



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENTAL AND LAND DIVISION

ELC CIVIL SUIT NO. 139 OF 2013

NJUWANGU HOLDINGS LTD..... PLAINTIFF

VERSUS

LANGATA KPA NAIROBI 1ST DEFENDANT

WEST TRADING CO. LTD

JOHN OCHIENG OCHOLA..... 2ND DEFENDANT

DOUGLAS OWINO..... 3RD DEFENDANT

LYDIA AKOTH..... 4TH DEFENDANT

(2nd, 3rd and 4th Defendants sued on their own behalf and as the Chairman, Secretary and Treasurer

respectively of the LANGATA K.P.A Nairobi West Self Help also known as LANGATA K.P.A NAIROBI WEST C.B.O)

COMMISSIONER OF LAND5TH DEFENDANT

ATTORNEY GENERAL 6TH DEFENDANT

RULING

The Plaintiffs applications dated 28/1/2013 and 6/2/2013 are the subject of this ruling. The application dated 28/1/2013 seeks interim injunctive orders against the 1st to 4th Defendants restraining them from in anyway interfering with the plaintiff's possession and/or other ownership rights in respect of **L.R. NO. 209/13415** Nairobi pending the hearing and determination of this suit. This application is principally premised on the ground that the plaintiff purchased the suit land namely **L.R. NO. 209/13415** from the previous registered owner and is now the duly registered owner and is as such owner entitled to have his property rights protected as by law guaranteed under the constitution.

The Plaintiff asserts that the Defendants claim to having been allocated **L.R. NO. 209/10636** is unfounded since such land does not exist both on the ground and on paper the same having been subsumed following amalgamation after a replanning exercise undertaken in 1997 to create **L.R.**

NO.209/13415 which the plaintiff purchased for valuable consideration from the previous registered owner and he is now the registered proprietor and in possession. The application dated 6th February 2013 arising from the amendment that enjoined the Commissioner of Lands and the Attorney General as the 5th and 6th Defendants seeks to have a conservatory order barring the 5th Defendant, the Commissioner of Lands, from processing a grant of title in favour of the Defendants and/or their associates or agents as relates to **L.R. 209/10636**. The plaintiff premises this application on the fact that **L.R. NO. 209/10636** does not exist and thus should a Deed Plan in respect of the same be issued and processed that would amount to duplication of title as the plaintiff already holds title in respect of **L.R. 209/13415** where realistically L.R. NO.10636 would fall on the ground noting that title in regard to **L.R. NO. 209/13415** resulted from a replanning exercise way before the alleged allocation of **L.R. NO. 209/10636** to the Defendants in 2012.

The plaintiff in support of the applications has annexed supporting affidavits sworn by **Mary Wangui Mungai** on 28th January 2013 and 6th February 2013 and a further affidavit sworn on 26th June 2013 all with annexures. Among the annexures attached to the supporting affidavit of **Mary Wangui Mungai** to the application of 28th January 2013 include:-

- i. Copy of Grant **NO.L.R.75931 of L.R. NO. 209/13415** dated 17th June 1997 issued to **Gatero Enterprises Ltd** and registered on 18th February 1998. A transfer to **Njuwangu Holdings Ltd** is shown to have been registered against this title on 16th September 2008. An official search dated 12th October 2011 certifies these entries on this title.
- ii. A KRA stamp Duty declaration form/receipt dated 11/9/2008 shows that a value of **Kshs.77,000,000/-** was declared on the instrument of transfer from **Gatero Enterprises Ltd** to **Njuwangu Holdings Ltd** and stamp duty of **Kshs.3,080,010/-** paid on the transfer.
- iii. Annexures marked **MWM12** being a letter dated 18/5/2010 from **Onsando Ogonji & Tiego Advocates** then representing **Langata KPA Nairobi West Self Help Group**, letter dated 26th May 2010 from Ministry of Lands in response to the said Advocates letter and a letter of allotment dated 23rd December 1987 of **L.R. 209/10636** Nairobi to **Langata KPA Nairobi West Selp Help Group**. The letter from the Ministry of Lands signed by **Mr. F.K. Orioki** for Commissioner of Lands clearly disowns the said letter of Allotment of 23rd December 1987 and categorically denies having signed the same.
- iv. Annexure marked "**MWM13**" being a letter from Ministry of Lands dated 14/8/2012 addressed to **Kiarie Kariuki & Co. Associates** signed by **J.M. Mwaniki** for Director of Surveys confirms no Deed Plan was issued in respect of **L.R. NO. 209/10636** and that the same was amalgamated in 1997 and became **L.R. NO. 209/13415** and allocated to **Gatero Enterprises Ltd** with the approval of the Commissioner of Lands. The Director of Surveys states that **L.R. NO.209/10636** ceased to exist upon amalgamation and creation of **L.R.NO.209/13415**.

