



Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & another v Higher Education Loans Management Board & 2 others (Environment & Land Case 59 of 2014) [2024] KEELC 572 (KLR) (6 February 2024) (Judgment)

Neutral citation: [2024] KEELC 572 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 59 OF 2014
OA ANGOTE, J
FEBRUARY 6, 2024**

BETWEEN

REGISTERED TRUSTEES OF THE KENYA RAILWAYS STAFF RETIREMENT BENEFITS SCHEME 1ST PLAINTIFF

KENYA RAILWAYS CORPORATION 2ND PLAINTIFF

AND

HIGHER EDUCATION LOANS MANAGEMENT BOARD 1ST DEFENDANT

CHIEF LANDS REGISTRAR 2ND DEFENDANT

DIRECTOR SURVEYS 3RD DEFENDANT

JUDGMENT

Background

1. In the Amended Complaint dated 25th September, 2018, the 1st and 2nd Plaintiffs pray for the following orders:
 - a. A permanent Injunction be issued restraining the 1st Defendant, its employees, servants and or agents and any other person acting or purporting to act on behalf of the 1st Defendant from trespassing, occupying, alienating, dealing in any manner or otherwise interfering with the 2nd Plaintiff's property being L.R. No. 209/12178.
 - b. A permanent Injunction be issued restraining the 1st Defendant, its employees, servants and or agents and any other person acting or purporting to act on behalf of the Defendant from construction, developing or otherwise interfering in any manner whatsoever with the 2nd Plaintiff's property being L.R. No. 209/12178.



- c. A declaration that all that property located on L.R. No. 209/12178 belongs to the 2nd Plaintiff.
 - d. A revocation of any documents of ownership held by the 1st Defendant with regards to L.R. No. 209/12178.
 - e. 2nd Defendant be compelled to revoke and cancel the title issued to the 1st Defendant and to issue the title in respect of the suit premises to the 1st Plaintiff.
 - f. General Damages for trespass by the 1st Defendant on the 1st Plaintiff's property.
 - g. Costs of the suit.
 - h. Any other relief this Honourable Court deems fit.
2. The Plaintiffs' case is that vide the Kenya Railways Corporation (Vesting of Land) Order 1986, 2nd Plaintiff was vested with the ownership of L.R. No. 209/6525; that the 2nd Plaintiff thereafter, through Legal Notice 169 of September, 2006, vested a portion thereof known as L.R. No. 209/12178 (the suit property) among other properties to the 1st Plaintiff and that this was in consideration for the value of contributions to the 1st Plaintiff's Pension Fund which the 2nd Plaintiff is the sponsor.
 3. It was averred by the Plaintiffs in the Plaint that the Plaintiffs were in the process of obtaining title to the same; that there are flats on the suit property rented out to the Plaintiffs' staff to generate revenue for the 2nd Plaintiff and that upon taking possession, they realised that a portion of the suit premises had been hived off and fenced, which portion included some of its buildings that the Plaintiffs have been denied access to the said portion.
 4. They averred that the said portion was illegally and irregularly allotted to a third party and later transferred to the 1st Defendant without reference to the 2nd Plaintiff; that there is no record to show that the 2nd Plaintiff sold or surrendered the property to any entity as provided for under Section 14(4) of the *Kenya Railways Corporation Act*; that on 13th January, 2014, the 1st Defendant commenced clearing and levelling the suit premises and that there is a risk that the houses standing thereon will be demolished.
 5. The Plaintiffs set out the particulars of loss and damage as well as particulars of fraud and illegality, and averred that whereas the 1st Defendant lay claim to a portion of the suit property, the Plaintiffs challenged the illegal excision and irregular issuance of any title or claim of ownership over the suit property.
 6. The 1st Defendant filed an Amended 1st Defendant's Statement of Defence dated 8th November, 2018 and denied the averments laid out in the Plaint. The 1st Defendant averred that the suit disclosed no reasonable cause of action against the Defendants and that the suit was incurably defective as it relates to a different parcel of land from that owned and occupied by the 1st Defendant, which is L.R. No. 209/13515.
 7. In any event, it was averred, the Kenya Railways Corporation was not capable of vesting an interest as alleged in the Plaint or that the suit property was vested in the 1st Plaintiff as alleged or at all and that the 1st Plaintiff was not the owner of the suit property and the gazette notice allegedly vesting it in the 2nd Plaintiff refers to an un-specified part of the suit property.
 8. It is the 1st Defendant's case that it purchased L.R. No. 209/13515 in 2000 whereas the vesting order was done in 2006 and that it was thus irregular and invalid as the 1st Defendant's property was not



capable of being vested in 2006 as it was already owned by the 1st Defendant's predecessor in title, and later the 1st Defendant, hence it was done with the intention of defeating the 1st Defendant's rights.

