



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 1066 OF 2016

CHRISTOPHER OANDA ONUONG'A.....PALINTIFF

=VERSUS=

THE BOARD OF DIRECTORS-KENYA VETERINARY

VACCINES PRODUCTION INSTITUTE.....DEFENDANT

JUDGMENT

Introduction

1. The dispute in this suit revolves around the question of validity of **Grant Number IR 106018** registered on 18/5/2007 and currently held by the plaintiff, Christopher Oanda Onuong'a. Comprised in the Grant is 1.109 hectares of land situated in South B, Nairobi, surveyed as **Land Reference Number 209/17224**. The land was surveyed by a **Mr P Adero**, Licensed Surveyor, in May 2007 and the Grant was issued to **M/s Tuguta Enterprises Limited** in 2007. It was transferred to the plaintiff on 30/11/2007. The plaintiff contends that the defendant is a trespasser on the said piece of land. On their part, the defendant contends that the parcel of land comprised in the said Grant is part of the land comprised in **Grant Number IR 74326**, comprising **Land Reference Number 209/13409**, surveyed and registered in 1997 in the name of Kenya Veterinary Vaccines Production Institute (hereinafter referred to as "**the Institute**"). They further contend that the Grant held by the plaintiff was illegally and irregularly surveyed out of the Institute's land without its knowledge or consent, and that the plaintiff's Grant is a nullity.

Plaintiff's Case

2. Through a plaint dated 5/9/2016, the plaintiff contended that he purchased the suit property in May 2007 from **M/s Tuguta Enterprises Limited** at Kshs 6,000,000. The suit property was subsequently transferred to him in October 2007 (sic). On or about 26/7/2016, he visited the suit property and found strangers grazing cows on the suit property. On inquiry, the strangers confirmed that they were employees of the Institute and the cows belonged to the Institute. He added that the Institute continued with the trespass, prompting him to initiate this suit.

3. He sought the following verbatim reliefs against the defendant:

a) A permanent injunction do issue restraining the Defendant by itself, its agents, servants and/or employees from entering into, trespassing, grazing cows, interfering with the plaintiff's quiet and peaceful occupation and/or dealing in any manner whatsoever with the plaintiff's all that parcel of land known as LR No 209/17224.

b) General damages

c) Costs

d) Interests

Defendant's Case

4. The defendant filed a statement of defence dated 3/10/2016. In summary, the case of the defendant was that Kenya Veterinary Vaccines Production Institute was a state corporation with power to sue and be sued in its name, and that the suit against the Board of Directors of the Institute was misconceived and an abuse of the court process. Secondly, the defendant contended that the Institute was the owner of the suit property

since 1957 (sic). They added that the suit property was part of Land Reference Number 209/8260, measuring 93.2 hectares and registered in the name of the Institute and part of the 93.02 hectares had been illegally and irregularly “grabbed,” leaving the Institute with 29.05 hectares surveyed as Land Reference Number 209/13409, comprised in Grant Number IR 74326. The defendant added that the grabbed, land was the subject of **Nairobi ELC Petition No 939 of 2014**. It was the defendant’s case that the plaintiff’s title was a nullity because the Institute held title to the suit property, registered on 5/6/1997. They contended that the plaintiff had never had possession of the suit property. They urged the court to dismiss the plaintiff’s suit.

Plaintiff’s Evidence

5. The plaintiff testified as PW1. He did not lead evidence by any other witness. He adopted his witness statement dated 5/9/2016 as part of his sworn evidence-in-chief. He produced a total of 15 documents as exhibits, among them, **Grant No IR 106018** and **Deed Plan No 274358** both comprising **Land Reference Number 209/17224**. In summary, his evidence was that he purchased the suit property from M/s Tuguta Enterprises Limited in May 2007 for a consideration of Kshs 6,000,000. He carried out an official search at the Lands Registry prior to purchasing the suit property and he was issued with an official search dated 18/5/2007, confirming that M/s Tuguta Enterprises Limited were the registered proprietors of the suit property. On 18th October 2007 (sic) the suit property was registered in his name. He had been paying land rent and land rates relating to the suit property since then. He intended to develop the suit property but his plans did not materialize due to lack of funds. In July 2016, he went to the suit property and found unknown individuals grazing cows on it. He later established that the unknown individuals were workers of the Institute. The Institute continued grazing on the suit property and uprooted a “for sale” signage he had erected on the suit property to market it. This prompted him to institute this suit. He urged the court to grant him the prayers sought in the plaint.

