



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ENVIRONMENT AND LAND CASE No. 159 OF 2013

(FORMERLY HCCC No. 307 OF 2010)

GALAXY REALTORS LIMITED..... PLAINTIFF

VERSUS

KENYA FOREST SERVICE DEFENDANT

JUDGMENT

1. By plaint filed on 18th November 2010, the plaintiff averred that it is the registered proprietor of the parcel of land known as Nakuru Municipality Block 19/186 (hereinafter “the suit property”) which it purchased from one Kipkoech Tallam after conducting due diligence and establishing authenticity of the title. It further averred that it is a bona fide purchaser for value and that the defendant through its officers in Nakuru threatened to take over the suit property claiming that it owns it. It therefore seeks judgment against the defendant for:

- a) A declaration that the plaintiff is the lawful and the sole owner of land parcel Nakuru Municipality Block 19/186 to the exclusion of all others.*
- b) A temporary injunction pending the hearing of the suit restraining the defendant, its servants, agents, employees or any person acting under it from claiming, interfering, trespassing, dealing or any other way dealing with the plaintiff’s quiet and peaceful occupation of land parcel Nakuru Municipality Block 19/186.*
- c) A permanent injunction restraining the defendant, its servants, agents, employees or any person acting under it from claiming, interfering, trespassing, dealing or any other way dealing with the plaintiff’s quiet and peaceful occupation of land parcel Nakuru Municipality Block 19/186.*
- d) Costs of this suit.*

2. The defendant filed defence and counterclaim in which it averred that the suit property is forest land which forms part of Menengai Forest and has always been used to house forest rangers. It added that the property has never been legally allocated to any individual and denied that the plaintiff is a bona fide purchaser for value. The defendant further averred that if Kipkoech Tallam holds any title to the suit property then the title was acquired illegally. It therefore prays that the plaintiff’s suit be dismissed and that judgment be entered against the plaintiff for:

- a) An order directing the cancellation of title to land parcel Nakuru Municipality Block 19/186.*
- b) An order of eviction against the plaintiff from Nakuru Municipality Block 19/186.*
- c) Costs of this suit.*

3. The matter then proceeded to hearing whereat the plaintiff’s sole witness was Everton Ezekiel Terigin, who introduced himself as a businessman, a director of the plaintiff herein and the Managing Director of Total Security, a security company with branches across the country. He stated that the plaintiff is the registered owner of the parcel of land known as Nakuru Municipality Block 19/186 (the suit property) and that sometime in July 2009, his security company was looking for a place to locate its office. It needed a raised place so as to place its mast for radio communication. He added that he got to know that the suit property was on sale when he bumped into its then owner, Mr Kipkoech Tallam in Nairobi. He later drove to Nakuru and Mr Tallam showed him the suit property. There were two houses on it, one big and the other small. They were partly wooden and partly cement. A cousin of Mr Tallam was residing in the house. He then instructed his advocates who did a search which confirmed that Mr Kipkoech Tallam was indeed the owner. Mr Tallam gave him a copy of a letter of allotment dated 19th February 1998 and a copy of a title deed. The letter of allotment offered Mr Tallam land specified as “UNS. Residential plot No. 159 - Nakuru” which the witness confirmed to be the suit property. He also gave the witness a copy of a lease between him and the Government of Kenya, a copy of a certificate of lease, copies of receipts showing payment by him of the amount specified in the letter of

allotment and other sums and a copy of a letter dated 27th January 2000 from the Commissioner of Lands addressed to Registrar of Lands Nakuru forwarding a lease in respect of the suit property for registration. The witness added that Mr Tallam and him negotiated and agreed on terms of sale whereupon he instructed his lawyers Kale Maina & Bundotich Advocates who then drafted a sale agreement dated 19th August 2009. The purchase price for the land and all the structures was KShs 5million. The lawyers conducted an official search at the lands registry and obtained a Certificate of Search dated 28th October 2009 which showed that Mr Tallam was the owner. Since Mr Tallam did not have the original of the title document, an application was made to replace the lost title and the witness paid for the cost of replacement. The land registrar Nakuru advertised the loss of the title in Kenya Gazette as Gazette Notice No. 5584 of 21st May 2010. Subsequently, a transfer was registered on 16th June 2010 a certificate of lease issued in favour of the plaintiff on 18th June 2010.

4. The witness further testified that the plaintiff then occupied the property and that at the time of take-over, there was nobody else in occupation besides Mr Tallam and his cousin. The defendant was not in occupation but had an office across the road. Six months after the take-over, a government grader was used to block the entrance and an officer of the defendant moved into one of the rooms on the suit property. On enquiring at the defendant's main office in Nakuru, the witness was told by a Mr Njuguna who was in charge of Nakuru that they had been instructed by the defendant's director to move in. He added that as at the time of his testimony, both the plaintiff and the defendant were in occupation with the defendant occupying half of one block while the plaintiff's staff occupying the other half. The other block is fully occupied by the plaintiff's staff.

