



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 26 OF 2014

GALOT INDUSTRIES LIMITED.....PLAINTIFF

VERSUS

ROSE NYAGA NJAMBI.....1ST DEFENDANT

JOASH OCHIENG.....2ND DEFENDANT

JOHN KIMANI GITIYA.....3RD DEFENDANT

GODFREY WERE.....4TH DEFENDANT

JUDGMENT

INTRODUCTION:

1. This suit was commenced by way of a Plaint dated 3rd April, 2014. In the Plaint, the Plaintiff averred that it is the registered proprietor of land described as L.R. No. 12867/511 situated in Mavoko, Machakos County measuring 1.733 Ha (*the suit land*).
2. The Plaintiff averred that the Defendants have invaded the suit land and have proceeded with acts of possession and use which are injurious to the Plaintiff's proprietary rights over the suit premises. The Plaintiff is seeking for an eviction order as against the Defendants and all those people claiming under them from the suit land, together with *mesne* profits.
3. The 2nd Defendant filed a Defence in which he averred that the Plaintiff is not the legal owner of land known as L.R. No. 12867/511; that if the Plaintiff is the registered owner of the suit land, then such registration was procured fraudulently and that he acquired interests on the suit land for valuable consideration.
4. In a joint Defence and Counter-claim, the 1st, 2nd and 3rd Defendants averred that the Plaintiff is not the registered proprietor of the suit land; that they have not trespassed on the suit land and that they were allocated the suit land as unsurveyed residential plots by the government.
5. In the Counter-claim, the Defendants averred that the Plaintiff's title known as L.R. No. 12867/511 was illegally created and allocated to the Plaintiff without following due process; that the title that was issued to the Plaintiff was based on a repealed Act and that the sub-division and creation of L.R. No. 12867/511 was done without considering the interests of the Defendants pursuant to the Letters of Allotment dated 1st July, 1999 and 23rd June, 1996.

The Plaintiff's case:

6. The Plaintiff's witness, PW1, informed the court that the Plaintiff bought land measuring 259.01 Ha which was described as Land Reference Number 1338/2 and Land Reference number 1337 in the year 1980. According to PW1, the Plaintiff consolidated the two parcels of land to create parcel number L.R. No. 12867 which it sub-divided to create L.R. No. 12867/1-31, with the remainder being 12867/R (*now L.R. No. 12867/510*).
7. It is the Plaintiff's case that in the year 2009, through gazette notice number 4398 and 4399, the Commissioner of Lands compulsorily acquired some portions of L.R. No. 12867/R in which the registered owner was wrongly indicated as Manchester Outfitter; that the Plaintiff requested to be given a Deed Plan for L.R. No. 12867/R in its name and that after preparing a Deed Plan for L.R. No. 12867/R (*L.R. No.*

12867/510), the Plaintiff requested to be issued with the title document.

8. PW1 informed the court that on 23rd August, 2012, the Commissioner of Lands informed the Plaintiff that the government wish to acquire a portion of L.R. No. 12867/510 for Athi River Road Development Project; that the Commissioner of Lands asked the Plaintiff to get in touch with the Director of Survey to revise the survey and issue it with a new Deed Plan and that the Director of Surveys approved the plan for the resurveyed land being F/R 536/185, where after the Deed Plan was approved by the Director of Surveys.

9. After making the requisite payments, PW1 informed the court that the Commissioner of Lands issued to the Plaintiff a Certificate of Title over L.R. No. 12867/511 on 4th April, 2013; that the Plaintiff applied for building plan approval to erect a boundary wall and gate and that the plan could not be approved because the land had squatters.

10. It was the evidence of PW1 that the government acquired a portion of L.R. No. 12867/510 before they were issued with the title document for L.R. No. 12867/511; that the Deed Plans that were issued were for L.R. No. 12867/511 and 12867/510/1 and that L.R. No. 12867/510/1 is what was acquired by the government.

11. PW1 informed the court that the Defendants have no right whatsoever to build, remain on and continue to use the Plaintiff's land and that they should be evicted from the suit land.

12. In cross-examination, PW1 stated that the suit land has been owned by the Plaintiff since 1980; that Manchester Outfitters is related to the Plaintiff and that correspondences shows that the reference to the name Manchester Outfitters in the gazette notice was a mistake.

