



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

CIVIL CASE NO. 99 OF 2004

1. KALAVATI BABOOLAL MEHTA

2. KASUMBEN PRABASHNKER MEHTA

3. RAMAGAURI MANILAL MEHTA.....PLAINTIFFS

= VERSUS =

1. THE COMMISSIONER OF LANDS.....DEFENDANTS

AND

1. AGRICULTURAL INDUSTRIAL HOLDINGS LTD

2. SILVER CROWN MERCHANTS LTD.....INTERESTED PARTIES

J U D G E M E N T

1. By an amended plaint dated 2nd July 2004 and filed on the same day, the plaintiffs sued the Commissioner of Lands/National Land Commission as the defendant and Agricultural & Industrial Holdings Limited and Silver Crown Merchants Limited as Interested Parties. The suit was brought under the Law Reform Act by the personal representative to the estates of Ms M. M. Mehta, B. K. Mehta and P. K. Mehta who are all deceased. The plaintiff pleaded that the deceased were registered proprietors of L.R No. 209/2260 and 209/2261 in Nairobi under the Registration of Titles Act. That the Agricultural Development Corporation approached the deceased with offers to purchase the said land in 1976 which offer was declined.

2. The plaintiffs plead that the government compulsorily acquired the said lands vide gazette notices dated 6th December 1977 for public usage by the Agricultural Development Corporation. However, in the year 2003, the plaintiff discovered the aforesaid action by the defendant was never effected and instead the land was fraudulently given to the 1st Interested Party, a private organisation not related to Agricultural Development Corporation who in turn leased it to the 3rd defendant. The particulars of fraud pleaded are as follows;

- a) Falsely stating that the acquisition was intended to be utilized for public purposes.
- b) Falsely stating that the parcel had subsequent to the acquisition vested in Agricultural Development Corporation when it had not.
- c) Fraudulently vesting the assigned interest in the Interested Party irregularly.
- d) Failing to discuss with the plaintiffs and the public that the vesting was not in the Agricultural Development Corporation but the Interested Party.
- e) Fraudulently concealing the results of the transaction from the plaintiffs despite repeated requests.
- f) Fraudulently and compulsorily acquiring the plaintiffs' land.

3. That by reason of the aforesaid fraudulent acquisition, the plaintiffs constitutional right to ownership of property was violated causing them to suffer loss of income from the premises. Particulars of special damages were given as;

a) Loss of monthly rental income from the premises at commercial market rates since 1977 to date.

b) Deprivation of the premises and its accrued value to date.

4. The plaintiff therefore prays for judgement against the defendant for orders;

a) Declaring the compulsory acquisition of the suit land unconstitutional, a violation of their right to own property and a nullity *ab initio*.

b) General and special damages with effect from 1978 to date.

c) Costs of the suit.

5. The Commissioner of Lands (1st defendant) filed a statement of defence dated 11th November 2005 denying the plaintiffs' claim. The 1st defendant admitted that the government compulsorily acquired the two titles under the provisions of the Land Acquisition Act Cap 295. It is pleaded that the same was acquired for the benefit of Agricultural Development Corporation and Agricultural Finance Corporation which were both public institutions.

6. The allegations of fraud pleaded in paragraph 12 (a) – (f) of the plaint are denied and the plaintiffs were put to strict proof. The 1st defendant denied that his conduct demonstrated a conspiracy to defraud the plaintiffs of their legally held title. The particulars of special damages pleaded were also denied. The 1st defendant further pleaded that the suit is defective and bad in law as no verifying affidavit had been filed with the plaint. The jurisdiction of this Court was also denied. I did not find on record documents filed on behalf of the Interested Parties/2nd and 3rd defendants.

7. This matter came up for hearing during the service week on 7th May 2019 before Waithaka J. The judge was suspended before writing the judgment hence I took over the matter to write the judgement with consent of Mr. Wafula learned counsel appearing for the plaintiffs.

8. Vivek Prabashaker Mehta gave evidence as **PW1**. He is related to the plaintiffs and continued the suit as their legal representative. PW1 said he had sued the defendants because the government compulsorily acquired the suit titles for public purposes in 1977. That the properties are situated in Moi Avenue and Tom Mboya Street opposite former U.S Embassy, Nairobi. PW1 said their family was compensated based on Government valuation at the time with for a sum of Kshs.3000000. PW1 continued that there are several correspondence regarding the acquisition some of which he included in his list of documents dated 19/5/2014.