9. The 1st Defendant averred that the Plaintiffs had admitted in their Plaint that the 1st Defendant was in possession of the suit property at the time the 1st Plaintiff's interest accrued, having owned and fully occupied its property six years before the 1st Plaintiff's said interest; that the suit is time barred as the 1st Plaintiff and its predecessor in title, the 2nd Plaintiff, had owned it for about 17 years prior to the suit.
10. Further, it was averred that the 1st Defendant had purchased the property after conducting due diligence with a view to putting up its offices and for rental of the surplus; that by a letter dated 22nd January, 2001, the 2nd Plaintiff was aware that the Commissioner of Lands chose railway land at Upperhill to subdivide and allocated L.R. No. 209/13515 to the 1st Defendant's predecessor in title and that it had no notice of the 1st Plaintiff's alleged interest in the 1st Defendant's property, and thus was a purchaser for value without notice.
11. The 1st Defendant averred that it is the rightful and registered owner having received confirmation from the Ministry of Lands and the Registrar of Titles of that fact, and is entitled to the use of the land; that the 1st Defendant's property being L.R. No. 209/13515, was materially different from the Plaintiffs' alleged property which is L.R. No. 209/12178 and that the 1st Defendant took possession of its parcel after purchase without resistance from the Plaintiffs or any other person and has occupied it continuously without interruption.

Hearing and Evidence

12. On 8th November, 2022 when this matter came up for hearing, the 1st Plaintiff's witnesses were absent even though it was aware of the date. This being a 2014 matter, the court declined to adjourn the matter. The 1st Plaintiff's case was dismissed with costs for want of prosecution.
13. On the same day, the suit proceeded for hearing of the 2nd Plaintiff's case. The 2nd Plaintiff's Acting General Manager, Legal Services and Corporation Secretary, PW1, reiterated the averments set out in the Plaint and added that the Plaintiffs took up the matter of the illegal and irregular excision and allocation of the suit premises to the 1st Defendant with the Minister for Lands and the Commissioner of Lands.
14. Pw1 stated that the claim of ownership by the 1st Defendant is reckless, fraudulent, irregular and an unlawful attempt to deprive the Plaintiffs of their lawful title to the suit property; that the 1st Defendant did not conduct due diligence and that the Plaintiffs have challenged the illegal excision and irregular issuance of any title or purported ownership of their title to the suit property.
15. It was the evidence of PW1 that the 1st Plaintiff is the legal owner of the suit property, the same having been legally vested to it by the 2nd Defendant vide Legal Notice No. 169 of September, 2006; that the 1st Plaintiff's quiet enjoyment of the suit property ought to be restored, recognised and respected by the 1st Defendant and anyone claiming under it and that the 2nd Plaintiff should be granted the orders sought in the Amended Plaint.
16. In cross examination, PW1 testified that the 2nd Plaintiff is not the registered owner of the land as it does not vest in the 2nd Plaintiff; that the 2nd Plaintiff had a legal interest in the land as the 1st Plaintiff's sponsor; that the land was vested in the 1st Plaintiff to meet obligations owed by the 2nd Plaintiff as it did not have cash to settle the accrued pension liability and that the employees of the 2nd Plaintiff are different from the 2nd Plaintiff and the land now belongs to the aforesaid employees.



