



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Suit 182 of 1999

GOVAS HOLDINGS LIMITED PLAINTIFF

VERSUS

TOM MAYANI OMAMI 1ST DEFENDANT

GEORGE ONGWENI OMAMI 2ND DEFENDANT

THE ATTORNEY GENERAL 3RD DEFENDANT

J U D G M E N T

The plaintiff in its amended plaint seeks :

- a) Injunction to restrain first and second defendants from dealing with his land comprised in Title No. 209/12110;
- b) A declaration that excision of a portion of plaintiff's land LR 209/11278 and the granting the same to the first and second defendant is null and void;
- c) An order directing the Commissioner of Lands to cancel the said Grant No. IR 66459/1;
- d) Damages;
- e) Costs.

The plaintiff pleads that at all material times he was the registered proprietor of the property REGISTERED AS No.209/11278 comprising of 1.907 hectares or thereabouts registered in Land Titles Registry on 19/1/1990 and it is Grant No. 48935/1. The Commissioner of Lands purported to excise part of the said land measuring 1.2256 hectares out of the plaintiff's land which was purportedly allocated to the first and second defendants. The plaintiff pleads that the actions of the Commissioner of Lands are unlawful and the purported title is defective, invalid and void ab inatio as it was obtained fraudulently.

Particulars of fraud are pleaded.

The plaintiff's claims are denied by the defendants who have partly counter claimed against the plaintiff and Attorney General on behalf of Commissioner of Lands for injunction from interfering with their land LR 209/12110 and damages and in the alternative Sh.234,5000/- against first, second and 3rd defendants in counter claim for loss of bargain and indemnity for adverse consequences arising out of this suit.

Evidence was given for the plaintiff by a director PW.1. He produced documents deed plan and a grant. He also testified that building plans were approved and it is only when he took the contractor to the site that he learned a portion of his land had been hived off and fresh beacons were on the land. He carried out investigations and obtained a copy of a new grant issued in the names of first and third defendants whom he sued. The new grant was registered in 1995 comprising of the land measuring 1.225 hectares. This grant was issued five years after the plaintiff's grant was registered. It is to be noted at this stage that the Deed plan attached to the new grant 66459 in respect of the plot LR 709/12110 is accompanied by a Deed plan not numbered. The witness produced exhibits 5 & 6 from which it can be seen from the survey details that Plot No. 209/12110 is carved out of Plot No.LR209/11278. The plaintiff thereafter instructed his advocate to write to Commissioner of Lands seeking clarification.

On 4th May 1999 the Commissioner of Lands copied a letter he wrote to the Director of Surveys as follows:

“Double Allocation of LR 209/11278,

LR 209/12110

It has been brought to my attention that the above land reference numbers belong to one and the same plot. According to my records Land Reference number 209/11278 was surveyed earlier.

I do not understand how the second LR. No. 209/12110 was surveyed since the plot had already been surveyed and title issued.

Would you please check the survey records and let me have survey plans showing the two plots.”

On cross examination by Ms Mbiyu for State the witness said the plot was not developed because of delay in this case.

Further evidence for plaintiff was tendered by PW.2 a Surveyor who testified that he has visited the site and examined the land. The plot No. 209/12110 was overlapping plot number 209/11278 which is an old plot. On cross examination he said “theoretically one is on top of the other”.

The first and second defendants did not appear for hearing or their advocate though he was served with a hearing notice and an affidavit of service filed.

Ms Mbiyu for Commissioner of lands did not call any evidence although she did cross examine plaintiff's witnesses.

On 9-3-04 the suit was listed for hearing of submissions of counsel. Only Mr. Okogo for plaintiff appeared and requested to be heard as he had served all advocates with notice. His submissions were in support of the plaintiff's case. He submitted that under Section 3(a) Government Lands Act Cap 280 the Government cannot allot or in any way alienate land which has already been allocated to another person. The act of Commissioner of Lands carrying a survey of the land and allocating it to first and second defendants is unlawful and illegal.

I have considered the pleadings there was no agreed issue by the parties. The issues submitted by the Plaintiff are 19 in all. Issued No. 1 and 2 and 3 are admitted and therefore the answer is in the affirmative. Issue 4 the answer is in the negative. The land of Plaintiff already alienated and granted to him five years before the purported 2nd alienation and therefore not available for alienation to another person - the defendants. This allocation was unlawful. Issue 6 is answered in the affirmative. Issue No.

7 that the land was resurveyed and purportedly sold to the first and second defendants twice indicates there was high fraud in the circumstances. Defendants must have been involved. They did not pursue the suit though they alleged to have paid lands sum of money to purchase the land. Issues 8, 9, 10 are answered in the affirmative. This suit is not time barred being based on fraud as a cause of action. Issue No.12 is answered as follows. The land law guarantees title or grant after it is issued. The first grant is therefore protected by law against any subsequent title until expiration of term granted. The title issued to the plaintiff herein is indefeasible and no damages can compensate for the loss of a 99 year commercial property lease in the city of Nairobi. The first and second defendants did not pursue their counter claims against the Attorney General. No orders can be considered here.

In view of what I have said above and as the evidence of the plaintiff is not controverted or dented in any way I find that the case is proved on a balance of probability and I enter judgment for plaintiff as prayed in the amended plaint with costs and interest. No damages have been proved except the mention that the loss was Shs. 15 million. The court is not with any material to assess damages. This prayer is dismissed.

On the part of defendant their counter claim was not proved and I would dismiss the same with costs.

Dated 28th October 2004.

J. KHAMINWA

JUDGE

Chege – clerk

Mr. Okogo for Plaintiff.

Mr. Gichana for Lubullali

Ms. Umaara for Attorney Genera.

Judgment read in their presence.

J. KHAMINWA

JUDGE