The Defendants oppose the applications by the plaintiff and place reliance on the replying affidavits sworn by **John Ochieng Ochola** the 2nd Defendant and a director of the 1st Defendant. The Defendants aver that they have been in occupation of the parcel of land known as **L.R.NO.209/10636** for the last 23 years. The Defendants fault the process of allocation of **L.R. NO. 209/13415** to **Gatero Enterprises Ltd** and suspect the same to have been obtained fraudulently. The Defendants further fault the processing of the transfer in favour of the plaintiff and allege no records exist in regard to the land office file relating to **L.R. NO. 209/13415** and aver that even the registration of the transfer in favour of the plaintiff took over 2 years to be finalised and aver that the same was registered when a temporary file was opened following the registration of a Deed of indemnity by the Advocates for the plaintiff **M/S Kiarie Kariuki & Company Advocates**. The Defendants contend that **L.R.NO.209/10636** could not be amalgamated in 1997 as alleged as no Deed Plan had been issued in regard to the same. It is contended by the Defendants that there is no evidence that the Director of Physical Planning approved any replanning that may have led to the issuance of the Grant to **Gatero Enterprises Limited** and thus argue that the title to **Gatero Enterprises Limited** was irregularly issued.

The plaintiff through a further affidavit sworn by **Mary Wangui Mungai** on 26th June 2013 clarifies that

the plaintiff's Advocates **M/S Kiarie Kariuki advocates** had before the purchase of the suit property on 17/4/2008 applied for an official search in respect of the suit property which the land office issued on 23/4/2008 as per annexure "MWM2" confirming that **Gatero Enterprises Ltd** was as at that date the registered proprietor of the suit property and there were no encumbrances on the property. The plaintiff further annexed correspondence confirming that the Director of survey authenticated the survey process. The plaintiff thus asserts that the appropriate due diligence was carried out before entering into the sale agreement that led to the suit property being transferred to the plaintiff for valuable consideration. The plaintiff in the further affidavit responded to the issues raised in the replying affidavit sworn by **Gordon Ochieng** for the 5th and 6th Defendants and suggest the deponent is selective with the information that he has put forth and makes reference to communication/correspondences that would otherwise be available in the lands office correspondence file in relation to the suit premises but which apparently **Mr. Gordon Ochieng** blanked out.

The plaintiff and the 1st to 4th Defendants filed written submissions in support of their respective positions in this matter. The 5th and 6th Defendants opted not to file any submissions and relies on the filed responses on behalf of the 5th & 6th Defendants.

I have carefully reviewed and considered the filed pleadings affidavits and the annexures attached thereto, and the submissions and authorities referred to by the parties. The 1st to the 4th Defendants claim to the property the subject of the suit appears to be based on the fact that they claim to have been in occupation of the suit premises since the 1980's on what is claimed to have been Government land. The penultimate letter of allotment dated 4th October 2012 through which the Defendants now predicate their claim to **L.R. NO. 209/10636** was issued to the 1st Defendant, a limited liability company and there is a sense that the 2nd to 4th Defendants would like to peg their claim to the suit land on the long period of occupancy save that they are conscious of the fact that a claim for adverse possession is unsustainable against the Government. The Defendants faced with the reality that the plaintiff may be or is holding a title to land that they claim has been allocated to them through the 1st Defendant through the counter claim challenge the title issued to **Gatero Enterprises Ltd** who sold the land to the plaintiff as having been irregularly processed and contend that the title in respect of the property is fraudulent and/or was fraudulently obtained. The Defendants seek an order of cancellation of the title **L.R.NO.209/13415** and in place thereof they pray for an order directing the Commissioner of Lands to issue title in respect of L.R.NO.209/10636 to the 1st Defendant.