17. According to PW1, the vesting of the suit property took place on 7th September, 2006 whereas L.R. No. 209/13515 was transferred to the 1st Defendant on 26th July, 2000; that the 2nd Plaintiff became aware of the 1st Defendant's title in 2001 and that the 2nd Plaintiff was joined in the suit in 2018, and in the period between 2001 - 2018, the Plaintiffs engaged the Commissioner of Lands to cancel the title.
18. PW1 testified that the fraud must have been in early 2000 and it was perpetrated by all parties involved in the registration process, who must have been government officials; that although the parcel numbers are different, the 1st Defendant's land L.R. No. 209/13515 was hived off of the land vested to the 1st Plaintiff; and that there was a survey showing that it was just a portion which was hived off, which survey plan he did not have.
19. On further cross-examination, PW1 testified that there is no indication that the corporation ever surrendered the land; that the 1st and 2nd Plaintiffs are still being in possession and occupation of the property; that in 2003, they received an eviction notice and that at the time, registration had not been processed and they were holding the land on the basis of a vesting order.
20. After PW1's testimony, the court proceeded to close the 2nd Plaintiff's case. The Defendants closed their respective cases without calling any witness.

Submissions

21. The 2nd Plaintiff's Counsel submitted that the suit property was vested in the General Manager of the East African Railways and Harbours via Vesting of Land Registration Legal Notice No. 144 of 1963; that it was transferred to the 2nd Plaintiff via vesting of Land Order Legal Notice No. 24 of 1986; and that the said Notice revoked the 1963 Order and provided that the land described in its schedule shall vest in the 2nd Plaintiff, making it the first allottee of L.R. No. 209/12178 (the suit property).
22. According to counsel, vide Legal Notice No. 169 of 2006, the suit property was vested to the 1st Plaintiff in consideration for the value of pension contributions due and payable by the 2nd Plaintiff to the 1st Plaintiff.
23. Relying on the definition of un-alienated public land under Section 2 of the Repealed Government *Land Act* and Section 3 of the Physical and Planning Act, (repealed), Counsel submitted that the suit property was not un-alienated government land available for allocation to a private individual being the 1st Defendant's predecessor in title, Paul Koinange t/a Hardy Playland and that it was illegal for the Commissioner of Lands to re-allocate the suit property to a private entity when it was already allocated for use to the 2nd Plaintiff, a government entity.
24. With regards to fraud, Counsel submitted that the deed plan was fraudulently and irregularly issued because the property was not available for survey on 20th November, 1997 by the 3rd Defendant; that the issuance/grant of the title document was done in total disregard of the vesting order; and that in fact, the Commissioner of Lands had initially given authority for survey to the 2nd Plaintiff under Ref. No. 71326 dated 12th March, 1993 with a view to issuing it with a title.
25. Counsel submitted that a survey was done under F/R24/76 and the plot assigned L.R. No. 12178. It was submitted that a deed plan was however issued to the 1st Defendant even though the suit property was no longer available having already been allocated to a public body.
26. Counsel argued that the 2nd and 3rd Defendants acted in breach of their statutory duty by allowing the second survey which illegally hived off the property subject matter of the suit herein. The Plaintiffs'



counsel relied on numerous authorities which I have considered. The Defendants' counsel did not file submissions.

Analysis and Determination

27. Having considered the parties' pleadings, submissions and evidence tendered, the issues that lend themselves for the determination by this Court are:
 - i. Whether the suit property was un-alienated government land available for allocation to a private entity?
 - ii. Whether the Defendants acted fraudulently in allocation of the suit property and whether the title thereto is invalid, null and void?
 - iii. Whether the 1st Defendant trespassed onto the 2nd Plaintiff's property?
 - iv. Costs of the suit.
28. By way of brief background, according to the 2nd Plaintiff, it was vested with ownership of the suit property in 1986. The 2nd Plaintiff is the sponsor of the 1st Plaintiff, which is a staff retirement benefits scheme for its employees, and the 2nd Plaintiff is obligated to make its share of pension contributions to the 1st Plaintiff. It was averred in the Plaint that as a consideration for pension payments that were due and payable to the 1st Plaintiff by the 2nd Plaintiff, the 2nd Plaintiff vested the suit property to the 1st Plaintiff.
29. It was averred that upon taking possession, the Plaintiffs discovered that a portion thereof had been forcefully occupied by the 1st Defendant and that the 1st Defendant obtained title to the portion of the suit property known as L.R. No. 209/13515, on which stands a building belonging to the 2nd Plaintiff which had tenants. It is the 2nd Plaintiff's case that the 1st Defendant's continued occupation of the property has occasioned it loss and damage.
30. According to the 2nd Plaintiff's case, the Commissioner of Lands who allocated the land to the 1st Defendant's predecessor in title, Paul Koinange t/a Hardy Playland, had no power to do so since the suit property was alienated land set aside for use by a government entity and that the purported allocation and issuance of title was done fraudulently, illegally and irregularly.
31. The letter dated 8th April, 2004 from the 2nd Plaintiff's Human Resource Department to the Corporation Secretary, produced in court by PW1 shows that there was a building standing on the parcel of land claimed by the 1st Defendant. The said building housed the 2nd Plaintiff's employees at the time of entry by the 1st Defendant.
32. Indeed, no evidence was called by the 1st Defendant to dispute the fact that the disputed land had a house occupied by the 2nd Plaintiff's employees. The suit property therefore, was already reserved for use by the 2nd Plaintiff, itself a government entity, and was set aside for use as residential quarters meant to house its employees.
33. It is clear that the suit property was alienated government land and therefore not available for allocation by the Commissioner of Lands to Paul Koinange t/a Hardy Playland. The 1st Defendant evidently



