



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI

ELC CASE NO. 674 of 2011

DINESH KUMAR, JITENDRA KUMAR AND

TOR BJORNSEN (*Suing in their capacity as OFFICIALS OF ANANDA*

MARGA MISSION IN KENYA.....PLAINTIFF

VERSUS

CONSTITUENCIES DEVELOPMENT FUND BOARD.....1ST DEFENDANT

AND

MARTIN O PHIRI - Chairman

FUND ACCOUNT MANAGER -EMBAKASI EAST –

EX-OFFICIO MEMBER

DEPUTY COUNTY COMMISSIONER

NATIONAL GOVERNMENT OFFICIAL & 7 OTHERS (MEMBERS)

(*all members of the Embakasi East CONSTITUENCY DEVELOPMENT* .

FUND COMMITTEE.....2ND DEFENDANT

JUDGEMENT.

1. The Plaintiffs are officials of Ananda Marga Mission in Kenya which is the registered owner of ***LR Nos Nairobi/Block 147/347 and 349*** (suit properties) . The suit properties which are located at Mihango area of Embakasi East Constituency were purchased from Kariobangi Gikabu Company Limited on 4th June 2009. The Plaintiffs processed and obtained certificate of leases on 31st December 2009. The two properties had been purchased specifically for setting up a nursery school and a primary school.
2. When the Plaintiffs moved into the suit properties to start construction of the nursery school and primary school, they were stopped by residents of the area who claimed that the suit properties were public properties which were unlawfully converted into private property. The then area member of parliament for the then Embakasi Constituency Hon. Ferdinand N Waititu started construction of a primary school known as Gikabu Primary School which was being funded by Constituencies Development Fund Board. This is what prompted the Plaintiffs to file this suit against the Defendants.
3. The Plaintiff filed an application for injunctive reliefs but the court in a ruling delivered on 14th March 2013 ordered maintenance of the status quo to preserve the suit properties until the dispute is heard and determined.
4. The Plaintiffs contend that the suit properties were purchased from Kariobangi Gikabu Company Limited but they have not been allowed to develop the suit properties as the area residents through incitement from the then member of parliament for Embakasi Hon. Ferdinand N Waititu. The Plaintiffs argue that the takeover of the suit properties is the height of impunity because the plaintiff has titles but cannot access

their properties for development.

5. The 1st Defendant stated in its evidence that its functions are spelt out under Section 6 of the Constituencies Development Fund Act of 2013 . The 1st Defendant received a constituency project submissions from the then Embakasi Constituency. The form was accompanied with a list of projects within Embakasi Constituency which required funding. One of the projects which required funding was Gikabu Primary School. After the request was processed, the 1st Defendant released the funds to the approved projects one of which was Gikabu Primary School.

6. The 1st Defendant states that it is not within its mandate to determine ownership of land where the projects are to be undertaken. It is upon the constituency Development Committee to determine that. The 1st Defendant admitted during the hearing that they had received a complaint from the plaintiff through its lawyers but that they could not address the complaint as they received summons for a case which had been filed against it.

7. The 2nd Defendant through Victor Mbaka, the Fund Account Manager of the Constituency Development Fund Committee testified that when it was decided that a public school be set up within the then Embakasi Constituency, members of the public were involved in a public participation exercise where it was discovered that the suit properties were reserved for public purposes but were later converted to private use. It is at this juncture that the then member of parliament for Embakasi Constituency gave a go ahead for the construction of Gikabu Primary School. Construction continued until the court stopped further construction which was being funded by the 1st Defendant.

8. The 2nd Defendant maintains that the suit properties are public properties and that the construction should be allowed to go on after dismissal of this suit.

9. I have considered the evidence adduced by the Plaintiffs and the Defendants. I have also considered the submissions filed by the parties herein. The issues which emerge for determination are firstly, were the suit properties initially reserved for public purpose, secondly was the sale to the Plaintiff done lawfully and lastly, are the Plaintiffs entitled to the prayers sought.

Whether the suit properties were initially reserved for public purpose.

10. There is no doubt that the suit properties had been reserved for public purpose. The public purpose was construction of a nursery school and a primary school. The Plaintiffs attached to their documents a sub-division scheme which shows that the suit properties had been reserved for a nursery school and primary school. The company which sold the suit properties to the Plaintiff in their letter of 17th December 2009 confirmed that they had set aside the suit properties for construction of a nursery school and primary school but the board later resolved to give the same to the Plaintiff to build facilities for the benefit of the area residents.

11. The Ministry of Lands in a letter dated 3rd February 2011 reveals that the suit properties had been re-allocated to Kariobangi Gikabu Company Limited for residential purposes. In this letter, it is clear that the re-allocation was not proper. The letter further states that the suit properties had already vested in the permanent secretary Treasury to hold it on behalf of the public. It was suggested that the letters of allocation of the suit properties to the permanent Secretary Treasury were to be revoked to allow the Plaintiffs to develop a school.

12. The letter of 16th May 2011 by the District Commissioner Njiru in response to the one of 3rd February 2011 by the Commissioner of Lands is clear that the land was public but that the Plaintiff was being given on condition that a clause be inserted in the lease that the plots were to automatically revert to the public if the schools ceased to operate as public schools. It is therefore clear that the suit properties had been reserved for a public purpose

Whether the sale of the suit properties to the Plaintiff was done lawfully.

13. The Commissioner of Lands expressed regret that the suit properties had been re-allocated to Kariobangi Gikabu Company Limited for residential purposes. The suit properties had been reserved for public purpose. The same were not available for re-allocation to Kariobangi Gikabu Company Limited. The re-allocation of the public plots by the Commissioner of lands was unlawful. The purported sale of the re-allocated Public land to the Plaintiff was unlawful. The Plaintiff was aware of the irregularity of the transaction and that is why the officials of the Plaintiff were willing to have a clause put in the lease that if the school which they intended to put up on the suit properties ceased to operate as such , the suit properties were to automatically revert to the government.

14. Before the Plaintiff moved to court, the 2nd Defendant had already started putting up a public school as was originally intended. The construction was only halted by the Court pending determination of the dispute. It is clear that re-allocation of the land which had been reserved for a public purpose to Kariobangi Gikabu Co. Ltd was unlawful and the company had no good title to pass to the Plaintiff. The titles held by the Plaintiff are therefore a nullity. In **Farook Imtiaz Mohamed Malik Vs Director of Police Investments & 3 Others (2018) eKLR** the Court held as follows:-

“ 65 The suit land was set aside for a public purpose, that of putting up government houses , as and when funds were available . It would not be allocated to a private person at the whim of the Commissioner of Lands, who was mandated by the Constitution to hold it in trust for the public”.

15. The Proviso to Section 26 of the Land Registration Act is clear that title to land can be challenged where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. It is clear that the certificates of title held by the Plaintiff were acquired illegally. The land had been reserved for a public purpose. The re-allocation of the same to Kariobangi Gikabu Co.Ltd who in turn sold it to the Plaintiff was unprocedural and illegal. The company was being given back what they had surrendered for a public purpose.

Whether the Plaintiff is entitled to the prayers sought.

16. The Plaintiff is not entitled to the prayers sought. The land had been reserved for construction of a nursery school and Primary School. It was not available for sale. The Plaintiff cannot therefore obtain orders to demolish the buildings which the 2nd Defendant had started putting up. I therefore find that the Plaintiff cannot be granted any of the prayers. The upshot is that the Plaintiff's suit is dismissed with costs to the Defendants.

Dated, Signed and delivered at Nairobi on this 5th day of May 2020.

E.O.OBAGA

JUDGE

In the absence of parties who had been duly notified that Judgement was to be delivered virtually through Microsoft teams.

Court Assistant: Hilda

E.O. OBAGA

JUDGE