The plaintiff for its part has demonstrated that it indeed purchased **L.R. NO. 209/3415** from **Gatero Enterprises Ltd** at the price of **Kshs.77,000,000/-** as is attested by the KRA stamp duty declaration form and payment receipt and the transfer in its favour was registered on 16th September 2008. The plaintiff asserts that the registration of the transfer had nothing to do with the Deed of indemnity that the plaintiff made and was registered on 9/9/2010 as the plaintiff by that time had already been registered on 16th September 2008 as the proprietor. The official search issued on 23/4/2008 clearly indicates the Deed file was available at the Land office to enable the search to be issued. Among the documents the plaintiff supplied to enable the Deed of indemnity to be processed and registered for purposes of opening a temporary file was a copy of Grant **NO.L.R. 75931** in respect of **L.R. NO.209/13415** which already had the endorsement of the registration of the transfer as **Entry NO.2.** on the title held by the plaintiff. A Deed of indemnity at any rate can only be made by the registered proprietor and not any other person. If a Deed of indemnity was required for purposes of processing the registration of the transfer to plaintiff the indemnity would have been made by **Gatero Enterprises Ltd.** In the premises it is therefore very probable that the records in respect of **L.R. NO. 209/13415** were "made to disappear" from the land office after the transfer in favour of the plaintiff was registered. The big question is who might have been responsible for the disappearance? The court may never get an answer to that question but whoever caused the disappearance may have deliberately intended to create a state of confusion and uncertainty to advance their own cause or interest.

On the basis of the documents tendered by the plaintiff to support their ownership of the suit property I am not at this stage able to determine whether their registration as owners of the suit property was

irregularly and/or fraudulently procured. A definitive finding can only be arrived at after taking evidence and the parties and their witnesses being cross-examined to test the veracity of their evidence. That task will be within the province of the trial court. However on the face of it I must observe that there is no doubt the plaintiff is the registered proprietor of **L.R. NO.209/13415** and prima facie the title the plaintiff holds is conclusive evidence that they are the owners. The process through which the plaintiff became registered on the face of it appears regular. There is evidence that due consideration was paid, stamp duty was paid, all dues in respect of rates and land rent was paid and consent for the transaction appear to have been duly given. For all intent and purposes thereof the plaintiff was a bona fide purchaser for value without any notice of any other third party claims.

As I indicated above I am not in a position at this stage to hold that any irregularity and/or fraud as alleged by the Defendants against the plaintiff has been established. The allegations of irregularity and/or fraud remain just that until established and/or proved. The standard of proving fraud in Civil cases, the courts have consistently held, is higher than on a balance of probability. An allegation of fraud is a serious indictment against a party to whom it is made and though the standard of proof is not beyond a reasonable doubt as in criminal cases it is no doubt near there but is certainly higher than on a balance of probability and thus when a party in a civil matter makes an allegation of fraud against a party he should be prepared to tender and adduce evidence to prove the allegation to the required standard. In the present case, I am afraid the fraud allegations against the plaintiff have been generalized and lack specificity and are generally unproved.

Having held that the plaintiff has demonstrated he is the registered owner of L.R.NO.209/13415 the title that he holds requires protection under the law. Under section 25 (1) of the Land Registration Act NO.3 the rights of a proprietor are indefeasible except as provided under the Act.

Section 25(1) provides:-

“The rights of a proprietor whether acquired on first registration or subsequently for valuable consideration or by an order of court shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor together with all privileges and appurtenances belonging thereto free from all other interests and claims whatsoever but subject to-

- a. **To the leases, charges and other encumbrances and to the conditions and restrictions, if any shown in the register and**
- b. **To such liabilities, rights and interest as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register”.**

Under section 26 the certificate of title is prima facie evidence of ownership and cannot be challenged except on grounds of fraud or where it is shown the title has been acquired illegally, unprocedurally or through corruption.

