



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 432 OF 2012

REGISTERED TRUSTEES OF REDEEMED

GOSPEL CHURCH.....PLAINTIFF

=VERSUS=

UMOJA RESIDENTS ASSOCIATION

(Sued through its officials, P.S Kinyanjui (Chairman)

Arkipo Onyango (Secretary) and Richard Kavemba

(Committee Member)).....1ST DEFENDANT

CITY COUNCIL OF NAIROBI.....2ND DEFENDANT

JUDGMENT

The plaintiff brought this suit against the defendants on 23rd July, 2012 seeking:

- (i) A declaration that the plaintiff is the lawful proprietor of all that parcel of land known as Nairobi/Block 107/384 (hereinafter referred to as “the suit property”).
- (ii) A declaration that any or purported cancellation by the 2nd defendant of the plaintiff’s allotment or title in respect of the suit property is null and void ab initio and of no legal effect.
- (iii) A permanent mandatory injunction barring the 1st defendant from interfering with the plaintiff’s quiet enjoyment of the suit property.
- (iv) A permanent mandatory injunction restraining the 2nd defendant from interfering howsoever with the plaintiff’s quiet enjoyment of the suit property and from cancelling or purporting to cancel the plaintiff’s title thereto.

The plaintiff averred that at all material times it was and still was the registered proprietor of the suit property which is situated at Umoja II estate, Nairobi. The plaintiff averred that the suit property was allocated to it by the 2nd defendant through a letter of allotment dated 11th August, 1998. The plaintiff averred that after complying with the terms of the allotment, it was registered as the owner of the suit property and issued with a certificate of lease on 7th July, 2011.

The plaintiff averred that it took possession of the suit property on 15th July, 2012 after the eviction of another church which had occupied the suit property illegally. The plaintiff averred that after taking possession of the suit property as aforesaid, the 1st defendant threatened it with violent eviction from the property claiming that the property was public land. The plaintiff averred that the 1st defendant also instigated the 2nd defendant to evict the plaintiff from the suit property on allegation that the allotment of the suit property to the plaintiff was cancelled in 2006 by the 2nd defendant. The plaintiff averred that it was a stranger to the alleged cancellation of the allotment of the suit property to it and that it received no notice of such drastic and arbitrary action by the 2nd defendant which in any case was null and void. The plaintiff averred that it was apprehensive that the defendants intended to interfere with its lawful enjoyment of the suit property unless restrained by the court.

The 2nd defendant filed a defence to the plaintiff's claim on 22nd August, 2012. The 2nd defendant averred that the allocation of the suit property to the plaintiff was cancelled on 23rd August, 2006 by the 2nd defendant and as such there was no way the plaintiff could have obtained a lawful title in respect of the property on 7th November, 2011. The 2nd defendant averred that the title held by the plaintiff was null and void. The 2nd defendant denied that it was being instigated by the 1st defendant to evict the plaintiff from the suit property. The 2nd defendant averred that since the plaintiff held an invalid title over the suit property, it had no right to be in occupation thereof.

The 2nd defendant averred that the suit property was reserved for public use and that it wanted the plaintiff to vacate the same so that it could construct thereon a community centre for the benefit of the public. The 2nd defendant averred that following the cancellation of the allotment of the suit property to the plaintiff, a lease ought not to have been issued in favour of the plaintiff in respect thereof since the property had reverted back to the public for development of a community centre.

The 2nd defendant urged the court to dismiss the plaintiff's suit and enter judgment against the plaintiff for:

- (i) Cancellation of the plaintiff's title over the suit property.
- (ii) A declaration that the suit property is public land.
- (iii) A permanent injunction barring the plaintiff from interfering with the defendant's quiet enjoyment of the suit property.

The 1st defendant filed its statement of defence and counter-claim on 9th December, 2014. The 1st defendant averred that the plaintiff had acquired the suit property fraudulently. The 1st defendant averred that during the subdivision that gave rise to the suit property, the suit property was reserved for the construction of a community centre. The 1st defendant averred that the suit property ought not to have been allocated to the plaintiff and that the whole process from the allocation to the issuance of a title was fraudulent. The 1st defendant denied that it had threatened the plaintiff with eviction from the suit property or that it had instigated the 2nd defendant to evict the plaintiff. The 1st defendant averred that the plaintiff was aware that its title was revoked by the 2nd defendant following a resolution by the 2nd defendant's development committee.

