



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT KISUMU

E & L CASE NO. 864 OF 2015

ALSHAD GULAMALI SURANI.....1ST PLAINTIFF

ZULEKHA SADRUDIN ESMAIL.....2ND PLAINTIFF

VERSUS

THE MINISTER FOR HOUSING.....1ST DEFENDANT

DISTRICT LAND REGISTRAR, KISUMU.....2ND DEFENDANT

THE ATTORNEY GENERAL.....3RD DEFENDANT

JUDGMENT

1. **Alshad Gulamali Surani** and **Zulekha Sadrudin Esmail**, the Plaintiffs, commenced this suit through the Plaint dated the 20th September, 2011 and filed on the 21st September, 2011 against **The Minister for Housing District Land Registrar, Kisumu** and **The Attorney General**, the Defendants, seeking for the following prayers:

“(a) Against the 1st Defendant, for vacant possession of the said premises L. R. No. Kisumu/Municipality/Block 8/456 and in default.

“(b) Against the 1st Defendant, for mesne profits with effect from June, 2011 until the 1st Defendant delivers the property in vacant possession to the Plaintiffs.

“(c) Against the 2nd Defendant, for an order directing the removal of the restriction registered against the title to L. R. No. Kisumu/Municipality/Block 8/456 on 14th May, 2009.

“(d) Against the 1st Defendant, general damages for trespass to property.

“(e) Interest on (b) and (d) at Court rates from date of judgment until payment in full.”

The Plaintiffs aver that they were, and still are, the registered proprietors in common of lease over the suit property having been so registered on the 13th September, 1995. That they had let out the suit premises to monthly tenants and on or about 27th January 2011, the 1st Defendant handed over notice to the said tenants demanding surrender of the property and payment of arrears of rent. That in the month of May 2011, the 1st Defendant evicted the tenants and took possession of the property thereby denying them their constitutional right to property and income. That during a routine search on the 23rd March 2011, the Plaintiffs discovered that the 2nd Defendant had registered a restriction against the title on the 14th May, 2009 at the instance of the 1st Defendant.

2. The Plaintiffs' claim is opposed by the Defendants through their defence dated the 25th June, 2012 and filed on the 27th June, 2012. The Defendants deny that the Plaintiffs are the legal proprietors of the suit property, as it is a government property on which stands government houses referred to as **Kisumu/Hou/MGA-8/43 A & B**, which are occupied by civil servants. That the Plaintiffs have no Part Development Plans and or approved plans for the suit property and their attempt to acquire the property was illegal, and a travesty of the laid down procedures on acquisition of government property. That the occupants of the suit property who were not civil servants moved out voluntarily upon receipt of eviction notices, and the civil servants who took possession were asked to pay rent to the 1st Defendant who is the legal owner of the property on behalf of the Government of Kenya. That the restriction was placed on the title to preserve it as it was not available for alienation to the Plaintiffs.

3. The hearing of the Plaintiffs' case commenced on the 28th March, 2017 with the 1st Plaintiff testifying as PW1 on his own behalf and on behalf of the 2nd Plaintiff, who is his sister. She told the Court that they bought the suit property from **Zebedayo Barnabas Lubisia**, of Baluke Investments, under the sale agreement dated the 28th May, 1995 for Kshs.1,000,000. That they paid the deposits as agreed to have the title documents be processed, as the vendor had only a letter of allotment by then, and the balance of Kshs.765,000 on the 13th September, 1995 after the lease dated the 25th August, 1995 was registered and Certificate of Lease issued. That they took vacant possession of the property and that it remained vacant for about two to three years. That in 1999, they rented the houses to two people at Kshs.10,500 but in 2011, the tenants informed them that they had been asked to vacate. The Plaintiffs instructed an advocate to handle the matter for them. That they also reported to the police who advised that they stop using the houses and the plot until the issue of ownership was sorted. That they had been paying land rent and rates. The witness (**PW1**) produced as exhibits receipts for payment of land rent for the suit property dated 7th June 1996, 27th October 1997, 25th February 1998, 25th February 1999, 8th May 2000, 25th February 2002, 10th April 2003, 6th February 2004, 2nd March 2005, 16th February 2006, 11th January 2007, 7th February 2008, 8th January 2009, 11th January 2010 and 14th January, 2011. The receipts bearing the following dates for payment of land rates for the suit property were also produced as exhibits; 18th November 1997, 11th March 1998, 1st March 1999, 9th March 2000, 2nd March 2001, 25th February 2002, 5th February 2004, 4th March 2005, 16th February 2006 and 2nd March 2007. That receipt dated 9th April 2003 was also produced as exhibit but it relates to Block 8/454 and not the suit property. The Plaintiffs' case is that they had their title document lawfully, procedurally and regularly processed and should therefore be declared the owners. That during cross examination, PW1 stated that she could not tell whether the advocate handling the transaction for them had applied and obtained a Certificate of official search for the suit property. She confirmed having seen a copy of the letter of allotment in the name of Vendor but indicated she did not have a copy. That she had visited the suit property and found on it were two houses, each three bedroomed and with servant quarters. That the Vendor had told them the houses belonged to the government, but the Plot was his. That she does not know how the Vendor had obtained the Plot.

