



Kenya Airports Authority v Bundotich & 5 others (Environment & Land Case 283 of 2018) [2022] KEELC 14733 (KLR) (10 November 2022) (Judgment)

Neutral citation: [2022] KEELC 14733 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 283 OF 2018
EK WABWOTO, J
NOVEMBER 10, 2022**

BETWEEN

KENYA AIRPORTS AUTHORITY PLAINTIFF

AND

EDISON KIPLAGAT BUNDOTICH 1ST DEFENDANT

SALLY CHEPKEMOI 2ND DEFENDANT

SIMON ONDIEK 3RD DEFENDANT

COMMISIONER OF LANDS 4TH DEFENDANT

REGISTRAR OF TITLES 5TH DEFENDANT

DIRECTOR OF SURVEYS 6TH DEFENDANT

JUDGMENT

1. The dispute between the parties in this case relates to LR No 209/14824 or LR 209/13080. The Plaintiff commenced this suit vide a plaint dated October 6, 2005. The Plaintiff sought the following reliefs:

As against the 1st, 2nd and 3rd Defendants: -

- a. A declaration that the grant issued in respect of LR No 209/14824 and registered in the Lands Titles Registry in Nairobi as IR 92165/1 is null and void.
- b. A permanent injunction to restrain the 1st-3rd Defendants their servants, agents, and anybody authorized by them from advertising for sale, interfering with, alienating, sub-dividing, trespassing upon, or in any manner dealing with all that parcel of land known as LR No 209/14824 or LR 209/13080 or any part thereof.



- c. An order for delivery of the original grant in respect of LR 209/14824 and registered in the Lands Titles Registry in Nairobi as IR 92165/1 to the 4th and 5th Defendants for cancellation.
 - d. General damages for trespass
 - e. Costs of the suit.
 - f. Interest on (d) and (e) at court rates.
 - g. Any other remedy this Honourable court may deem fit to award.
Against the 4th and 5th jointly and severally;
 - h. An order is hereby issued directing the 4th and 5th Defendants to nullify and or cancel the Grant in respect of LR No 209/14824 and registered in the Lands Titles Registry in Nairobi as IR 92165/1 and to that extent an order to expunge and cancel the entry registered as number IR 92165/1.
 - i. Costs of the suit.
 - j. Any other remedy this Honourable Court may deem fit to award.
Against the 6th Defendant;
 - k. An order against the 6th Defendant to rectify his survey records and plans and to that extent to expunge and or cancel Deed Plan Number 241672 dated May 3, 2002.
 - l. Costs of the suit.
 - m. Any other remedy this Honourable Court may deem fit to award.
2. The 1st, 2nd and 3rd Defendants filed a statement of defence dated July 19, 2016 together with a list and bundle of documents dated on the same date. The 1st, 2nd and 3rd Defendant's denied all the averments in the plaint. They averred that they were the registered owners of the suit property and that they lawfully acquired the same after following the due and lawful process. They prayed for the dismissal of the Plaintiff's case.
3. The 4th, 5th and 6th Defendant also filed a statement of defence dated September 17, 2009 and supported the Plaintiff's claim to the extent that it applied to the 1st, 2nd and 3rd Defendants.

The Plaintiff's Case

- 4. It was the Plaintiff's case that by a grant dated, September 18, 1996 and registered in the Land's Titles Registry in Nairobi IR No 70522/1 the President of the Republic of Kenya granted unto the Plaintiff all that parcel of land containing 163.67 hectares or thereabouts which said piece of land is also known as Land Reference Number 209/13080. The Plaintiff has erected on the said parcel of land an airport known as Wilson Airport which airport by virtue of the traffic handled therein is one of the busiest airports in Africa.
- 5. The Plaintiff averred that the Grant had a deed plan number 205579 dated May 21, 1996 which plan delineates the dimensions, abutments and boundaries of the Plaintiff's parcel of land.
- 6. The Plaintiff further averred that the 1st, 2nd and 3rd Defendants knowing very well that the Plaintiff was the registered owner of LR No 209/13080 submitted an application to the 4th Defendant for issuance with the land comprised in LR No 209/13080.