acknowledges that the suit property belonged to the 2nd Plaintiff at paragraph 9(f) of its Amended Defence where it is averred that:

“...the Commissioner of Lands chose railways land at Upperhill, subdivided and, surveyed and assigned L.R. No. 209/13515 measuring approximately 0.6 and subsequently allocated Hardy Playland”.

34. There can be no question that having been alienated as such, neither the suit property nor any portion thereto, was available for re-allocation to Paul Koinange t/a Hardy Playland or any other private entity. In the case of Nelson Kazungu Chai & 9 others vs Pwani University (2014) eKLR, which has been cited by the Plaintiff extensively, this court sitting at Malindi held that:-

“148. Even if the Defendant does not utilize the entire land previously reserved for Kilifi Institute of Agriculture, the law provides that the Commissioner of Lands, under the repealed Government Lands Act, could not allocate Government land reserved for public purpose to individuals for their private use.

149. Section 3 of the repealed Government Lands Act, which is the applicable law in this case, provides that the President may, subject to any other law, make grants and dispositions of any estates, interests or rights in or over unalienated Government land.

150. Section 9 of the same Act provides that the Commissioner of Lands may cause any portion of a township which is not required for public purpose to be divided into plots and may be disposed of in the prescribed manner.

151. The above two sections clearly shows that land reserved for public purpose cannot be allocated to individuals. This position has been reinstated at Article 62 (1) (b) of *the Constitution*. The Article has defined “public land” to include land lawfully held, used or occupied by any State organ. Such land cannot be disposed of or otherwise used except in terms of an Act of Parliament.

152. The issue of land which has been set aside for public purpose not being available for allocation by the President or the Commissioner of Lands has been up held in numerous decisions.

153. In the case of Lalitchandra Dugarshankar Padya & Another Vs Saled Awale & Another, Mombasa HCCC No. 87 of 2001, Justice Maraga , as he was then held as follows:

“I am also satisfied and I find that at all material times the suit piece of land was to the knowledge of the Plaintiffs as it is clear from the letters EX 25 and 26, public land vested in the second Defendant (Kenya Railways) for its use as a marshaling yard. At no time did the second defendant surrender it to the Government. It was therefore by virtue of section 9 of the Government *Land Act*, not available for allocation by the Commissioner of Lands. Its allocation to the people who later transferred it to the Plaintiffs was therefore null and void.”

35. In Republic vs Commissioner of Lands & 4 others Ex parte Associated Steel Limited [2014] eKLR, the court had this to say:

“We have already found that as from the time when the disputed property was identified and set aside as a public plot the Commissioner of Lands did not have any power to alienate the specific plot for any other purpose as he purported to do by what he states was a replanning exercise in 1998/1999. After the designation of the disputed plot as an access road the



Commissioner of Lands was constituted a trustee in respect of the same on behalf of the public and did not possess any power to alienate it for any other purpose. It would therefore follow that the Commissioner of Lands did not have any power and/or authority to issue a letter of allotment in respect of the disputed property to either the 1st Interested Party or the 2nd Interested Party. The letters of allotment issued to both the 1st and 2nd Interested Parties were thus illegal and unlawful.”

36. See also Kenya Anti-Corruption Commission vs Lima Limited & 2 Others (2019) eKLR where the Court stated as follows:

“The land in dispute was already alienated for public utilities and was fully developed with a High Court Station, district hospital, fire station and Administration Police Camp and therefore it could not be deemed unalienated. The 2nd Defendant therefore had no authority in law to make the alienation and therefore no interest could be conferred upon the 1st Defendant.”

37. Land reserved for a particular public purpose is not available for further alienation. Such reservation need not be by way of a title, or deed plan alone. The presence of a building put up by a government entity for its use, like in this case, suffices.
38. Going by the above authorities, the documents on record, and the pleadings, this court finds that the suit property was alienated government land, and was not available for allocation to the said Koinange t/a Hardy Playland or any other private entity.
39. The 2nd Plaintiff has contended that the process through which the Commissioner of Lands allocated the suit property to Paul Koinange t/a Hardy Play was irregular, illegal, fraudulent, null and void. The 2nd Plaintiff has pleaded particulars of fraud and illegality against the Defendants in allocating the suit property and issuing a title to land that was unavailable for allocation contrary to the Government Lands Act (GLA).
40. As already pointed out above, the Defendants did not call any witnesses to controvert the evidence of PW1. In Dina Management Limited vs County Government of Mombasa & 5 others [2021] eKLR, the Supreme Court held as follows:

“It is clear to us that the guarantee of protection under Article 40 of *the Constitution* of Kenya 2010 also existed under section 75 of the repealed Constitution. It is correct to say that the appellant has a right to own property and that it is entitled to its property only to the extent that the said property was acquired and purchased in accordance with the correct procedure and within the framework of the law. In our view, where property is acquired through a procedure against the law, the title cannot qualify for indefeasibility. The land in question was reserved for public use or utility and the access road leading to the said land for entry, use and enjoyment of the original purpose for which the land was created or reserved. Any attempt to deviate or depart from the original purpose, no matter the persons involved and subsequent interests acquired, is defeasible to that extent. In essence, it was not possible or open to any person or entity to alienate it for private use. In our view, the moment a property is reserved for public use, it remains public utility land incapable of giving rise to a private proprietary interest capable of being protected by a court of law.”

41. I have already stated that the suit property was all along reserved for the 2nd Plaintiff. Courts have been categorical that the process of acquisition of the title is material and important especially when there



- are doubts regarding the legality or regularity of the process. In a case like this one, where the very root of the title is being questioned, it is not enough to show that one is in possession of the title.
42. It is the 2nd Plaintiff's case that they have never surrendered their interest in the suit property neither was it consulted in the process that led to the excision of its land and re-allocation to Paul Koinange t/a Hardy Playland. By virtue of the fact that the suit property was set aside for housing of the 2nd Plaintiff's employees, itself a government entity, the suit property is and remains alienated government land incapable of being allocated to a private entity.
 43. From the copy of the title, the transfer in favour of the 1st Defendant was done on 26th July, 2006. However, that does not change the fact that the property had already been vested/allocated to the 2nd Plaintiff as at that time, or as at the time it was illegally re-allocated to Paul Koinange t/a Hardy Playland.
 44. This court therefore agrees with the 2nd Plaintiff that the Commissioner of Lands acted illegally and fraudulently, contrary to the provisions of the repealed Government Lands Act (Cap 280), when he purported to allocate and to issue a Grant over the suit property to Paul Koinange t/a Hardy Playland. Consequently, the title issued over L.R. 209/13515 being Grant No. I.R. 76614 is invalid and thus null and void.
 45. It goes without saying that the title having been declared invalid, the 1st Defendant claim fails the test of the vendor's apparent valid title. Contrary to the 1st Defendant's claim that it did not have knowledge of the 2nd Plaintiff's interest in the suit property, it is not disputed that when it bought the L.R. No. 209/13515, there was a building thereon belonging to the 2nd Plaintiff.
 46. The said building was occupied by the 2nd Plaintiff's employees, a clear indication of the 2nd Plaintiff's interest in the property. As confirmation that the 1st Defendant was fully aware that the building was not vacant, it issued notices to vacate dated 5th May, 2003 addressed to the 2nd Plaintiff's employees who were in occupation thereof.
 47. Nothing done under a defective title can qualify for protection under law for the reason that it is null and void. Consequently, the transfer emanating therefrom to the 1st Defendant could not pass good title or at all because Paul Koinange t/a Hardy Playland had no title to give to begin with, even to an alleged innocent purchaser. Accordingly, the 1st Defendant is not entitled to and cannot enjoy protection under the doctrine of innocent purchaser without notice.
 48. The 1st Defendant is still in illegal possession of the suit property. Proof of the 1st Defendant's trespass is found in a letter dated 6th April, 2004 which this court has seen, where the 1st Defendant admitted that it had in fact developed the parcel of land. From the foregoing, the court finds that the 1st Defendant is a trespasser within the meaning of Section 3 (1) of the *Trespass Act*.
 49. This court has already pronounced itself that the allocation of the suit property to Paul Koinange t/a Hardy Playland and the ensuing transfer to the 1st Defendant was fraudulent and illegal. The title issued on the said allocation is invalid and thus could not have been passed to the 1st Defendant.
 50. Consequently, the transfer therefore was equally null and void. That being the case, the 1st Defendant cannot continue to occupy or possess the suit property because it is obviously a trespasser thereon as is anyone claiming under it.
 51. Since there is no justifiable reason for the 1st Defendant's continued possession and occupation of the 2nd Plaintiff's land, it follows that the 2nd Plaintiff has proved its case with regards to the issuance of the



