



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 65 OF 2014

CAPRI CONSTRUCTION CO. LTD.....PLAINTIFF

=VERSUS=

MINISTRY OF LANDS, HOUSING &

URBAN DEVELOPMENT.....1ST DEFENDANT

THE CHIEF LAND REGISTRAR.....2ND DEFENDANT

THE ATTORNEY GENERAL.....3RD DEFENDANT

JUDGMENT

Introduction

1. The dispute in this suit revolves around the legality of **Grant No. IR 90968** in which **Land Reference Number 209/14992** is comprised (**the suit property**). The Grant was processed and issued by Mr Sammy Silas Komen Mwaita, the then Commissioner of Lands, during the transition from the Daniel Arap Moi Administration to the Mwai Kibaki Administration. It was signed by Mr Mwaita on 27/11/2002 and registered and issued to one **Mr Edwin Kiprotich Ngetich (Mr Ngetich)** on 8/1/2003. Sitting on the land (at the time of issue of the Grant and to-date) is a government house occupied by a civil servant who pays rent to the State Department of Housing and Urban Development. The suit property was registered in the Inventory Register of Government Houses in 1950s and is still so registered as Asset Number **NAIR/HOU/MG 255**. It is located in South B, Nairobi. The plaintiff contends that the suit property is private property pursuant to Grant No IR 90968. The State Department of Housing and Urban Development Housing Development contends that the suit property is public property vested in the said State Department.

Plaintiff's Case

2. Through an amended plaint originally dated 23/1/2014 and amended on 11/1/2018, the plaintiff contended that the suit property was vested in Mr Ngetich through Grant No IR 90968 issued on 8/1/2003. Subsequently, in 2009, the plaintiff's benefactor, one George Kimani Njuki (PW1), bought the suit property from Edwin Mr Ngetich at Kshs 3,200,000 through an undated sale agreement signed in 2009 and caused the suit property to be conveyed to the plaintiff as his nominee. The plaintiff further contended that despite the vendor (Mr Ngetich) conveying the title to them in 2011, the 1st defendant had refused and/or neglected to hand over vacant possession of the suit property to them.

3. Consequently, the plaintiff sought the following verbatim orders against the defendants:

1A. A declaration to the effect that the plaintiff is the sole

registered proprietor of the suit premises known as LR No 209/14992 together with all developments therein and is entitled to the same.

1B. Vacant possession of the suit premises forthwith.

1C. Mesne profits for the period that the 1st defendant has

been in occupation and possession of the suit premises

from the date that the plaintiff became the registered proprietor ie 11th May 2011, and or any other date that this honourable

court may consider fair and just, and such mesne profits to be determined by this honourable court, together with interest at court rates.

AND/ OR IN THE ALTERNATIVE

1D. The defendants to pay the plaintiff a total sum of Kshs 50

Million being the estimated market value of the suit premises, together with interest at court rates.

1E. Costs of this suit.

1F. Such other and/or further relief that this honourable

court might consider fit and just to grant in the unique

circumstances of this matter.

Defendants' Case

4. In answer to the suit, the Attorney General filed an amended defence and counter-claim dated 4/5/2015. Subsequent to that, the plaintiff amended her plaint to bring on board the Ministry of Lands, Housing & Urban Development and the Chief Land Registrar as parties to the suit, both represented by the Attorney General. The three defendants conducted their defence on the basis of the amended defence and counter-claim dated 4/5/2015 without any further amendments.

5. The case of the defendants was that the Government was the lawful owner of the suit property; the suit property was at all material times occupied by a civil servant on tenancy terms effective from 2001; and the said civil servant had been enjoying quiet possession until 2013 when the plaintiff in this suit began to claim rent arrears from her. They further contended that, being a developed government property, the suit property could only be disposed in accordance with Government Procedures & Regulations relating to disposal of Government assets. They added that the suit property had never been disposed as such and was never available for alienation or transfer to a private person or entity.

