



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

CIVIL CASE NO. 124 OF 2005

JANE KEMUNTO MAYAKA.....PLAINTIFF

-VERSUS-

THE MUNICIPAL COUNCIL OF NAKURU.....1ST DEFENDANT

THE CONSTITUENCY DEVELOPMENT FUND BOARD.....2ND DEFENDANT

THOMAS OYANDO KHABEGA.....3RD DEFENDANT

ROSEMARY MUGURE KINYANJUL.....4TH DEFENDANT

JOHN WAICHURI MWANGI.....5TH DEFENDANT

THE CONSTITUENCY ACCOUNT FUND MANAGER (NAKURU TOWN

CONSTITUENCY).....6TH DEFENDANT

JUDGMENT

1. At all material times the plaintiff was the registered owner of Land parcel known as **Nakuru Municipality Block 6/156** measuring Zero Decimal Zero Five Zero Hectares (0.050Ha), by a certificate of lease dated 20th August 2003, hereinafter referred to as the **suit plot**.

2. In her Amended plaint dated 27th November 2009 the plaintiff claims that the defendants jointly and severally unlawfully invaded her suit plot and began to construct what they termed as public toilets.

3. It is the plaintiff's averment that the said invasion was unlawful and without any legal basis and as a result, the plaintiff states to have suffered loss and damage, and seeks two orders:

(1) A permanent injunction restraining the defendants, their servants and or agents from building, or in any other manner interfering with plaintiff's quiet possession, use and/or ownership of the stated suit plot.

(2) Order of demolition of the toilets unlawfully and illegally created on the plaintiff's suit Plot.

4. The 1st defendant claims to be a stranger to the plaintiff's claim and called for strict proof of the plaintiff's ownership of the suit plot.

In the same breath, the 2nd, 3rd, 4th and 5th defendants deny the plaintiffs ownership claim and further state that the said plot does not exist and that if it does, it was acquired illegally and superimposed onto a public utility for whose development plans had been duly approved by the relevant authorities, and therefore they had the necessary authority to construct the complained of toilets on the disputed suit Plot No.156.

5. The plaintiff's case

PW1 the plaintiff testified that she bought the suit plot in 2003 from one **Peter Njuguna** and **Nehemiah Kiplagat** by a sale agreement dated 4th June 2003 for a sum of Kshs.1.1. Million – vide bankers cheques produced as PExt 1.

Receipts from Municipal Council of Nakuru for Rates clearance certificate were also tendered in evidence – PExt 2, 3(b) respectively.

6. The plaintiff further produced a certificate of lease issued to her on the 20th August 2002 –PExt 4 and 5.

It was her evidence that she approached the court by this suit when the defendants started constructing toilets with authority of the Municipal Council officials.

On cross examination it was her evidence that upon purchase she continued to pay rates in the vendor's names as the Municipal Council failed to change names on the rating card into her names. It is her further evidence that she was not aware that the plot was a public road reserve as at date of purchase, it was vacant, without any development on it.

7. Upon further cross examination by the 3rd, 4th and 5th defendants advocates, the plaintiff admitted that there is indeed a toilet built on the plot, and that she did not develop the plot nor took possession after purchase.

8. **PW2, Mungare Gekonga** was the Advocate who prepared the sale agreement between the plaintiff and the sellers after conducting an official search that revealed vendors as Peter Njuguna and Nehemia Kiplagat. He also witnessed the same. No such official search certificate was produced to the court.

9. Defence case

DW1 was James Kariuki, a Land Surveyor and planner. His evidence was that he carried an investigation into the suit plot with a conclusion that the plot is a road reserve, an encroachment on the public road. He testified that the first development plan for Nakuru Municipality was done in 1989, and it clearly marked the plot by beacons as a road being 18.2 Meters.

It was his evidence that there was no part development plan for the suit plot in the survey plan, which he produced as an exhibit – DW1 - 5.

10. He testified that part of the road was used to create the boundary of the plot thus reduced it in size by 10.36 meters, leaving the road with a size of 7.28 meters. The Land Surveyor acknowledged creation of a lease (title) to the suit plot but could not rule out illegality in its acquisition, further stating that the plot is too narrow for any development, and confirmed there being a public toilet standing thereon.