6. In cross-examination, he testified that the Title he held was a Grant from the President of the Republic of Kenya, meaning that the land was an unalienated government land. He saw the letter of allotment relating to the suit property but he did not produce it as an exhibit. M/s Tuguta Enterprises Limited did not comply with Special Condition No 2 which required them to develop the suit property within 24 months. The directors of Tuguta Enterprises Limited were **Mr Patrick Osero** and **Mr Owino**. He did not know if his advocates availed documents to the defendant’s advocates in response to their letter dated 23/8/2016. He did not visit the Commissioner of Lands to verify the claim by the Institute that the suit property was part of the Institute’s land. He did not have any survey report relating to the suit property. He did not apply for change of user of the suit property. His fence was removed by the Institute. A stone wall was erected around the suit property in 2016.

Defendant’s Evidence

7. Benard Gitonga testified as DW1. His evidence was that he worked at the Provincial Surveys Office, Nairobi. He was based at Surveys of Kenya, Ruaraka. He was a Land Surveyor Assistant 1, Job Group K. He was employed by the Government of Kenya in 2006 in the Department of Surveys. Or in 2007, the Director of the Institute wrote to the Director of Surveys seeking to establish the beacons of Land Reference Number 209/13409. He was delegated to undertake the exercise. He executed the work and prepared a Survey Report - Defence Exhibit No 3. He established that the area of the Institute’s land, Land Reference Number 209/13409, was 29.05 hectares and the same was the same as what was reflected in the Deed Plan and in the title held by the Institute. He further established that there was an encroachment of 1.91 hectares into Land Reference Number 209/13409. He produced the Survey Report and the Sketch showing the encroachment as exhibits. He added that he came to the conclusion that there was an encroachment because that particular portion was fenced and the Institute indicated they did not erect the said fence.

8. When shown the plaintiff’s Deed Plan, he stated that he could not place it inside the Institute’s land because its shape did not fit in the defendant’s Deed Plan. He added that because the plaintiff’s Deed Plan read “NEW GRANT”, it could only be in respect of an unalienated government land, not an already surveyed and titled parcel of land.

9. During cross-examination by Mr Oyugi for the plaintiff, he stated that he joined the Public Service in 2006. He trained at the Kenya Institute of Surveys and Mapping. He earned a Diploma in 2001. He subsequently got a Higher Diploma in 2006. He worked as a Government Surveyor. He was not a member of the Institute of Surveyors of Kenya. He signed the Report in his capacity a Surveyor, Nairobi Province. He added that in cadastral survey, the survey re-establishes the beacons. He did not see any missing feature on the Institute’s Deed Plan. There was an encroachment of 1.19 into the Institute’s land. There was a fence on the encroached part of the land.

10. In re-examination, he stated that he was a Government Surveyor working under the Director of Surveys. He did not require registration to undertake government survey work on behalf of the Director. He was not aware of existence of the plaintiff’s Deed Plan when he re-established the beacons of the Institute’s land. He learnt about the encroachment from the Institute when the Institute requested the Director of Surveys to establish if the fenced land fell within the Institute’s land. DW1 was stood down for further examination by the parties upon inspecting the suit property.

11. During further cross examination by Mr Oyugi after the court had inspected the land, DW1 stated that some beacons relating to the plaintiff’s title were on the ground while others were not. He did not know why some beacons were missing. He added that the shape of the

land in the plaintiff's deed plan related to the land on the ground.

12. During further examination by Mrs Mbabu after the inspection tour of the suit property by the court, he stated that the Grant produced by the defendant represented the land belonging to the Institute and the deed plan still existed in the Survey Office. He added that it was not normal to have a sub-division deed plan relating to an existing unsurrendered deed plan without the consent of the registered proprietor.

13. Walter Nyamwaya testified as DW2. He said he was an Advocate of the High Court of Kenya working with the Institute as an in-house counsel. He adopted his written statement dated 22/10/2018. He produced the defendant's documents, except those which had been produced by DW1. In summary, his evidence-in-chief was that the Institute was the owner of Land Reference Number 209/13409 comprised in Grant No IR 74326 and registered on 5/8/1997. On 6/7/2009, the Institute wrote to the Commissioner of Lands complaining about illegal/irregular alienation of part of its land. The Commissioner responded on 26/8/2009 advising them that no alienation of its land had been carried out. Further, the Director of Surveys subsequently confirmed to the Institute that there was an encroachment of 1.91 hectares into its land. The Institute had never sub-divided, surrendered nor sold part of its land. The Institute's land was originally LR No 209/8260 measuring 93.02 hectares and the same was illegally and irregularly grabbed leaving them with 29.05 hectares surveyed as Land Reference Number 209/13409. The land grabbed out of Land Reference Number 209/8260 was the subject of **Nairobi ELC Petition No 939 of 2014**.

14. DW2 added that the Institute was not aware of the plaintiff's title until they received a demand letter from the plaintiff's lawyers. The land comprised in the plaintiff's title was part of the Institute's land. They were not privy to the dealings between the plaintiff and M/s Tuguta Enterprises Limited. In 2009, Tuguta Enterprises Limited filed Nairobi ELC No 454 of 2009 claiming ownership of Land Reference Number 209/17223. The grabbing of the Institute's land was contained in the Ndungu Report and had featured in the past Report of the Auditor General. The plaintiff did not present his title to the National Land Commission when it was reviewing Grants.

15. During cross-examination by Mr Oyugi, DW2 confirmed that he had seen the exhibits produced by the plaintiff. He added that the Institute was the owner of Land Reference Number 209/13409 measuring 29.6 hectares. The Institute had never surrendered their title for sub division. They were not aware of the plaintiff's title. When they learnt about the existence of the plaintiff's title, they wrote to the Commissioner of Lands. The letter to the Commissioner of Lands referred to Land Reference Numbers 209/13293, 17234 and 18219 but did not refer to the suit property.

Plaintiff's Submissions

16. The plaintiff filed written submissions dated 29/10/2020 through the firm of **Oyugi & Company Advocates**. Counsel for the plaintiff identified the following as the four key issues falling for determination in this suit: (i) whether the plaintiff is the legal owner of all that property known as Land Reference Number 209/17224 IR Number 106018; (ii) whether the defendant trespassed into the plaintiff's property; (iii) whether the plaintiff is entitled to the prayers set out in the plaint; and (iv) who is to pay costs of this suit.

17. On the first issue, counsel submitted that the plaintiff's title was protected under Section 26 of the Land Registration Act because the plaintiff was the registered proprietor of the suit property and there was no evidence of privity of the plaintiff to any of the vitiating grounds set out under **Section 26** of the **Act**. Counsel added that the plaintiff was entitled to the constitutional right of protection of his title under **Article 40** of the **Constitution**.

18. On the 2nd issue, counsel submitted that DW2 had admitted at paragraph 6 of his witness statement dated 19/10/2018 that the defendant had trespassed on the suit property and had prevented the plaintiff from utilizing it. On the third itemized issue, counsel argued that the plaintiff was entitled to the prayers set out in the plaint because he was the registered proprietor of the suit property; his title documents had not been challenged; and his title documents were protected under **Sections 25** and **26** of the **Land Registration Act** and **Article 40** of the **Constitution**. Counsel added that the plaintiff had suffered loss and damages.

19. Counsel cited the following decisions to support the plaintiff's case: (i) **Esther Mumbua Kathedu v Mary Maia Lole and 2 others [2019] eKLR**; (ii) **Sammy Magera v Kuria Kiarie and 2 others [2017] eKLR** and (iii) **Vincent Koskei v Benard Koskei [2018] eKLR**.

20. Further, counsel urged the court to award the plaintiff general damages in recognition of his proprietary rights and on the ground that the defendant had prevented him from using and/or occupying the suit property. Counsel proposed the sum of Ksh 20,000,000/- as a just and fair compensation for the defendant's violation and interference with the plaintiff's proprietary rights. Counsel urged the court to grant the plaintiff the prayers sought in the plaint.

Defendant's Submissions

21. The Defendant filed written submissions dated 6/11/2020 through the firm of **R K Mbabu & Company Advocates**. Counsel submitted that the suit property was part of a surveyed and tiled public land which had never been surrendered nor sub-divided by the Institute and whose user was clearly prescribed in the title. Counsel added that when the Institute noticed encroachment on its land, it wrote to the Commissioner of Lands on 6/7/2009 and the Commissioner of Lands wrote back confirming that the Institute's land was intact and had not been alienated. She added that DW1 had confirmed the title and deed plan held by the plaintiff were an encroachment on the Institute's land. Counsel argued that the visit made to the suit property by the court together with the parties to this suit and the surveyor had confirmed the encroachment.