7. It was also contended that the 6th Defendant unlawfully and in bad faith caused to be prepared and or approved a deed plan number 241672 for a parcel of land designated as LR No 209/14824.
8. It was also averred that at the time of the approval or preparation or issuance by the 6th Defendant of Deed Plan Number 241672 to the 1st, 2nd and 3rd Defendants there was already in existence Deed Plan Number 205579 dated May 21, 1996 in respect of the Plaintiff's parcel of land. It was the Plaintiff's contention that the issuance of the said deed plan by the 6th Defendant was negligent and an act of extreme dereliction of duty.
9. The Plaintiff further contended that the 4th and 5th Defendants pursuant to the issuance of the Deed Plan Number 241672 in respect of LR No 209/14824 and in total disregard of the Plaintiff's proprietary rights issued a Grant dated January 14, 2003 to the 1st, 2nd and 3rd Defendants in respect of LR No 209/14824 and the same as IR 9216J/1 knowing well that the land comprised in the said grant was already part of LR No 209/13080 owned by the Plaintiff.
10. Rashid Abdullahi a Land Surveyor working with the Plaintiff testified as the sole Plaintiff's witness. During his testimony he adopted his witness statement dated September 18, 2017 as part of his evidence in chief. He also relied on the Plaintiff's bundle of documents dated July 4, 2012 which was also adopted as part of his evidence in chief.
11. He testified that the suit property had already been allocated to the Plaintiff for use as part of Wilson Airport and hence it was not possible for the same to be allocated to any other person including the 1st- 3rd Defendants. He also stated that the 1st and 3rd Defendant despite being illegally allocated the land never paid for the stand premium within the stipulated period and also never took possession of the same.
12. During cross-examination, he stated that the letter of allotment was issued in respect to an 'surveyed land' and hence he could not be able to tell whether the same was valid or not. He also stated that the Plaintiff had challenged the allotment on the basis that it was issued in respect to land that was not available.
13. On re-examination, he stated that the suit property is right opposite the Wilson Airport manages to office which is within Wilson Airport and the same forms part of LR No 209/13080.

The case of the 1st, 2nd and 3rd Defendants

14. The 1st, 2nd and 3rd Defendants filed a joint statement of defence dated July 19, 2016 together with a list and bundle of documents dated on the same date.
15. Mohamed Munir Chaudhri testified on behalf of the 1st, 2nd and 3rd Defendants. He stated that he had a power of attorney dated June 30, 2010 and registered on July 12, 2010 wherein the 1st, 2nd and 3rd Defendant had appointed him as their lawful Attorney to inter alia manage, superintend, control the management of our interest in the property known as Land Reference No 209/14824.
16. During the hearing, he relied on his witness statement dated January 31, 2020 which was also adopted as part of his evidence in chief. It was his testimony that LR Number 209/14824 belongs to the 1st, 2nd and 3rd Defendants which was lawfully acquired. It was also his testimony that the 1st, 2nd and 3rd Defendant's followed due process in acquiring the property. The required stamp duty was paid same for premium rent as was required. It was also his testimony that if indeed the suit property was Plaintiff's property then the 4th-6th Defendant should be held liable for the allotment of the same.



17. On cross-examination, he stated that he was not certain on whether the 1st -3rd Defendant raised the issue of the property being within Wislon Airport. He also reiterated that the 1st- 3rd Defendants had filed a Notice against the co-defendants in the event that the court would find otherwise.
18. On re-examination, he reiterated that the land was acquired lawfully and there was no fraud on the part of the 1st -3rd Defendant.

The Case of the 4th - 6th Defendants

19. The 4th, 5th and 6th Defendants filed its statement of defence dated September 17, 2019. During the hearing of the case, they did not call any witness to testify on their behalf.

The Plaintiff's submissions

20. The Plaintiff filed its submissions dated September 26, 2022 through the firm of Nyiha, Mukoma and Company Advocates. Counsel for the Plaintiff submitted on three issues: -
 - i. Whether the Plaintiff is the registered proprietor of LR Number 209/13080.
 - ii. Whether granting of title to the 1st, 2nd and 3rd Defendants was conducted through a fraudulent process.
 - iii. Whether the Plaintiff is entitled to the relief sought.
21. On the first issue, Counsel made reference to Section 26 of the [Land Registration Act](#) and submitted that the Plaintiff is the registered proprietor of LR Number 209/13080 and the property was legally apportioned to the Plaintiff through the Grant dated September 18, 1996. Reliance was made to the case of [John Kiguru Karume –Vs- Kenya Institute of Administration & 4 others \(2017\) eKLR](#) where the court held as follows: -

' The concept of absolute and indefeasible ownership of land cannot be clothed with legal and constitutional protections if the interest was acquired through fraud, misrepresentation, illegality, unprocedural ways or corrupt schemes. This concept cannot be used to sanitize the commissioner if it allocates or issues title in such manner. In the case of Champaklal Ramji Shah & 3 others –Vs- AG & Another HCCC No 145 of 1997, it was held that the court has a duty to examine the process of acquisition of such title and if it determines that there is an illegality, should nullify the titles as required.'