Section 26(1) provides:-

1. **The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by a proprietor shall be taken all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances easement, restrictions and conditions contained or endorsed in the certificate and the title of that proprietor shall not be subject to challenge except:-**
 - a. **On the ground of fraud or misrepresentation to which the person is proved to be a party or**
 - b. **Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.**
2. **A certified copy of any registered instrument signed by the Registrar and sealed with the seal of the Registrar shall be received in evidence in the same manner as the original.**

Article 40 of the constitution guarantees property rights of every person and specifically under article 40 (3) provides that no person shall be deprived of property or of any interest in or right over property of any description without prompt and just compensation being made to the person deprived of the property. However where property is found to have been unlawfully acquired protection is waived under Article 40 (6) of the constitution.

Thus, it is patently clear that in the instant case unless it is established the plaintiff's title is challengeable under section 26(1) (a) (b) of the Land Registration Act or his found to fall within the exemption of protection under Article 40(6) of the constitution the title is indefeasible. As I have held no fraud has been proved and/or established to which the plaintiff can be said to have been a party I find that the plaintiff would be entitled to have his property rights protected since prima facie he holds an indefeasible title. My view is that article 40(6) is only applicable where due process is initiated and it is proved that the property was unlawfully acquired. The plaintiff has demonstrated that they acquired the property through purchase for valuable consideration. The Commissioner of Lands was a player in the initial allocation to Gatero Enterprises Ltd and he consented to the transfer in favour of the plaintiff. The same Commissioner of Land has purported to allocate the same land or a portion of the same land that had already been allocated and transferred out to a third party to the 1st Defendant. The allocation is yet to be progressed to a registrable title. There cannot and there ought not to be two titles over the same parcel of land. The Commissioner of Lands should therefore be estopped from continuing to be the author of confusion by issuing a new title on top of an existing title until this suit is heard and determined.

As matters now stand the plaintiff who has a registered title over the suit property has a superior claim to that of the 1st Defendant who only holds a letter of allotment. I am in agreement with the decision of the court of Appeal in the case of **Satya Investments Ltd –vs- J.K. Mbugua Civil Appeal NO. 164 of 2004**, where the court held that a temporary occupation licence could not override a registered title under the Registration of Titles Act Cap 281 Laws of Kenya (repealed). Equally it is my view that a letter of allotment cannot override a duly registered title under the Act and where there is a registered title and a letter of allotment over the same property barring any fraud on the part of the party holding the registered title, a letter of allotment must of necessity give way. The rights of a party who holds the registered title have crystallised as opposed to those of the party holding a letter of allotment which are yet to crystallise.

I am in the circumstances satisfied the plaintiff has established it has a prima facie case with a high probability of success and I for all the reasons I have canvassed in this ruling find and hold that the plaintiff's two applications dated 28/1/2013 and 6/2/2013 have merit and in respect of the application dated 28/1/2013 I grant orders in terms of prayers 3 and 5 of the Notice of Motion and in respect of the Notice of Motion dated 6th February 2013 I make orders in terms of prayer 5 of the Notice of Motion.

As the Commissioner of Lands has been enjoined in the suit as a party I decline to make an order for him to make disclosure as the parties will at the prior trial preparations have opportunity to exchange documents and make discovery as envisaged under order 11 of the Civil Procedure Rules. I direct that the parties do therefore comply with order 11 of the Civil Procedure Rules within the next 60 days of the date of this ruling whereupon any of the parties can apply to have the suit fixed for a pretrial conference to facilitate timeous hearing of the suit.

I will make no order for costs in regard to the applications and I order that each party bears their own costs.

Ruling dated, signed and delivered at Nairobi this 2nd day of May 2014.

J.M. MUTUNGI

JUDGE

In presence of:

.....For the Plaintiff

..... For the Defendants