



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 94 OF 2011

GODFREY KARUME

TIMOTHY MUCHINA CHEGE.....PLAINTIFFS

VERSUS

1. COMMISSIONER OF LANDS

2. LAND REGISTRAR KILIFI

3. HON. ATTORNEY GENERAL

4. WILSON GACHANJA

5. ALFRED CHERWON

6. JAMES RAYMOND NJENGA

7. REGISTRAR OF TITLES MOMBASA

8. DIRECTOR OF SURVEYS

9. PRINCIPAL REGISTRAR OF TITLES & 10 OTHERS.....DEFENDANTS

JUDGMENT

BACKGROUND

1. This suit was originally filed on 10th December 1997 at the High Court of Kenya at Nairobi as HCCC No. 3112 of 1997.

2. By their 33-Paragraph Complaint dated 5th December 1997 as Amended on 14th April 1998, Re-amended on 20th June 2008 and further Re-amended on 13th July 2011, Godfrey Karume

and Timothy Muchina Chege (the Plaintiffs) pray for Judgment against the 19 Defendants jointly and severally for a series of orders listed in the Further Re-Amended Complaint as follows:-

a) A declaration that the area where the suit lands are situated has at all material times been Trust Land, application of the Land Adjudication Act Cap 284, was Constitutional and lawful and the purported cancellation of the 1st Plaintiff's titles of LR Kilifi/Jimba/326 and Kilifi/Madeteni/437 and 600; and transfer to the Government of Kenya on 22.11.1986 and all the other subsequently(sic) transactions in respect of the suit lands since then were unconstitutional, illegal and null and void ab initio;

b) An order directed to the Land Registrar Kilifi(the 2nd Defendant), his servants and/or agents to rectify the Land Registry by cancelling all registrations from 22.12.1986 to the date of Judgment and register the Plaintiffs as the sole proprietors of the suit lands;

c) The Plaintiffs to be paid general and punitive exemplary damages; based on Kshs 5,000,000/- per acre of the suit lands; interest of the same from 22.12.1986 to the date when the suit lands shall be re-transferred back to the Plaintiffs, at Commercial Bank overdraft rates of interest of 35% annually of the value of Kshs 5,000,000/- per acre or any higher rate, calculated on monthly rests until the said sum shall have been paid in full plus cost of this suit and any other relief this Honourable Court may deem necessary and just to grant;

d) The Plaintiffs do be paid the difference of the costs of construction of the development which the Plaintiffs had planned to do in 1986 and the construction costs of the said project as at the time of Judgment and also a declaratory Judgment to be made that the claim of the Commissioner of Lands vide his Circular Letter No. 113936/55 of 28.5 1986 that the suit lands were Government Land is res judicata the Judgment and ruling of the Land Adjudication officer's Courts of Exclusive jurisdiction of 28.2.1978 that all land along Kilifi District Coastline was all Trust Land;

e) A temporary injunction do issue restraining the 19th Defendants whether by his servants, or agents or otherwise howsoever from selling, alienating, leasing, charging or in any other way howsoever disposing of the suit property Kilifi/Jimba/326 pending the hearing and final determination of this suit.

f)

g) Costs of this suit and interest thereon.

3. Those prayers arise from the Plaintiffs' contention that at all times material, the 1st Plaintiff was the registered proprietor and occupant of the suit properties known as LR No. Kilifi/Jimba/204, and 326 as well as Kilifi/Madeteni/475 and 600. The 2nd Plaintiff was said to be an interested party by virtue of having purchased interest in the suitlands.

4. The Plaintiffs assert that on or about 22nd December 1986, the 1st, 2nd and 6th Defendants acting unconstitutionally, illegally and in a high handed manner purported without any colour of rights to cancel the 1st Plaintiff's said registration as proprietor of the suitlands and that the 4th and 5th Defendants have since been unconstitutionally and unlawfully administering the same as Government land.

5. It was further the Plaintiffs' case that the purported cancellation of the titles without due process of the law and the purported registration of the Government of Kenya as the proprietor thereof amounts to deprivation of the Plaintiffs' property contrary to Section 75 of the then Constitution. As a result the Plaintiffs aver that they have suffered loss and damages hence this suit.

6. But in a Statement of Defence filed for and on their behalf by the Honourable the Attorney General (himself the 3rd Defendant herein) on 27th June 2003, the 1st to 11th Defendants admit the occupation of the 1st Plaintiff of the suit properties but state that the suit properties were registered under the Registered Land Act, Cap 300 by mistake.

