



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT GARISSA**

**ELC CASE NO. 27 OF 2018**

**ABDULLAHI SHEIKH AHMED.....PLAINTIFF**

**VERSUS**

**MANDERA COUNTY GOVERNMENT.....DEFENDANT**

**JUDGEMENT**

**BACKGROUND**

1. The Plaintiff via a plaint dated 15<sup>th</sup> December, 2014 and amended on 17<sup>th</sup> May ,2019 moved this court seeking the following orders;

- (a) A declaration that the Plaintiff is the legal and registered owner of property L.R No. 13139/680 Grant I.R No. 5287.
- (b) A declaration that the acquisition of the suit property L.R No. 13139/680 Grant I.R. 5287 by the Defendant and any developments thereon was fraudulent.
- (c) An order of eviction do issue compelling the Defendant, its officers, assigns, agents or institutions to vacate and surrender the suit property L.R No. 13139/680 Grant I.R No. 5287 to the Plaintiff failure to which, the Defendant, its officers, assigns or institutions be forcefully evicted therefrom.
- (d) That in the alternative, the Defendant to pay the Plaintiff a reasonable compensation of a sum of Kshs.7,200,000/= being the financial compensation of the current market value of the parcel of land known as L.R No. 13139/680 Grant I.R No. 5287.
- (e) Interest at commercial rate from the date of filing the suit till payment in full.
- (f) Costs of this suit.

2. The Defendant filed its statement of defence dated 25<sup>th</sup> May, 2018 denying the claim.

**THE PLAINTIFF'S CASE**

3. The Plaintiff testified on oath and stated that he is the registered proprietor of land parcel Number 13139/680 Grant I.R No. 5287 located in Mandera County having been allocated the same by the Mandera County Council (defunct) for a term of 99 years with effect from 1<sup>st</sup> March, 1995. The Plaintiff further stated that the land was grabbed, alienated and/or forcefully acquired by the successor of Mandera County Council who is the Defendant herein namely Mandera County Government and the same was used to build Mandera Polytechnic. The Plaintiff also stated that upon enquiries and demands culminating in a demand Notice dated 21<sup>st</sup> November, 2014 by his Advocates the Defendant has refused, ignored and/or neglected to offer him any compensation for forcefully acquiring his parcel of land.

4. The Plaintiff further contests that the actions by the Defendant are excessive, oppressive and illegal and that they should be compelled to compensate him Kshs.7,000,000/= (seven million) which is the current market value of the suit property. He produced a letter of allotment dated 23<sup>rd</sup> February, 1995 for a term of 99 years effective from 1/3/1995. After he was allocated the plot, the PDP Plan was prepared on 6/2/95 being PDP Plan No. 31. Thereafter, he was issued with a title deed on 7/10/95 for title deed No. 13139/680 and deed plan No. 198657. The deed plan shows the location of the plot. He has continued to pay rates for the plot to the County Government of Mandera. He produced the land receipt issued on 8/1/2015 for Kshs.4,400/=. The Plaintiff also produced a certificate of official search indicating that the same is still in his name. he also produced a receipt of Kshs.18,900/= which he paid for processing the title deed. He stated that the Defendant encroached his land in the year 2014 and destroyed his fence and put up a new fence. He has not been able to utilize the plot. He had bought a posho mill which he wanted to install on the suit property but the County Government of Mandera denied him access. He stated that his plot has now been fenced as part of the polytechnic property without compensation. He has not been accused that he acquired the suit

property fraudulently illegally, irregularly, unprocedurally or through a corrupt scheme. He engaged a valuer who prepared a report in the year 2016 which he also produced as an exhibit in this case. The suit property was valued at Kshs.7.4 million.

5. The Plaintiff called one witness namely David Chege who is a registered and licensed valuer No. 175 who testified that on 20<sup>th</sup> April, 2016 he was instructed by the Plaintiff herein to visit the suit land and conduct a valuation on land parcel number 13139/680 situated in Mandera County. He visited the site and conducted valuation which he said is near the polytechnic on the main street within Mandera County. He valued the property at Kshs.7,200,000/=. He produced the report as an exhibit in this case. He was paid his fees of Kshs.40,000/=.

#### **DEFENDANT'S CASE**

6. The Defendant called two witnesses namely Diriye Haji Hassan (DW1) and Mohamed Abdille Gabow (DW2). Diriye Haji Hassan (DW1) who works with Mandera County Government as a Land Administrator based at Mandera East Sub-county referred to his witness statement he recorded on 4/3/2020. According to him, the Plaintiff's claim is misguided since he is acting on assumption that the alleged and purported registration of L.R No. 13139/680 was regularly done. He stated that the registration of the Plaintiff as proprietor of the land parcel No. 13139 was illegal as the land is a public land having been allocated to the polytechnic in the year 1985 after its registration. He stated that subsequent development plans were developed by the Defendant's predecessors and later on 21<sup>st</sup> November, 1998 documentation shows the plan that constitutes polytechnic and the parcel of land.