To support his evidence, the Land Surveyor produced numerous documents – as stated in the defence list of documents, as exhibits, by consent of all the parties Advocates – DExt 1-5.

11. **DW2 Wilson Waweru Kinya** described himself as an administrative officer in the 1st defendants legal department. To support his evidence that the plaintiff is not the owner of the suit plot, he testified that the rates card and valuation roll did not bear her names, but confirmed ownership by Peter Njuguna and Nehemiah Kiplagat. He further testified that the plot was not valued and therefore, as it does not appear in the valuation roll, then it did not exist.

He produced the Rates card valuation roll for 2015 and some rates receipts to prove his averments as DEx 6, 7, 8 and 9.

12. Issues for determination

1. Whether the suit Plot Parcel No. Nakuru Municipality Block 6/156 exists?

2. If the plaintiff the registered owner is entitled to the prayers sought in her Amended plaint.

13. Analysis and determination

There is no dispute that the plaintiff bought the suit plot by an agreement dated 4th June 2003 and holds a certificate of title issued on the 20th August 2003 which under **Section 26 of the Land Registration Act 2012** is conclusive evidence of proprietorship, which ownership can only be defeated or challenged on ground of fraud, illegality or misrepresentation to which the owner is proved to have been a party, or where the certificate of Title is proved to have been obtained illegally, procedurally or through a corrupt scheme – **Ethics and Anti-Corruption Commission & 3 Others -vs- African Safari Club Ltd & 2 Others (2013) e KLR.**

14. The certificate of title to the suit plot shows the acreage as 0.0500 hectares. The plaintiff bought the same from one Peter Njuguna and Nehemiah Kiplagat vide a **Sale Agreement dated the 4th June 2003** and fully paid the purchase price stated to have been KShs.1.1 Million.

15. However, the Hon. Wendo J on the 11th July 2012 rejected production of the Sale Agreement as an exhibit for lack of stamp duty under the Stamp Duty Act Cap 450 Laws of Kenya.

That holding is in place and this court has not been told, nor is there any evidence on record, that it has been either set aside or reviewed.

To that extent, there is no valid agreement of sale of the suit property – suit plot – between the plaintiff and the original allottees, the said sale agreement being the basis of this suit.

To hold or find otherwise would in effect be sitting on appeal or reviewing the Hon. Judge's (Wendo J) ruling, without being promoted to,

and out of order and unlawful, the said order being by a Judge of concurrent jurisdiction – See **Appellate Jurisdiction Act Cap - See also LCD –vs- ENB & PKN (2018) e KLR.**

16. It is the plaintiff's evidence that since the purchase, she has not developed or took possession of plot.

17. The question is whether there is indeed a plot by the description given, that exists and that was capable of being sold to the plaintiff in 2003 by the stated vendors.

The Commissioner of Lands allocated the land parcel to Peter Njuguna and Nehemiah Kiplagat by an allotment letter dated 7th November 2016 – produced in court. These initial allottees and owners paid rates to the 1st defendant.

This is admitted by **DW1** the Land Surveyor who investigated the dispute over the suit plot. He confirmed existence of the survey plan for plot No.156, the Registry Index Map (RIM) but could not find any Development Plan.

The land surveyor thus concluded that the suit plot existed and exists but it is a road reserve.

18. **Who is the lawful proprietor of the suit plot?**

Unless the defendants can demonstrate that the plaintiff obtained title to the suit plot illegally, unprocedurally or through fraud or misrepresentation, in which she participated, the title to the plaintiff cannot be defeated – See **Section 26 Land Registration Act 2016 Article 40 of the Constitution** gives every person a right to own property of any description and in any part of the County. However **Article 40(6)** is categorical that the right does not extend to any property found to be unlawfully acquired –

- **Kibusia Arap Konga –vs- Evans Obonyo Obiero & Another (2017) e KLR, Elijah Makeri Nyangwara –vs- Stephen Mungai Njuguna & Another (2013) e KLR.**

19. In challenging ownership of the suit plot by the plaintiff the 1st defendant, citing the case **James Ng'ang'a Mukiru –vs- James Nakhulo Orodí (2015)** when the court held that when the registered proprietor cannot trace the root of the title, it is not sufficient to dangle the instrument of title as proof of ownership. The court further rendered that a proprietor must go beyond the instrument (title) and prove the legality of how he acquired the title and show that it was legal, formal and free from encumbrances.

20. The 3rd, 4th and 5th defendants while admitting that the plaintiff holds a title to the suit plot, they submit that the interest in the title is suspect, by reason that the sellers of the plot to the plaintiff were by then working at the physical planners office and that at the time there was a general moratorium prohibiting dealings in all public utility plot since 2003.

To that end, it was their submission that the suit plot was a public utility, and was unprocedurally obtained and sold to the plaintiff by the allottees.

The question is therefore whether the suit plot was unprocedurally, illegally or unlawfully allocated to the original allottees and illegally sold to the plaintiff and if so, whether the plaintiff was an active participant to the illegality, fraud and misrepresentation.

21. **DW1** the Land Surveyor was candid in his evidence that he could not confirm whether the title was procedurally obtained.

DW1 Land Surveyor however, upon his investigations found that the suit plot eats into a public road and therefore narrow for any development.

He continued to state that the suit plot has taken up 10.3 meters of the road that may affect future development of the road and is superimposed on the public road.

22. I have looked at the survey and development plan for the area.

It shows that the suit plot, the bigger part falls on a road reserve, that the 1st development plan was done in 1989 and approved by the Director of Physical Planning and the Commissioner of Lands. It is also evident that the said suit plot is adjacent to the road but there is no part development for plot No.156, the suit plot.

The survey plan for the plot No. 156 further confirms that it was hived from the road, by 10.36 meters.

23. In my opinion, what comes out clearly is that the suit plot may not have been legally and lawfully acquired or allocated to the original allottees who then sold it to the plaintiff.

It was not explained why the plaintiff did to get the original allottees of the plot to testify on the manner of their allotment.

24. The valuation roll – PEx 7 for Block 6 shows the last plot as 155. The suit plot No. 156 does not exist thereon. No contrary evidence was tendered that indeed the suit plot appears in the valuation roll. The plaintiff did not know the user for the plot. She only bought a plot without knowing for what purpose she would put it into. This is not consistent with a genuine and innocent purchaser, and did not take possession or develop yet it was her evidence that she used to pass near the plot so often.

25. The Land Surveyor (DW1) confirmed that the larger part of the suit plot is public road, leaving a small narrow space incapable of being developed.

It is evident that the suit plot was and is a public road and the Commissioner of Lands ought not to have allocated the same to a private individual.

26. In the case **Republic –vs- Commissioner of Lands & 4 Others exparte Associated Steel Ltd, High Court Misc. Civil Suit No. 273 of 2007 (2014) e KLR** where the dispute was allocation to a private individual of land that was public road, the court held that the land was public road and not available for allocation or alienation to a private individual.

27. In a dispute like the one before me, evidence of a land expert, the Land Surveyor is very crucial.

In the case **Rose Kaiza –vs- Angelo Mpanju Kaiza (2009) e KLR the Court of Appeal** held that

“Where the expert who is properly qualified in his field gives an opinion and gives reasons upon which his opinion is based and there is no other evidence in conflict with such opinion, we cannot see any basis upon which such opinion could even be rejected.

But if a court is satisfied on good and cogent grounds that the opinion through it be of an expert, is not soundly based, then a court is not only entitled but would be under a duty to reject it.”

28. There is no question as to the Land Surveyors expertise, his credentials having been given in court.

The court has no reason to depart from the expert opinion of **DW1** that he could not rule out that the certificate of title was obtained irregularly, basing such opinion on the maps and development plans for the suit plot and more so that the valuation roll for Block 6, that plot No. 156 did not exist.

29. I concur with the holding by Munyao Sila J, in **Daudi Kiptungen –vs- Commissioner of Lands & 4 Others (2015) e KLR** that

“it is enough that one issues a lease or certificate of lease and assets that he has a good title by the mere possession of the Lease or certificate of lease where there is contention that a lease or certificate of lease held by an individual was improperly acquired, then the holder thereof must demonstrate, through evidence, that the lease or certificate of lease that he holds was properly acquired. The acquisition of Title cannot be constructed only in the end result. The process of acquisition is material.....”

30. In my opinion, the 1st defendant called evidence by **DW1** the Land Surveyor to prove that the disputed suit plot did not exist on the ground and could have been acquired irregularly, by production of the part development plans.

