



REPUBLIC OF KENYA

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IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC CASE NO. 25 OF 2018

FORMERLY CIVIL CASE NO. 103 OF 2011)

KALOLENI MUSLIM MOSQUE COMMITTEE.....1ST PLAINTIFF

KISUMU MUSLIM ASSOCIATION.....2ND PLAINTIFF

VERSUS

SEVENTH DAY ADVENTIST LIMITED.....1ST DEFENDANT

NATIONAL LAND COMMISSION.....2ND DEFENDANT

JUDGEMENT

The genesis of this suit is a letter dated 25/9/1985 wherein Mohammed Abdo Saleh on behalf of the second plaintiff, applied for a site to build a new mosque on plot number 5/40 Kisumu Municipality and Madrasa classrooms. The letter was addressed to the Commissioner of Lands and copied to the Provincial Commissioner Kisumu, Provincial Physical Planner Kisumu, District land Officer Kisumu, District Commissioner Kisumu and the Town Clerk Kisumu. The commissioner of lands did not respond directly to the letter.

Subsequently, on 7th July 1987, the Honourable Secretary Kisumu Muslim Association wrote to the Town Clerk Kisumu Municipality to be allotted plot no. 5/40 for purposes of the construction of a school. The letter was copied to the Town Planning Officer.

Thereafter, on 2nd November 1988, a reminder was made to the Town Clerk Kisumu Municipal Council and on 14/3/1980 a letter was addressed to the Town Planning Officer for a consent to enable them seek allocation.

On 9/5/1990, the Honourable Secretary Kisumu Muslim Association wrote to the District Commissioner Kisumu detailing the development projects being undertaken by the Association including Kaloleni Muslim Primary School which was congested and therefore they had identified plot no. 5/40 for expansion. The District Commissioner received the letter and advised them to use the procedure for acquisition of land.

On 4th September 1991, the Acting Town Clerk Municipality of Kisumu wrote to the Kisumu Muslim Association informing them that their application for the plot had been received and considered at the works and Town Planning Committee meeting held on the 19/6/1991 and allocation was recommended vide minute No. 110.

On 7th February 1992, the District Land Officer, Kisumu, a representative of the Commissioner of lands wrote to the Kisumu Muslim Association indicating that their application for a plot was under consideration.

On the 25/3/1990 the Provincial Physical Planning Officer wrote to the District Land Officer recommending the plot to be allocated to the 2nd plaintiff.

On 10/11/1992, the District Land Officer, Kisumu wrote to the Commissioner of lands as follows:

The Commissioner of Lands,

P.O. Box 30089

NAIROBI

RE: APPLICATION FOR A SITE TO BUILD A NEW MOSQUE KISUMU MUNICIPALITY/BLOCK 5/40

Reference is made to my letters copies of which are enclosed herein with for ease of reference. The Kisumu Muslim Association are still pressing for the allocation of the site to them to enable them tackle the existing congestion problem at the present Kaloleni Muslim Primary school which also houses the mosque.

The Primary school has no area for expansion and it is overcrowded with the students. The term of the lease given to M/S. associated Sugar Company Limited expired, sometimes last year but so far there still exists a charge which was registered in 1975 and has not been discharged.

If the title can be cleared by the Bank and the plot reverts to the Government it is my recommendation that the Kisumu Muslim Association be considered for the same.

(N. OCHIENG COMBE)

For: DISTRICT LAND OFFICER

KISUMU DISTRICT

On the 4th of June 1993, the Provincial Commissioner Nyanza wrote to the Commissioner of Lands to sort out the matter of allocation of the suit property to the Plaintiff as per his recommendations.

On 24/6/1993 the Commissioner of Lands wrote to the District Land Registrar Kisumu inquiring on the legal status of the charge existing on the parcel of land since the lease had expired in 1991.

On the 30th of June 1993 the Chairman Kisumu Muslim Association wrote to the Manager Standard Bank Ltd as follows:-

Our Ref: KMA-N(ADMIN)14.6B. 30th June 1993

The Manger,

Standard Bank Ltd.,

P.O. BOX 354

KISUMU

Dear Sir,

RE: DISCHARGE ON PLOT/5/40 KISUMU

We have been allocated the above mentioned plot by the Commissioner of Land, but the Ministry of Land requires you to put in writing whether the charge against the land which was given on lease to Ramisi Sugar authority has been discharged or not.

