



Naivas Limited v National Social Security Fund Board of Trustees (Environment & Land Case 563 of 2018) [2022] KEELC 2852 (KLR) (7 July 2022) (Judgment)

Neutral citation: [2022] KEELC 2852 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 563 OF 2018**

**LN MBUGUA, J
JULY 7, 2022**

BETWEEN

NAIVAS LIMITED PLAINTIFF

AND

NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES . DEFENDANT

JUDGMENT

1. The background to this suit is that on or about July 10, 2011, the plaintiff bought a portion of land from defendant's larger parcel no. LR.209/11314 for a sum of ksh. 181, 089,600 of which the defendant later subdivided the land and executed a transfer in favour of the plaintiff. The latter was duly issued with a title deed on 28.8.2014 for parcel LR. NO. 209/21245. However, the title was revoked pursuant to proceedings conducted by the National Land Commission (NLC), prompting the plaintiff to file this suit to recover the monies paid. Vide a Plaint dated 24th December 2018, the Plaintiff prays for the following:
 - i. The sum of Kenya Shillings Three Hundred Forty Eight Million Six Hundred Eleven Thousand One Hundred Forty (Kshs. 348,611,140) with interest at the rate of 14 per annum from 27th November 2013 until payment in full.
 - ii. Costs of this suit together with interest on (a) above at court rates from the date of filing of this suit till payment in full.
2. In their statement of defence dated March 28, 2019, the Defendant while acknowledging to have sold the said land to the Plaintiff, denied passing a defective title stating that they were bonafide purchasers for value having purchased the said land in 1995 and obtaining an indefeasible title thereof. They also stated that they obtained all government consents and approvals and subdivided the land into three portions. They aver that they were not aware that the parcel of land was a road reserve. To this end, the defendant applied and were granted leave to institute 3rd party proceedings against Multi-Purpose



Co-operative Development Centre Limited, the entity which had sold the mother parcel of land to the defendant.

Plaintiff's case

3. It was pleaded that as per the agreement of 10.7.2011 between the Plaintiff and the Defendant, the suit property was located at the junction of the Outer Ring and Jogoo Road measuring approximately 4.59 acres and the consideration was Kshs. 170,748,000. The said land was to be hived off from Defendant's property LR No. 209/11314 (mother parcel). Apparently, once the survey was completed, the property was slightly bigger than the initial agreed acreage and as such, the consideration was adjusted upwards to Kshs. 181,089,600. It was further pleaded that the Plaintiff paid off the consideration between July 16, 2012 and November 27, 2014 and thereafter a transfer was executed in their favour and were accordingly registered as the proprietors and were issued with a Certificate of Title dated August 28, 2014 for parcel 209/21245.
4. However, the title was revoked on grounds that it was on a transport corridor and had been unlawfully obtained. The Plaintiff therefore stated that they are entitled to reimbursement of the Kshs. 181,089,600 paid to the Defendant with interest.
5. The Plaintiff stated that they filed ELC Case Number 1339 of 2016 for a review of the NLC decision but the suit was dismissed and they were told to seek compensation from defendant. That while their suit (1339 of 2016) was pending, Judge Obaga delivered a judgment in ELC Petition 175 of 2016; Regnol Oil (K) Limited vs, National Social Security Fund in respect of a parcel of land in the neighbourhood of the suit premises and which was also acquired from the current defendant in circumstances similar to this suit, and the court had determined that the land was public land and had been illegally acquired. That NSSF (the Defendant) then applied to NLC for a review of the decision but NLC buttressed that the said property was not available for allocation and the Defendant should compensate the affected land owners and reimburse the value for passing a defective title.
6. During the trial, the Plaintiff called one witness David Kimani Mukuha (herein referred to as PW1) the Plaintiff's CEO and Chairman. He adopted his written statement dated 10th December 2021 as his evidence. He also produced the 12 documents in his list dated 24.12.2018 as Plaintiff Exhibit 1-12. He testified that they purchased the property from the Defendant having undertaken due diligence which confirmed that the property belonged to the Defendant and had no encumbrances. They then paid the Defendant a total of Kshs. 181,890,600. PW1 alluded to not having entered into a written agreement with the Defendant for the extra piece of land purchased. A transfer was then executed in their favour and they were effectively issued with a Certificate of Title to the property sometime in year 2014.
7. Thereafter Kenya Urban Roads Authority (KURA) claimed the said land and went ahead to build a road on what ought to have been their land.
8. That on November 18, 2014, the National Land Commission (NLC) published a notice of its intention to review grants falling within the Outer Ring Road Expansion/ Improvement project. On 5th December 2014, the Plaintiff presented its ownership documents. On October 27, 2015, NLC wrote to KURA with a report indicating that the defendant's larger parcel 209/11314 was on a transport corridor and therefore a public utility land and that the titles derived therefrom were illegal. NLC therefore made a recommendation to the Registrar of titles to have the aforementioned titles revoked. On January 26, 2016 the NLC put up a report in the Daily Nation Newspaper that they had revoked some title deeds of properties which had encroached on the road reserve along the Outering Ring Road and the suit property was affected.