In its counter-claim, the 1st defendant averred that the 2nd defendant and the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (hereinafter referred to only as "the Ndungu Commission") had recommended that plaintiff's title be revoked. The 1st defendant averred further that the National Land Commission had also commenced investigations on how the suit property that was reserved for public use was allocated to the plaintiff. The 1st defendant sought judgment against the plaintiff for:

- (i) Revocation of the title for the suit property held by the plaintiff.
- (ii) A declaration that the suit property is public land and was reserved for the construction of a community/social hall.

At the trial, the plaintiff called three (3) witnesses, Joshua Katua Ngoi (PW1), Rev. John Bankosky Kitonga (PW2) and Bishop Daniel Mutiso (PW3). These witnesses adopted their witness statements as their evidence in chief. They also testified at length on how the plaintiff acquired the suit property, the disputes that ensued thereafter and how they were resolved. The plaintiff's witnesses also told the court about the defendants' interference with the plaintiff's quiet possession of the suit property. They produced as exhibits the documents that were attached to the plaintiff's list and supplementary list of documents dated 23rd July, 2012 and 25th May, 2016 respectively.

The 1st defendant called one (1) witness, Peter Stephen Mburu Kinyanjui (DW1). DW1 adopted his witness statement that was filed in court together with the 1st defendant's statement of defence and counter-claim on 9th December, 2014. In the statement, DW1 gave the history of the suit property, the plaintiff's attempts to acquire the same and the resistance by the 1st defendant to that move. DW1 reiterated the averments in the 1st defendant's statement of defence that the suit property was no lawfully allocated to the plaintiff as it was reserved for the construction of a community centre for the residents of Umoja II estate. DW1 produced as exhibits, the documents attached to the 1st defendant's list of documents dated 5th June, 2014. The 2nd defendant did not tender evidence.

After the conclusion of evidence, the parties made closing submissions in writing. The plaintiff filed its submissions on 8th November, 2019 while the 1st defendant filed its submissions on 22nd November, 2019. The 2nd defendant did not file submissions. I have considered the evidence tendered by the parties in support of their respective cases and the submissions of counsels. In my view the issues arising for determination in this suit are the following;

1. Whether the plaintiff acquired the suit property lawfully and as such holds a valid title over the same.
2. Whether the defendants interfered with the plaintiff's quiet enjoyment of the suit property.
3. Whether the plaintiff is entitled to the reliefs sought in the plaint.
4. Whether the defendants are entitled to the reliefs sought in their respective counter-claims.
5. Who is liable for the costs of the suit?

Whether the plaintiff acquired the suit property lawfully and as such holds a valid title over the same.

The plaintiff led evidence that the suit property was allocated to it by the 2nd defendant for religious purposes through a letter of allotment dated 11th August, 1998. The plaintiff told the court that after paying the stand premium that was set out in the letter of allotment, the 2nd defendant executed a lease in its favour which was registered on 7th July, 2011 after which it was issued with a certificate of lease on the same date. In its submission, the plaintiff cited section 24(b) of the Land Registration Act 2012 and contended that as the registered proprietor of the suit property it was entitled to the enjoyment of all rights and privileges associated with that proprietorship. The plaintiff submitted that the suit property was allocated to it by the Nairobi City Commission, the 2nd defendant's predecessor which had powers to allocate the same. The plaintiff submitted further that the National Land Commission (NLC) had no power to review the title of the suit property after the plaintiff had moved this court and obtained an order restraining the defendants from interfering with the property. The plaintiff submitted that the decision of the NLC regarding the ownership of the suit property was illegal, null and void. The plaintiff cited section 25(1) of the Land Registration Act, 2012 and submitted that having acquired the suit property for valuable consideration, its right over the same could not be defeated as no act of fraud or wrong doing on its part has been established by the defendants.

I have considered the plaintiff's submissions on the issue of the validity of the title that it holds over the suit property. There is overwhelming evidence on record showing that the suit property which is situated in Umoja II Estate Nairobi was reserved for public use. From the evidence, the suit property was reserved for the construction of a community social centre for the residents of Umoja II Estate. In his evidence in cross-examination, PW2 admitted that the suit property was set aside for public use. The legality of the acquisition of the suit property by the plaintiff was investigated by the Ndungu Commission. In its report that was published in June, 2004, the commission found that the suit property was reserved for a community centre and that its allocation to the plaintiff for religious purposes was illegal. The commission recommended that the title held by the plaintiff be revoked.