13. According to the Plaintiff, Manchester Outfitters is one of the group of companies of the Plaintiff and that the two companies are one and the same thing. It was the evidence of PW1 that the government acquired the portion it wanted for the construction of the road.

14. A Surveyor from the Director of Survey's office, PW2, informed the court that she visited L.R. Nos. 1337, 1338/2, 12867/1-31, 12867/R, 12867/511 and 12867/510 on 15th December, 2017 and acquired the history pertaining to the said parcels of land.

15. In her Report dated 27th February, 2017, PW2 informed the court that L.R. No. 1337 and 1338/2 were consolidated into one parcel of land which is L.R. No. 12867 and sub-divided into three parcels namely 12867/1, L.R. No. 12867/2 and L.R. No. 12867/R. This information is captured in survey plan number F/R. No. 159/73.

16. According to PW2, L.R. No. 12867/R was sub-divided into L.R. No. 12867/3- 131 and R and that the remainder (R) was further sub-divided vide F/R. No. 529/29. According to PW2, previously, every time a parcel of land remains after sub-division (R), the acreage is never indicated in the survey plan; that currently, they do not allow remainders (R) during sub-divisions and that the land that was acquired by the government had its own Land Reference number, which was L.R. No. 12867/510/1 and that L.R. No. 12867/510/2 is what became L.R. No. 12867/511.

17. It was the evidence of PW2 that according to survey plan number 536/185, L.R. No. 12867/R was later sub-divided into L.R. No. 12867/511 and L.R. No. 12867/510/1 and that L.R. No. 12867/510/1 is what was surrendered to the government for the construction of the road. It was the evidence of PW2 that the Defendants' buildings are inside parcel number 12867/511.

18. PW2 testified that L.R. No. 12867/511 was issued with a Deed Plan number 348644 and that the government only acquired a portion of L.R. No. 12867/510 which was L.R. No. 12867/510/1 and that what remained reverted back to the original owner of L.R. No. 12867/510.

19. In cross-examination, PW2 stated that the Deed Plan for L.R. No. 12867/511 is reflected in survey plan number 536/185 which was drawn in the year 2012; that before survey plan F/R. No. 536/185 was drawn, there was plan number 522/29 which was a sub-division of the remainder (R) and that before that, there was survey plan 159/73 in which the remainder had been sub-divided into parcel numbers 3-31.

20. After the sub-division of the initial 'R' into plots 3-31, PW2 stated that the remaining "R" measuring 16.883 Ha formed a portion of the land that was acquired by the government for the road network.

21. According to PW1, the area without the road network is in Deed Plan number 335950 whose acreage is 2.447 Ha and that the Certificate of Title shows the owner of the land to be the Plaintiff. It was the evidence of PW2 that it is the acquisition diagram that guided her to prepare her Report and that the remainder of the acquired land usually goes to the original owner of the land.

22. In cross-examination, PW2 stated that the land being occupied by the Defendants is not government land; that if the land was government land, then the maps should have indicated the words "G.L."; that before land is allocated by the government, there must be an approved Part Development Plan and that the Defendants did not have approved Part Development Plans from the government.

Defence case:

23. In her evidence, the 1st Defendant, DW1, informed the court that she was allocated the suit land by the then Mavoko Municipal Council and that she has been living on the land being claimed by the Plaintiff for the past ten (10) years. DW1 stated that she does not know anything about L.R. No. 12867/511.

24. DW1 informed the court that it is the Surveyor of the then Mavoko Municipal Council who pointed out to her the land that she is occupying and that she put up a mabati house. According to DW1, the then Municipal Council of Mavoko promised to process for her the title document. DW1 stated that the people occupying the suit land are about 18-20.

25. DW1 stated that when they commenced building on the suit land, the land was not surveyed; that the said land had been acquired by the government in the year 2009 and that the land that they were shown was what remained after the acquisition by the government. It was the evidence of DW1 that any unutilized land acquired by the government should revert to the government.

26. In cross-examination, DW1 stated that they were allocated the portions of land they are occupying by the then Mavoko Municipal Council between the years 2010 and 2011; that they were not given any documents and that they built houses on the said land without approvals by the Council.

27. The 3rd Defendant, DW2, informed the court that he bought a portion of the suit land from someone who had been allocated the land by the then Mavoko Municipal Council in the year 2009; that his building plan was approved by the Council and that the land that the original allottee was allocated was the remainder of the land that had been acquired by the government.

28. In cross-examination, DW2 stated that he purchased the portion of the suit land from Joseph Njenga in the year 2009; that the said Joseph Njenga did not show him any ownership documents of the land other than a Certificate of Ownership and that the Certificate of Ownership shows the owner of the land to be one Rochi Investment.

Submissions:

29. The Plaintiff's advocate submitted that the Plaintiff owned two parcels of land namely L.R. No. 1337 and 1338/2; that the two parcels of land were consolidated to form one parcel of land known as L.R. No. 12867, which was later sub-divided into parcels of land known as L.R. No. 12867/1-31, leaving L.R. No. 12867/R.

30. Counsel submitted that L.R. No. 12867/R was sub-divided to create L.R. No. 12867/511 and L.R. No. 12687/510/1; that L.R. No. 12687/510/1 was acquired by the government for the road expansion and that the Plaintiff is the legal owner of L.R. No. 12687/511.

31. The Plaintiff's counsel submitted that the Certificate of Title held by the Plaintiff for L.R. No. 12687/511 was legally obtained; that the savings and transitional provisions in the Land Act permitted the Application of the repealed Act and that the interest over the suit property had accrued to the Plaintiff before the commencement of the Land Act.

32. The Defendants' advocate submitted that the purported title known as L.R. No. 12867/511 was issued irregularly; that the registered owner of L.R. No. 12867/R was Manchester Outfitters and that there was no evidence to show that Manchester Outfitters Limited is a sister company of the Plaintiff.

33. According to the Defendants' counsel, the entire land known as L.R. No. 12867/R was compulsorily acquired by the government and that the Certificate of Title for L.R. No. 12867/511 is a resultant portion of L.R. No. 12867/R.

34. The Defendants' counsel submitted that the sub-division of L.R. No. 12867/R was done after the said land had been compulsorily acquired by the government in the year 2009 and that the Certificate of Title for L.R. No. 12867/511 was issued unlawfully in the year 2013.

35. The Defendants' counsel submitted that the illegal purported creation of L.R. No. 12867/510 and L.R. No. 12867/511 was an unlawful and calculated scheme perpetuated by the Plaintiff, with the assistance of the Director of Surveys, to excise portions of land which had remained from the original L.R. No. 12867/R after the construction of the Kitengela Interchange and that the purported Deed Plan number 348644 and the subsequent issuance of the Certificate of Title was irregular.

Analysis and findings:

36. The Plaintiff's case is that it is the owner of land known as L.R. No. 12867/511 measuring 1.733 Ha. According to the Plaintiff, it initially bought two parcels of land known as L.R. No. 1337 and L.R. No. 1338/2 measuring 259.01 Ha; that it had the two parcels of land consolidated and created L.R. No. 12867 which was later on sub-divided to create L.R. No. 12867/1-31 and L.R. No. 12867/R, which became L.R. No. 12867/510.

37. According to PW1, the government acquired a portion of L.R. No. 12867/R, which is wrongly indicated as land belonging to Manchester Outfitter; that L.R. No. 12867/R did not have a title at the time the government acquired a portion thereof and that the portion of the land that the government acquired was surveyed as L.R. No. 12867/510/1 leaving L.R. No. 12867/511 which was eventually registered in favour of the Plaintiff.

38. A Surveyor from the Director of Surveys, PW2, gave a chronology of how parcel of land L.R. No. 12867/511 was created out of L.R. No. 12867/R. PW2 also produced the Survey Plans to support the history of how L.R. No. 12867/511 was created.

39. According to PW2, L.R. No. 1338 and 1337 were surveyed vide Survey Plan number 2/172 of 10th March, 1910, which PW2 produced in evidence. PW2 produced in evidence Survey Plan No. 53/99 which shows the sub-division of L.R. No. 1338 into four portions, that is L.R. No. 1338/1-4. Portion number 1338/2 is what the Plaintiff has stated that it acquired alongside portion number 1337 in 1980.

40. According to Survey Plan Number F/R. No. 153/100 of 6th May, 1981 which was produced in evidence, L.R. No. 1337 was consolidated with L.R. No. 1338/2 to create L.R. No. 12867 which was later sub-divided into three portions, namely L.R. No. 12867/1; 12867/2 and 12867/R, with "R" denoting the remainder of the sub-division. The total acreage of L.R. No. 12867 is indicated in F/R. No. 153/100 as 259.1 Ha.