Please note that this information is very vital for us, therefore kindly supply us with it. We shall be grateful to you for your co-operation.

Mohammed Haji Issa,

VICE CHAIRMAN

On the 2nd July 1993 the Land Registrar wrote to the Commissioner of Lands as follows:

The Commissioner of Lands,

P.O. BOX 30089,

NAIROBI

RE: KISUMU/BLOCK 5/40

Reference is made to your letter Ref. NO. 41768/130 of 24th June, 1993 in connection of the above title.

The above title is registered in the name of Association Sugar Company Ltd of P.O. Box 90130, MOMBASA and the certificate of lease was issued to the company on 22nd April, 1976. The Title is subjected to a loan of Kshs. 10,000,000/= from the Standard Bank Limited P.O. Box 304, Kisii. The loan has not been discharged. The lease has expired and it is subject to renewal by the Commissioner of lands on application by the registered proprietor please advise on the matter and advise me accordingly.

W.O. SIWA

LAND REGISTRAR

KISUMU DISTRICT

This letter was copied to the permanent secretary ministry of lands & settlement and the chairman, Kisumu Muslim Association and the manager Standard Bank Limited which presupposes that there was communication between the plaintiffs and the representatives of the Commissioner of Lands on the ground.

On the 2/7/1993, the Permant Secretary Lands wrote to the 2nd plaintiff indicating the land was still charged to Standard Chartered Bank for a loan of Kshs. 10,000,000/=.

On the 6th July 1993, the Manager Standard Chartered Bank wrote to the Commissioner of Lands inquiring on the particulars of the owner of the parcel of land. A similar letter was addressed to the 2nd plaintiff.

On the 12th July 1993, the plaintiff wrote to the Standard Chartered Bank informing them that the land was registered in the names of Associated Sugar Company who leased it from November 1991 for 40 years and that the term had expired in 1991.

On 6th September 1993 the Provincial Commissioner wrote to the Plaintiff informing him as follows:

6th September 1993

The Chairman,

Kisumu Muslim Association,

KISUMU

APPLICATION FOR PLOT NO. KISUMU

MUNICIPALITY/BLOCK 5/40 – KISUMU

MUSLIM ASSOCIATION

During this year's Idd futr Celebrations, you did raise the issue of Plot No. 540 Kisumu Municipality which, according to you, had been allocated to you but had got stuck somewhere.

The Commissioner of Lands has said that this plot is owned by somebody else and charged by a bank in Kisii. It did appear to me that you are applying for plot No. 540 instead of 5/40. If there is a mistake, we can rectify but if it is the same plot then what you need to do is to still identify another plot so that we can support you as it were.

(J.K. KAGUTHI)

PROVINCIAL COMMISSIONER

NYANZA PROVINCE

The Plaintiff responded as follows:

KMA-N (ADMIN) 14.6B/29

18TH OCTOBER 93

Mr. Joseph K. Kaguthi,

Provincial Commissioner

NYANZA PROVINCE

Dear Sir,

RE: APPLICATION FOR PLOT NO. 5/40

Your letter ref. No. LND.5.Vol. IX/(54) of 6th September 1993 was received with thanks and whose contents were well understood.

We would like to assure you that the said plot was leased by Associated Sugar Company of P.O. Box 50415, NAIROBI for forty years starting from November 1951. This shows that the lease expired in November 1991.

We checked and found that the Associated Sugar Co. has not applied for the extension of the lease and that there are no encumbrance even with the Standard Chartered Bank- KISII Branch on which the plot was charged.

Hoping that the foregoing will enable you assist us conveniently.

Yours faithfully,

Mohammed Haji Issa

CHIARMAN

MUSLIM ASSOCIATION.

The provincial Commissioner responded by requesting for the official search of the plot. He copied the letter to the Provincial Land valuer to take necessary action.

On the 21/12/1993 the Provincial Commissioner requested the Commissioner of lands to allocate the plot to the plaintiff.

On the 10/6/1994, the District land Officer Kisumu, wrote to the Commissioner of lands as follows:

KSM/345/12

10 JUNE 94

The Commissioner of Lands

P.O. BOX 30089

NAIROBI

RE: ASSOCIATED SUGAR COMPANY

KISUMU BLOCK 5/40

I refer to the above mentioned plot which was registered in the name of Associated Sugar Company.