9. The plaintiffs are seeking reimbursement of their money together with interest since the Defendant had held the funds for a period of 10 years.
10. On cross examination, PW1 stated that he is claiming interests because he bought the land with the intention of putting up a mall. He never got the land, and the monies were paid to the defendant hence the claim.

Defence case

11. The defence side called on one witness Hellen Chepkorir Koech (DW1) who is their Acting Manager Legal Services. She adopted her witness statement dated May 7, 2019 as her evidence in chief and produced 27 documents in their bundle as Defendant's Exhibits 1-27. The defence evidence as captured in that statement of DW1 is that the suit property was allocated to Multi – Purpose Co – operative Development Centre Limited vide allotment reference no.122139/13 of 1st August 1989 which premises is adjacent to that one allocated to Rachuonyo Enterprises Limited vides allotment reference no. 118941/5 of 19th March 1987. The aforementioned allotment letters are to be found at pages 8 -10 and pages 13 – 14 in their List of Documents.
12. That correspondence dated 16th September 1988 from the Director Physical Planning to the Commissioner of Lands produced at pages 15 – 16 in their List of Documents clearly indicates that the queries had been raised concerning the allocation. That the Director of Physical Planning indicated before the plans were submitted for approval to facilitate allocation, that there had been exhaustive consultation with the City Engineer and there was confirmation that future road development proposals would not affect the site at all.
13. DW1 further stated that there were further correspondence dated 13th June 1989 availed at page 17 in their List of Documents indicating that Rachuonyo Enterprises Limited and Outering Ring Road Enterprises Limited were relocated to Land Reference No. 209/11152 after Rachuonyo Enterprises Limited requested for the re-sitting of the plot and approval being granted. Further Multi – Purpose Co – operative Development Centre Limited is said to have applied for re – planning of the area for purposes of allocation.
14. That correspondence dated August 20, 1988 from Kenya Power & Lightning Company addressed to the Director of Physical Planning indicated that the Director of Physical Planning had applied for the re-routing of 11KV Donholm feeder Jogoo/Outering Road Junction as evidenced at page 12 in their List of Documents.
15. That thereafter, another valuation was done and another allotment letter was issued in the name of Endesha Multi –Purpose Co – operative Development Center Limited vide allotment letter reference no. 122139/13 of 1st August 1989.The allottee then made an application to do an informal transfer of the suit property to Multi – Purpose Co – operative Development Centre Limited. The letter mentioned is at page 17 of their List of Documents. Thereafter, a title was issued in the name of Multi – Purpose Co – operative Development Center Limited for property known as L.R. No. 209/11314, a copy of the said title is at page 18-21 in their List of Documents.
16. Dw1 further stated that Endesha Multi –Purpose Co – operative Society Limited and Multi – Purpose Co – operative Development Centre Limited were owned by the same people as evidenced by correspondence dated 1st March 1991 by the Secretary Endesha Multi – Purpose Co – operative Society Limited to the Commissioner of Lands-see page 22 of defence List.
17. That the defendant acquired the suit property in 1995 for the sum of Kshs. 124,500,000.00 from Multi – Purpose Co – operative Development Centre Limited as per the agreement at pages 28 – 30 in the



- Defendant's List of Documents. The Land Registrar then registered the transfer of the suit property to the Defendant thereafter.
18. The Defendants therefore contend that they acquired the suit property in good faith, for value and without knowledge of any defects, and the Government of Kenya through the Ministry of Lands through the aforementioned steps certified and confirmed that the property was legally capable of transfer and irrevocably represented to the Defendant that it had acquired a proper and a valid title to the suit premises. Thus defendants are bonafide purchasers.
 19. That having acquired the suit property, the defendants caused the same to be sub-divided into three sub – plots A, B and C on March 5, 2012 as is evident at pages 35 – 38 of their List of Documents. The Defendants paid all the requisite fees and applied for consents to sub-divide from the Commissioner of Lands and the City Council which consents were granted. Thereafter the Defendants caused a surrender measuring 0.1445 Ha to the Government of the Republic of Kenya as a pre-requisite for the approval of the sub-division.
 20. That sometimes on 10th July 2011, the Plaintiff agreed to purchase from the Defendant's parcel L.R. 209/21245 approximately 4.59 acres or thereabouts to the sum of Kshs. 170,748,000.00/= and upon receiving all the proceeds of sale, the defendants handed over completion documents to the plaintiff who then caused the land to be transferred in their favour.
 21. On cross examination, DW1 affirmed that she was aware that the NLC had revoked the land's Title on grounds that it was null and void because the said land was meant for road expansion. She however insisted that they had passed a valid title to the plaintiff, hence they could not refund the money and the Plaintiff should follow up with NLC on revocation of the Title. Adding that the special conditions in the letter of offer stipulated that the Plaintiff was to bear any liabilities accruing from the land.