7. The witness also stated that there were numerous correspondences between the defunct town council and the project co-ordinator with respect to trespass on the suit property by unknown persons. He said that the polytechnic has been its current land since it was established in the year 1985 and that donors and National Government have been funding and equipping the polytechnic. He further stated that he is aware that the development plans were approved and that he communicated the same vide a letter dated 8<sup>th</sup> March, 2000 to the Project Co-ordinator Mandera Youth Polytechnic. He stated that he is also aware that the then District Commissioner wrote a letter indicating that all the person allocating themselves land were illegal and were informed that such allotments were cancelled. He stated that as a Land Administrator, he is well conversant with the process of allocation of land under the repealed Trust Land Act and the local Government Act which must be followed strictly before one can be allocated land and title deed by the Commissioner of Land. The witness testified that any other method or process which does not follow the laid down procedure is fraudulent and that any title issued thereafter is a product of an illegal process which should be revoked.

8. DW2 on his part stated that he is an employee of the Ministry of Lands, Housing and Physical Planning Mandera County. He stated that he was transferred by the Director of Surveys as the District Surveyor of Mandera on 13<sup>th</sup> July 2001 until 30<sup>th</sup> Jun3, 2015 when he retired. He stated that thereafter, he was employed by the Mandera County Government as a Principal Land Surveyor on contract and that currently he is incharge of all surveyors in the entire District and previously his role as a District Surveyor was to submit plans and computations to the Director of Surveys in Nairobi for checking approval and authentication of the completed surveys.

9. The witness stated that after authentications, the survey plans are passed to the R.I.M Section for amendments to show the newly surveyed plots in the R.I.M and give them parcel numbers. He stated that Development Plans (DPs) and Part Development Plans (PDPs) are prepared by the Physical Planning Department while surveys are done by the Department of Surveys. He stated that the land in dispute was revealed to him by the Executive Committee Members for Land, Housing and Physical Planning of Mandera County Government who is also her boss. He stated that he could identify L.R No. 13139/680 in the survey map and that his opinion on the suit land L.R No. 13139/680 is in Metameta area of Bulla Jamuhuria which is far away from the polytechnic. He stated that the suit land parcel No. 13139/680 was surveyed with others shown by the survey plan F/R 259/55 of 5/8/1995, a copy of which could be availed.

#### **ISSUES FOR DETERMINATION**

The following are the appropriate issues for determination

- 1. Whether the Plaintiff is the lawful and binafide owner of the suit property L.R No. 13139/680 Grant I.R No. 5287?***
- 2. Whether the Defendant lawfully and legally acquired the suit property.***
- 3. What appropriate orders should the court grant and who will bear the costs of this suit?***

#### **Whether the Plaintiff is the lawful and binafide owner of the suit property L.R No. 13139/680 Grant I.R No. 5287?**

10. The Plaintiff in his evidence stated that he applied for allocation of a plot to the Mandera County Council (defunct) and that he was allocated the suit plot on 23/2/95. He produced a part development plan (PDP) which was prepared on 6/2/95 as an exhibit. On 7/10/95 he was issued a title deed in respect of the suit land parcel No. 13139/680 Grant No. 5287. The title deed in respect of the suit land was issued under the Registration of Titles Act Cap. 281 Laws of Kenya (now repealed). Section 23(1) of the said Act which is now repealed is similar with Section 26 (1) of the Land Registration Act No. 3 of 2012 which provides as follows;

***“23(1) The certificate of title issued by the Registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive of evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.”***

11. Although the Registration of Titles Act together with other Acts were repealed following the enactment of the Land Registration Act No.

3 of 2012, Section 107 of the Land Registration Act No. 3 of 2012 provides that any right interest, title power, or obligation acquired, accrued or established under the repealed Acts, would continue to be governed by the Law applicable to it immediately prior to the commencement of the new Act. To that extent, therefore, the Plaintiff's rights and interests to the suit property having been acquired prior to the coming into force of the Land Registration Act would therefore stand to be construed under the provisions of the repealed Registration of Titles Act Cap 281 Laws of Kenya.

