



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC SUIT NO. E13 OF 2020

THE TRUSTEES FOR

KENYA PEOPLE'S CONTRACTOR'S LTD.....PLAINTIFF

VERSUS

THE ATTORNEY GENERAL OF KENYA (AG)...1ST DEFENDANT

THE CABINET SECRETARY

MINISTRY OF INTERIOR AND COORDINATION

OF NATIONAL SECURITY.....2ND DEFENDANT

THE NATIONAL LANDS COMMISSION.....3RD DEFENDANT

THE COUNTY COMMISSIONER FOR

MAKUENI COUNTY.....4TH DEFENDANT

THE DIRECTOR OF PHYSICAL PLANNING

MAKUENI COUNTY.....5TH DEFENDANT

JUDGMENT

1. By a Plaint dated 4th December, 2020 and filed in court on the same day the Plaintiff prays for judgment against the Defendants in the following terms;

a) **An order of a permanent injunction restraining the Defendants from encroaching or in any other manner interfering with the Plaintiff's land parcel No. NZAUI/KIKUMINI/201.**

b) **An order of eviction against the Defendants compelling them to remove the offending structures that have encroached into the plaintiff's parcel of land No. NZAUI/KIKUMINI/201.**

c) **Alternatively, the Plaintiff prays for full compensation as entitled to them under the parameters set for lawful compulsory acquisition, set under Article 40 of the Constitution and the Land Acquisition Act Cap 295 Laws of Kenya.**

d) **Cost of this suit.**

2. The Defendants were served with Summons to Enter Appearance but never entered Appearance nor filed Defence. Interlocutory Judgment was entered against the Defendants on the 11th of April 2021.

3. The matter proceeded to formal proof on 22nd of September 2021.

PLAINTIFF'S EVIDENCE

4. PW1 Samson Ndiku stated that he was a member of the Trustees for the Kenya People's Contractors Ltd the Plaintiff herein. He adopted his statement dated 19th March 2021 as his evidence. He stated that the Plaintiff's organisation was the *bona fide* registered owner of land parcel No. Nzau/Kikumini/201 (hereafter the suit land). He stated that the suit land was registered in the names of Jeremiah Kiwiya, Wilson Mue, James Kavoo, Joseph Kimeu and himself. He produced a copy of the Title deed as exhibit 2 and a sketch rendering the location of the land parcel No. Nzau/Kikumini/201. It is his evidence that they purchased the suit land in 1965 and utilised it for grazing. That in the year 2007, without their knowledge and or consent, the Office of the Chief Kikumini Location, Nguu Division, was illegally and unlawfully erected on the suit land in total disregard of the Plaintiff's proprietary rights. He stated that the land was never purchased nor acquired by the Government. That later in 2017 an Administration Police Base was established in the suit land. That on 23/03/2017 they complained to the County Commissioner Makueni County vide the letter dated 23/03/2017. It is his further evidence that in 2018, the Director of Physical Planning Mukueni County amended the local area map of the location which in turn changed the status of their land from being private to public land. It is his evidence that the amendment was illegal as the land had not been acquired by the State and that no compensation had been paid out. That despite several demands, the Chief Kikumini Location had declined to vacate the suit land. He produced copies of letters to the respondents as exhibit 1 and the demand notices as exhibit 4.

5. The Plaintiff closed its case and filed written submissions on the 13th of October 2021 which I have considered.

6. The Plaintiff submitted that the issues for determination were:

(i) ***Whether the Plaintiff is the registered owner of land parcel No. Nzau/Kikumini/201.***

(ii) ***Whether the Defendants followed the lawful process in acquiring the suit land.***

7. The Plaintiff submitted that it was the registered owner of the suit land and that the Defendants had not followed the process laid down to acquire land. The Plaintiff further submitted that the evidence was not challenged and therefore it had proved its case on a balance of probabilities.

8. The Plaintiff relied on the case of **Safarilink Aviation Ltd Vs Trident Aviation Kenya Ltd & Another** in support of its submission.

ANALYSIS AND DETERMINATION.

9. Although the suit was undefended, the Plaintiff has a duty to formally prove its case on a balance of probabilities as is required by the law.