The lease has since expired but they have not written to apply for extension of lease. However, Kisumu Muslim Association have shown a lot of interest since they are in need of a place to put up a mosque.

Our records show that there was a charge registered in favour of Standard Bank but they have written to any so such charge reflected in their records. The bank has stated in their letter of 24 May 1994 that they have no interest in the plot.

Enclosed herein find copies of the letters from the Bank for ease of reference.

L.A ONYANGO (MRS)

FOR: DISTRICT LAND OFFICER

KISUMU

CC

Permanent Secretary

Ministry of Lands & Settlement

P.O. BOX 30450

NAIROBI

On the 2nd of September 1998, the Plaintiff formerly applied to the Commissioner of lands for the suit property but elicited no response.

12 years later on the 27th April 2010 when the 2nd plaintiff was in possession and had allowed artisans to occupy the same, the 1st defendant applied for allotment of the same plot and at lightning speed, the letter of allotment was issued on the 2nd August 2010, the acceptance was made through the letter dated 10/8/2010. The lease dated 20/9/2010 was registered on the same date. The certificate of lease was issued on the 24th of December 2010.

The plaintiffs now seek for an order from this court to issue against the 2nd Defendant to expunge the register and cancel the certificate of lease issued in favour of the 1st Defendant in respect of the suit parcel of land. The 2nd Defendant be ordered to issue a letter of allotment to the 2nd plaintiff.

The Plaintiff claims that the allocation of the plot to the 1st Defendant and subsequent registration was tainted by a corrupt scheme, illegality and unprocedural allocation.

The Plaintiff alleges that the sale was supposed to be by public auction as envisaged by section 9, 12 and 13 of the repealed Government Land Act. The Plaintiff claims that the 2nd Defendant unreasonably refused to allocate him the plot. The Plaintiff's claim is based on the principle of legitimate expectation.

The 1st Defendant on his part denies allegations by the Plaintiff and states that he followed the right procedure for allocation and requisition of parcel No. 5/40.

I have considered the rival submissions and do find the following issues ripe for determination.

- 1. Whether the Plaintiff had legitimate expectation to the parcel of land.**
- 2. Whether the 1st Defendant was properly allocated the parcel of land.**
- 3. Whether the Plaintiff has the locus standi to claim the suit.**

WHETHER THE PLAINTIFF HAS PROVED THAT HE HAD LEGITIMATE EXPECTATION TO THE PROPERTY.

Allocation of public land by the Commissioner of Lands before the advent of the new constitution was a process that involved various state departments namely the District Land Officer, the Provincial Planning Officer and the Municipal Council where the town plot is situated. The Commissioner of Lands was to allocate the land in consultation with the officers on the ground.

In this matter there was communication between the plaintiff and the various government departments. When it was discovered that the parcel of land was still charged to Standard Chartered Bank, the 2nd Plaintiff was informed of the same but she soldiered on with her quest to be allocated the land. She went at great length to ensure that the issue of the charge to the standard bank was clarified.

The Plaintiff decided to engage the Bank until the Bank cleared the air by stating that there was never such a charge. It appears that the Commissioner of Lands was willing to allocate the land to the plaintiff but the only hindrance was the charge. This hindrance was cleared and therefore it appeared the plaintiff could have been allocated the plot. This was not done but the 1st Defendant was allocated the same.

Three basic questions were identified in **R (Bibi) vs. Newham London Borough Council [2001] EWCA Civ 607 [2002] 1 WLR 237 at [19]** in respect of the principle of legitimate expectation as follows:

“In all legitimate expectation cases, whether substantive or procedural, three practical questions rise, the first question is to what has the public authority, whether by practice or by promise, committed itself to; the second is whether the authority has acted or proposes to act unlawfully in relation to its commitment; the third is what the court should do.”