9. **PW1's** evidence is that in the year 2003, the plaintiff's discovered that the property had been fraudulently acquired as they had not been put to use as gazetted. Instead the 1st defendant fraudulently assigned the property a new title number L.R. 209/13374 and allocated the same to the 2nd defendant which is a private organisation and not Agricultural Development Corporation. That from a physical inspection of the deed plan, the plaintiffs confirmed that title number 209/13374 is the same as the suit plot. The plaintiff contends that the property having been acquired for public purpose and now being used for other purposes is contrary to the Constitution and the Land Acquisition Act as the same amounts to unlawful taking of private property. That the same is also an infringement of the plaintiff's Constitutional right to own property. That the 2nd defendant conspired with the 1st defendant to defraud them of their property. The plaintiff urged the Court to grant the orders sought in the amended plaint. He produced all the documents contained in his list dated 19/5/2014 as exhibits in this Case.

10. The plaintiffs rehashed the evidence presented in his submissions. They also submitted on the question whether the plaintiffs' rights were violated. While answering this question the plaintiffs cited several case laws and sections of the statute. It is submitted that under Article 40(3) (b) of the Constitution the right to own property is not absolute as private property can be acquired by the State for public purposes. That the public purpose principle is also recognised in Section 6 of the Land Acquisition Act Cap 295 which provides follows;

“6. Where the Minister is satisfied that any land is required for the purposes of a public body, and that –

(a) The acquisition of the land is necessary in the interests of defence, public safety, public order, public health, town and country planning or the development or utilization of any property in such manner as to promote the public benefit; and

(b) The necessity therefore is such as to afford reasonable justification for the causing of any hardship that may result to any person interested in the land, and so certifies in writing to the Commissioner he may in writing direct the Commissioner to acquire the land compulsorily under this Part.”

11. The plaintiff further referred the Court to the case of *Patrick Musimba Vs The National Land Commission and others (2016 eKLR)* where Onguto J (as he then was) stated thus;

“The land must be acquired for a public purpose or in public interest as dictated by article 40(3) of the Constitution. In our view, the threshold must be met; the reason for the acquisition must not be remote or fanciful. The National Land Commission needs to be satisfied in these respects and this it can do by undertaking the necessary diligent inquiries including interviewing the body intending to acquire the property.”

12. It is the plaintiff's case that the 1st defendant in violation of the aforementioned provisions of the law purported to compulsorily acquire the plaintiff's properties L.R. No. 209/2260 and 209/2261 and subsequently allocated the same to Agricultural and Industrial Holdings

Limited which is a private entity. That the letter of allotment (*item 3 on defendant's bundle*) shows the properties were allotted to Agricultural and Industrial Holdings Limited who swapped properties with Agricultural Finance Corporation (AFC). That the land acquired for Agricultural Finance Corporation was not fit for the purpose for which it was acquired as it violated Section 4 of Cap 295. That if Agricultural Finance Corporation wanted the property owned by Agricultural and Industrial Holdings then nothing stopped the government from acquiring the specific property instead of the swap.

13. Lastly the plaintiff referred this Court to the decision in *James Joram Nyaga Vs A. G & Ano (2007) eKLR* where the Court stated thus;

“Under Section 75 of the Constitution and Section 6 of the Land Acquisition Act, there must be justification for the hardship that will be occasioned to those whose land is compulsorily acquired. Most times, compulsory acquisition does cause hardship and sometimes untold hardship to the original owners that the compensation offered by the Government may never equate or adequately compensate the suffering and inconvenience caused but in those circumstances, the public interest overshadows the private interest. We agree with the observation in the NIAZ case, that if the Government were to be allowed to compulsorily acquire land and use it for other purposes other than those envisaged under the Constitution, there is bound to be abuse of those powers by an ill-intentioned Government which would acquire land, compensate the owners with tax payers’ monies and dispose of it to its friends and cronies. We are of the view that if the acquired land is no longer necessary for the purpose for which it was acquired and it is unnecessary to hold it in trust, then equity requires that the property reverts back to the original owners.”

14. The plaintiffs concluded that if the government no longer wanted the property, it ought to have reverted back to the plaintiffs. That having failed to do so entitles the plaintiffs to compensation as set out in the valuation report dated December 2017 and filed in court on 21st March 2018.

15. I have considered the issues raised in the pleadings, the evidence adduced and the submissions rendered. From the, I frame the following questions for determination;

- (a) Whether the acquisition by the government of the two titles was fraudulent.
- (b) Whether or not the plaintiffs are entitled to compensation and if so at what rates.
- (c) Who should pay costs of this suit?

16. The plaintiffs pleaded that the Commissioner of Lands fraudulently acquired the suit titles. The particulars of fraud were set out in paragraph 8 (a) – (f) of the plaint. Some of the grounds given are;

- (i) **Falsely stating that the acquisition was intended to be utilized for public purposes.**
- (ii) **Failing to disclose to the plaintiffs and the public that the vesting was not on Agricultural Development Corporation but the Interested Party.**

17. The question for determination is whether the allegations of fraud levelled against the Commissioner of Lands was proved. Proof of fraud is required to be done on a higher standard than in Civil Case – see the decision in *Vijaj Morjaria Vs Nansingh Madhusingh Darbar & Ano (2000) eKLR* thus;

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.