There is also evidence on record that in a meeting of the 2nd defendant's General Purposes Committee held on 23rd August, 2006, it was resolved that the allocation of the suit property to the plaintiff be revoked because the land was set aside for a social hall. The minutes of the proceedings of the committee were annexed to the affidavit of P.S Kinyanjui sworn on 10th July, 2013 filed in court on the same date.

The legality of the allocation of the suit property to the plaintiff was also investigated by the National Land Commission (hereinafter referred to only as "the NLC") under the power that was conferred upon it by section 14 of the National Land Commission Act, 2012 to review grants and dispositions of public land. The NLC also made a finding that the suit property was allocated to the plaintiff illegally and recommended that the same be revoked through a decision that was published in the Kenya Gazette on 18th July, 2014 as Gazette Notice No. 5022. From the material before the court, the NLC has already revoked the plaintiff's title and allocated the property to the 2nd defendant's successor, Nairobi County Government to hold in trust for Umoja Residents. See, the letter of allotment attached to the affidavit of P. S. Kinyanjui sworn on 24th July, 2018 and filed in court on 2nd August, 2018. As I have mentioned earlier in this judgment, the plaintiff had submitted that the NLC had no jurisdiction to review its title to the suit property. As I have stated above, the NLC had jurisdiction to review grants and dispositions of public land. The suit property was public land. Whether the NLC could exercise its review of dispositions of public land jurisdiction while this dispute was pending in court is not for determination in this suit since the NLC is not a party to the suit.

The questions that this court has to answer in light of the foregoing are, first, whether the suit property having been reserved for specific public purpose was available to the 2nd defendant for allocation to the plaintiff and, secondly, whether lawful procedure was followed in allocating the suit property to the plaintiff. In Nairobi High Court Civil Suit No. 1024 of 2005(O.S), Milankumar Shah & 2 others v The City Council of Nairobi & another, the court stated as follows:

“We hold that the registration of title to land is absolute and indefeasible to the extent firstly that the creation of such title was in accord with the applicable law and secondly where it is demonstrated to a degree higher than the balance of probability that such registration was not procured through fraud and misrepresentation to which the person or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law, and the public interest”.

From the material placed before the court, Umoja II Estate is an expansive residential area which is a home to several people. During the planning of the estate, the suit property was reserved for the construction of a community centre for use by the residents of Umoja II Estate. The suit property was therefore surrendered to the 2nd defendant to hold for that public purpose. I am of the view that once the suit property was surrendered to the 2nd defendant for the purposes of construction of a community centre for use by the residents of Umoja II Estate, the 2nd defendant held the property in trust for the residents of Umoja II Estate. As a trustee of the said property, the 2nd defendant could not deal with the same in a manner inconsistent with that trust and without consulting the beneficiaries of the trust. In Republic v Minister for Transport & Communication & 5 Others Ex Parte Waa Ship Garbage Collector & 15 Others Mombasa HCMCA No. 617 Of 2003 [2006] 1 KLR (E&L) 563 the court stated as follows on the doctrine of public trust:

“Courts should nullify titles by land grabbers who stare at your face and wave to you a title of the land grabbed and loudly plead the principle of the indefeasibility of title deed. It is clear from section 75 of the Constitution that the doctrine of public trust is recognised and provided for by the superior law of the land and applies in a very explicit way as regards trust land. The doctrine is, however, not confined to trust lands and covers all common properties and resources as well as public land. Although the doctrine had origins in Roman Law it is now a common heritage in all countries who adopted the English common law..... It is quite evident that should a constitutional challenge succeed either under the trust land provisions of the Constitution or under section 1 and 1A of the Constitution or under the doctrine of public trust a title would have to be nullified because the Constitution is supreme law and a party cannot plead the principle of indefeasibility which is a statutory concept. A democratic society holds public land and resources in trust for the needs of that society. Alienation of land that defeats the public interest goes against the letter and spirit of section 1 and 1A of the Constitution.”

Section 144 (5) of the Local Government Act, Chapter, Chapter 265 Laws of Kenya (now repealed) allowed a local authority to let or grant to any person a licence to occupy any land which was owned by the local authority, with the consent of the Minister of Local Government for any term or without the consent of the Minister of Local Government for a term not exceeding 7 years and in such case the local authority

could impose in respect thereof such rent, stand premium and fees as may be necessary. Section 144(8) of the said Act provides that nothing in section 144 (which includes section 144 (5) of the Act) shall authorise the disposal of land by a local authority, whether by sale, lease or exchange, “in breach of any trust, covenant, or agreement binding upon the local authority....” (emphasis added).