4. The Defendants presented one **Geoffrey Nyangi Onyango**, the Director of Housing Kisumu, who testified as **DW1** on the 4th December, 2018. He told the Court that on the suit property are two government houses numbers 43A and B that are occupied by civil servants who pay rent to the government. The witness testified that in 2011, his office got to know that the two houses were being occupied by persons who were not civil servants, and with the assistance of the District Commissioner, the two were evicted. DW1 took the Court through the process followed where a government house is being alienated which culminates with Form F058 which is a financial document, being filled and forwarded to the Principal Secretary Housing, who then forwards it to the Principal Secretary, Treasury. That after the approval of the Principal Secretary, Treasury, the house in question is removed from the government assets/houses, and may be offered for alienation to a private individual. The witness testified that the Plaintiffs' alleged transaction over the suit property did not follow that procedure. That upon finding that the Plaintiffs had never indicated their interest to buy the two government houses, and on confirming that they had the two houses irregularly registered as L. R. Kisumu Municipality/Block 8/456, the 1st Defendant filed a restriction against the title. They also reported to Ethics and Anti-Corruption Commission and the National Land Commission who in July 2017 revoked the Plaintiffs' title to the suit property. During cross examination, DW1 testified that the office had registered a restriction against the title on the 14th May, 2009 to safeguard public interest over the property. That they had done a survey that confirmed that the two government houses are situated on Kisumu Municipality/Block 8/456. That the eviction notice sent to the illegal occupant of the two houses required them to vacate, and pay to the government Kshs.470,000 rent in arrears. That the illegal occupants vacated from the houses but the office has not followed them on the rent arrears.

5. The learned Counsel for the Plaintiffs filed their written submissions dated the 10th June, 2019. The learned counsel for the Defendants filed their submissions dated the 17th July, 2019 on the 24th July, 2019. The Counsel for the Plaintiffs filed a reply to the Defendants' submissions dated the 8th August 2019, and on the 13th March 2010, an order was made by *Ombwayo J*, of Environment & Land Court, Kisumu to forward the file to me for writing of the judgment.

6. The learned Counsel submitted that the 2nd Defendant did not tender evidence to controvert that of the Plaintiffs' that they acquired their lease and Certificate of Lease to the suit property lawfully. That the Plaintiff's title having been registered under the **Registered Land Act, Chapter 300 of Laws of Kenya (Now repealed)**, their interests are indefeasible under **Sections 27 and 28 of the Act**. That the Defendants through DW1 did not tender evidence to confirm that the Government houses Numbers 43A and B are situated on L. R. Kisumu Municipality/Block 8/456. That as the Plaintiffs have denied that the developments on the suit property are government houses, then the Court should find in their favour as the Plaintiffs do not know where the houses Nos. 43A and B are situated. That the Plaintiffs are entitled to the prayers sought in the Plaint, including being put back into possession of the suit property and mesne profits being calculated at the rate of Kshs.10,500 per month from February, 2011 to the date the Plaintiffs get possession. That the Caution be removed, general damages of Kshs.5,000,000 and costs of the suit be granted.