22. Counsel faulted the registration of the plaintiff as proprietor of the suit property on the ground that: (i) it was done in violation of Special Condition No 9 which forbade transfer of the title before development of the suit property; (ii) the instrument of transfer did not have names and the Kenya Revenue Authority Personal Identification Numbers of the Vendor's directors; and (iii) Special Condition 9 in the Grant was

not satisfied.

23. Counsel faulted the plaintiff's title on the ground that it did not have a supporting application for allotment; letter of allotment and evidence of compliance with the provisions of the repealed Government Lands Act. Counsel argued that the title held by the plaintiff was not sacrosanct because it was obtained in violation of the law in that the suit property was part of a surveyed and titled parcel of land that was not available for alienation under **Section 3** of the repealed Government Lands Act. Relying on the decisions in (i) **R v James Joram Nyaga & Others [2007]eKLR**; (ii) **Kenya National Highways Authority v Shalien Masood Mughal & Others [2017]eKLR**; (iii) **Mureithi & 2 Others [For Mbari ya Murathimi Clan] v Attorney General & 5 others [2006] IKLR**, (iv) **Munyu Maina v Hiram Gathiha Maina [2013] eKLR**; and (v) **Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others [2016]**, counsel urged the court to dismiss the plaintiff's suit.

Analysis & Determination

24. I have considered the parties' pleadings, evidence and submissions. I have also considered the relevant constitutional and legal frameworks. Further, I have considered the prevailing jurisprudence by Kenya's superior courts on the key issues falling for determination in this suit. Two key issues fall for determination in the suit. The first issue is whether this suit is incompetent on the ground that it was instituted against the Board of Directors of Kenya Veterinary Vaccines Production Institute (**the Institute**) instead of being instituted against the Institute itself. The second issue is whether Grant Number IR 106018 expressed as comprising 1.109 hectares of land surveyed in 2007 as Land Reference Number 209/17224 is part of the Institute's land comprised in Grant Number IR 74326 consisting of 29.05 hectares surveyed in 1997 as Land Reference Number 209/13409 and registered in 1997. I will make brief sequential pronouncements on the two issues in the above order.

25. At paragraph 3 of their statement of defence, the defendant objected to the plaintiff's suit on the ground that the Institute was a state corporation with power to sue and be sued in its own name and therefore the suit against the Board of Directors of the Institute was misconceived and an abuse of the court process. In his evidence in chief [paragraph 1 of the witness statement], DW2 testified that the Institute was a fully owned State Corporation established under the **State Corporations Act [Cap 446]** Legal Notice No 233 dated 5/3/1990. The above defence and evidence were not addressed by the plaintiff. Section 3 of the State Corporation Act contains the following framework on the establishment and powers of state corporations established under the Act:

3. Establishment of state corporations by the President

1) The President may, by order, establish a state corporation as a body corporate to perform the functions specified in that order.

2) A state corporation established under this section shall—

a) have perpetual succession;

b) in its corporate name be capable of suing and being sued;

c) subject to this Act, be cap

26. An examination of the gist of the plaintiff's suit is that he alleges that the Institute, through its employees, severally trespassed onto the suit property and used it as a grazing ground. If this be the case, the proper defendant to answer this suit would be the Institute. The above legal framework clearly indicates that, as a state corporation duly established under the Act, the Institute had powers to sue and be sued in its own name. There is therefore no valid reason why the plaintiff elected to institute the present suit against the Board of Directors of the Institute instead of the Institute itself. If not for any other reason, this suit would fail on this ground. My finding on the first issue therefore is that the suit herein is incompetent on the ground that it was instituted against the Board of Directors of the Institute instead of the institute itself as provided under **Section 3** of the **State Corporations Act (Cap 446 of the Laws of Kenya)**.

27. The second issue is whether Grant Number IR 106018 expressed as registered in May 2007 comprising of 1.109 hectares of land expressed as surveyed in 2007 as Land Reference Number 209/17224 is part of the Institute's land comprised in Grant Number IR 74326 registered in 1997 and consisting of 29.05 hectares surveyed in 1997 as Land Reference Number 209/13409. Besides listening to evidence in court, the court, together with the parties and their respective advocates retreated to the **situs** to appreciate the precise location of the suit property. DW1 pointed out the beacons of the suit property. DW1 also pointed out the beacons of the Institute's land [**Land Reference Number 209/13409**] comprised in Grant Number IR 74326.

28. It does emerge from the evidence of DW1 and DW2 and from the visit to the **situs** that the suit property is a parcel of land surveyed out of an already surveyed and titled parcel of land registered in the name of the Institute. The Institute's Grant was signed by the Commissioner of Lands on 5/6/1997 and registered as a Title on 5/8/1997. The Grant was a product of Deed Plan Number 212360 authenticated by the Director of Surveys on 28/4/1997.

29. The root of the Institute's title is an allotment made to the Institute on 4/11/1993 for 84.5 hectares. It was contended by DW2 that part of the original land was grabbed and the grabbed land is the subject of a different suit.

30. On his part, the plaintiff led evidence to the effect that he was a purchaser for value and a registered proprietor of the suit property. He did not call the directors of M/s Tuguta Enterprises to demonstrate how they got to be allocated land that was already alienated, surveyed and titled in the name of the Institute. Similarly, he did not call Mr P Adera to demonstrate the basis upon which he generated a deed plan for land which had already been surveyed and titled in the name of the Institute.

31. What emerges from the totality of the evidence before court is that the deed plan dated 26/1/2007 which the plaintiff is waving relates to a portion of the Institute's land which was surveyed in April 1997 and in respect of which Deed Plan Number 212360 authenticated on 28/4/1997 existed. Secondly, the Grant dated 2/5/2007 which the plaintiff is waving relates to a portion of land which was titled in the name of the Institute way back in August 1997. Thirdly, there is no evidence that the Institute was privy to the generation of the Deed Plan and Grant held by the plaintiff.

32. Kenya's land law did not and does not countenance the generation of new survey plans and new titles relating to an already surveyed and titled parcel of land without the authority of the registered proprietor. Secondly, **Section 3** of the repealed **Government Lands Act** did not permit the Commissioner's alienation of an already alienated, surveyed, and titled land. Suffice it to say that, the title held by the plaintiff was procured illegally and unprocedurally.

33. Suffice it to further say that, Kenya's superior courts have been categorical on the fate of titles relating to illegally or improperly acquired public land. The Court of Appeal in **Chemey Investment Limited v Attorney General & 2 Others [2018] eKLR** rendered itself on this subject in the following words:

“Decisions abound where courts in this land have consistently

declined to recognise and protect title to land, which has been obtained illegally or fraudulently, merely because a person is entered in the register as proprietor. See for example Niaz Mohamed Jan Mohamed v. Commissioner for Lands & 4 Others [1996] eKLR; Funzi Island Development Ltd & 2 Others v. County Council of Kwale (supra); Republic v. Minister for Transport & Communications & 5 Others ex parte Waa Ship Garbage Collectors & 15 Others KLR (E&L) 1, 563; John Peter Mureithi & 2 Others v. Attorney General & 4 Others [2006] eKLR; Kenya National Highway Authority v. Shalien Masood Mughal & 5 Others (2017) eKLR; Arthi Highway Developers Limited v. West End Butchery Limited & 6 Others [2015] eKLR; Munyu Maina v Hiram Gathiha Maina [2013] eKLR and Milan Kumarn Shah & Others v. City Council of Nairobi & Others, HCCC No. 1024 of 2005. The effect of all those decisions is that sanctity of title was never intended or understood to be a vehicle for fraud and illegalities or an avenue for unjust enrichment at public expense.

34. Counsel for the plaintiff argued that the plaintiff was an unblemished purchaser for value and was protected under Sections 25 and 26 of the Land Registration Act. The Court of Appeal in **Munyu Maina v Hiram Gathiha 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 proprietor's 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”

35. In light of the above evidence, legal frameworks, and jurisprudence, it is the finding of this court that Grant Number 106018 held by the plaintiff comprises of land that is part of the parcel of land comprised in Grant Number 74326 held by the Kenya Veterinary Vaccines Production Institute. Secondly, the Grant held by the plaintiff was generated illegally and unprocedurally without the approval of Kenya Veterinary Vaccines Production Institute. It is therefore the finding of this court that Grant Number IR 106018 comprising of Land Reference Number 209/17224 is null and void because it relates to part of the Institute's land comprised in Grant Number IR 74326 consisting of 29.05 hectares surveyed in 1997 as Land Reference Number 209/13409.

36. In the end, the plaintiff's suit is dismissed on the above grounds. Because the plaintiff contended that he purchased the impugned title without knowledge of its defects, I will give him the benefit of doubt. I will therefore not condemn him to bear the defendant's costs of the suit. Parties shall bear their respective costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 16TH DAY OF FEBRUARY 2021.

B M EBOSO

JUDGE

In the Presence of: -

Mrs Mbabu for the defendant

Ms Moraa Nyakundi for the plaintiff

Court Clerk: June Nafula