22. It was also submitted that the property claimed by the 1st – 3rd defendants was never available for allocation since the same had already been allocated and set aside for us as part of Wilson Airport property. Counsel made reference to the cases of [Robert Mutison Lelli –Vs- Kenya Medical Training College, AG & Another \(2019\) eKLR](#), [Timothy Langosi & 87 others –Vs- Kenya Forest Services & 2 others \(2015\) eKLR](#) and [Republic –Vrs- Minister for Transport & Communication & 5 others Ex-parte Waa Ship Garbage Collector & 15 others \(2006\)1 KLR \(E&L\)563](#).
23. The Plaintiff's Counsel concluded the submissions by urging the court to grant the reliefs sought owing to the fact that the property was public land which could not be alienated.

The Submissions for the 1st, 2nd and 3rd Defendants

24. The 1st, 2nd and 3rd Defendants participated in the proceedings but did not file any written submissions for consideration by the court despite being granted an opportunity to do so. However, that



notwithstanding, the court is still obligated to consider their pleadings on record and evidence tendered when rendering its judgment.

The submissions for the 4th, 5th and 6th Defendants.

25. The 4th, 5th and 6th Defendants filed their written submissions dated September 26, 2022 through J Motari Mutunda, Principal Litigation Counsel. Counsel submitted in support of the Plaintiff's case. Three issues were outlined for consideration by the court. These were:
 - i. Whether the Plaintiff's property is public land.
 - ii. Whether the 1st, 2nd and 3rd Defendants could acquire the suit land in existence and without surrender of the Plaintiff's suit land.
 - iii. Costs.
26. It was submitted that from the evidence that was tendered, it was not in dispute the land in question was public land which had been earlier allocated to the Plaintiff which is a state corporation.
27. It was also submitted that the suit property had been reserved for use as a public facility being Wilson Airport and the same could not be allocated to any other person. Counsel made reference to several cases including, James Joram Nyaga & Another –Vs-AG & two others, Republic –Vs- Ministry of Transport & Communication & 5 others Exparte Waa Ship Garbage Collector & 15 others (2006) 1 KLR (E&L)563, *Mureithi & 2 others –Vs- AG & 5 others (2006) 1 KLR*, *Dr Joseph Arap Ngok –Vs- Justice Moiwo Ole Keiwua & 5 others Civil Appeal No 60 of 1997* among others which the court has considered.
28. Counsel reiterated that in light of the above decisions, the law is settled that a title that was illegally acquired cannot be protected.

Analysis and Determination

29. I have considered the parties respective pleadings, evidence and written submissions. The following are the key issues falling for determination by this court;
 - i. Whether the title held by the 1st, 2nd and 3rd Defendants is valid.
 - ii. Whether the Plaintiff is entitled to the orders sought.
 - iii. What orders should issue as to costs.
30. I have considered the evident presented to this court including the relevant survey plans and deed plans. The suit property is located at Wilson Airport. The Plaintiff is primarily seeking for a declaration that the Grant issued in respect of LR No 209/14824 and registered in Nairobi as IR 92165/1 is null and void and also for a permanent injunction restraining 1st -3rd Defendants from interfering or dealing with the said property in any way among other orders.
31. It is trite law that he who alleges must prove. This is set out under Section 107(1)(2) of the *Evidence Act*, which provides as follows:
 - ' (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.



(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.'