41. The same Survey Plan shows that after sub-division of L.R. No. 12867, the sub-divisions measured as follows: L.R. No. 12867/1 - 4.047 Ha and L.R. No. 12867/2 - 4.047 Ha. The measurements of the remainder (R), that is L.R. No. 12867/R is not indicated in F/R. No. 153/100.

42. PW2 informed the court that the acreage of the remainder (R) of any sub-division never used to be indicated in the Survey Plan, a practice that the survey department has since changed. However, from Survey Plan F/R. No. 153/100 dated 6th May, 1981, it follows that the acreage of L.R. No. 12867/R is the difference between the acreage of the entire L.R. No. 12867 on the one hand and L.R. No. 12867/1 and 12867/2 on the other hand. That difference is 251.006 Ha (*approximately 627 acres*).

43. The Survey Plan F/R. No. 159/73 that was produced in evidence shows that L.R. No. 12867/R was further sub-divided into several parcels being L.R. No. 12867/3-31 leaving another remainder (R) known as L.R. No. 12867/R. This sub-division was done in 1982. It is a portion of L.R. No. 12867/R that the Plaintiff has stated the government acquired for the construction of the Kitengela Interchange. The Legal Notice that acquired the said land was not produced in evidence at all.

44. In his evidence, and the Report dated 27th February, 2017, PW2 stated as follows:

“Parcel number L.R. No. 12867/R was later sub-divided into L.R. No. 12867/511 and L.R. No. 12867/510/1 (road surrender) according to F/R No. 536/185.”

45. PW2 produced in evidence Survey Plan F/R. No. 536/185 which is dated 4th December, 2012. The said Survey Plan shows the following details:

“L.R. No. 12867/510/1 – Road for Surrender.”

46. The said Survey Plan further shows the creation of L.R. No. 12867/511 and shows the “owner” of L.R. No. 12867 as “Manchester Outfitters”. In his Report the Surveyor concluded as follows:

“The acreage of the L.R. No. 12867/R (F/R No. 159/73) is 2.4485 Ha which was further sub-divided to L.R. No. 12867/511 (1.7332 Ha) and L.R. No. 12867/510/1 (road surrender) which is 0.7153 Ha.”

47. The Surveyor concluded that the Defendants’ structures are on L.R. No. 12867/511 of which the Grant was issued in favour of the Plaintiff on 25th February, 2013.

48. The evidence of the Plaintiff is that the government acquired a portion of L.R. No. 12867/R in the year 2009; that by the time the said portion was acquired, the Plaintiff had not processed the title document for L.R. No. 12867/R and that the title document for L.R. No. 12867/511 was processed after the government acquired L.R. No. 12867/510/1, which was carved out of L.R. No. 12867/R.

49. The Defendants’ case is that L.R. No. 12867/511 was acquired unlawfully because, firstly, the land belonged to an entity known as Manchester Outfitters and secondly, that the said land had been acquired by the government.

50. Although it is not disputed that the government compulsorily acquired land for the construction of the Kitengela-Interchange, along Mombasa Road, none of the parties tendered documentary evidence to show the land that the government acquired.

51. Indeed, considering that the Plaintiff’s case was that the government acquired only a portion of L.R. No. 12867/R in the year 2009, and the said land having been private land since 1910, the Defendants should have exhibited the gazette notice that was used to acquire L.R. No. 12867/R or a portion thereof. It is only after perusing the gazette notice, or any other document showing the exact acreage that the government acquired for the construction of the road, that this court would have been able to arrive at a conclusion as to whether the suit land forms part of the land that was acquired by the government or not.

52. Indeed, as was held by the Supreme Court in the case of *Town Council of Awendo vs. Nelson O. Onyango & 13 Others, (2019) eKLR*, where land is acquired by the government and is not utilized in full, neither the original owners, nor their successors in title have pre-emptive rights to re-acquire the un-utilized portions.

53. The burden of showing that the title of L.R. No. 12867/511 forms a portion of the land that was acquired by the government lay with the Defendants. I say so because it is the Defendants who were alleging that the Plaintiff had fraudulently acquired the title to the land, which, according to them, belongs to the government. This position is supported by the Court of Appeal’s decision in the case of *Peter Kamau Njau vs. Emmanuel Charo Tinga (2016) eKLR* where the Court of Appeal held as follows:

“In terms of the requirements of Section 107 of the Evidence Act, the burden was on the Respondent to demonstrate, on a balance of probabilities that the title was obtained fraudulently. That being the law, we find no evidence to impeach the Appellant’s title...Fraud must be pleaded with a great degree of particularity and to be proved by evidence on a standard heavier than on a balance of probabilities generally applied in civil matters.”