5. Mr Terigin further stated that when the plaintiff acquired the suit property, there was no encumbrance against the title and he was not aware of any dispute between the defendant and Mr Tallam or any court order against Mr Tallam in respect of the plot. The witness was then referred a copy of a Gazette Notice dated 8th October 2001 published by Minister for Environment as Legal Notice No. 152, for alteration of Boundaries of Nakuru Forest situated within Nakuru Municipality. The alteration was to exclude 270.5 hectares from the said forest. The witness stated that the suit property falls within the area the notice applied to. He was then referred a copy of an order made on 22nd April 2002 in Nairobi HC Misc. Civil Application No. 421 of 2002, a Judicial Review application. The witness stated that neither he nor Mr Tallam were parties to the case and that the order did not therefore bind him. He acknowledged that leave to commence judicial review proceedings was granted in the order and that the leave stayed Legal Notice No. 152. He added that he did not know the outcome of the case. According to him, the plaintiff's title is clean. Under cross-examination, he acknowledged that the suit property was excised from the forest through the gazette notice on 8th October 2001 and that Mr Tallam's lease commenced on 1st March 1998 and was registered on 28th January 2000.

6. The plaintiff's case was then closed.

7. The defendant equally called one witness, Evans Kegode, who introduced himself as the head of survey and mapping at the defendant's headquarters. He stated that the suit property is public property being part of a gazetted forest. He produced a map showing the co-ordinates of Nakuru Municipality Forest Block and stated that the suit property falls within the gazetted forest block. He added that the use of the land has never changed to anything other than a public forest and that it remains un-alienated government land meant for forestry development. He produced a copy of Gazette Notice dated 8th October 2001 published by Minister for Environment as Legal Notice No. 152, whose intention was to de-gazette 270.5 hectares of the forest block. He added that the said legal notice was successfully challenged in court and that the land therefore remains a gazetted forest block. The witness was then referred to the plaintiff's certificate of lease and he pointed out that the term of the lease is 99 years with effect from 1st March 1998 and that the register for the parcel was opened on 28th January 2000 before the legal notice which was issued in the year 2001.

8. Under cross examination, Mr Kegode stated that there was no action from the defendant to challenge Legal Notice No. 152 and that the defendant has not registered any caution against the title because all forest land is gazetted and anybody dealing with land which he fears to be part of a forest should do due diligence by confirming through the relevant gazette notice.

9. Defence case was then closed.

10. Parties then filed and exchanged written submissions. For the plaintiff, it is argued that its certificate of title is conclusive proof of ownership and that if aggrieved, the defendant ought to have enjoined Mr Tallam in these proceedings. It is further argued that the defendant had acknowledged that the plaintiff is a bona fide purchaser in some affidavits filed herein for purposes of interlocutory applications. Citing the cases of **Shimoni Resort v Registrar of Titles & 5 others [2016] eKLR**, **Samwel D. Omwenga Angwenyi v National Land Commission & 2 others [2019] eKLR** and **Lawrence P. Mukiri v Attorney General & 4 others [2013] eKLR**, it is argued that for the plaintiff's title to be impeached, it must be shown that the title was acquired illegally, unprocedurally or through a corrupt scheme to which the plaintiff was a party. According to the plaintiff, those requirements have not been met. It is further argued that although the defendant claimed that Legal Notice No. 152 of 2001 was quashed through Nairobi HC Misc. Civil Application No. 421 of 2002, no final order to that effect was produced and there being no evidence of de-gazettement of Legal Notice No. 152 of 2001, the suit property remains outside the forest land. Additionally, it is argued that if it really maintains that the suit property was not properly acquired, the defendant ought to have enjoined Mr Kipkoech Tallam, the Land Registrar and the Commissioner of Lands to these proceedings and that failure to do so if proof that it has no case against the plaintiff as alleged in the counterclaim. Accordingly, the plaintiff urges the court to grant it the reliefs sought in the plaint and to dismiss the counterclaim.

11. For the defendant, it is argued that the allotment to Mr Kipkoech Tallam was irregular since there was no de-gazettement to remove the suit property from forest land and that in any case the plaintiff did not call Mr Kipkoech Tallam to testify in support of his title. It is further argued that the plaintiff's title can be impeached since grave acts of fraud and misrepresentation have been demonstrated and that the plaintiff is not in the circumstances, a bona fide purchaser for value without notice. In conclusion, it is argued that the plaintiff has not demonstrated that the methods used to acquire its title were regular and in the circumstances the plaintiff's case should be dismissed and judgment entered as sought in the counterclaim.

