



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L CASE NO.323 OF 2012

SARORA COFFEE CO-OPERATIVE SOCIETY.....PLAINTIFF

=VERSUS=

KIPKARREN LOCATIONAL YOUTH POLYTECHNIC.....1ST DEFENDANT

CALEB MUREI.....2ND DEFENDANT

JAPHETH KOSGEL.....3RD DEFENDANT

DANIEL NGETICH.....4TH DEFENDANT

TANY GINA DAIRY COOLING PLANT LIMITED.....5TH DEFENDANT

MATHEW MUGE.....6TH DEFENDANT

AND BY WAY OF COUNTERCLAIM

CALEB MUREI (Suing as the Chairman of KIPKAREN

LOCATIONAL YOUTH POLYTECHNIC)1ST PLAINTIFF

TANY GINA DAIRY COOLING PLANT LIMITED.....2ND PLAINTIFF

VERSUS

SARORA COFFEE CO-OPERATIVE LIMITED.....1ST DEFENDANT

THE NATIONAL LAND COMMISSION.....2ND DEFENDANT

JUDGMENT

By a plaint dated 19th March 2007 the plaintiff herein sued the defendants jointly and severally seeking for the following orders:

- a. A declaration that the entire parcel of land known as **NANDI/KIPKARREN SALIENT/379** is the property of the plaintiff.
- b. A permanent injunction do issue against the defendants jointly and severally barring them from alienating, subdividing, interfering or in any way dealing with the parcel of land known as **NANDI/KIPKARREN SALIENT/379**.
- c. Costs of the suit.
- d. Any other relief as the Honourable court may deem fit to grant.

The Defendants filed a defence and counterclaim and denied that the Plaintiff is the rightful owner of the property. The 1st and 2nd Defendants in the counterclaim in which the National Land Commission is enjoined claimed that the land is Public Land and set aside for public use. The 1st and 2nd Defendants in their counterclaim sought for the following orders:

- a. That the plaintiff's suit be dismissed with costs.
- b. The title to the suit land in favour of the plaintiff in the original action be nullified and cancelled.
- c. The 2nd defendant in the counterclaim be ordered to restore the suit land to the public use it had been set aside for

PLAINTIFF'S CASE

PW1 Peter Keino Some the Chairman of Sarora Cooperative Society testified that the society is registered under the Cooperative Societies Act registration No. CS 772 whereby he produced a certificate of registration as Pexb 1. It was the plaintiff's case that the land was being sold by Sirikwa County via a tender which they duly applied for and produced the advertisement as Pexbt 3.

PW1 also stated that the District Commissioner wrote a letter dated 9th August 1965 stating that he had no objection to the county approving the transaction. PW1 further stated that the society paid Kshs. 8,000 on 4th November 1965 vide a receipt No. 35432. The land was 100 acres which was meant for the welfare activities and 26 acres for mill and 7 acres had a house which was to be a health center.

It was PW1's evidence that in 2016 they had a meeting with the County government who later agreed to transfer the land of which he produced the minutes held on 14th April 2016 as Pexbt no. 7. That after the approval, they paid for the transfer and were issued with a title deed to **NANDI/KIPKAREN SALIENT/379** approximately measuring 5.6 Hectares of which he produced a copy of the title as Pexbt 8.

PW1 also testified that there was no objection to the issuance of the title deed and they subsequently issued Kipkaren Polytechnic with 5 acres of the suit land. PW1 also stated that the defendants are non-existent apart from the 6th defendant who is in court and is not an official of the Polytechnic and that they followed due process in the issuance of the title. The plaintiff therefore urged the court to allow the claim as prayed as the same had already been settled. He urged the court to dismiss the defendant's counterclaim with costs.

DEFENCE CASE

DW1 who is the 6th Defendant adopted his statement as filed in court and stated that the suit land belonged to the government and should be used for public utilities. He urged the court to order the 2nd defendant in the counterclaim to restore the suit land to public use that it had been set aside for.

PLAINTIFF'S SUBMISSIONS

Counsel for the plaintiff filed submissions and listed the following issues for determination:

- a. Whether the plaintiff purchased and was allocated parcel No..NANDI/ KIPKARREN SALIENT/379.
- b. Whether the plaintiff acquired the title legally.
- c. Whether land parcel No. NANDI/KIPKARREN SALIENT/379 is public land.
- d. Whether Caleb Murei the plaintiff in the counterclaim has locus standi to prosecute the counterclaim.
- e. Whether the Plaintiff's in the Counterclaim are entitled to orders of cancellation of title for parcel No. NANDI/KIPKARREN SALIENT/379.

On the first issue as to whether the plaintiff purchased the suit land counsel relied on the evidence and the exhibits produced to show the purchase. That the plaintiff paid for the land and the transaction got the approval and consent/ participation of the then Mossop Area Council which was under Sirikwa County Council. That the society took possession of the parcel of land whilst the title was being held in trust by the council for the society.

On the second issue as to whether the plaintiff acquired the title legally, counsel submitted that **PW1**, testified that upon purchase of the property it approached now the County Government of Nandi to give them the necessary approval to have the title transferred and registered in the name of the Plaintiff. **PW1**, further testified that on 23rd March, 2016 a meeting was held by the Nandi County Town Planning and Relevant Control Committee and it approved and recommended the transfer of the said parcel from the Government to Sarora Co-operative Society. That the minutes dated 14th April, 2016 were produced as exhibit as demonstrated and specifically in **MIN 72/23/03/2016**.

On the third issue as to whether the land parcel NANDI/KIPKARREN SALIENT/379 is Public Land, counsel submitted that **Article 62(1) (a)-(n) of the Constitution** provides for the definition of public land. The said Article provides for the various circumstances which land can be described as public land. Counsel submitted that the defendant has failed to establish that the land is public land as per the definition provided for.

