 281)."

In his submissions, counsel for the plaintiff reiterated the Defendant's defence that the suit land was part of the land gazette in 1961 as Prisons land, and a restricted area, and well before the land was allotted to the plaintiff. Although the plaintiff averred that the land had been degazetted, he produced no evidence to back up that submission. Counsel therefore submitted, -

"if at all the land had been gazetted and remained gazetted, it would have been clear from the records during the allotment and would not have been available for alienation since it would already have been alienated. Only alienated land may be allotted. Counsel submitted that if there had been a mistake as to the land available for allotment, the mistake cannot and should not be taken as the plaintiff's fault."

With respect, I entirely agree with counsel's submissions. Alienated land cannot be allotted. It is contrary to Section 3 of the Government Lands Act, to which the allotment is subject. Section 3 of the Act defines "***unalienated government land***" means "***government land which is not for the time being leased to any other person or in respect of which the Commissioner has not issued any letter of allotment.***"

Besides Section 9 of the Government Lands Act, only empowers the Commissioner of Lands to cause any portion of a township which is not required for public purposes to be divided into plots suitable for erection of buildings for business or residential purposes, and such plots may from time to time be disposed of in the prescribed manner.

In the case of **PAUL NDERITU NDUNGU & 20 OTHERS VS. PASHITO HOLDINGS LIMITED & ANOTHER** (*Nairobi HCCC No. 3063 of 1996*), it was held-

"that the Commissioner of Lands had no legal authority to allocate two pieces of land which had been reserved as a Police Post and a Water Reservoir as they had already been allotted."

The court, (*Mbogholi Msagha J*) said at p. 12 of his Ruling -

"Under the Government Lands Act (Cap. 280, Laws of Kenya), the Commissioner of Lands can only

make grants or dispositions of any estates, interests or rights in, over unalienated government land (S.3). In the instant case, the two parcels of land among others had been alienated and designated for particular purposes. It was not open for the Commissioner of Lands to re-alienate the same. So the alienation was void ab initio."

In Constitutional Court, (Nyamu J.) (as he then was), Wendoh and Emukule JJ. endorsed that position of the law in the case of **MILANKUMAR SHAH & 2 OTHERS VS. CITY COUNCIL OF NAIROBI, (2) THE ATTORNEY-GENERAL and STONE INDUSTRIES (Third Party) (Nairobi HCCC No. 1029 OF 2005 (O.S.))**.

In this case, there was no evidence that Gazette Notice No. 371 of 1961, which the Defendants pleaded and relied upon, and which reserved the suit land (*as part of LR. No. 452/1/4*) had been degazetted and therefore part, or the whole of it, was available for alienation. Indeed the plaintiff who declared in his evidence-in-chief that he is a skilled cartographer and map reader, failed to produce any evidence of the degazettement of the suit land as part of the larger prison's land. In fact I agree with the plaintiff's claim that correspondence from that Department claiming extension of the prison's land in the 1970s was written from both error and ignorance of the historical perspective and Gazette Notice of 371 of 1961. Without evidence of the degazettement of the land, or part of it, any alienation thereof was contrary to the clear provisions of Sections 3 and 9 of the Government Lands Act. The allotment to the plaintiff was therefore void ab initio, and the subsequent lease and certificate of lease were also void and are cancelled forthwith.

Having come to this conclusion, the answers to the issues raised by the plaintiff's counsel, must all be answered in the negative -

- (i) *the suit land was part of the land gazette under Gazette Notice Number 371 of 1961 and was already alienated,*
- (ii) *the purported allotment of alienated land was illegal,*
- (iii) *the plaintiff is not the lawful owner of the land,*
- (iv) *the land should be delivered to the Prison Department for its extension,*
- (v) *no order of eviction against Prisons arises, and that prayer fails,*
- (vi) *the plaintiff is not entitled to any general damages, or mesne profits.*

I am keenly aware that this outcome is greatly harsh not only to the plaintiff but to many others who are probably in similar situations. An allotment of land is an act of Government, and the citizenry must be allowed to trust their government irrespective of which Political Party is in power. The Republic of Kenya is one, and there is only one authority vested with the disposal of alienable land. Where that authority, the Commissioner of Lands acts outside its authority, its acts are *ultra vires* the law, and the courts will declare its acts illegal.

There are however consequences arising from acts of illegality by organs of Government. In my view, those organs of Government are liable to compensate third parties, like the plaintiff in this case, who on reliance upon Letters of Allotment which they think have been lawfully issued, and then proved otherwise. To hold otherwise would (in the words of Lord Wolf in **M. VS. HOME OFFICE & ANOTHER [1995] T.L.R. (July 27, 1993)**) establish a proposition that such organs of government or the executive obeyed the law as a matter of grace not necessity.

In our case, the plaintiff like many other land buying Kenyans, (*called developers today*), look for opportunities to get allotment of government land, as opposed to purchase in the open market, where prices are exorbitant, and where they strike fortune, and meet the conditions of allotment, the Government should compensate them for relying upon that Letter of Allotment.

Unfortunately in this case the plaintiff sued the owner of the land, and not the Commissioner of Lands who purported to allot alienated, (*the 1st defendant's land*), contrary to the clear provisions of Section 3 of the Government Lands Act. I am therefore unable to award any damages to the plaintiff.

The Plaintiff's suit is therefore dismissed with a direction that each party shall bear its own costs.

There shall be orders accordingly.

Dated, delivered and signed at Nakuru this 13th day of October, 2011

M. J. ANYARA EMUKULE
JUDGE