orders of permanent injunction sought in the Amended Plaintiff. Accordingly, the order of a permanent injunction against the 1st Defendant as prayed is appropriate.

52. That aside, it is obvious that the 2nd Plaintiff has been deprived the possession of its land for the period that the 1st Defendant has been in occupation thereof. In the Plaintiff, 2nd Plaintiff has pleaded particulars of loss and damage which include loss of proceeds from the property. It is trite law that trespass is actionable per se.
53. However, the Court has noted that the Plaintiffs have not given any sums to guide the Court in assessing general damages for trespass. The 2nd Plaintiff ought to have indicated for instance the rent collected from the premises at the time the 1st Defendant forcefully entered into the land. That would have represented the opportunity cost of the deprivation of the use of land caused by the 1st Defendant's possession and continued occupation. Since none was provided, this court is not in a position to estimate the amount of damages payable for trespass.
54. Further, the 2nd Plaintiff and the 1st Defendant are both public entities. This court, in the interest of justice, declines to condemn the 1st Defendant to pay damages for trespass.
55. In the end, it is the finding of the court that the Plaintiff's have proved their case against the Defendants on a balance of probabilities. That being so, Judgment is entered in favour of the 2nd Plaintiff as follows:
 - a. A permanent Injunction be and is hereby issued restraining the 1st Defendant, its employees, servants and or agents and any other person acting or purporting to act on behalf of the 1st Defendant from trespassing, occupying, alienating, dealing in any manner or otherwise interfering with the 2nd Plaintiff's property being L.R. No. 209/12178 or the portion thereto referred to as L.R. No. 209/13515.
 - b. A permanent Injunction be and is hereby issued restraining the 1st Defendant, its employees, servants and or agents and any other person acting or purporting to act on behalf of the 1st Defendant from construction, developing or otherwise interfering in any manner whatsoever with the 2nd Plaintiff's property being L.R. No. 209/12178 or the portion thereto referred to as L.R. No. 209/13515.
 - c. A declaration is hereby made that all that property located on L.R. No. 209/12178 including the portion thereto referred to as L.R. No. 209/13515 belongs to the 2nd Plaintiff.
 - d. An order of a revocation and or cancellation of all documents of ownership, including the title document, held by the 1st Defendant with regards to L.R. No. 209/12178 or the portion thereto referred to as L.R. No. 209/13515, and are hereby cancelled.
 - e. An order be and is hereby issued directed at the 2nd Defendant to revoke and/or cancel the title issued to the 1st Defendant and to issue the title in respect of the suit premises to the 2nd Plaintiff.
 - f. Each party to bear its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 6TH DAY OF FEBRUARY, 2024.

O. A. Angote

Judge

In the presence of;

Mrs Omwenga for Ms Maina for 2nd Plaintiff



Mr Maruti for 1st Defendant

Court Assistant - Tracy