7. The said Defendants further assert that the registration of the Plaintiff as the proprietor of the suit properties was equally done by mistake. They deny therefore that they acted unconstitutionally, illegally, in a high handed manner and without any colour of right in cancelling the 1st Plaintiff's registration as proprietor of the suit land.

8. On the contrary, the Defendants aver that on realizing the mistake, they acted Constitutionally and legally gave notice to the occupiers of various parcels of land in the suit area that the land was Government Land as prescribed under the Government Lands Act, Cap 280 of the Laws of Kenya.

9. The 12th to 19th Defendants neither entered appearance nor filed a Statement of Defence.

10. The Suit was subsequently transferred from Nairobi to this Court for trial and determination.

The Plaintiff's Case

11. At the trial herein the 1st Plaintiff testified as the sole witness in their case.

12. The Plaintiff testified that the four parcels of land belong to him after he acquired them during the process of land adjudication in the area. The Plaintiff had an interest in building a hotel and that is what led him to scout for and buy the suit properties.

13. The Plaintiff testified that he bought LR No. Kilifi/Jimba/326 in 1979 although he did not recall the name of the person who had sold it to him. He was subsequently issued with a title deed therefor. He fenced off the land but had since not carried out any activities therein. The Plaintiff told the Court that he did however use the parcel of land as collateral to secure a loan from the Kenya Commercial Bank.

14. In regard to LR No. Kilifi/Jimba/204, the Plaintiff testified that he bought the same from an Administration Police Officer by the name Patrick Karanja in 1983. He was issued with a title deed which he has currently charged to Barclays Bank of Kenya to secure a loan.

15. The Plaintiff told the Court that he also bought LR No. Kilifi/Madeteni/600 and was issued with a title deed in July 1983. He did not however recall from whom he had bought the land. Similarly title for Kilifi/Madeteni /475 was issued to him in July 1983.

16. The Plaintiff testified that on 28th May 1986, the Commissioner of Lands published a Circular cancelling the titles for the Kilifi-Jimba

and Madeteni Adjudication Sections and asked all title holders to return the same. This was followed with a Gazette Notice dated 30th May 1986.

17. The Plaintiff told the Court that he then consulted with his lawyers who advised him that the cancellation was illegal. He then refused to return his titles in compliance with the Notice. Subsequently, the Commissioner of Lands removed the Plaintiff's name from the Land Registers without giving him any hearing. The Plaintiff told the Court that he was the first registered owner of the four parcels of land and that he acquired the same in a regular manner.

18. The Plaintiff further testified that at some point in time, the 19th Defendant appeared from nowhere and started claiming ownership of the parcel of land. The Plaintiff urged the Court to cancel the title for the said 19th Defendant and to order compensation in his favour in the sum of Kshs 5 Million due to the activities of the Defendants.

19. On cross-examination, the Plaintiff told the Court that his claim for compensation for Kshs 5 Million per acre was based on what he had seen others being awarded. He further told the Court that two of the properties were charged to Banks as collateral.

20. The Plaintiff further told the Court that his titles were cancelled although he had never seen any letter or communication cancelling the same. He had also not been sued or asked to return them by anyone and the parcels of land still belong to him.

The Defence Case

21. Despite entering appearance and filing a Statement of Defence, the 1st to 11th Defendants did not call any evidence in support of their case. The 12th to 19th Defendants on their part neither entered appearance nor filed any Statement of Defence herein.

Analysis and Determination

22. In their Further Re-Amended Plaint dated 13th July 2011, the two Plaintiffs urge the Court to grant a number of orders against the 19 Defendants herein. In the first instance, they seek a declaration that the area where the four suit properties are situated has at all material times been Trust Land and that the purported cancellation of the 1st Plaintiff's registration as proprietor of the suit properties and the subsequent transfer of the same to the Government of Kenya on 22nd November 1986 was unconstitutional, illegal and null and void ab initio.

23. In that regard the Plaintiffs pray for an order directed to the Land Registrar Kilifi by cancelling all registrations from 22nd December 1986 and to register the Plaintiffs as the sole proprietors of the suitlands. The Plaintiff also pray for an award of general and punitive damages in the sum of Kshs 5,000,000/- per acre of the suit properties from 22nd December 1986 to the date when the suit properties shall be re-transferred to themselves.

24. The Plaintiffs further desire to be paid the difference of the costs of construction of the developments they planned to do on the suit premises in 1986 and the construction costs of the project at the time of this determination.

25. Testifying in support of his case the 1st Plaintiff told the Court that the four parcels of land-Kilifi/Jimba/204 and 326 as well as Kilifi/Madeteni/475 and 600 situated within Kilifi County are all registered in his name. While he could not recall the names of the persons from whom he bought the parcels of land save for LR No. Kilifi/Jimba/204, he told the Court that he purchased all the parcels from the original allottees during the period of land adjudication in the area and hence the titles came out in his name as the first registered owner thereof.

26. In regard to LR No. Kilifi/Madeteni/600, the 1st Plaintiff testified that he had bought the same in 1981 together with one Gideon Mwaura Mugo but the said Mugo passed away and that he therefore holds the title for himself and in trust for the family of the deceased. It was further his case that his co-Plaintiff herein had passed away leaving him as the sole Plaintiff herein.

27. While the 1st to 18th Defendants herein are civil servants generally working in various Departments of what was then the Ministry of Lands and Settlement and are sued as such for the various roles they played within those Departments, the 19th Defendant was sued in a different capacity.

28. According to the Plaintiff, on or about 3rd December 2010, during the pendency of this suit, he came to learn that the 2nd Defendant herein had issued a Certificate of Lease for the parcel of land known as Kilifi/Jimba/326 in the name of the 19th Defendant. The Plaintiff therefore applied to enjoin the 19th Defendant in these proceedings and seeks an order of injunction restraining him from selling, leasing or in any manner whatsoever dealing with the said parcel of land.

29. The suit herein was otherwise precipitated by a letter dated 28th May 1986 from the then Commissioner of Lands JR Njenga (6th Defendant) in reference to allocation of plots in Chembe/Kibabamshe, Kilifi/Jimba, Kilifi/Madetehi, Kakuyuni/Madunguni and Kilifi/Matsangoni Adjudication Sections within the then Kilifi District. The said letter addressed to the Plaintiff among others, reads in full as follows:-

“It has come to light that between 1973 and 1983, a large number of people erroneously claimed land in the above mentioned areas. You are one of those people as you are occupying Plot(s) Number(s).....

I wish to advise that your occupation of the said land/plot is improper and not in accordance with the law.

Apparently the Land Adjudication Act (Cap 284) was erroneously applied to the Government Land. This Act only applies to Trust Lands. It could therefore not be used to facilitate your registration as the absolute proprietor of the said plot. It follows that in law your registration as the owner of the plot(s) in question was a nullity ab initio and consequently the title you hold in respect thereof is a defective title.

This being the legal position, the Government has decided to cancel your Title. To this end, you are requested to report to the Land Registrar Kilifi who shall cancel your defective title and rectify the Register.”

I wish, however, to intimate to you that the Government is considering to allocate the piece of land you now occupy to you under the provisions of the Government Lands Act, Cap 280. It must however be understood that this shall be on an entirely without prejudice basis and the same shall be done at the full discretion of the Government. If you are in possession of more than one plot in the affected area you will be allocated with only one plot of your choice. The size of the plot to be allocated shall again be at full discretion of the Government.

You are hereby requested to report to the Land Registrar Kilifi within sixty (60) days from the date hereof to facilitate an early finalization of this exercise. Note that if you do not report to the said Land Registrar within the time limit hereof, the Government shall assume that you are not interested in the plot(s) and the matter shall be submitted to the Attorney General who shall make necessary application in Court to have your title cancelled forthwith.”

30. Some two days after the letter aforesaid, the Commissioner caused to be published in the Kenya Gazette a Gazette Notice No. 2505 dated 30th May 1986 wherein it was stated as follows:-

“NOTICE TO LAND OWNERS IN KILIFI DISTRICT

A letter has been sent to the land owners within Chembe/Kibabamshe, Kilifi/Jimba, Kilifi/Madeteni, Kakuyuni, Madunguni and Kilifi/Matsangoni, all in Kilifi District, requesting them to respond to the said letter before 31st July 1986 and also requesting them to report to the District Land Officer, Kilifi District before 31st July, 1986.

Those who might not have received the said letter are requested to contact the Commissioner of Lands, P.O. Box 30089 Nairobi (telephone No. 721780, Nairobi), as soon as possible.”

31. The Plaintiff told the Court that he neither responded to the letter nor the Gazette Notice. He therefore retained his title deeds and remained in possession of his parcels of land. He however complains that he has been unable to fully utilize the same as the 2nd Defendant revoked his registration in the Land Register.

32. As I understood his case the Plaintiff contends that his rights relating to ownership of the suit properties have been contravened through the acts of the Defendants who have unlawfully and/or arbitrarily cancelled his titles in respect thereto. While they did not produce any evidence herein, the 1st to 18th Defendants assert that the registration of the Plaintiff as the proprietor of the suit properties under the repealed Registered Land Act was done in error and that immediately this was realised, they sought to correct the same.