Submissions

22. Counsel for the Plaintiff in their submissions dated May 4, 2022 submitted that the issues for consideration were: Whether there was a total failure of consideration; whether the Defendant was unjustly enriched and whether interest is payable.
23. On the first issue, it was submitted that plaintiff did not get what they bargained for from the Defendant since the land they purchased was declared a public utility and the Title revoked by NLC. As such there was total failure of consideration, adding that since the said property was a public utility it meant that the contract entered into was illegal, null and void ab initio. Therefore, the Defendant should reimburse the Plaintiff's money paid as purchase price. On this point, reference was made to *Halsbury's Law of England* (4th Edition reissue) vol 9 (1) para 1128 -1131 which elaborated on how money paid under an ineffective contract are recoverable.
24. Reference was also made to the Court of Appeal case of *Rover International Ltd and others v Cannon Film Sales Ltd (No 3)* [1989] 3 ALI ER 423 at 433 where Kerr LJ stated: "... The test is whether or not the party claiming total failure of consideration has in fact received any part of the benefit bargained for under the contract or purported contract...". Also cited was the case of *Sukhdev Singh Laly vs Philip Ojwang Kamau & 3 others* (2018) eKLR where the Court held: "...being the party that unlawfully benefitted from an unlawful transaction, the 3rd Defendant is responsible to the plaintiff for the whole purchase price paid..."
25. Other cases relied on by the plaintiff are; *Marcello Perrucchetti & another v Kinuthia Holdings Limited & 4 others* (2020) eKLR and *Sedena Agencies Ltd v Presbyterian Foundation* [2017] eKLR



26. On the issue as to whether the Defendant was unjustly enriched, it was submitted that the Defendant sold public land and are now enjoying the Plaintiff's Kshs. 181,089,600 and this amounts to unjust enrichment. Reference was made to a myriad of case laws such as the Court of Appeal case of *Kleinwort Benson Ltd v Birmingham City Council* [1996] 4 All ER 733 at 736-737 where the court held: "...If that contract is void, then it inexorably follows that this right does not exist, and the payee has no right to that money. The payee is unjustly enriched, since there is no justification for the retention of money to which he has no right...that injustice can only be corrected by returning the money to the payer".
27. Other cases cited to buttress the above point are Chase *International Investment Corporation and Another v Laxman Kesbra and 3 others* [1978] eKLR, *Patrick Kimutai Kiprono v Erick Kipkurgat Kiprono* [2019] eKLR; *Sedena Agencies Ltd v Presbyterian Foundation* [2017] eKLR and *Joel Mwangangi Kithure v Priscah Mukorimburi* (2022) eKLR.
28. On the question of interest, it was submitted that the plaintiff paid sh. 181 089 600 but never got the land, thus its pocket is emptier than it would have been if the money or its value was still there. Reference was made to the case of *Sedena Agencies Ltd v Presbyterian Foundation* [2017] eKLR where it was stated that: "...The purpose of interest is to compensate the decree holder for the period his money was kept away from him unjustly. ..."
29. The defendants submitted that it was a bonafide purchaser for value of the said property having acquired it in 1995 from Multi-Purpose Cooperative Development Centre Limited. Reference was made to the Court of Appeal case of *Arthi Highway Developers Limited v West End Butchery Limited* on the issue of bonafide purchaser for value where the court held: "... One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects..."
30. It was submitted that the person named as proprietor of the land is the absolute and indefeasible owner of the land. That having undertaken due diligence before purchasing the said property, defendants title could not be impeached. It was further submitted that there was no evidence that the said title was acquired illegally or fraudulently by the Defendant and they had good title to the property having undertaken due diligence and paying all the requisite fees and attaining consent for the said land back in 1995. Reference was made to the case of *Attorney General vs. Kenya Commercial Bank Limited & 3 others* (2014) eKLR that: "... It would be a bad precedent where parties to a transaction in land would not only have to satisfy themselves that the land in question is registered but also trace the history of the land to establish whether or not the title to the said parcel of land was legitimately acquired..." Reference was also made to the case of *Elizabeth Wambui Githinji & others vs. Kenya Urban Roads Authority & others*.
31. The Defendant contends that it did not breach its contractual obligation as per the agreement, that they duly received the purchase price, they transferred title and delivered vacant possession thus discharged its obligations. It was submitted that the Plaintiff's Certificate of Title was evidence of proprietorship as per section 26 of the *Land Act* and they had good title to land. Reference was made to the case of *David Peterson Kiengo & 2 Others vs Kariuki Thuo* [2012] eKLR where it was stated that; "...The person whose name is recorded on the register holds guaranteed title to the property. Since the state guarantees the accuracy of the register, it makes it unnecessary for a person to investigate the history of past dealings with the land in question before acquiring an interest...". The case of *Munyu Maina vs Hiram Gathiba Maina* [2013] eKLR and *Gitwany Investment Limited v Tajmal Limited & 3 others* (2006) eKLR have also been relied upon.
32. Finally, it was submitted that the parties to whom the defendants had desired to join in these proceedings are the ones who were liable because they ought to have provided evidence as to how