12. I have carefully considered the pleadings, the evidence and the submissions in this matter. There is no dispute that the plaintiff has a title in respect of the suit property issued to it on 18th June 2010. The plaintiff purchased the property from one Mr Tallam Kipkoech pursuant to

a sale agreement dated 19th August 2009. According to the plaintiff, the vendor was allocated the suit property through allotment letter dated 19th February 1998 and signed by one E.K. Kosgei on behalf of the Commissioner of Lands. It is equally not disputed that Mr Tallam Kipkoech was issued with a title in respect of the suit property on 28th January 2000, as is indeed confirmed by the certificate of search that was produced by the plaintiff.

13. The issues that arise for determination are firstly, whether the suit property was forest land as at the date of allotment to Mr Tallam Kipkoech and its sale to the plaintiff; secondly, whether the plaintiff is a bona fide purchaser; and lastly, whether the reliefs sought by the parties should issue.

14. Was the suit property was forest land as at the date of allotment to Mr Tallam Kipkoech? As noted above, the allotment was by the Commissioner of Lands through letter dated 19th February 1998. It follows therefore that prior to 19th February 1998, the suit property was government land or public land. The allotment letter specifically states that the land offered was located in Nakuru. In his evidence, PW1 admitted that the suit property is within the area that was covered by Legal Notice No. 152 of 2001 dated 8th October 2001. The effect of the notice was to reduce the size of Nakuru Forest situated within Nakuru Municipality in Nakuru District by hiving from it 270.5 hectares as stated in the notice. Going by the date of the legal notice, it follows that as at 19th February 1998 when the suit property was offered to Mr Tallam Kipkoech by the Commissioner of Lands and as at 18th June 2010 when a title deed in respect thereof was issued to him, the suit property was still un-alienated government land or public land. This is also clear from the fact that the legal notice was issued under **Section 4 (1) (c) of Forests Act (Chapter 385)** (repealed) which empowered the minister to declare that a forest area shall cease to be a forest area. The Act defined "forest area" to mean any un-alienated government land declared to be a forest area. The **Forests Act (Chapter 385)** was repealed by the **Forests Act, 2005** which was in turn repealed by the current **Forest Conservation and Management Act, 2016**.

15. The letter of allotment issued to Mr Tallam Kipkoech by the Commissioner of Lands stated that the grant was made under the **Government Lands Act** (now repealed). The plaintiff herein produced various documents which it states that it received from Mr Tallam Kipkoech and which, it maintains, show that it acquired a good title to the suit property. I have looked at those documents and I see nothing which suggests that the President had authorized the Commissioner of Lands to alienate the suit property. There are many authorities on the issue of alienation of public land by the Commissioner of Lands. In **Henry Muthee Kathurima v Commissioner Of Lands & another [2015] eKLR**, the Court of Appeal stated:

... We have examined the evidence on record; there is nothing on record to show that the President had authorized the Commissioner of Lands to alienate the suit property. We have examined the provisions of Sections, 3, 7, 9 and 12 of the Government Land Act and we are satisfied that the Commissioner of Lands had no power or authority to alienate the suit property and issue the Certificate of Lease. ...

*... We have considered the submissions by the appellant in this appeal and have no hesitation to state that we concur with the findings and decision of the trial court. The Commissioner of Lands had no power to alienate public land and any action taken without due authorization is a nullity. We cite the case of **Said Bin Seif v. Shariff Mohammed Shatry, (1940)19 (1) KLR 9**, and reiterate that an action taken by the Commissioner of Lands without legal authority is a nullity; such an action, however, technically correct, is a mere nullity, and not only voidable but void with no effect, either as legitimate expectation, estoppel or otherwise.*

16. In view of the foregoing, issue number one is answered in the affirmative. The suit property was forest land as at the date of allotment to Mr Tallam Kipkoech and when he purported to sell it to the plaintiff.

17. As noted earlier, there is no dispute that the plaintiff purchased the suit property from Mr Tallam Kipkoech through sale agreement dated 19th August 2009 and that a certificate of lease in respect of the suit property issued to it on 18th June 2010. Prior to selling the suit property, Mr Tallam Kipkoech was issued with a title in respect thereof on 28th January 2000. The plaintiff maintains that its certificate of title is conclusive proof of ownership and that it is bona fide purchaser for value. We have already seen above that the suit property was forest land as at the date of allotment to Mr Tallam Kipkoech and when he purported to sell it to the plaintiff. As Lord Denning famously stated in **Macfoy vs. United Africa Co. Ltd [1961] 3 All E.R. 1169**:

If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. ... And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.