18. The plaintiff's produced documents that prove the acquisition actually took place. The documents include inter alia;

- (a) Gazette notices Nos 3498 & 3499 dated 6th December 1977.
- (b) Copy of certificate of title showing entry No. 13 registering Notice of taking possession under the Land Acquisition Act vide gazette notices in (a) above.
- (c) Letter dated 2nd September 1993 by the Commissioner of Lands to the A.G which stated that the government took possession on 16th January 1979 and thereafter issued Agricultural Development Corporation and Agricultural Finance Corporation with a letter of allotment.

19. The acquisition was not objected by the plaintiffs. Gazette notice No. 3499 refers to notice of inquiry pursuant to section 9(1) of the Land Acquisition Act, 1968 for the hearing of claims for compensation by persons interested in the land. The plaintiffs' witness confirmed in his oral evidence before the Court that compensation was indeed paid in the sum of Kshs.3,000,000 as per the valuation done by the government valuer. The witness went further to state that the acquired land was later allocated to Agricultural and Industrial Holdings Limited which is a private organisation.

20. First, the plaintiffs did not produce a search from the Companies Registry to establish that indeed Agricultural and Industrial Holdings Limited is a private entity. Secondly, the copy of certificate of title produced in the name of Agricultural and Industrial Holdings Limited

reads grant No. 72189 for L.R No. 209/13374 measuring 0.1003ha. The plaintiff argues that this title occupies the same ground as the acquired titles. This same was first issued on 28th January 1996.

21. If the title No. 209/13374 refers to the same sit titles as pleaded, then the same was given to the 2nd defendant/1st Interested Party 17 years after the government acquired the land from the plaintiffs. No evidence was led on what use the government put the land to during the 17 years. However, worth noting is the plaintiffs' submissions that Agricultural Development Corporation / Agricultural Finance Corporation swapped the acquired land with the 2nd defendant. The plaintiff wondered what stopped the government from acquiring the land directly from Agricultural and Industrial Holdings Limited instead of first acquiring the suit titles and later swapping it.

22. The question the Court finds not answered is whether there was a swap and if positive whether that faults the initial acquisition if the agricultural Finance Corporation is still in occupation of the land they swapped with the suit titles. The second question I find unanswered and/or not proved by the plaintiffs is who is in actual occupation of the two suit tiles. The plaintiff's letter dated 13th August 1993 addressed to the Attorney General over the suit titles at paragraph (c) stated *that U. N. Patel & Sons have been tenants on L.R No. 209/2261 since 1955. That they did not move out even after the acquisition.* In the same paragraph, the plaintiff was asking for the files of U.N Patel & Sons for the tenancy agreements and accounts. The inference drawn on the content of this letter is that the plaintiffs are unsure who is collecting rents if any from the suit premises.

23. On the face of the evidence adduced, I am not persuaded that the plaintiffs have proved that the property was fraudulently acquired as their own documents show due process was followed. Secondly, the swap complained of does prove that the suit title was not put to use for the purpose for which it was acquired since it was not proved who was in actual possession of the suit titles. Thirdly there is no evidence that the acquired titles were subsequently transferred to a private entity. In summary, I find that the particulars of fraud have not been proved.

24. The second question is whether there was a violation of the plaintiff's rights. The plaintiffs' own evidence is that compensation was paid. They did not plead that the compensation paid was an under-value of the properties acquired. The plaintiffs never refused the monies paid out to them. The provisions of Section 75(1) (c) of the repealed Constitution (which was the applicable law at the time) requires for, provision to be made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation. Once prompt compensation was paid, it is my considered opinion that no right of the plaintiff was capable of being violated.

25. In respect to the amount of Kshs.850,000,000 claimed as special damages, I hold that the same does not lie. The compensation payable if any would be the value of the property as at the time of acquisition. The valuation report only gave a market value at Kshs.140,000,000 for plot No, 209/2260 as at December 2017 but did not give the value when the acquisition was made in 1977-79. No valuation was made in respect of plot No. 209/2261. The submissions that it would also be valued at Kshs.140,000,000 is an assumption that was made without any basis.

26. Last who bears the costs of the suit? Although the 1st defendant filed a statement of defence, none of the defendants attended court during the hearing. I also find that the plaintiffs Case has not been proved. The proper order to make in the circumstances is to dismiss the suit and each party shall bear their respective costs.

Dated, signed and delivered at BUSIA this 12th day of May, 2020.

A. OMOLLO

JUDGE

Judgment delivered electronically through mail this 12th Day of May, 2020 due to Covid-19 pandemic.

A. OMOLLO

JUDGE