6. The Attorney General averred that the alleged alienation and registration of the suit property in the name of Mr Ngetich and the subsequent transfer to the plaintiff were fraudulent. The Attorney outlined particulars of the alleged fraud and sought the following verbatim orders in the counter-claim against the plaintiff:

1. A declaration that the issuance of the title, transfer and subsequent registration of the plaintiff in the main suit as proprietor of Land Parcel known as LR No 209/14992, IR No 90968 was irregular, illegal and tainted with fraud.

2. A declaration that the plaintiff in the main suit has never been in possession of the suit property known as LR No 209/14992, IR No 90968.

3. An order directing the Chief Land Registrar to cancel the title in respect to LR No 209/14992, IR No 90968.

4. A declaration that the 1st defendant in the counterclaim is the lawful owner of the suit property.

5. An order directing the Chief Land Registrar to register the property in the name of the National Treasury for and on behalf of the Ministry of Lands, Housing and Urban Development.

6. Costs of this suit and counterclaim.

Plaintiff's Evidence

7. The plaintiff led evidence by one witness, George Kimani Njuki (**PW1**). He adopted his witness statement dated 11/1/2018 as part of his sworn evidence-in-chief. His evidence was that, on 8/1/2003, the 2nd defendant registered Grant No IR 90968 in the name of Edwin Kiprotich Ngetich (Mr Ngetich) as the absolute and indefeasible proprietor under the provisions of the **Registration of Titles Act** (now repealed). In 2009, Mr Ngetich sold the suit property to him (PW1) at Kshs 3,200,000. On diverse dates between 2009 and 2010, Mr Ngetich paid to the Government validation fees amounting to Kshs 450,000. On 2/2/2011, the suit property was transferred to the plaintiff company as his nominee. Despite the defendants' knowledge of the plaintiff's registration as proprietor of the suit property, the 1st defendant had refused to hand over vacant possession of the suit premises to the plaintiff. On 18/12/2013, the plaintiff's advocates served a notice of intention to sue on the 3rd defendant as the legal representative of the 1st and 2nd defendants. He produced 8 documents, among them, Grant No IR 90968 and an undated sale agreement between Mr Ngetich and himself.

8. During cross-examination, he stated that he identified the suit property through an agent by the name **Kioi**. The suit property had an old government house on it, occupied by a tenant. He did not meet the tenant. The house on the suit property was marked as **MG 255**. The suit property was located in South B near Mater Hospital. He did not see the allotment letter relating to the suit property. He did not see receipts relating to payment of stand premium. He did not exhibit copy of any official search obtained by himself before purchase. When he later enquired about the tenant, he established that she was a government employee. He paid purchase price through a cheque. The suit property

was still occupied by the civil servant.

9. In re-examination, he stated that the suit property was in the name of Mr Ngetich at the time of purchase. The Government had not demanded surrender of the title he held. He sued the 3rd defendant because the occupant of the house had refused to vacate it.

Defendants' Evidence

10. The defendants led evidence by one witness, Julius Waweru Mwangi (DW1). He said he was a Deputy Director (Estates) in the State Department of Housing and Urban Development. He adopted his witness statement dated 6/11/2019 as his sworn evidence-in-chief. In summary, his evidence was that the suit property was a Government property on which Government House Number NAIR/HOU/MG 255 was constructed. The House was constructed in 1950s and registered as NAIROBI/HOUS/A5/191. The registration later changed to NAIR/HOU/MG 255. The suit property is situated in South B, Nairobi. According to Government records, the House was allocated to Miss Jane Indogo, a civil servant, on 14/2/2002 and the said civil servant was still in occupation of the House. The Firm of Robert Muthama & Associates wrote to the said tenant a letter dated 8/1/2013 demanding rent arrears. The tenant forwarded the letter to the State Department of Housing & Urban Development. The State Department responded to the letter on 15/1/2013 indicating that the suit property was Government property which had not been transferred to anybody.