7. The learned Counsel for the Defendants submitted that property belonging to the Government remains government property even where a private individual claims to have acquired it through purchase. The Counsel referred to the decision in the case of ***Susan Waiithera Kariuki & 4 Others Vs The Town Clerk, City Council of Nairobi & 2 Others (2011) eKLR***, where the Court held that **"Where there is a conflict between the public interest and the private interest, the public interest must prevail"**. That the acquisition of the suit property by the Plaintiffs through purchase did not confer upon them absolute title as the acquisition was contrary to the Act governing sale of government property. The Counsel referred to the case of ***Ethics & Anti-Corruption Commission Vs Njuguna Macharia Nairobi High Court ELC No. 310 of 2014 (2015) eKLR***, where the Court cited the case of ***Milankumar Shah & 2 Others Vs City Council of Nairobi & Others Nairobi Hccc No. 1024 of 2005*** in which the Court had found that the Plaintiff did not have absolute and indefeasible title having acquired the same through a process which was in violation of the **Government Land Act (Now repealed)**. The counsel further submitted that the **Public Procurement and Asset Disposal Act of 2015** was not complied with when the Plaintiffs obtained registration with the suit property. The counsel cited the case of ***Republic Vs Nairobi City County & Another Exparte Wainaina Kigathi Mungai, High Court Judicial Review Misc. No. 356 of 2013 [2014] eKLR***, where the Court stated that **"...the legal position is that legitimate expectation cannot override the law. Article 40(6) of the Constitution clearly stipulates that the right to property does not extend to property that has been found to have been unlawfully acquired..."**. That in the case of ***Tarmal Industries Ltd Vs Commissioner of Customs & Excise, (1968) E. A. 471***, the Court made a finding that the suit property was unlawfully acquired and stated as follows;

"...Guided by the provisions of Article 40(6) of the Constitution, it is our finding that the doctrine of legitimate expectation

cannot be used to protect property that has been unlawfully acquired. We find that the appellant cannot rely on this doctrine to circumvent the provisions of Article 40(6) of the Constitution...there cannot be a legitimate expectation without adherence to statutory or constitutional provisions.”

The learned Counsel also referred to the case of **Republic Vs DPP Exp. Kebilene [1993] 3 WLR 972**, where the Court expressed its position that no legitimate expectation can override clear statutory provisions. That the Plaintiffs’ suit cannot stand as it violates the laws governing disposal of government property and hence no reliefs can be awarded to the Plaintiffs. That the Plaintiffs should be ordered to pay the Defendants’ costs of the suit.

8. The learned Counsel for the Plaintiffs in their reply to the Defendants’ submission pointed out that the existence of Kisumu Municipality/Block 8/456 has not been disputed. That however, the Defendants have not availed evidence, like a copy of the register, to confirm that the parcel had ever been registered with the government. That the **Public Procurement and Asset Disposal Act of 2015** replaced the **Public Procurement and Asset Disposal Act of 2005** while the Plaintiffs acquired title to the suit property in 1995, long before the said Act. That the Plaintiffs cannot be accused of breaking the provisions of an Act that did not exist at the time of acquiring the title to the suit land.

9. The following are the issues for the Court’s determinations;

(a) Whether the two houses identified as Kisumu/Hou/MGA 43A & B are government houses and if so, whether they are situated on land parcel Kisumu Municipality/Block 8/456.

(b) Whether Kisumu Municipality/Block 8/456 was part of public land before being so registered and if so, whether it was available for alienation to private use.

(c) Whether the registration of the Plaintiffs with land parcel Kisumu Municipality/Block 8/456 conferred upon them good title that is absolute and indefeasible.

(d) Whether the Plaintiffs are entitled to any of the prayers in their Pleint.

(e) Who pays the costs of the suit?

10. The Court has carefully considered the pleadings filed, oral and documentary evidence tendered by PW1 and DW1, the learned Counsel submissions and come to the following findings;

(a) That from the testimony of PW1, and paragraph 3 of the document headed **“MEMORANDUM OF AGREEMENT OF SALE ON THE UNDERMENTIONED PROPERTY BETWEEN THE PARTIES NAMED HEREUNDER UPON THE TERMS SPECIFIED BELOW:”**, hereinafter referred to as the **Sale Agreement** that she produced as exhibit, land parcel Kisumu Municipality/Block 8/456, the suit property, traces its origin to a letter of allotment **“Ref. 30973/L11 dated 28th April, 1995 from Commissioner of Lands for Kisumu Municipality unsurveyed industrial plot “A” on attached plan...”** That though PW1 informed the Court that she had seen a copy of the said letter of allotment in the name of the person (Vendor) who sold it to them, she did not have a copy with her and did not produce one as exhibit for the Court’s attention.

(b) That the evidence of PW1 and the copies of the Lease dated the 25th August 1995, Certificate of Lease dated 13th September 1995, and Certificate of official Search issued on the 23rd March, 2011 that she produced as exhibits, clearly confirms the Plaintiffs’ interest over the suit property was for a term of 99 (ninety-nine) years from the 1st May, 1994. That further, the Lease and Certificate of Lease clearly shows that while the Plaintiffs are the Lessees, the Lessor is the Government of the Republic of Kenya.