32. In the present case, the 1st –3rd Defendant's claim to the property can be traced back to an allotment dated January 6, 1999 which subsequently lead to the issuance of LR No 209/14824 through grant dated January 14, 2003. However, owing to the testimony that was adduced by Mohamed Munir Chaudhri he confirmed in cross-examining that the said allotment was issued when the said property had already been allocated to the Plaintiff. The Plaintiff was allocated the said property vide a grant dated September 18, 1996 and registered in the Ministry of Lands Registry as IR No 70522/1 for the entire block measuring 163.67 Hectares also known as LR Number 209/13080 which was also known as Wilson Airport. The 1st -3rd Defendants witness in cross-examination stated that you have to access the Wilson Airport for you to get to the said property.
33. In respect to allotment letters, the law is settled to the effect that only once a letter of allotment is issued and the terms thereon accepted, that title comes into existence. This was the holding by the Court of Appeal in the case of *Wreck Motor Enterprises vs Commissioner of Lands & 3 others [1997] eKLR*, who held as follows:
- ' Title to landed 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 a title document pursuant to the provisions held.'
34. A similar decision was made in the case of Joseph Arap Ngok vs Justice Moyo Ole Keiwa, Nairobi HCCA, APPL No 60 of 1997 (Unreported) where it was observed as follows:
- ' It is trite that such title to landed property can only come into existence after issuance of letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of title document pursuant to provisions in the Act under which the property is held.'
35. It was the evidence of the Plaintiff's witness that the 1st -3rd Defendants despite being issued irregularly with the allotment letter did not comply with the conditions therein and hence cannot lay any claim on the said property.
36. In the case of *Daudi Kiptugen v Commissioner of Lands & 4 Others [2015] eKLR* the court stated that: -
- ' The acquisition of title cannot be construed only in the end result; the process of acquisition is material. It follows that if a document of title was not acquired through a proper process, the title itself cannot be a good title. If this were not the position then all one would need to do is to manufacture a Lease or a Certificate of title at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein.'
37. The Court of Appeal in *Munyu Maina v Hiram Gathiba Maina [2013] eKLR* emphasized the duty of the holder of an impugned title in a claim such as the present one in the following words:
- ' We state that when a registered proprietors' root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances, including any and all interests which need not be noted on the register'



38. Whereas title is protected, the protection can be removed and title impeached, if it is proved to have been procured through fraud or misrepresentation to which the person is proved to be a party, or where it is procured illegally, un-procedurally, or through a corrupt scheme.
39. Having considered the above, it is therefore the finding of this court that the suit property was not available for allocation since the same had already been allocated to the Plaintiff for public use as part of Wilson Airport. This in effect makes the 1st- 3rd Defendant's title and ownership to the same to be null and void.
40. The Plaintiff sought for various reliefs and having made a finding to the effect that the 1st-3rd Defendants claim to the property was not lawfully acquired, the same being null and void; it is the finding of this court that the Plaintiff has proven its case to the required standard and is entitled to the reliefs sought in its plaint.
41. On the claim for general damages for trespass, from the evidence that was tendered, it was evident that the 1st-3rd Defendant's never took possession of the said suit property. The Plaintiff also did not submit on the same and hence the same is not for granting.
42. On the issue of costs, under Section 27 of the Civil Procedure Act, the same is a doctrine of the court and ordinarily costs follow the event, unless otherwise stated. In the instant case, the Plaintiff has succeeded in its claim and I will award costs to be paid by the 1st, 2nd and 3rd Defendants.

Final Orders

43. In conclusion, it is the finding of this court that the Plaintiff has proved its case to the required standard. I enter judgment in favour of the Plaintiff against the Defendants in the following terms: -
 - a. A declaration that the grant issued in respect of LR No 209/14824 and registered in the Lands Titles Registry in Nairobi as IR 92165/1 is null and void.
 - b. A permanent injunction to restrain the 1st-3rd Defendants their servants, agents, and anybody authorized by them from advertising for sale, interfering with, alienating, sub-dividing, trespassing upon, or in any manner dealing with all that parcel of land known as LR No 209/14824 or LR 209/13080 or any part thereof.
 - c. An order for delivery of the original grant in respect of LR 209/14824 and registered in the Lands Titles Registry in Nairobi as IR 92165/1 to the 5th Defendant for cancellation.
 - d. An order is hereby issued directing the 5th Defendant to nullify and or cancel the Grant in respect of LR No 209/14824 and registered in the Lands Titles Registry in Nairobi as IR 92165/1 and to that extent an order to expunge and cancel the entry registered as number IR 92165/1.
 - e. An order against the 6th Defendant to rectify its survey records and plans and to that extent to expunge and or cancel Deed Plan Number 241672 dated May 3, 2002.
 - f. Costs of the suit to be paid by the 1st, 2nd and 3rd Defendants.

Judgment accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 10TH DAY OF NOVEMBER 2022

E.K. WABWOTO



JUDGE

In the Presence of: -

Ms. Olembo h/b for Ms. Wangui Koech for the Plaintiff.

Mr. Bruno the 1st - 3rd Defendants.

Mr. Motari for 4th - 6th Defendants.

N/A for the 6th Defendant.

Court Assistant; Caroline Nafuna.

E.K. WABWOTO

JUDGE

