



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Environmental & Land Case 141 of 2010

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ELC. 141 OF 2010

JOHN PETER KAMAU RUHANGIPLAINTIFF
V E R S U S
KENYA FOREST SERVICEDEFENDANT

R U L I N G

The Plaintiff is the registered proprietor of land parcel L. R. No. 17942 (IR. No. 57926) situated along Kiambu Road, Ridgeways, Nairobi, having bought it from Sardul Singh Viridi and Gursharan Kaur Viridi for KShs. 2,500,000/=. The parties signed the transfer dated 30th July, 2007 which was registered on 11th April, 2008. Documents “JPKR1” refer. The previous owners were allocated the land by the Commissioner of Lands on 17th February, 1992.

The Defendant is a State Corporation under **section 4** of the **Forests Act, 2005** and is mandated to manage all State forests. Its case is that the suit property is situated within the boundaries of Karura Forest and falls under the **Forest Act, 2005** and therefore the purported allocation above was illegal and the title is null and void. The Defendant states that the suit property was not available for allocation as it was a State forest.

The suit was brought because on diverse dates in the month of March, 2010 the Defendant through its agents and employees had trespassed on the suit property and prevented the Plaintiff from developing it. The Plaintiff sought a permanent injunction, and general damages and exemplary damages for the trespass. With the suit was filed a chamber application under **Order 39 rules 1, 2, 3 and 9** of the **Civil Procedure Rules** and **section 3A** of the **Civil Procedure Act** for a temporary injunction to restrain the Defendant either by itself, its agents and or servants from trespassing, entering or interfering with the suit property pending the hearing and determination of the suit.

The Replying Affidavit was sworn by Peter James Kamwara who is the Head of Survey and Mapping at the Defendant Corporation. He swore that Karura Forest is a state forest measuring 2,580 acres (1,044.11 Ha.) as originally declared by proclamation No. 44 of 1932 and further declared to be a Central Forest by Legal Notice No. 174 of 20th May, 1964. He annexed “K1(a)” and “K1(b)” which are copies of the Proclamation and Legal Notice. He stated that the suit property falls within the Forest boundaries, and annexed “K2” which is a certified copy showing the boundaries of the Forest, and a copy of Boundary Plan No. 75/7 delineating Karura Forest Reserve. The deponent went on that the suit property measures about 0.8651 Ha. and is located at the precincts of Rui Rwaka River and is sandwiched between the old and new Nairobi - Kiambu Road. The old Nairobi – Kiambu Road, being 200 ft wide and 6 miles long, was gazetted vide Government Notice No. 237 of 1951. “K3” is copy of the Gazette Notice. He stated that in the 1960s the Nairobi – Kiambu Road was relocated to its present location, leaving a vacant portion measuring 1.838 Ha. but that the said old Nairobi – Kiambu Road corridor never ceased to be part of Karura Forest, and has never been de-gazetted to date. The disputed property, he said, falls within the abandoned vacant road corridor which is part of the Forest.

The Defendant is therefore saying that there has never been any lawful excision of a part of the Forest purported to measure approximately 0.8651 Ha. nor has such a portion been made available to the Commissioner of Lands for allocation pursuant to the **Forests Act (Cap. 385)** (repealed), or the **Forests Act 2005**. The Commissioner of Lands, the Defendant continued, has no authority to alienate gazetted forest without or in disregard of the provisions of the **Forest Act** as all forest areas as defined under the **Act** are public land held in trust for the common good of the people of the Republic of Kenya with the rights and interests thereto enshrined and protected under the Constitution. The Defendant annexed a copy of the Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (known as the Ndung’u Report) annexes Volume II page 674 No. 38 “K4”) to show that the Report identifies the suit property as having been illegally acquired. The Defendant referred to the documents (“JPKR1”) annexed by the Plaintiff in the supporting affidavit and questions their validity as follows:-

- a) the transfer is dated 30th July, 2007 yet it was registered on 11th April, 2008;
- b) the said transfer is not endorsed with the registration particulars as required by law; and

c) the documents do not have Land Rates and the Land Rent Clearance Certificates and the Commissioner of Land Consent.