they acquired title to the property on a road reserve. Reference was made to the case of *City Finance Bank Limited v Cedar Bank Enterprises Limited & another* [2015] eKLR where it was stated that: "... However, in my judgement, parties who have a role to play in the process of protecting the sanctity of a title must also be penalised if they are found to be guilty..."

33. The defendants contend that the third parties should bear costs of the suit too.

Analysis and determination

34. Having regard to all the material presented before me, I find that the issues falling for determination are;

- i. Whether the Defendant passed a valid Title to the Plaintiff.
- ii. If the answer to the above question is on the negative, was there failure of consideration?
- iii. What are the remedies available to the Plaintiff thereof.

35. There is no controversy that the Defendant did sell to the plaintiff the piece of land in question for consideration of Kshs. 181,089,600 in total and that thereafter the Certificate of Title was issued to the Plaintiff dated August 28, 2014. It is further not in contention that the said certificate of title was revoked by the National Land Commission. The said Title was revoked on the grounds that the parcels were located on a transport corridor which was not available for allocation and all titles issued were illegal and void ab initio. It is also not in dispute that a road has since been built on the suit land.

36. The defendant makes an assertion that they passed on a good title to the Plaintiff. However, that is hollow evidence in view of the admission by Dw1 that the title was revoked as the land was public land.

37. Further, it is not lost on the court that Dw1 has given an elaborate history of the land. For instance at Paragraph 6 of the statement of Dw1, she states as follows;

“... correspondence dated 16th September 1998 from the Director Physical Planning to the Commissioner of Lands produced at page 15-16 in the list of documents clearly indicates that queries had been raised concerning the allocation and the Director of Physical Planning indicated before the plans were submitted for approval to facilitate allocation, there had been prepared after exhaustive consultation with the City Engineer had been done who confirmed that future road development proposals would not affect the site at all...”

38. The defendant chose to avail all the above information to this court. And no rocket science is needed to discern that the acquisition of the land by Multipurpose Co-operative Development Center Limited was shrouded in mysterious irregularities. Thus the defendant cannot feign ignorance of the fact that the mother title was irregular.

39. In the Plaint, the Plaintiff made reference to ELC Petition 175 of 2016 stating that it had similar facts to the current suit. This Court has perused the said case cited as *Regnol Oil (K) Limited v National Land Commission & another* [2017] eKLR and is in agreement that its facts are similar to this suit. In that case, Justice Obaga in a judgment delivered on 31.7. 2017 has outlined at length the history of how this particular land (mother title) which was public land was illegally and unlawfully acquired for private use and then sold to the 1st Defendant who consequently sold it off to other unsuspecting buyers. In the said Judgement, the learned Judge held:

“NLC found that Regnol had indeed put up developments on the suit land. These developments were valued at Kshs. 269,675,000/=. Regnol is to be paid this amount but they argue that they are also entitled to compensation for the land itself. Already the land



in issue has been found to have been unlawfully acquired. It was public land meant for expansion of two crucial roads in the city of Nairobi. article 40(6) of *the Constitution* does not afford any protection to land which is found to have been unlawfully acquired. Article 40(6) of *the Constitution* does not exclude innocent purchasers of land which is found to have been unlawfully acquired. This is so because someone who has acquired land unlawfully has no good title to pass because that title is void ab initio. If it was the intention of *the constitution* to protect such innocent purchasers of unlawfully acquired land, then there will be chaos because people would unlawfully acquire land and quickly sell the same to innocent purchasers who would then retain it. I therefore find that Regnol is not entitled to compensation for the land”.

40. It is important to note that the current defendant (NSSF) was a party (interested party) in the aforementioned case Petition 175 of 2016 and they had joined ranks in supporting the case of the Petitioner (Regnol Oil (K) Limited). Thus the defendants here in are very much aware that an ELC Court has already rendered a decision into the legality of the parcel of land which NSSF was selling to various parties and they cannot sustain a claim that they had a good title.
41. This court also makes reference to the Court of Appeal case of *Tom Dola & 2 others v Chairman, National Land Commission & 5 others* [2020] eKLR where it was held:

“... As we have already stated, the mischief that *2010/constitution the Constitution* wished to address when it expressly provided in Article 40(6) that the right to property does not extend to property that is unlawfully acquired, was the widespread abuse of the existing land laws and the rampant theft of public land christened “land-grabbing”...”
42. Similarly, the Court of Appeal in *Robert Mutiso Lelli v Kenya Medical Training College & 2 others* [2021] Eklr held;

“In our view plots 61 and 64 ... having been allocated and reserved for public purpose meant that they were placed beyond the Commissioner’s reach for reallocation to other individuals or private entities. In effect, he was estopped from overstepping his powers to convert land reserved for public purpose into private usage. Hence, we find that the allocation of the subject plots by the Commissioner of Lands to the appellant and subsequent issuance of titles to him was in contravention of the law which rendered the appellant’s acquisition of the subject plots to be unlawful...”
43. And finally, the Court of Appeal in *Funzi Island Development Limited & 2 others v County Council of Kwale & 2 others* [2014] eKLR Justice Maraga J.A (as he then was) stated

“... A court of law cannot, on the basis of indefeasibility of title, sanction an illegality or give its seal of approval to an illegal or irregularly obtained title”.
44. It is crystal clear that no good title can be passed from land obtained illegally or unlawfully. It is thus the finding of this court that the Defendant could not pass good title for land that was initially reserved for public use but was fraudulently converted into private land and titles acquired illegally.
45. Was there then failure of consideration and what remedy is the Plaintiff entitled to?. Having determined that no good title was passed to the Plaintiff, this Court makes reference to the case of



Sukhdev Singh Laly v Philip Ojwang Kamau & 3 others [2018] eKLR (also cited by the Plaintiff) where it was held that:

“As it transpired, not only were the documents forgeries, they later proved to have been incapable of passing any proprietary interest in the suit property to Ojwang, with the result that the transaction failed to culminate in a legitimate transfer of the suit property. So that, contrary to the terms of the sale agreement, Sukhdev failed to fulfill (sic) his part of the contract, which failure resulted in the recession of the agreement, and an obligation to refund the purchase price.”

46. Guided by the above analysis and the holding in *Regnol Oil (K) Limited V National Land Commission & Another* (Supra), I find that plaintiff's case is merited and so is the defendant's claim against the 3rd party who did not defend the suit after being served with the Third Party Notice.
47. I however decline to give the award of Ksh.348, 611, 140 sought by the plaintiff in view of the fact that the plaintiff should not benefit from what was an unlawful transaction. He is only entitled to a refund and interest thereof.

Final Orders

1. Refund: Judgment is hereby entered for the plaintiff against the defendant for the sum of Kshs. 181,089,600, the same being refund of monies paid by plaintiff to the defendant.
2. Interest and costs: Pursuant to the provisions of Section 26 & 27 of the *Civil Procedure Act*, a court has discretion to award interest and costs. The court takes cognizance of the fact that the amount mentioned in clause (1) above, was paid way back in years 2012 – 2014. The court also notes that by the time this suit was filed the Defendants were well aware that they had no good title in view of the judgment delivered in the Regnol oil case on 31st July 2017. In the circumstances, I find that the plaintiffs are entitled to interests and costs. The defendant is condemned to pay interest on the amount mentioned in clause (1) above as from 24th December 2018 (when this suit was filed) upto to the time of full payments at court's rate. The defendant is also condemned to pay costs of the suit.
3. Claim Against Third Party: An order is hereby issued for the defendant to be indemnified by Multi Purpose Co-operative Development Centre Limited in respect of the awards, interests and costs awarded to the plaintiff as well as costs incurred by the defendant in defending the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF JULY, 2022 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Ochieng for the Defendant

Court Assistant: Eddel