In **Keroche Industries Limited v. Kenya Revenue Authority & 5 Others** [2007] eKLR Nyamu, J (as he then was) found that the applicant's claim that its legitimate expectation to continue paying tax on a specific tariff which the respondents had been accepting over the years based on the mode of licensing products, had been thwarted. The court cited the English case of **R (Bibi) v Newham London Borough Council** [2001] 1 WLR 237 and quoted the three practical questions which Schieman LJ gave for the Court to pose in ascertaining whether a claim based on legitimate expectations is properly grounded. These are quoted by Nyamu J as follows:

“(1) What has the public authority whether by practice or promise committed itself to;

(2) Whether the authority has acted or proposes to act unlawfully in relation to its commitment;

(3) What should the court do”

I am of the considered view that the Communication between the Plaintiffs, the Provincial Commissioner, the District Lands Registrar and the District Land registrar created a legitimate expectation that he was to be allocated the land. Moreover, the plaintiffs had been permitted to take possession of the parcel of land and chose to allow the small traders to utilise the parcel of land and therefore had been allowed to benefit from the suit property.

By allocating the plot to the 1st Defendant in 2010 after the plaintiff had engaged the government for 12 years was an affront to the plaintiff's legitimate expectation.

This court finds that the Plaintiff had legitimate expectation to the suit property.

WHETHER THE 1ST DEFENDANT WAS PROPERLY ALLOCATED.

On the issue as to whether the 1st Defendant was properly allocated the land, I do seek evidence with the repealed Government Lands Act. The suit land was governed by the Government Land Act as the plot in issue was a Town plot. It was un-alienated Government Land having been surrendered to the Government and the commissioner had the discretion to dispose it by way of auction.

Sections 9 of the repealed Government Land Act Cap 280 Laws of Kenya provided as follows:

“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.”

Section 10 provided as follows:

“Leases of town plots may be granted for any term not exceeding one hundred years”

Section 11 as follows:

“(1) Before any town plot is disposed off under section 12, the Commissioner shall determine—(a) the upset price at which the lease of the plot will be sold;(b) the building conditions to be inserted in the lease of the plot;(c) the special covenants, if any, which shall be inserted in the lease; and(d) the periods into which the term is to be divided and the annual rent to be paid in respect of each period.(2) For the purposes of the rent payable under a lease under this Part granted before the 1st January, 1989—the term of the lease shall notwithstanding anything to the contrary contained in the lease, be divided into periods, the first of which shall expire on the 31st December, 1988 and each period thereafter shall expire on the 31st December of every tenth year until end of the term;(b) the annual rent shall be payable in advance on the 1st January in each year of the term;(c) the annual rent payable for the period expiring on the 31st December, 1988 shall be that reserved in the lease; and(d) the annual rent payable on and after the 1st January, 1989 shall for each next ensuing period of ten years be at such percentage of the unimproved value of the land as at the 1st January of such ensuing periods as the President may by order in the Gazette determine.(3) For the purposes of the rent payable under a lease under this Part granted for a term commencing on or after the 1st January, 1989—(a) the term of the lease shall be divided into ten periods, the first of which shall expire on the 31st December of every subsequent tenth year until the end of the term;(b) the annual rent shall be payable in advance on the 1st January in each year of the term;(c) the annual rent payable for the first period of ten years of the term shall be that reserved in the lease; and(d) the annual rent payable on and after the 1st January, 1999 shall for each next ensuing period of ten years be at such percentage of the unimproved value of the land as at the 1st January of such next ensuing period as the President may by order in the Gazette determine.

Section 12 as follows:

“Leases of town plots shall, unless the President otherwise orders in any particular case or cases be sold by auction.”

The other alternative was to dispose it by way of allocation under section 3 of the repealed government lands act but recognise the legitimate rights of the 2nd plaintiff.

On Locus Standi. I do find the 2nd Plaintiff though not registered at the time of the perceived legitimate Expectation, was entitled to the

expectation though as legitimate expectation is a constitutional principle that should not be defeated by locus standi.

In conclusion, I do find that the plaintiffs have proved that they had legitimate expectation to be allocated the parcel of land. However this court can't allocate land and I do order that the Plaintiff's legitimate expectation be considered by the National Land Commission and the County Government of Kisumu. On the other hand, the allotment letter dated 2nd August 2010, the lease dated 20th December 2010 and the certificate of lease issued on 24th December 2010 are hereby cancelled. Each party to bear own costs this being a dispute between religious institutions.

DATED AND DELIVERED THIS 23RD DAY OF OCTOBER, 2020.

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

JUDGE

This judgment is hereby delivered to the parties by electronic mail due to the measures restricting court operations due to COVID -19 pandemic and in light of directions issued by the Honourable Chief Justice on 15TH March 2019 and with the consent of the parties.

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE