



**Sunflag Property Investment Limited v Kenya Railways Corporation (Environment and Land Case Civil Suit 271 of 2011) [2022] KEELC 14735 (KLR) (10 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14735 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 271 OF 2011  
OA ANGOTE, J  
NOVEMBER 10, 2022**

**BETWEEN**  
**SUNFLAG PROPERTY INVESTMENT LIMITED ..... PLAINTIFF**  
**AND**  
**KENYA RAILWAYS CORPORATION ..... DEFENDANT**

**JUDGMENT**

**Back ground**

1. The Plaintiff, a limited liability company, instituted this suit vide a Plaint dated 8<sup>th</sup> June 2011. The Plaintiff has sought for the following orders:
  - a. An order requiring the Defendant to immediately vacate the said land being Land Reference Number 25805 Nairobi and restore its vacant possession to the Plaintiff.
  - b. Special damages being the cost of rebuilding the boundary wall demolished by the Defendant as at the time of restoration of possession of the said land to the Plaintiff.
  - c. General and exemplary damages in such amount as this Honourable Court may assess and deem fit to grant.
  - d. Costs of this suit.
  - e. Interest on the above at court rates.
  - f. Such other or further reliefs this Honourable Court may deem fit to grant.
2. The Plaintiff's case is that it is the registered owner of the suit land, LR No 25805, which measures approximately two hectares; that it purchased the land from Gami Properties Limited through an agreement dated 25<sup>th</sup> March 2009, at a consideration of Kshs. 70,000,000 (Seventy Million Shillings) and that the land was transferred to the Plaintiff through a Transfer dated 11<sup>th</sup> June 2009.



3. The Plaintiff averred in the Plaint that it thereafter took possession of the land and took steps to develop the land by appointing architects and engineers to draw plans to build a warehouse, boundary wall, store and guardhouse; that it thereafter appointed a contractor to build the boundary wall at the cost of Kshs 9, 395,443 and that on 12<sup>th</sup> June 2010, by which time the boundary wall was 80% complete, a group of people claiming to have been sent by the Defendant entered the land, chased away the contractor's security guards and demolished the boundary wall.
4. It is the Plaintiff's case that it is the third registered proprietor of the land, with the Grant of the land having been issued on 27<sup>th</sup> November 2002 to the first proprietor and registered on 3<sup>rd</sup> December 2002 as I.R No 90589/1; that the land was subsequently transferred to Gami Properties Ltd and that the allegation that the Grant was issued fraudulently is not true.
5. The Plaintiff asserted that the Defendant's entry into the suit land and taking possession thereof was wrongful and has deprived it the use and enjoyment of the land; that the Defendant's unlawful action has deprived the Plaintiff of the rental income it would have received from letting the godowns it was to build, measuring five thousand (5000) feet which would have fetched Kshs. 3,750,000 per month and that it is entitled to more than Kshs. 7,500,000, being the value of the work completed when the Defendant demolished the wall, as well as exemplary damages.
6. In its Defence and Counterclaim filed on 18<sup>th</sup> July 2011, the Defendant averred that it is the registered proprietor of all that parcel of land known as LR No 209/19708 (I.R. No 25879), which is a portion of a 204-acre piece of land belonging to the Defendant, popularly known as Makadara Marshalling Yard; that the suit property was alienated in favour of the Defendant for public purposes and that the suit property could not be re-alienated to private persons.
7. It was averred that the Plaintiff's claim over LR 25805 (I.R. No 90589) is unsustainable as land survey plan number 239082 which gave rise to title LR No 25805 (I.R. No 90589) overlaps the Defendant's property, LR No 209/19708 (I.R. No 125879), land survey plan number 308559 and that the Deed Plans attached to the two suits are the same although identified differently by the documents in the parties' possession.
8. According to the Defendant, land survey plan number 239082 has been condemned by the Department of Surveys which has recommended that the Plaintiff's title over LR No 25805 I.R. No 90589 as well as two other titles, LR No 25803 and 25804, be cancelled and that ELC No 133 of 2009, Smitam Limited v Kenya Railways and ELC No 631 of 2008 Smitam Limited v Rift Valley Railways which are in respect of LR. Nos 25803 and 25804 are pending in the High Court.
9. It is the Defendant's contention that if indeed the Plaintiff purchased the suit property from a third party, then the Plaintiff purchased a bad title; that the suit land was vested in the General Manager of the East African Railways and Harbours Administration vide Kenya (Vesting of Land) Regulations 1963 and that the land was thereafter vested in the Defendant by the *Kenya Railways Corporation (Vesting of Land) Order, 1986*, as successor to the East African Railways and Harbours Administration.
10. The Defendant finally averred that it has never conveyed the suit land to any person or entity whatsoever, and that the suit property was subsumed in LR No 209/19708 measuring 4.71 hectares whose title has been issued to the Defendant.
11. In its Counterclaim, the Defendant averred that title No 25805 is illegal and an infringement of its right to property; that the court should cancel the said title and that the title has already been condemned by the Ministry of Lands



### **Plaintiff's evidence**

12. PW1, the Plaintiff's Managing Director, informed the court that it purchased the suit property from Gami Properties Ltd for consideration of Kshs. 70,000,000; that it engaged a contractor to construct a perimeter wall for Kshs. 9,395,443 and had paid Kshs 4,000,000 by 12<sup>th</sup> June 2010 towards the construction and that the Defendant's agents entered the suit property on 12<sup>th</sup> June 2010, demolished the wall and took possession of the suit land.
13. It was the evidence of PW1 that the Grant shows that the title to the suit property was issued in 2002; that they are the third owners of the suit land and that the Plaintiff has never been involved in any fraud.
14. PW1 urged that the Plaintiff has suffered loss of rental income of approximately Kshs. 6,750,000 per month and claim damages for the same. PW1 stated that the Plaintiff is also claiming at least Kshs. 11,177,627 being the cost of rebuilding the wall and that Kenya Railways behaved in a high handed and objectionable manner as they never gave them an opportunity to respond to their alleged claim to the land and forcibly ejected them from their land in disregard of the law. According to PW1, the Plaintiff is entitled to exemplary damages.
15. PW1 produced in evidence the following exhibits: the title, the agreement for sale, transfer, planning permission to build the wall, local purchase order, invoices, letters dated 30<sup>th</sup> June 2010, 22<sup>nd</sup> August 2010, 11<sup>th</sup> October 2011, 14<sup>th</sup> June 2017 from Krupau Construction, and a letter dated 16<sup>th</sup> September 2011 from the Lands Registrar, and photographs.
16. In cross-examination, PW1 stated that the railway line was not within the suit property; that the Grant was issued to Francis Samoei, Julius Kemei and Paul Hassan who were registered on 27<sup>th</sup> November 2002 and that the Plaintiff did not sue Garmin properties nor the Registrar of Titles. In re-examination, PW1 stated that Kenya Railways admitted that they are the ones who demolished the wall and that the land was currently leased to Riva Oils Ltd.
17. The Plaintiff's General Manager, PW2, asserted that the Plaintiff had instructed Krupau Construction Ltd, a building contractor, to build the boundary wall; that he was called on 13<sup>th</sup> June 2010 and informed by the Contractor about the Defendants claim that it is the owner of the land; that the Defendant never showed him its title document and that he is not aware that the title they have overlaps that of the Defendant.
18. The Director of Krupau Construction Ltd, PW3, averred that in 2009, they agreed to build for the Plaintiff a boundary wall on the suit land for Kshs. 9,395,443; that by 12<sup>th</sup> June 2010, they had completed 80% of the work worth approximately Kshs. 7,500,000 for which they had been paid Kshs. 4,000,000 by the Plaintiff and that he heard of the Defendant's entry and demolition of the wall from the security guards on 13<sup>th</sup> June 2020.
19. PW3 stated that they would need Kshs. 11,177,627 to rebuild the wall due to increase in cost of fuel, material and labour and that he did not have any bill of quantities from a Quantity Surveyor nor any document to show that 80% of the work had been completed.

### **The Defendant's evidence**

20. DW1, a Senior Legal Officer with the Defendant, testified that the suit property, the Defendant's Marshalling Yard, has been a subject of encroachment, and that the Director of Surveys recommended for the cancellation of Deed Plan No 239082 which is registered in the Plaintiff's name.



21. In cross-examination, DW1 testified that under the Local Government (Valuation and Ratings) Ordinance 1956, the suit land was reserved for public purposes. DW1 presented a map of the Marshalling Yard which has one title.
22. DW2, from Survey of Kenya, presented a report which he prepared dated 22<sup>nd</sup> April 2021. He stated that the subject matter land is LR No 209/13767; that survey plan number F/R No 358/189 is in their records and that the reserve area was 2,124 acres which is the larger Makadara, whose survey map F/R 8/197 is part of his report.
23. According to DW2, LR No 209/211/R was marked “Makadara Marshalling Yard” and has an approved PDP from the Director; that the PDP was approved in 1991; that the suit property was allocated to the Kenya Railways Corporation as LR No 209/211/3 which was subdivided into LR No 209/19702-19708 vide Survey Plan F/R No 361/61.
24. It was the evidence of DW2 that Deed Plan Nos 308/553- 308/559 were issued after the subdivision of LR No 209/211/3 and that during the subdivision of the land, it was discovered that some parcels of land were overlapping on the land.
25. In his report, DW2 stated that there was an overlap between the already registered land LR No 209/211 and the subdivisions and the new grants which were created separately, including the Plaintiff’s property and that he found at Survey of Kenya office copy for Deed Plan No 308559 for LR No 209/19708, but did not find the office copy for Deed Plan number 239082 for LR 25805.
26. According to DW2, the actual size of land in Deed Plan No 239082 in the Plaintiff’s bundle is 2 hectares while the size of land in Deed Plan number 308559 is 4.751 hectares. It was the evidence of DW3 that the Plaintiff’s land is at the tip of the large Deed Plan.
27. DW2’s testimony was that the Plaintiff’s Deed Plan does not appear in the bigger Deed Plan and is not part of the sub-division scheme; that the Director of Surveys did a letter on 8<sup>th</sup> February 2010 in which he stated that plan numbers 23908-239082 overlaps the survey of LR No 209/211/3; that the overlap occurred because the new grant LR 25805 (the Plaintiff’s land) omitted crucial details such as the neighbouring plots and that no cross-referencing was done leading to the overlap.
28. In cross-examination, DW2 stated that the survey plan for LR No 25803 and 25805, F/R 403/1192 exists in their office and was authenticated on 23<sup>rd</sup> November 2001 and that survey plan number F/R 8/197 does not show a marshalling yard and does not state that the land belongs to Kenya Railways.
29. The Principal Land Surveyor, Kenya Railways, DW3, testified that the Defendant is the registered proprietor of LR No 209/19708 (I.R. No 125879), measuring approximately 253 acres in the Makadara area, which is known as the Makadara Marshalling Yard.
30. He testified that the Marshalling Yard was allocated LR No 209/211/3 which was later subdivided into seven parcels, LR209/19702- LR 209/19708 and that LR No 25805 (I.R. No 90589) overlaps subdivision LR No 209/19708 (I.R. No 125879), land survey plan number 308559 which belongs to the Defendant.
31. It was the evidence of DW3 that the Director of Surveys did a letter dated 8<sup>th</sup> February 2010 to the Commissioner of Lands advising him about the overlapping surveys that had been noted on LR No 209/211/3 and that the Director of Surveys recommended to the Commissioner of Lands to recall the titles overlapping the Defendant’s property and cancel them to rectify the anomaly.



32. It was the evidence of DW3 that in the minutes of 10<sup>th</sup> February 1964, there was an objection for reservation of the whole land as a Marshalling Yard; that the land was zoned and reserved as a Marshalling Yard with other facilities in 1962 and that the railway line is adjacent to LR. No 25805.

### Submissions

33. In its submissions and response to the Defendant's submissions, the Plaintiff submitted that it is an innocent purchaser for value and that there is no evidence of any right of the Defendant to the Plaintiff's land; that the suit land remained unalienated Government land and that from the minutes annexed on the Defendant's list of documents, there was no reservation of the Makadara Marshalling Yard.
34. It was submitted that no map or Part Development Plan was availed to show that the suit land was reserved for use by the Defendant; that the Plaintiff's title which was issued in 2002 prevailed and was first in time against the Defendant's title which was issued in 2010.
35. The Plaintiff submitted that the Defendant could not without due process of the law acquire the Plaintiff's land by force. The Plaintiff relied on the cases of *Isaac Gathungu Wanjohi & another v Attorney General & 6 others* [2012] eKLR, *Kuria Greens Limited v Registrar of Titles and another* [2011] eKLR and *Republic v Kisumu District Lands Officer and another* Misc. App No 80 of 2020 eKLR and *Eunice Grace Njambi Kamau & another v Attorney General & 5 others* [2013] eKLR.
36. They argued that the Director of Physical planning was not called as a witness to testify; that the claim by the Director of Surveys that the Plaintiff's land had no PDP had no weight because the Plaintiff is not responsible for maintaining the records of PDPs and that the Defendant failed to prove that the Plaintiff's title was obtained illegally, unprocedurally or through a corrupt scheme.
37. According to the Plaintiff, the Plaintiff's title is protected by the principles of the Torrens system in that they did not need to investigate the history of past dealings with the land or search behind the title as depicted on the register. The Plaintiff relied on numerous authorities which I have considered.
38. The Defendant submitted that the suit property is public land which was not available for alienation or allocation for private purposes and that the any allocation that could have been done was contrary to the *Government Lands Act*, *Kenya Railways Corporation Act* and the *State Corporations Act*. They relied on *Republic v Permanent Secretary Ministry of Public Works & Housing ex-parte Tom Maliachi* [2014] eKLR, *Kenya Ant-Corruption Commission v Online Enterprises Ltd & 4 others* [2019] and *Pashito Holdings Limited & another v Paul Nderitu Ndung'u & 2 others* [1997] eKLR.
39. It was submitted by the Defendant that the Plaintiff's assertion that it is an innocent purchaser unaware of the fraudulent transaction does not hold water because the rights of real title holders prevail against unscrupulous persons by dint of Section 26 of the *Land Registration Act*.
40. On the claim for special damages by the Plaintiff, it was submitted that no evidence was produced to prove that the wall was demolished by the Defendant; that the Plaintiff also failed to demonstrate with evidence the extent of construction of the wall and that the testimony its witnesses offered was hearsay evidence, thus inadmissible.

### Analysis and Determination

41. Having considered the pleadings, the evidence and submissions tendered by the parties, the issues for determination before this court are:-
- a. Whether the Plaintiff's Title LR 25805 (I.R. No 90589) is valid.



- b. Whether the Plaintiff is entitled to special damages for the destruction of the wall, as well as general and exemplary damages
42. This suit was instituted by the Plaintiff who asserted that it is the lawful owner of LR No 25805 (the suit property). It is the Plaintiff's case that the agents of the Defendant trespassed onto its land in 2010, demolished a boundary wall that was being constructed and took over possession of the land.
43. The Defendant's case on the other hand is that the Plaintiff's title has overlapped its land being LR 209/19708 (I.R. No 125879), which it claims was vested in its predecessor in 1963 and later vested in the Defendant in 1986. It is the Defendant's contention that the Plaintiff's title was created illegally and that the Plaintiff did not obtain good title. The Defendant has urged that the Plaintiff's title be cancelled.
44. The Plaintiff has correctly argued that Kenya's land registration system, particularly under the *Registration of Titles Act* (repealed), is based on the Torrens System. This system guarantees the integrity and conclusiveness of a certificate of title as proof of ownership, such that it would be inconceivable to have two titles over the same land.
45. The Kenyan land registration system has however been plagued by fraud resulting in cases such as this, where two titled parties are claiming the same land. Section 26 of the *Land Registration Act* No 3 of 2012 prescribes that a certificate of title is conclusive proof of proprietorship and can only be challenged on grounds of fraud, misrepresentation or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
46. The rationale of Section 26 of the *Land Registration Act*, which is similar in all respects to section 23 of the *Registration of Titles Act* (repealed) was enunciated by the Court of Appeal in *Joseph Arap Ngok v Justice Moiwo ole Keiwua & 5 others*, Civil Appeal No Nai. 60 of 1997 as follows:
- “Section 23(1) of the Act gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”
47. It is all the same a matter of notoriety that in Kenya, it is a risky business to undertake land transactions without conducting due diligence. This was aptly captured by the Court of Appeal in *Arthi Highway Developers Limited v West End Butchery Limited & 6 others*, Civil Appeal No246 of 2013 as follows:
- “It was common knowledge, and well documented at the time, that the land market in Kenya was a minefield and only a foolhardy investor would purchase land with the alacrity of a potato dealer in Wakulima market. Perhaps the provisions of the new Constitution 2010 and the *Land Registration Act*, 2012 will have a positive impact for land investors in future.”
48. In this case, the Defendant has in its Counter claim challenged the validity of the Plaintiff's title, arguing that the title was illegal and that there existed no legal basis upon which the said title could have been issued.



49. While the Plaintiff has sought for reliefs under the principle of sanctity of title, the Court of Appeal in *Munyu Maina v Hiram Gathiba Maina* (2013) eKLR held that a registered proprietor must prove the legality of how it acquired its title.

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

50. In *Elijah Makeri Nyangwra v Stephen Mungai Njuguna & another* [2013] eKLR, the court held as follows:

“First, it needs to be appreciated that for Section 26 (1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions.”

51. The Defendant adduced evidence to show that LR No 209/211/R which was marked “Makadara Marshalling Yard” had an approved PDP from the Director of Surveys. The said PDP was approved in 1991. Evidence was also adduced to show that the land in dispute was allocated to the Kenya Railways Corporation as LR No 209/211/3 having been surveyed in 1997 vide survey plan number F/R 271/38.

52. This registration was in conformity with the Commissioner of Land’s approval letter reference no. 71326/92 of 15<sup>th</sup> March 1993 and the Approved Development Scheme Number LP 1087, which documents were produced in this court.

53. After the survey of LR No 209/211/3 in 1997, a Deed Plan No 217228 was issued. The “Marshalling Yard was later subdivided into LR Nos 209/19702-19708 as presented on Survey Computations No 58364 and cadastral survey plan number F/R 361/61 dated 10<sup>th</sup> February 2010. Upon authentication, Deed Plan numbers 308553-308559 for the sub divisions were issued for registration of title.

54. The evidence before this court shows that it was during the subdivision of LR No 209/211/3 that it was discovered that there were other grants that were overlapping on LR No 209/211/3, including the Plaintiff’s title.

55. The overlap over the Defendant’s land was confirmed by the Director of Surveys vide his letter dated 8<sup>th</sup> February 2010 in which he stated that plan numbers 23908-239082 overlap the survey of LR No 209/211/3 and that the overlap occurred because the new Grant, LR 25805 (the Plaintiff’s land), omitted crucial details such as the neighbouring plots and no cross-referencing was done leading to the overlap.

56. It is trite law that while alienating public land under the repealed laws, and specifically the *Governments Land Act* and the *Registration of Titles Act*, a Part Development Plan must be drawn first and approved by the Commissioner of Lands or the Minister for lands before any unalienated Government land could be allocated. After a Part Development Plan (PDP) has been drawn, a letter of allotment based



on the approved PDP is then issued to the allottees. (See *Nelson Kazungu Chai & 9 others v Pwani University* [2014] eKLR).

57. The Plaintiff did not prove its root of title by adducing a copy of an approved Part Development Plan, which is critical in the process of alienating Government land. Considering that the Defendant had the suit property surveyed in 1997 vide survey plan FR 271/38 which gave rise to LR No 209/211/3, the Plaintiff failed to undertake the necessary due diligence before it purported to purchase the suit property, which actually overlaps the Defendant's land.
58. This conclusion is informed by the decision in *Kenya Anti-Corruption Commission v Frann Investments Limited & 6 others* [2020] eKLR, where it was held that Government land set aside for public purpose cannot be alienated for private use. The court stated as follows:

“ ... where Government land had been specifically assigned for a specific public purpose, then so long as that public purpose remains, that land ought to be considered to be part of Government land that cannot be alienated to private individuals for private use. I do not think any other interpretation would make sense. I say so because it is a fact that historically, not all Government land had been titled. Probably the Government was easy that because such land is under its use, or has been assigned a public use, then nobody is going to tamper with it. But does it mean that because the Government has not issued an allotment letter to such land, to say a Government parastatal or Government Department, and has not issued a title to the body that is supposed to make use of the land, then the said land can be allocated to private individuals for private use? I do not think so. If this was to be the position, then developed infrastructure including roads, hospitals, schools, and even courts could be allocated to private individuals simply because no allotment letter or title had been issued...

My view is that so long as land had, or has been, set aside by the Government for specific use, which use is apparent from the pertinent records, including survey plans and/or PDPs, or visible on the ground, then that land must be considered to be part of “alienated Government land.” That was indeed the basis of the holding by the Court of Appeal in the case of *Chemey Investment Limited v Attorney General & 2 others* (supra).”

59. This court is persuaded by the Defendant's case and finds that the creation of LR No 25805 was illegal and unprocedural. Any due diligence would have shown that the land was reserved for the Defendant, and no title could validly be issued on the same land.
60. Indeed, that explains why the Plaintiff did not avail any Part Development Plan (PDP) because none could have been approved considering that the land had already been reserved for use by the Defendant. In the circumstances, the Plaintiff's recourse is for damages as against the people who sold to it the suit property.
61. Considering that the Plaintiff has not proved that it is entitled to the suit property, the issue of general and special damages does not arise. For those reasons, this court disallows the Plaintiff's claim as laid out in its Plaintiff and allows the Defendant's counterclaim as follows:
- a. The title in the name of the Plaintiff for LR No 25805 be and is hereby cancelled.
  - b. The Plaintiff to pay the costs of the suit.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 10<sup>TH</sup> DAY OF NOVEMBER, 2022.**



**O. A. ANGOTE**

**JUDGE**

In the presence of;

Ms Shan for Plaintiff

Mr. Muturi for Defendant

Court Assistant - June