The Plaintiff swore a further affidavit saying that the suit property was created vide Government Notice No. 237 of 1951 of **Public Roads Ordinance (Cap. 229)** removing the suit property from the Forest, and therefore the suit property does not fall under the **Forest Act, 2005** or under the management of the Defendant. He stated that the suit property was part of the land delineated from the Road Plan NB/31 and subsequently subdivided and allocated to different people by the Kenya Government. He annexed a copy of the Survey Plan of L.R. No. 27/62 – 66 as “JKPKI”. The Plaintiff stated that he was the third registered owner of the suit property and that the original allottees were properly given the land by the Commissioner of Lands who was sanctioned all subsequent transfers. Lastly, that he bought the land for value and has paid all the relevant Stamp Duty, Land Rent and Rates.

The court received written submissions from both the Plaintiff’s and Defendant’s counsel.

There is no dispute that the Plaintiff is the registered **proprietor of the suit property**. He has title under the **Registration of Titles Act (Cap.281)** whose **section 23 (1)** provides that a certificate of title issued to a purchaser shall be taken by the court as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner and the title shall not be challenged, except on the ground of fraud or misrepresentation. Under **section 24** of the **Act**, a party deprived of land through fraud or error can claim damages. Ideally, therefore, the Plaintiff who has this title issued to him by the Government should waive it to any claimant. (**Mbothu & Others –Vs- Waitimu & 11 Others [1986] KLR 171**).

However, the parties, by their affidavits and submissions, appear to agree that this case will ultimately be decided on whether the suit property was part of Karura Forest, whether it was degazetted and whether it was, therefore, available to the Commissioner of Lands for alienation. This is because it is this alienation that is the basis of the Plaintiff’s claim as he bought it from people who had been allocated the same by the Commissioner of Lands. Under **section 4** of the **Forest Act (Cap. 385)** (repealed) it was the responsibility of the Minister, by notice in Gazette, to declare the boundaries of a forest and to alter them; to declare that a forest area shall cease to be a forest, etc. The Defendant is saying the suit property was part of Karura Forest whose boundaries were gazetted and that that has not changed.

Both parties sought to rely on the Legal Notice No. 237 of 1951. The Defendant states that its import was to dedicate the suit property for the construction of Nairobi – Kiambu Road; that the Road was later relocated to its present location, leaving the suit property to devolve back to the Forest. The Plaintiff states that the Legal Notice removed the suit property from the Forest, that this was a degazettement that made the suit property available for the Commissioner of Lands to alienate.

On the material available at this interlocutory stage, I am unable to find that the Plaintiff has an indefeasible title. The parties will have to testify and their respective documents examined for the court to decide one way or the other. The result is that the Plaintiff has not established a *prima facie* case with a probability of success to be entitled to an interlocutory injunction (**Giella –Vs- Cassman Brown & Co. Ltd [1973] EA 358**). I hasten to add that where the applicant has title that resulted from the alienation of public land by the Commissioner of Lands, it is incumbent upon the court, which has the responsibility to protect any public land, to examine the title and the process of its acquisition to see that the law was followed all the way. This examination is necessary to avoid what is now commonly referred to as the “grabbing of Public property”. (See **Champaklal Ramji Shah & 3 Others –V- The Attorney General & Another, HCCC No. 145 of 1997 at Mombasa; The Town Council of Ol’Kalou –Vs- Nganga General Hardware, Civil Appeal No. 267 of 1997 (UR); and John Gitau & 3 Others –Vs- Theluji Dry Cleaners Ltd & Another, Civil Appeal No. 72 of 1987 (UR)**).

As to whether the Plaintiff has demonstrated that if the interlocutory injunction is not granted he will suffer such loss or injury that damages may not adequately compensate, it is clear that the land was bought for KShs. 2,500,000/=. The Defendant is a public corporation that should be able to pay such or any other amount that may be found due. Lastly, I find, the balance of convenience should tilt in favour of maintaining the *status quo*.

The result is that the application is dismissed with costs.

**DATED AND DELIVERED AT NAIROBI
THIS 18TH DAY OF OCTOBER 2010**

**A. O. MUCHELULE
J U D G E**