Counsel further submitted that the 6th defendant has no locus standi to prosecute the counterclaim as filed. That the 6th defendant claims that he is suing as Chairman of Kipkarren Locational Youth of which he admitted that in unregistered.

Miss Tum submitted that the **Constitution of Kenya in Article 67** established the National Land Commission which is vested with powers to manage public land on behalf of the National and County Governments under **Article 67(2)(c)** therefore submit that the 6th Defendant no locus to purport to lay claim on the land as public land which is essentially the function of the National Land Commission.

Counsel therefore urged the court to find that the plaintiff has proved its case against the defendants and judgment entered as prayed with costs to the plaintiff. That the defendant's counterclaim be dismissed with costs.

The Plaintiff in the Counterclaim therefore has no locus to prosecute the counterclaim and we urge the court to dismiss or have the counterclaim struck out with costs.

6TH DEFENDANT'S SUBMISSIONS

Counsel gave a brief background to the case and submitted that the suit land belongs to the government for public utilities and was therefore not available for allocation for private use. Counsel relied on the case of James **Joram Nyaga & another vs Attorney General & another (2019) eKLR** that once the suit land is reserved for the public then the same is held in trust by the commissioner of Land and therefore cannot be available for any other use.

Counsel further submitted that the plaintiff only purchased Jameson Water Mill and not the land. That the doctrine of Lis pendens bars the litigants from dealing with the property and a title acquired in such a manner is irregular. The process of acquiring title was defective as the property was unalienated government land which had been set aside for public utility.

Mr. Maina further relied on the case of **Kenya Anti-Corruption Commission v Online Enterprises Limited & 4 others [2019] eKLR**, where the court observed that:

"PWI led elaborate evidence with documents in tow to prove that the suit parcel of land had been reserved for Kenya Railways Corporation as early as 1935 and therefore it was not available for alienation.

The Commissioner of Lands also had no authority to alienate the suit land as Section 3 of the GIA, vests the power to alienate unalienated Government land in the President. The power to alienate is delegated to the Commissioner of Lands in limited circumstances for educational, charitable, sports and other purposes as set in the GIA. None of the exceptions set out therein empowered the defendant to alienate the suit property to the 2^d defendant."

Counsel further cited the case of **Sammy Mwangangi & 10 others v Commissioner of Lands & 3 others [2018] eKLR** where the court relied on evidence of the parties in finding that the suit property belonged to government. It held —

It is not in dispute that the suit property otherwise known as LR. No 209/11543 and LR. No. 209/11546 is Government land. This is also acknowledged by the appellants in their letter addressed to the Minister for Lands dated 6.4.98 at paragraph 7 where they stated as follows:-

'Since we are settled on Government Land, we use sewer water...

Counsel therefore urged the court to find that the suit land belongs to the government and dismiss the plaintiff's suit with costs and allow the counterclaim.

ANALYSIS AND DETERMINATION

This matter was filed in 2007 in the High Court but was later transferred to the Environment and Land Court in 2012 and given a new number. This makes it one of the oldest case in the court.

On 15th November 2018 Miss Tum for the plaintiff informed the court that this matter was finalized and urged the court to mark the same as settled. Mr. Mwetich for the 6th defendant also informed the court that he had gotten in touch with his client who informed him that he was aware of the settlement but required a mention date to confirm settlement.

Counsel for the 6th defendant later applied to amend the defence and file a counterclaim that during the pendency of the suit the plaintiff obtained a title to the suit land. The same was allowed and counsel filed the defence and counterclaim. The National Land Commission was also enjoined in the suit but it neither filed any response nor participated in this suit.

I have considered the pleadings, the evidence and the submissions by both counsel and find that the issues for determination are whether the suit land is government land and whether the suit land was acquired procedurally by the plaintiff. If the two issues are answered in the affirmative then the 6th defendant's counterclaim must fail.

It is not in dispute that the plaintiff purchased the suit land as per the documentary and the oral evidence adduced. The plaintiff gave a background as to how they tendered for the plot that had been advertised in 1965 and went through the approval processes and got a title deed to the suit land. The plaintiff produced the advert, the payment receipt, the minutes for approval and a copy of the title deed issued in their name. What more would be required as proof of purchase. The plaintiff further testified that they have been in occupation for the last 40 years.

There was no evidence from the 6th defendant to challenge the authenticity of the documents or the claim that the land was purchased and paid for. The defendant only claimed that he was a chair of an unregistered group and that the land belonged to the government.

Section 26 of the Land Registration Act provides that the certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, it also provides that such title can be impeached on the grounds of having been acquired fraudulently, through misrepresentation or illegally or unprocedurally.

Acquisition of a title to land is the end product and the process of acquisition is very important and must be procedural. The plaintiff showed how the plaintiff company acquired the title to a suit land. There is no evidence that the plaintiff acquired the land fraudulently or unprocedurally. If that was the case then the court would not hesitate in invoking Section 80 (1) of the Land Registration Act, 2012 which empowers the court to order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

Having answered the two issues in the affirmative I find that the plaintiff has proved its case on a balance of probabilities and therefore entitled to the orders sought in the plaint as prayed.

The defendants including the National land Commission who is the custodian of public land on behalf of the national and county governments did not defend the suit apart from the 6th defendant who filed a counterclaim on behalf of the government. I find that the 6th defendant has failed to prove his counterclaim and is therefore dismissed with costs to the plaintiff.

DATED and DELIVERED at ELDORET this 23RD DAY OF APRIL, 2020

M. A. ODENY

JUDGE