31. The plaintiff did not plead that she was a *bona fide* purchaser for value. It is trite that parties are bound by their pleadings and a court is barred from making a decision on a matter that is not pleaded. It is also bound by the pleadings – **Civil Appeal No. 168 of 2011 – Dakianga Distributors (K) Ltd -vs- Kenya Seed Company Ltd 2015 e KLR.**

It is also important to state here that despite the plaintiff’s assertion that she was paying rates to the 1st Defendant, the rating card did not bear her names. There is no evidence that she indeed made any such payments and reasons as to why for over three years after she obtained the certificate of lease the procedure notwithstanding, her names and particulars were not changed in the rating card in place of the original owners.

32. **Article 40(6) of the Constitution** is clear that the land ownership rights do not extend to any property that has been acquired unlawfully. - See **Elijah Makeri Nyangw’ra –vs- Stephen Mungai Njuguna & Another (2013) e KLR** Munyao J rendered that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme.

I am satisfied that the defendants have produced enough evidence to show that the plaintiff’s title was not obtained procedurally and lawfully, nor that it is not a public property. The court is under an obligation, when determining disputes between public interest and private interest to balance both interest.

33. I agree with Kimondo J in **Republic -vs- Commissioner of Lands & Another (2013) e KLR** that

“To argue that public interest must always override private interest would in my view render the constitutional provisions useless ...”

Having considered both parties interests in the suit plot, I come to the conclusion that the plaintiff’s interest cannot, in the instant case, supersede those of the 1st defendant.

34. To that extent, I come to findings on the twin issues that the suit plot does not exist on the ground but only on paper and that being the case the plaintiff’s certificate of title must be revoked for the benefit and use of the public through the 1st defendant whose presence is already on the ground in the manner of a public road and public toilets.

The remedy that presents itself to the plaintiff is to seek refund of the purchase price from the sellers one Peter Njuguna and Nehemiah Kiplagat.

35. Further, and in view of the court's rejection (See Par.15 above) of the sale agreement between the plaintiff and the original allottees to the suit plot, it follows that any step taken thereafter, including the issuance of the certificate of title in favour of the plaintiff is unprocedural and therefore illegal, by dint of **Section (3)(3) of Law of Contract Act** in respect of sale of Land is mandatory. It states:

“No suit shall be brought upon a contract for the disposition of an interest in land unless

a. The contract upon which the suit is found

i. Is in writing

ii. Is signed by all the parties hereto;

36. The plaintiff's testimony was that she has neither taken possession developed the suit plot nor done any act in furtherance of the contract. If she had done so, the **proviso to Section 3(3) (i)** would perhaps have come to her aid. -

See Patrick **Tarzan Matu & Another –vs- Nassim Sheriff Abdulla & 2 Others (2009) e KLR.**

In numerous other decisions, the courts have declined to enforce contracts which fall outside **Section (3) (3) of the Law of Contract Act.**

37. The net effect of the foregoing is that the plaintiff's suit has no legs to stand on in the absence of a valid sale agreement, among other grounds stated in the body of this judgment, hence the prayers sought in the plaint cannot be availed to the plaintiff.

38. However, to leave the decision at that would not resolve the entire dispute without giving orders and directions as to the standing of the Certificate of Lease in respect of the suit property. **Section 80 of the Land Registration Act** empowers a court to order rectification of the register when illegality or irregularities are demonstrated in the acquisition of the Title or Certificate of lease.

It states:

80. (1) Subject to Subsection (2) the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that the registration was obtained or made through fraud or mistake.

Section 80(2) may offer defence where the affected person, as I have rendered earlier, was or is in possession or occupation of the suit property which is not the case here.

39. The plaintiff may not have been a party to the illegality or unprocedural acquisition or allocation of the suit plot to the original allottees, and the eventual issuance of the Certificate of lease to herself. However the Certificate of Lease having been illegally and unprocedurally acquired, it cannot be allowed to stand. It ought to be revoked.

40. Accordingly, I make the following orders

1. That the plaintiff's suit is hereby dismissed with costs to the defendants.

2. That the Nakuru County Land Registrar is directed to revoke and cancel the Certificate of Lease registered in the plaintiff's favour on the 20th August 2003 in respect of the suit Plot Nakuru Municipality Block 6/156.

Dated, signed and delivered this 15th Day of May 2019.

J.N. MULWA

JUDGE