



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC SUIT NO. 2195 OF 2007**

**MAGUGA GREEN APARTMENTS LIMITED.....PLAINTIFF**

**VERSUS**

**THE ATTORNEY GENERAL.....1<sup>ST</sup> DEFENDANT**

**SBM BANK (KENYA) LIMITED.....2<sup>ND</sup> DEFENDANT**

**RICHARDSON PROPERTIES LIMITED.....3<sup>RD</sup> DEFENDANT**

**JUDGEMENT**

1. By a plaint dated 11<sup>th</sup> October 2007 and amended on 14<sup>th</sup> May 2010 and further amended on 22<sup>nd</sup> August 2016, the plaintiff seeks judgment against the defendants for:-

***(a) A declaration that LR No. 209/12948 is a public utility land and no construction should be carried out thereon.***

***(b) An order that the Title Deed No. 209/12948 issued to Emtol Properties Limited on 19<sup>th</sup> March 1996 and later on issued on the 3<sup>rd</sup> defendant on 29<sup>th</sup> December 2014 be cancelled forthwith.***

***(c) An order that the commissioner of lands or his successor, be compelled to rectify the records by allocating to the plaintiff the plot number 209/12948 to hold the land in trust for the residents/owners of houses constructed on LR No. 209/8873/2.***

***(d) Costs of this suit.***

***(e) An other relief this honourable court may deem fit to grant.***

2. Upon being served with copies of plaint and summons to enter appearance the 1<sup>st</sup> defendant, entered appearance on 4<sup>th</sup> April 2008 and filed a statement of defence dated 2<sup>nd</sup> April 2008.

3. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants defence and counterclaim is dated 3<sup>rd</sup> December 2007 and amended on 9<sup>th</sup> October 2015.

4. PW1 Anil Kapila, one of the directors of the plaintiff adopted his witness statement and the list of documents. He told the court that he is the owner of House NO. 18. He told the court that the residents of the plaintiff would like the parcel of land to revert back to the plaintiff for use as a parking and a children's play ground. That the title ought to be cancelled and/or revert back to the county government of Nairobi to hold in trust for the plaintiff. That the said land was not available for allocation to private individuals. He prays that the prayers in the further amended plaint be allowed.

5. The 1<sup>st</sup> defendant did not call any witnesses but tendered written submissions.

DW1 George Odette, the company secretary of the 2<sup>nd</sup> defendant told the court that he is the one who maintains records in respect of the suit property. He adopted his witness statement dated 23<sup>rd</sup> May 2019 and the bundle of documents dated 8<sup>th</sup> October 2014 and 23<sup>rd</sup> February 2015. He prays that the plaintiff's suit be dismissed and that judgment be entered as in the counterclaim.

6. It is the plaintiff's case that the suit property was previously owned by Orient Holdings Limited who subdivided and constructed

maisonettes. As a condition to the sub division, Orient Holdings Limited was required to surrender two portions of the land which were to be set aside for the residents use as a parking lot and a garden. It was expected that the commissioner of lands would issue the Nairobi City County with titles for the two parcels to hold in trust for the plaintiff. One of the parcels was issued with certificate of title no. 209/12948 Grant No. IR 68692. It was to be used as a garden and parking. The plaintiff used it as such until 2001 when Emtol Properties Limited constructed a wall blocking access to the land. The land was allocated to Emtol Properties Limited on 19<sup>th</sup> March 1996 who transferred to the 2<sup>nd</sup> defendant and then to the 3<sup>rd</sup> defendant. It is the plaintiff's case that the allocation was fraudulent. The 2<sup>nd</sup> defendant having acquired the land fraudulently could not pass good title to the 3<sup>rd</sup> defendant.

7. It is the 2<sup>nd</sup> and 3<sup>rd</sup> defendant's case that the suit property was allocated to Emtol properties Limited in 1996. There was no encumbrance except a caveat which was later properly removed and or lifted. In 2001 Emtol properties Limited found that the residents of the plaintiff trespassing onto the said parcel and they constructed a wall. The suit property was later transferred to the 2<sup>nd</sup> defendant who in turn transferred to the 3<sup>rd</sup> defendant. The said transfers were not fraudulent. It is their case that the plaintiff's interference and consistent harassment has caused them loss to the tune of Kshs.7,614,127.04 in delayed construction. Further that the plaintiff has encroached on the suit property by 330 metres and is therefore obliged to stabilize the property before any developments can go on. In their counterclaim they seek:-

*(a) A declaration that the plaintiff has caused the 2<sup>nd</sup> and 3<sup>rd</sup> defendants herein loss monies.*

*(b) General damages*

*(c) Interest on (a)*

*(d) Cost of the suit.*

#### **The Plaintiff's submissions**

8. They are dated 8<sup>th</sup> July 2019 and filed on 18<sup>th</sup> July 2019. All the transactions on the suit property took place before the enactment of the constitution 2010 and the new land laws. And as such the law that governed alienation of government land was the Government Lands Act. The procedure set out in section 9-13 was not followed. Orient Holdings Limited surrendered two portions of land which were set aside for the residents of the plaintiff to use as a garden and a parking lot. The surrender was for public use to be used by the plaintiff's residents. It has put forward the case of **Norbixin Kenya Limited vs The Attorney General, HCCC NO. 1814 OF 2002** where the court dismissed the plaintiff's case because they had not obtained change of user and had not followed the process of alienation.

9. The commissioner of lands had no right to allocate premises set aside for public utility to Emtol Properties Limited as the public purpose for which the land was reserved still existed. It relied on section 9 of the Government Lands Act and in the cases of **Timothy Ingosi & 87 others vs Kenya Forest Services & 2 Others [2016] eKLR; Kenya; Industrial Estates Limited vs Anne Chepsiror & 5 Others E&L No. 71 of 2013**. The land in question was surrendered for use by the plaintiff's resident as has been proven above. The same was to be held by the county government in trust for the plaintiff's residents. The owner of lands had no right to allocate such premises to Emtol properties Limited. If the public land had to revert to private hands then the proper procedure had to be followed.

10. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants are not innocent purchasers for value. Section 23 of the Registered Titles Act (repealed) provided that title could be challenged on grounds of fraud or misrepresentation. The 2<sup>nd</sup> defendant was aware of the wrangles surrounding the said land but it went ahead to purchase it. It has put forward the case of **Republic vs Permanent Secretary Ministry of Public Works and Housing Exparte Tom Mallachi Sitima [2014] eKLR**. Emtol Properties Limited illegally acquired the suit property hence it did not have a good title to pass to the 2<sup>nd</sup> defendant. The 2<sup>nd</sup> defendant's title was unlawfully and unprocedurally acquired hence it cannot be protected. It is liable to be cancelled as has already been gazetted by National Land Commission. It has relied on Article 40(6) of the Constitution and Section 26(1)(b) of the Land Registration Act 2012. It prays that the reliefs sought in the plaint be granted.

#### **The 1<sup>st</sup> defendant's submissions**

11. They are dated 9<sup>th</sup> September 2019 and filed on 10<sup>th</sup> September 2019. The 3<sup>rd</sup> defendant is the rightful owner of the suit property and not the plaintiff. A party can only claim ownership to land after their interest has been registered in the land register as provided by law. The plaintiff has not produced any document to show it was registered as the owner of the suit property. Ownership can only be proved by registration and subsequent issuance of a certificate of title. They have put forward the case of **Samuel Kamere vs Land Registrar, Kajiado [2015] eKLR**. The plaintiff was not able to avail any document that would show how the interest on the suit property was conferred to it. In essence it is asking the court to make a determination of fact that is not backed by a single document.

12. The plaintiff omitted to include the company that sold the land to it. The plaintiff has no evidence to show how Orient Holdings Limited conducted subdivision of the original property into several plots. It has put forward the case of **Governors Balloon Safaris Limited vs Zacharia W. Baraza t/a Siuma Auctioneers [2016] eKLR**. It has also relied on Section 62 and 63 of the Evidence Act. The plaintiff was not capable of giving direct evidence of the matters relating to surrender of the title to the suit property. Since it was not a party to the transaction. No documents have been produced by the plaintiff to show the land was to be registered in their favour after surrender of the title.

13. The 1<sup>st</sup> defendant was not in any way engaged in a fraud. The lands registry and the ministry of lands and physical planning conducted itself lawfully and has effected the wishes of legitimate owners of the land to confer the property as permitted by law. The plaintiff has the burden of proving that there was fraud by the 1<sup>st</sup> defendant as the allegations of fraud is serious and requires a standard of proof higher than a mere balance of probability. It has put forward the case of **Elizabeth Kamene Ndolo vs George Matata Ndolo [1996] eKLR; Denis Noel**

**Mukhulo Ochwada & Another vs Elizabeth Murungari Njoroge & Another [2018] eKLR.** The plaintiff has failed to meet its burden of proof as the claim of fraud has not been substantiated by any evidence as required by law.

14. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants are bonafide purchasers for value without notice. The suit property was available for allocation and was thus procedurally allocated. The 2<sup>nd</sup> defendant is the third owner of the suit property. There being no defect in the title from the initial owner, there would be no doubt that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants would subsequently acquire a good title to the suit property. Even if there were irregularities, the 2<sup>nd</sup> defendant would rightfully be considered a bonafide purchaser without notice. It has put forward the case of **Elizabeth Wambui Githinji and 29 others vs KURA & 4 others [2019] eKLR**. The plaintiff's rights on this case would be equitable right. A purchaser who has a clean title cannot be impeached by an equitable right. They have put forward the case of **Patrick Kenneth Muriithi vs Richard Karimi Nderitu [2014] eKLR**. It prays that the plaintiff's suit be dismissed with costs to the 1<sup>st</sup> defendant.

#### **The 2<sup>nd</sup> and 3<sup>rd</sup> defendants submissions**

15. They are dated 1<sup>st</sup> October 2019 and filed on the same date. The 2<sup>nd</sup> defendant had a good title by the time of transferring the same to the 3<sup>rd</sup> defendant. They have relied on sections 24, 25 and 26 of the Land Registration Act, 2012 as well as Section 23, 24 of Registered Titles Act (repealed). In order for the plaintiff to successfully challenge the 2<sup>nd</sup> defendant's title to the suit property, it bears the burden of establishing that it was obtained and or transferred through fraud and that the 2<sup>nd</sup> defendant was a party to the fraud. Also that the title was acquired irregularly. Fraud is a serious allegation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. The plaintiff's witness did not in his statement mention or give specifics of any instance of fraud on the part of the defendants. It was casually alleged that various commissions have recommended the revocation of title in respect of the suit property. No effort was made to demonstrate fraud. They have put forward the case of **Gichinga Kibutha vs Caroline Nduku [2018] eKLR; Republic vs Land Registrar, Taita Taveta District & Another [2015] eKLR; James Theuri Wambugu vs Mellen Mbera [2016] eKLR**.

16. The plaintiff did not demonstrate that there was any fraud in respect of the alienation of Emtol Properties Limited. The 2<sup>nd</sup> defendant's title was traceable to Emtol properties Limited and the 2<sup>nd</sup> defendant acquired the property free from any encumbrances except for a caveat which was subsequently lifted. The plaintiff did not adduce any evidence to support the claim that the surrender of the property to the government by Orient Holdings Ltd was conditional upon the property being used for public purpose and neither did the subdivision plan dated 6<sup>th</sup> November 1981 nor the deed of surrender dated 17<sup>th</sup> May 1989 make any reference to the surrender being conditional upon property being used exclusively for a public purpose. They have put forward the case of **Lawrence P. Mukiri vs Attorney General & 4 Others [2013] eKLR**. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants' witnesses testified that the 2<sup>nd</sup> defendant conducted due diligence and search results indicated that the property was registered in the name of Emtol Properties Limited, which is unchallenged by the plaintiff. The 2<sup>nd</sup> defendant was a bonafide purchaser for value without notice of any alleged fraud or impropriety. They have put forward the case of **Shimoni Resort vs Registrar of Titles & 5 Others [2016] eKLR**.

17. Enlisting of various parcels of land in the Ndungu Report is not in itself a ground for revocation of title documents to the parcels. They have put forward the case of **Robert Mutiso Lelli & Another vs National Land Commission & 3 Others [2017] eKLR; Geoffrey Kirimi Itania vs Chief Land Registrar & 3 Others [2018] eKLR**. The Ndungu Report is not a self executory document as the Act requires that the recommendations in the Commission's Report are to be forward to the National Assembly and the President who would then consider it and recommend to the Honourable Attorney General to move court for revocation of title. The plaintiff has not tendered evidence to the effect that this has been done. The recommendation of the National Land Commission for revocation of title to the suit property is not in itself a sufficient ground for the revocation of title. The proceedings before the National Land Commission are a subject of challenge before this Honourable court. In **ELC Pet No. 4 of 2019 SBM Bank (K) Limited vs National Land Commission & Others**. The plaintiff failed to lead evidence to establish that the allocation of the suit property to Emtol Properties Limited was tainted with fraud. They pray that the plaintiff's suit be dismissed with costs to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants and that the reliefs sought in their counterclaim be granted.

18. I have considered the pleadings and the evidence on record. I have also considered the written submissions tendered on behalf of the respective parties and the authorities cited. The issues for determination are:-

*(i) Whether the suit property was planned and set aside for a public purpose.*

*(ii) Whether the commissioner of lands could allocate it to private individuals and if so was the issuance of title to Emtol Properties Limited and subsequent transfer to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants procedural?*

*(iii) Whether the 2<sup>nd</sup> and 3<sup>rd</sup> defendants are bonafide purchasers for value without notice and if so are they entitle to the reliefs sought in the counterclaim?*

*(iv) Is the plaintiff entitled to the reliefs sought?*

*(v) Who should bear costs?*

19. It is the plaintiff's claim that LR No. 209/12948 (IR NO. 68692 herienafter referred to as the suit property") was surrendered by Orient Holdings Limited to the government upon surrender this portion was to be utilized by the residents, owners through the management of the plaintiff, as a garden and parking area. That they utilized the same in this manner until in 2001 when Emtol Properties Limited constructed an illegal wall blocking access to the land. When they investigated they discovered that the suit property had been allocated to Emtol Properties Limited on 19<sup>th</sup> March 1996 by the commissioner of lands. The new title allowed the land to be used for shops and flats contrary to the purpose for which the land was surrendered. PW1 Anil Kapila told the court that the original owners Orient Holdings Limited were to surrender part of their property for the expansion of Waiyaki Highway free of charge, surrender part of the parcel for open area plot 1 and 2

(the suit property) and to construct road across the estate.

20. By a letter dated 6<sup>th</sup> November 1981 (page 18 of the plaintiff's bundle) dated 22<sup>nd</sup> August 2016) M/S Orient Holdings Limited was allowed to subdivide the original title LR No. 209/8873 subject to several conditions. "No 8" Area of land coloured blue on the deposited plan to be surrendered to council free of cost"

No. 9 special purposes plot no. 32 and 33 for open space coloured green on the deposited plan to be surrendered to council free of cost"

On page 19 of the bundle, there is deed of surrender dated 17<sup>th</sup> May 1989 in respect of LR No. 209/8873/2 to the Government of Kenya. It is one of the subdivisions of the original title. The said portions shown a deed plan no. 133572 dated 12<sup>th</sup> May 1988. The said portion was allocated to Emtol Properties Limited on 18<sup>th</sup> March 1996 and given the No. LR No. 209/12948 vide deed plan No. 203110 dated 15<sup>th</sup> January 1996 (pages 22-24 of the plaintiff's bundle of documents). On 1<sup>st</sup> February 1996 the plaintiff's resident wrote to the commissioner of lands asking to be allocated the suit property for use as playground for the children and a parking lot (page 26-27 of the plaintiff's bundle. There is a letter from the Nairobi City Council dated 23<sup>rd</sup> July 1998 confirming that two plots were surrendered by M/s Orient Holdings Limited to the City Council (page 30 of the plaintiff's bundle). On 26<sup>th</sup> March 2002 the Director of Physical Planning wrote to the Commissioner of Lands asking that the surrendered plots be used for the intended user originally provided for the subdivision (page 31 of the plaintiff bundle). All these documents confirm that the suit property was surrendered to the Government of Kenya for public purpose. The said documents have not been challenged by the defendants. I therefore find that the suit property was set aside for public purpose. The subdivision map dated 16<sup>th</sup> June 1981. Exp 13, shows that the suit property was to be utilized as a garden and a parking lot. Exhibit p2 is a letter of approval from the Ministry of Lands acknowledging and approving the subdivision which included the suit property being held as a parking space and a garden. The suit property could therefore not be allocated to private individuals or entities.

21. It is not in dispute that the suit property was set aside for public purposes to be used by the residents of the plaintiff. Section 9 of the Government Land Act CAP 280, now (repealed) provides that:-

*"The commissioner may cause any portion of a township which is not required for public purposes to be divided into plots suitable for the erection of buildings for business or residential purposes and such plots may from time to time be disposed of in the prescribed manner"*.

It is clear that the suit property was not available for allocation as it has been surrendered for public purpose. In the case of **Norbixin Kenya Limited vs the Attorney General HCCC No. 1814 of 2002**. It was held that the commissioner of lands must bear the blame for the predicament that has befallen the plaintiff as the said office issued it with title to the suit property despite full knowledge that the property was reserved for public utility. The court declined to make orders in favour of the plaintiff even though he had been given title to it because the plaintiff allotment was irregular as the land was not available for allotment.

22. In the case of **Timothy Ingosi & 57 Others vs Kenya Forest Services & 2 Others [2016] eKLR** it was held thus;

*"The suit is dismissed with costs and the counterclaim by the 1<sup>st</sup> defendant is allowed thus a declaration is hereby issued that parcel no. 7561/R is forest land and therefore not available for allocation until due process is followed. This court finds that the allocation of the land parcel 7561/R by the 3<sup>rd</sup> defendant to the plaintiffs was conducted through an irregularity and therefore the titles issued over the land parcel 7561/R were irregularly acquired....."*

I am guided by the above authority in finding that the suit property was held by the county government in trust for the plaintiff's residents hence the allocation to Emtol Properties Limited was illegal and unprocedural. The title held by Emtol Properties Limited cannot be protected. I rely on Article 40(6) of the Constitution and Section 26(1)(b) of the Land Registration Act, 2012. I therefore find that the issuance of title of Emtol Properties Limited and the subsequent transfer to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants was unprocedural.

23. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants cannot be said to be bonafide purchaser for value without notice. Had the 2<sup>nd</sup> defendant done due diligence it would have discovered that the plaintiff's residents had been using the suit property as a garden and/or parking lot. The letters by the plaintiff's residents date back to 1996 when the land was irregularly allocated to Emtol Properties Limited. Its title cannot be protected. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants cannot feign ignorance of the wrangles existing with respect to the suit property. Their title cannot be protected. I find that the particulars of fraud against the 1<sup>st</sup> and 2<sup>nd</sup> defendants have been proved. The suit property was not available for allocation to Emtol properties Limited hence Emtol Properties Limited could not pass good title to the 2<sup>nd</sup> defendant.

24. I find that the plaintiff has proved its case as against the defendants' on a balance of probabilities. On the other hand I find that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants counterclaim fails. The same is dismissed with costs to the plaintiff.

25. Accordingly judgement is entered in favour of the plaintiff as against the defendants jointly and severally as follows:-

**(a) That a declaration is hereby issued that LR No. 209/12948 is a public utility land and no construction should be carried out thereon.**

**(b) That an order is hereby issued that the Title Deed for LR No. 209/12948 issued to Emtol Properties Limited on 19<sup>th</sup> March 1996 and later on issued on the 3<sup>rd</sup> defendant on 29<sup>th</sup> December 2014 be cancelled.**

**(c) That an order is hereby issued directing the Chief Land Registrar to rectify the records by allocating to the plaintiff the plot**

*number LR No. 209/12948 to hold the land in trust for the residents/owners of houses constructed on LR No. 209/8873/2 upon payment of the requisite charges.*

*(d) That costs of the suit be borne by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.*

It is so ordered.

**Dated, signed and delivered in Nairobi on this 18<sup>TH</sup> day of June 2020.**

.....

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

.....Advocate for the Plaintiff

.....Advocate for the 1<sup>st</sup> Defendants

.....advocate for the 2<sup>nd</sup> & 3<sup>rd</sup> defendants

.....Court Assistant