54. The Defendants failed to demonstrate that the government acquired the whole of L.R. No. 12867/R. To the contrary, the evidence before me, by way of Survey Map F/R. No. 536/185, shows that the government acquired a portion of L.R. No. 12867/R known as 12867/510/1 and not the entire L.R. No. 12867/R. Therefore L.R. No. 12867/511, which is also a sub-division of 12867/R cannot be said to be portion of the land that was acquired by the government.

55. Although the Defendants have alleged that the land which was acquired by the government belonged to an entity known as Manchester Outfitters, and that L.R. No. 12867/511 should not have been registered in favour of the Plaintiff, no evidence was led by the Defence to show that the original land, that is L.R. No. 12867 was registered in favour of the said entity. Indeed, no title document was produced to show that it is the said Manchester Outfitters who purchased L.R. No. 12867 in the early 1980's, or that it's the one that is entitled to the suit land. The mere fact that the name "*Manchester Outfitters*" is indicated on Survey Plan number 536/185 is not prove of ownership of the suit land.

56. In any event, if indeed the suit land should have been registered in the name of Manchester Outfitters, then the Defendants should have sought to join Manchester Outfitters in this suit to enable them to lay a claim on the land. Having not done so, this court is unable to pronounce itself that the suit land belongs to Manchester Outfitters and not the Plaintiff.

57. Although the Defendants informed the court that they were allocated the suit land by the then Mavoko Municipal Council, they did not exhibit any evidence to prove that they were indeed allocated the suit land. In any event, the suit land was created in 1980 when L.R. No. 1338/2 was consolidated with L.R. No. 1337. The land was surveyed and was not available for allocation. The Municipal Council of Mavoko did not have any authority known in law to allocate private surveyed land to individuals.

58. The Plaintiff is the registered proprietor of L.R. No. 12867/511. L.R. No. 12867/511 is a sub-division of L.R. No. 12867/R which was the remainder of the sub-division of L.R. No. 12867/3. L.R. No. 12867/R did not have a title upto and until the time the government acquired a portion thereof. That explains why the title to L.R. No. 12867/511 was issued way after the acquisition of a portion of L.R. No 12867/R by the government, that is L.R. No. 12867/510/1, and after the construction of the Kitengela Interchange.

59. The Defendants have faulted the title that was issued in favour of the Plaintiff for having been registered under the repealed law; that is the Registration of Titles Act.

60. It is trite that after the enactment of the Land Act, 2012, it took a while for the registration of titles to be undertaken under the new legal regime. Indeed, Section 162 of the Land Act allowed the registration of and issuances of new titles to be issued pursuant to the repealed Act, especially where the land had already been registered under the said Act. Section 162(2) of the Land Act provides as follows:

“(2) Unless the contrary is specifically provided in this Act or the circumstances are such that the contrary must be presumed, if any step has been taken to create, acquire, assign, transfer, or otherwise execute a disposition, any such transaction shall be continued in accordance with the law applicable to it immediately prior to the commencement of this Act.”

61. The interest of the Plaintiff in respect of L.R. No. 12867/R had accrued before the commencement of the Land Act, 2012. The Certificate of Title that was issued for parcel of land known as L.R. No. 12867/511 was in compliance with the provisions of the Registration of Titles Act (*repealed*) and Section 162 (2) of the Land Act.

62. The totality of the evidence before me shows that the Plaintiff has proved its claim as against the Defendants on a balance of probabilities. On the other hand, the Defendants have not proved their Counter-claim on the required standard.

63. For those reasons, I dismiss the Defendants' Counter-claim with costs and allow the Plaintiff's Plaintiff as follows:

a. An eviction order be and is hereby issued as against the Defendants and those claiming under them from the parcel of land known as L.R. No. 12867/511 situate in Mavoko Municipality, Machakos County within sixty (60) days of the date of this Judgment.

b. The Defendants to pay the costs of the suit and the Counter-claim.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 24TH DAY OF APRIL, 2020.

O.A. ANGOTE

JUDGE