12. The provision of Section 23(1) of the Registration of Titles Act Cap 281 (repealed) is clear that the title of a registered proprietor shall be taken by all courts as conclusive of evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof subject to encumbrances, easements, restrictions and conditions therein or endorsed thereon, and that the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party. I have looked at the Defendant's statement of defence dated 25<sup>th</sup> May, 2015 and filed in court on 27<sup>th</sup> May, 2015. There is no allegations of fraud or misrepresentation pleaded suggesting that the Plaintiff obtained the suit property fraudulently or through misrepresentation at all.

**Whether the Defendant lawfully and legally acquired the suit property L.R No 13139/680?**

13. The Court of Appeal in the case of **Charles Karaithe Kiarie & 2 Others –Vs- Administrators of Estate of John Mallace Muthare (deceased) & 5 others (20130 eKLR** held as follows;

***“The registration of Titles Act is entirely a product of the Torrens System of registration. The word “Torrens” is derived from Sir Robert Torrens, the third premier of South Australia and pioneer and author of a simplified system of land transfer which he introduced in 1958. This system emphasizes on the accuracy of the land register which must mirror all currently active registrable interests that affect a particular parcel of land. Government as the keeper of the master record of all land and their owners guarantees indefeasibility of all rights and interest shown in the land register against the entire World and in case of loss arising from an error in registration the person affected is guaranteed of Government compensation. This statutory presumption of indefeasibility and conclusiveness of title under the Torrens System can be rebutted only by proof of fraud or misrepresentation which the buyer is himself involved.”***

14. Other than merely denying the claim in their statement of defence, the Defendant did not challenge the Plaintiff's acquisition and registration as proprietor of the suit property under Section 23(1) of the repealed Registration of Titles Act Cap. 281 Laws of Kenya.

15. Order 2 Rule 10 (1) Civil Procedure Act Cap 21 Laws of Kenya provides as follow;

***“Subject to sub-rule (2) every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing.***

***(a) Particulars of any misrepresentation, fraud, breach of trust, willful default or undue influence on which the party pleading relies;.....***

16. As I have observed in my analysis above, the Plaintiff has produced documents leading to his acquisition of the title deed in respect of the suit property. The process of acquisition of the title has not been challenged. The Defendant has not pleaded or set out any particulars of fraud or misrepresentation in their defence. The certificate of title and the records at the lands office have not been disputed. The Defendant did not call any witness from the land office concerned to show that the Plaintiff acquired the title to the suit property through fraud, misrepresentation or through any other unlawful means.

17. The requirements for a party challenging a title issued to a proprietor of land was put into perspective in the case of **Kinyanjui Kamau Versus George Kamau Njoroge (2015) eKLR** where it was held;

***“ In this case fraud cannot be imputed on the part of the Respondent by the mere fact that the record in relation to the subject property was missing at the Lands Registry. To succeed in the claim for fraud, the Appellant needed to not only plead and particularize it, but also lay a basis by way of evidence, upon which the court would make a finding. In the present appeal, there is no such evidence, and the courts below rightly came to the conclusion that the Appellant had not made a case for the grant of the orders he sought.”***

18. In this case, just the same way the court in the above decision observed that there is no iota of evidence that the Plaintiff was involved in any fraud, misrepresentation or wrongful act in the process of acquisition of the title to the suit property.

**What appropriate orders should the court grant and who will bear the costs of this suit?**

19. Ultimately, this court is persuaded beyond peradventure that the Plaintiff has proved this claim and therefore entitled to the orders sought. I therefore allow this suit and issue the following orders;

**1. A declaration that the Plaintiff is the legal and registered owner of the suit property No. 13139/680 Grant I.R No. 5287.**

**2. A declaration that the acquisition of the suit property No. 13139/680 Grant I.R No. 5287 by the Defendant and any development thereon was fraudulent, illegal and unlawful.**

**3. An order compelling the Defendant, its officers, assigns, agents or institutions to vacate and surrender the suit property No. 13139/680 Grant I.R No. 5287 to the Plaintiff within six (6) months failing to which the Defendants, its officers, assigns,**

agents or institution forcefully evicted therefrom.

4. That in the alternative, the Defendant to pay the Plaintiff a reasonable compensation of a sum of Kshs.7,000,000/= (seven million) being financial compensation for the current market value of the parcel of land known as L.R No. 13139/680 Grant I.R No. 5287.

5. Interest at court rates from the date of judgement till payment in full.

6. The costs of this suit shall be borne by the Defendant.

Read, delivered and signed in the Open Court this 27<sup>th</sup> day of November, 2020.

.....

E. C Cherono (Mr.)

**ELC JUDGE**

**In the presence of:**

1. Mr. Ayieko for the Plaintiff.
2. Mr. Langat for the Defendant.
3. Fardowsa: Court Assistant