33. The Plaintiff however submits that the Commissioner of Lands decision to revoke the registration of the Plaintiff as the proprietor of the suitlands was illegal and unconstitutional and that having declared the affected areas as adjudication sections and issued the Plaintiff with a title deed, he could not be heard to turn around and declare that the adjudication was erroneous.

34. In this regard, it was the Plaintiff's case that he was a bonafide purchaser for value of the suit properties and that as the first registered owner, his title was absolute and indefeasible within the meaning of Sections 14 and 143 of the now repealed Registered Land Act, Cap 300 of the Laws of Kenya. Those provisions as it were, as well as Section 23(1) of the Registration of Titles Act (also repealed) imported into our law the “Torrens System” of land registration which have since been reproduced under Section 26(1) (a) and (b) of the Land Registration Act, 2012.

35. The Torrens System of land registration recognizes the sanctity of title in this Country such that the title of a registered owner will be held to be absolute and indefeasible unless it is shown that the registration was obtained through misrepresentation or fraud and/or that the title was obtained through a corrupt scheme to which the registered owner was a party.

36. Re-affirming the applicability of the Torrens System in Kenya in *Charles Karaithe Kiarie & 2 Others –vs- Administrators of the Estate of John Wallace Muthame & 5 Others (2013) eKLR*, the Court of Appeal observed as follows:-

“The Registration of Titles Act is entirely a product of the Torren System of registration. The word “Torrens” is derived from Sir Robert Torrens, the third premier of South Australia and pioneer and author of a simplified system of land transfer which he introduced in 1858. This system emphasizes on the accuracy of the land register which must mirror all currently active registrable interests that affect a particular parcel of land. Government as the keeper of the Master record of all land and their owners guarantees indefeasibility of all rights and interests shown in the land register against the entire world and in case of loss arising from an error in registration the person affected is guaranteed of government compensation. This statutory presumption of indefeasibility and conclusiveness of title under the Torrens System can be rebutted only by proof of fraud or misrepresentation in which the buyer is himself involved.”

37. Arising from the above decision, it is apparent that the law is alive to the fact that there might arise an error in the process of registration even under the Torrens System of land registration. Where such an error occurs, the Government as the keeper of the Master Record is obliged to compensate the affected parties such as the Plaintiff herein.

38. In the matter before me, while admitting that the Plaintiff is in occupation of the suit properties, it is the Government's position that there was an error in the registration where the officers responsible on the ground erroneously applied the Land Adjudication Act to Government Land. The Government sought to remedy this position by summoning the affected parties and rectifying their titles as appropriate.

39. As it turned out the Plaintiff neither responded to the summons nor did he surrender his title deeds. And while he claims that his titles were cancelled pursuant to the impugned letter dated 28th May 1986 and the Gazette Notice of 30th July 1986, nothing was placed before me to demonstrate that the Commissioner of Lands proceeded to cancel the titles. As can be seen from the penultimate paragraph of the Commissioner's Letter dated 28th July 1986, the Attorney General (the 3rd Defendant) was to make the necessary application to Court at the default of the Plaintiff to have the titles cancelled.

40. The Plaintiff did not place any evidence before me to indicate that the 3rd Defendant took the specified action and/or that the titles were cancelled. On the contrary, it was the Plaintiff's testimony that he remains in occupation of the properties and that he has infact since used two of the parcels –Kilifi/Jimba/204 and Kilifi/Jimba/326 as collateral to secure various loans from two Commercial Banks. Indeed at the time the Plaintiff testified herein, he told the Court that LR No. Kilifi/Jimba/204 was still charged to a Commercial Bank for a loan facility that had been advanced to himself.

41. Arising from the foregoing, I was unable to see the essence of the Plaintiff's demand to be compensated at Kshs 5,000,000/- per acre of the suit properties. For one to be entitled to compensation, a party must establish that a right to such claim exists. In a situation where the Plaintiff remains in occupation of the suit properties and is capable of utilizing the same as collateral in commercial transactions, I am not persuaded that the claim for compensation should lie.

42. In the circumstances of this case, I was not persuaded that the Plaintiff is entitled to any of the declarations and/or orders sought herein.

43. The Plaintiff's suit is accordingly dismissed with no order as to costs.

Dated, signed and delivered at Malindi this 6th day of February, 2020.

J.O. OLOLA

JUDGE