As I have stated above, the 2nd defendant held the suit property in trust for the residents of Umoja II Estate. The suit property was supposed to be used for construction of a community centre for the benefit of the residents of the said Estate. The 2nd defendant disposed of the suit property to the plaintiff through 99 years lease with effect from 1st July, 1973. According to the letter of allotment, the suit property was allocated to the plaintiff for religious purposes. However, in the instrument of lease, the property was let to the plaintiff for residential purposes.

Whether the plaintiff acquired the suit property for religious or residential purposes, those were not the purposes for which the 2nd defendant held the suit property in trust. The disposal of the suit property to the plaintiff was therefore in breach of the trust for which the 2nd defendant held the suit property and as such violated section 144 (8) of the Local Government Act aforesaid.

With regard to the procedure that adopted in the allotment, again I am of the view that the law was not followed. Section 144(5) of the Local Government Act (now repealed) provided that consent of the Minister of Local Government had to be obtained before a local authority could dispose of land by way of a lease in excess of 7 years. No evidence was placed before the court showing that the 2nd respondent passed a resolution to allocate the suit property to the plaintiff. The only resolution that the court has had sight of is that which was passed on 23rd August, 2006 by the 2nd defendant’s General Purposes Committee revoking the allotment of the suit property to the plaintiff. There was also no evidence that any such resolution was placed before the Minister of Local Government for approval. Without a council resolution allocating the suit property to the plaintiff and a consent of the Minister issued under section 144(5) of the Local Government Act giving his approval to the transaction, the allotment of the suit property and subsequent leasing of the same to the plaintiff were procedurally flawed and illegal.

Due to the foregoing it is my finding that the plaintiff did not acquire the suit property lawfully and as such its title to the property is unlawful. A title tainted with illegality and procedural errors cannot be protected by the law however innocently acquired.

Whether the defendants interfered with the plaintiff’s quiet enjoyment of the suit property.

I am not satisfied from the evidence before the court that the defendants unlawfully interfered with the plaintiff’s possession of the suit property. For the 1st defendant, what has been referred to as interference in my view was a protest by the residents of Umoja II Estate against illegal acquisition of the suit property by the plaintiff. With regard to the 2nd defendant, what the plaintiff considered as its interference with the suit property was its attempt to assert its right over the property which it admitted was allocated to the plaintiff irregularly the same having been reserved for public use. No evidence was placed before the court showing that the defendants attempted to evict the plaintiff from the suit property forcefully.

Whether the plaintiff is entitled to the reliefs sought in the plaint.

For the reasons that I have given above, I am not satisfied that the plaintiff has proved its case against the defendants to the required standard. The plaintiff has failed to establish that it has a valid title to the suit property. In the circumstances, the plaintiff is not entitled to the declaratory and injunctive reliefs sought in the plaint which can only issue to protect a valid title.

Whether the defendants are entitled to the reliefs sought in their respective counter-claims.

I am satisfied from the evidence before the court that the 1st defendant has established its claim against the plaintiff and that it is entitled to the reliefs sought in its counter-claim. The 2nd defendant did not tender evidence in support of its purported counter-claim. In any event its counter-claim was not a counter-claim as such. The 2nd defendant just sought reliefs its statement of defence without indicating that it was doing so by way of a counter-claim. That is contrary to the requirements of Order 7 rule 7 of the Civil Procedure Rules. In the circumstances, the said prayers in the defence cannot be recognised by the court as a counter-claim. I have also noted that no court fees was paid for the said reliefs in the defence.

Who is liable for the costs of the suit?

As a general rule, costs follow the event. The plaintiff has lost the case. In the absence of any reason to depart from the general rule, the plaintiff shall pay the costs of the suit but only to the 1st defendant since the 2nd defendant contributed to the dispute that led to the filing of the suit.

Conclusion:

In conclusion, I hereby make the following orders;

1. The plaintiff’s suit is dismissed.
2. Judgment is entered for the 1st defendant against the plaintiff in terms of prayers (a) and (b) in the counter-claim dated 5th June, 2014.

3. The 1st defendant shall have the costs of the suit and the counter-claim.

Delivered and Dated at Nairobi this 18th Day of May, 2020

S. OKONG'O

JUDGE

Judgment read through Microsoft Teams video conferencing platform in in the presence of;

Mr Oonge for the Plaintiffs

Ms. Hafsah h/b for Mr. Wanjohi for the 1st Defendant

N/A for the 2nd Defendant

Ms. C. Nyokabi- Court Assistant