10. In the case of **Kirugi and Another Vs Kabiya & 3 others (1987) KLR 347** the Court of Appeal held that;

“The burden was always on the Plaintiff to prove his case on a balance of probabilities even if the case was heard as formal proof”. Likewise, failure by the Defendant to contest the case does not absolve a plaintiff of the duty to prove the case to the required standard.”

11. Similarly, in the case of **Gichinga Kibutha Vs Caroline Nduku (2018) ekLR** the Court held that;

“It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”

12. I have considered the evidence on record, the pleadings and the documents produced by the Plaintiff and I find that the issues for determination are;

(i) ***Whether the Plaintiff is the registered owner of the suit land.***

(ii) ***Whether the Plaintiff is entitled to the orders sought in the plaint.***

WHETHER THE PLAINTIFF IS THE REGISTERED OWNER OF THE SUIT LAND

13. PW1 stated that the Plaintiff was the registered owner of the suit land. From the documentary evidence vide the copy of the Title deed for land parcel No Nzau/Kikumini/201 produced as exhibit 2, it is evident that Samson Ndiku, James Kavoo, Jeremiah Kiwa, Wilson Mue Nguta and Joseph Kimeu the trustees for the Kenya People Contractors Ltd were registered as the proprietors of the suit land on the 26th of July 1977. The title document was issued on the 4th of September 2007.

14. The law is very clear on the position of a holder of a title in respect of the land.

15. Section 24(a) of the Land Registration Act provides for the interest conferred by registration. It provides;

“Subject to this act the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all the rights and privileges belonging or apparent thereto.”

16. Section 26(1) of the Land Registration Act provides as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer shall be taken by all the courts as prima facie evidence that the person named as the proprietor of the land is absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge except;

a) On the ground of fraud or misrepresentation to which the person is proved to be a party or;

b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

17. The registration of Jeremiah Kiwiya, Wilson Mue, James Kavoo, Joseph Kimeu and Samson Ndiku on title NO Nzai/Kikumini/201 as Trustees of the Kenya People’s Contractors Ltd was a first registration. There was no evidence that they obtained the title through fraud or misrepresentation, illegally, un procedurally or through a corrupt scheme. I therefore find that Jeremiah Kiwiya, Wilson Mue, James Kavoo and Samson Ndiku the trustees of the Kenya People’s Contractors Ltd are the registered proprietors of the suit land. The Plaintiff has proved that it is the registered owner of the suit land and therefore the rightful owner.

WHETHER THE PLAINTIFF IS ENTITLED TO THE ORDERS SOUGHT IN THE PLAINT

18. Section 24(a) of the Land Registration Act provides for the interest conferred by registration. It provides as follows;

Subject to this Act;

The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.

19. Section 25 of the Land Registration Act provides for the rights of a proprietor. It provides as follows:

(I) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of the court, shall not be liable to be defeated except as provided by this Act and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject;...

20. These provisions vest on the registered owner of land with rights and privileges and provides for instances when the right can be taken away.

21. The Plaintiff stated that the Defendants encroached on the suit land and put up a police base and chief’s office. The Plaintiff further contends that the procedure laid down in Cap 295 to acquire land by the Government was not adhered to. As to whether the Defendant had encroached on the Plaintiff’s land, the uncontroverted evidence as well as the production of the title deed is sufficient proof.

22. If land is acquired by the government, the just compensation is to be paid promptly in full to the person whose land has been determined. This is in line with article 40(3) of the Constitution which provides that no person shall be deprived of his property of any description unless the acquisition is for a public purpose and subject to prompt payment in full of just compensation.

23. Having established that the Plaintiff is the registered owner of the suit property, I find that it is entitled to all the rights, interest and privileges that pertain to it. The Plaintiff is therefore entitled to the orders sought for in the Plaintiff.

24. In the end, I find that the Plaintiff has proved its case on a balance of probabilities as required.

25. I therefore enter judgment for the plaintiff against the defendants in terms of prayer (c) and (d) of the Plaintiff as follows;

a) The Plaintiff is entitled to compensation at the current market rate for land Parcel No. Nzai/Kikumini/201.

b) The Plaintiff is awarded costs of the suit.

JUDGMENT READ, DATED AND DELIVERED VIRTUALLY THIS 10TH DAY OF NOVEMBER, 2021 AT MAKUENI.

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HON. T. MURIGI

JUDGE

IN THE PRESENCE OF: -

Court assistant – Mr. Kwemboi

Kithuka for the Plaintiff