(c) That the evidence of DW1 is that the suit property is part of Kisumu Municipality/Block 8, which is designated for Government houses. That while it is true DW1 did not avail documentary evidence to support that position, the Plaintiffs through the testimony of PW1 had during cross examination and re-examination stated as follows:

“I do not know how the Vendor had obtained the Plot but he had told us that the houses there were Government houses, but that the Plot was his...The Vendor had alerted me that the houses on the Plot belonged to the Government but I went ahead and bought it.”

That the admission by the Plaintiffs through PW1 that their Vendor and themselves knew the two houses on the Plot they were buying were government houses amounts to confirmation that the Plot was indeed part of Kisumu Municipality/Block 8 that is designated for Government houses.

(d) That the findings in (a) to (c) above leads the Court to conclude that the two houses PW1 referred to as government houses, are the same ones their tenants were evicted from in 2011 by the 1st Defendant’s offices. That those houses are the ones identified in the Defendants’ defence and testimony of DW1 as **Kisumu/HOU/MGA 43A & B** and are situated on that parcel of land registered in the Plaintiffs’ name as Kisumu Municipality/Block 8/456.

(e) That though the Plaintiffs claim through PW1 to have obtained the leasehold to the suit property lawfully, and regularly, the Defendants have pointed out in their defence that the suit property was not available for alienation and that the prescribed process in the acquisition of government land and assets was not followed. That the act of the 1st Defendant of issuing and serving notices to vacate to the Plaintiffs’ tenants in the two houses in January 2011, and the ensuing correspondence between the Plaintiffs’ Advocate

and the 1st Defendant is a clear indication that the Plaintiffs claim of ownership or title to the suit property was under challenge. That it was therefore, upon the Plaintiffs to present evidence to the Court upon which the Court would make a finding that indeed they obtained their title to the land regularly, procedurally and lawfully. That however, PW1 appear not to have done due diligence to certify herself that the Vendor's title to the land offered to them for sale was good. That it is the evidence of PW1 that she did **"not know how the Vendor had obtained the plot..."**. That her **"husband is the one who dealt with the transactions and must have done the survey but I do not have any copy of the survey plan."** That **"I do not have copies of the deed plan, validation of the title or letter of the Commissioner to confirm the genuineness of the title. I do not have a copy of the letter forwarding those documents."** That the foregoing responses to the questions put to PW1 during cross examination shows that the Plaintiffs were only satisfied in entering into the sale agreement, making the deposit required and waiting for the lease documents to be prepared for them. That even after the Vendor disclosed that the two houses on the suit property belonged to the Government, they went ahead to purchase the plot without first confirming whether the Government had formally released the houses for sale to an individual for private use.

(f) That the finding in (e) above, leads the court to conclude that the Plaintiffs have failed to prove that they got or acquired a good title over the suit property through the transaction commenced through the sale agreement. That their Vendor did not have a good title that could be transferred to the Plaintiffs. The Plaintiffs may have fallen prey to conmen who, with collusion with public officers in the 2nd Defendant's offices and the Commissioner of Lands among others, allocated to themselves parcels of public land on which were situated Government assets for the purposes of obtaining undeserved wealth. That the law and the Constitution do not protect such titles.

(g) That it is strange that the Defendants did not counterclaim for the lost earnings [rent] and cancellation or revocation of the lease and Certificate of Lease issued to and held by the Plaintiffs. The Court only hopes that the Defendants have engaged the appropriate investigative agencies with the purposes of identifying which public officers were involved in transaction of unlawfully and irregularly allocating the suit land to the Vendor, who subsequently sold it to the Plaintiffs in addition to those who processed the documents of title to private individuals over Government property with a view of prosecuting and or surcharging them.

(h) That flowing from above, it is the finding of the Court that the Plaintiffs have failed to prove that they are entitled to any of the prayers set out in the Plaint. That the Plaintiffs should therefore meet the Defendants' costs in the suit in accordance with **Section 27 of the Civil Procedure Act Chapter 21 of Laws of Kenya**.

11. That in view of the foregoing, the court finds that the Plaintiffs have failed to prove their case on a balance of probabilities and their case is hereby dismissed with costs.

Orders accordingly.

Dated and signed at Eldoret this 9th day of April, 2020.

S. M. KIBUNJA

JUDGE

Judgment read in open court in the absence of all parties and Counsel. The Counsel have filed a consent that the judgment be delivered and transmitted to them through the e-mail addresses provided.

Court Assistant: Christine