18. It follows therefore that the allotment and subsequent issuance of title to Mr Tallam Kipkoech was a nullity.

19. The plaintiff has argued that it is a bona fide purchaser and that its title ought not to be impeached. The simple answer to that argument is that Mr Tallam Kipkoech had no valid title to pass. It follows therefore that the plaintiff's title is equally not valid. For one to be considered a bona fide purchaser for value, he must to begin with demonstrate that he acquired a valid and lawful title. The plaintiff has failed that elementary test. Further, both Mr Tallam Kipkoech's and the plaintiff's titles were issued under the repealed **Registered Land Act** prior to the effective date of the 2010 Constitution. While addressing a similar situation in **Chemey Investment Limited v Attorney General & 2 others [2018] eKLR**, the Court of Appeal stated:

... However, we must hasten to add that title to property that is obtained fraudulently or illegally in violation of the provisions of the statute is and was not sacrosanct and did not enjoy protection of the law under the repealed Act. ...

*Decisions abound where courts in this land have consistently declined to recognise and protect title to land, which has been obtained illegally or fraudulently, merely because a person is entered in the register as proprietor. See for example **Niaz Mohamed Jan Mohamed v. Commissioner for Lands & 4 Others [1996] eKLR**; **Funzi Island Development Ltd & 2 Others v.***

County Council of Kwale (supra); Republic v. Minister for Transport & Communications & 5 Others ex parte Waa Ship Garbage Collectors & 15 Others KLR (E&L) 1, 563; John Peter Mureithi & 2 Others v. Attorney General & 4 Others [2006] eKLR; Kenya National Highway Authority v. Shalien Masood Mughal & 5 Others (2017) eKLR; Arthi Highway Developers Limited v. West End Butchery Limited & 6 Others [2015] eKLR; Munyu Maina v Hiram Gathiha Maina [2013] eKLR and Milan Kumarn Shah & Others v. City Council of Nairobi & Others, HCCC No. 1024 of 2005. The effect of all those decisions is that sanctity of title was never intended or understood to be a vehicle for fraud and illegalities or an avenue for unjust enrichment at public expense.

20. Thus, the second issue for determination is answered in the negative. The plaintiff is not a bona fide purchaser.

21. In view of the findings that the suit property was forest land as at the date of allotment to Mr Tallam Kipkoech and when he purported to sell it to the plaintiff and that the plaintiff's title is invalid, the reliefs sought by the plaintiff against the defendant are not available. The defendant has on the other hand sought an order directing the cancellation of the plaintiff's title to the suit property and an order of eviction of the plaintiff from the suit property. In view of invalidity of the plaintiff's title, it follows that the situation needs to be sanitized by cancelling the purported title as sought by the defendant so that there is no ambiguity that the suit property remains public land. Further, the plaintiff's witness testified that the plaintiff is in part possession of the suit property. The defendant is thus entitled to eviction.

22. The plaintiff unfortunately chose to focus on fighting off the defendant while deliberately ignoring to pursue any claim against Mr Tallam Kipkoech. The plaintiff even defended Mr Tallam Kipkoech's title. The suggestion made in the plaintiff's submissions that it was for the defendant to pursue Mr Tallam Kipkoech does not hold. It is always the cardinal obligation of every purchaser to see to it that he gets a good title. It is now up to the plaintiff to decide how to proceed as between itself and Mr Tallam Kipkoech.

23. In the end, I make the following orders:

a) The plaintiff's (Galaxy Realtors Limited's) case against the defendant (Kenya Forest Service) is dismissed.

b) The plaintiff's (Galaxy Realtors Limited's) title in respect of the parcel of land parcel known as Nakuru Municipality Block 19/186 is hereby cancelled.

c) The plaintiff (Galaxy Realtors Limited) and its servants or agents to vacate the parcel of land parcel known as Nakuru Municipality Block 19/186 within 45 (forty five) days from the date of delivery of this judgment. In default, the plaintiff (Galaxy Realtors Limited) and its servants or agents be evicted therefrom.

d) The defendant (Kenya Forest Service) shall have costs both of the suit and the counterclaim.

24. This judgment is delivered remotely through video conference and e-mail pursuant to the Honourable Chief Justice's "Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, other Court Users and the General Public from the Risks Associated with the Global Corona Virus Pandemic" (Gazette Notice No. 3137 published in the Kenya Gazette Vol. CXXII—No. 67 of 17th April, 2020).

Dated, signed and delivered at Nakuru this 11th day of June 2020.

D. O. OHUNGO

JUDGE