11. DW1 added that the suit property was Government property contained in the Government Buildings Register. He added that the title held by the plaintiff in relation to the suit property was acquired irregularly and/or illegally on the following verbatim grounds:

i. The process of disposal of the government houses is regulated by Circular No.2/58 of 1958 which provides the procedures for boarding of government houses, both registered and unregistered.

ii. The Board of Survey can only be convened for disposal of government house to give way for new development, when the house is dilapidated or burnt beyond economic repair among others. In this case this process has not been undertaken and the house still remains intact and in our register at the State Department of Housing and Urban Development.

iii. According to Section 19.12 of the Government Financial Regulations and Procedures, the government can give as a gift or transfer its property. However, where the value is more than Kshs 200,000/- then the National Treasury and Parliamentary Approval is required. In this case no approval was given by the National Treasury nor Parliament.

iv. Section 3(a) of the Government Lands Act Cap 280 (repealed) had empowered the President or the Commissioner of Lands (under delegated powers) to, but subject to any written law, make grants only of un-alienated government land. The suit land with House Number MG 255 was not offered or available for alienation having been alienated for government houses.

v. Procedures (i), (ii) and (iii) above must therefore be strictly adhered to in respect to the suit property.

vi. During the sale of non-strategic Government Housing in Nairobi in 2004, Government houses in Government Housing Estate South B were not among those to be sold but were reserved for redevelopment in later dates.

12. DW1 termed the plaintiff's claim as baseless and urged the court to dismiss the plaintiff's suit and cancel the title held by the plaintiff.

13. During cross-examination, he stated that the Grant to Mr Ngetich was not made in accordance with the law. He added that the State Department of Housing learnt about the Grant when M/s Robert Muthama & Associates wrote to the tenant demanding rent arrears. The houses in South B were built in 1950s. He was aware that some of the government buildings in South B had been demolished and the new owners had put up apartments. The State Department of Housing and Urban Development requested the investigative departments to investigate the matter and take appropriate action. He was not aware of the action taken in relation to the South B houses. None of the alienated houses in South B had been recovered by the Government. The National Land Commission did not review the Grant relating to the suit property. The Government Lands Act did not permit alienation of already alienated or committed government land. The suit property was a committed government land and was not available for alienation. The suit property was not properly alienated because the relevant regulations and procedures were not followed. He did not know the value of the suit property. The Commissioner of Lands made a mistake by allocating the suit property to Mr Ngetich while aware that it was committed. He blamed both Mr Ngetich and the Commissioner of Lands for the irregular alienation. He also blamed the plaintiff because he was aware that the house on the land was government house and had a government tenant in it. Lastly, he stated that the officers who processed the Grant violated the law.

Plaintiff's Submissions

14. The plaintiff filed written submissions dated 17.12.2019. Mr Machira, counsel for the plaintiff, submitted that the key issue for determination in this suit was whether the plaintiff acquired its title fraudulently or not. Relying on the decisions in **Mbuthia Macharia v Annah Muhia Ndwiga & Another [2017] eKLR** and **John Mbogua Getao v Simon Parkoyiet Mokara & 4 Others [2017] eKLR**, counsel submitted that the defendant had failed to discharge their burden of proof. Counsel added that on its part, the plaintiff had demonstrated that it acquired the suit property procedurally.

15. Mr Machira added that the Grant issued to Mr Ngetich and subsequently conveyed to the plaintiff was protected under **Section 23** and **Section 24** of the repealed **Registration of Titles Act**. Counsel urged the court to dismiss the counter-claim because the defendants had failed to lead evidence by witnesses from the Department of Lands.

Defendants' Submissions

16. The defendants filed written submissions dated 3/3/2020 through Mr Oscar Eredi, Deputy Chief State Counsel. Counsel itemized the following as the five issues falling for determination in the suit: (i) whether the plaintiff had a good title to the suit property; (ii) whether the 1st defendant's continued occupation of the suit premises amounted to trespass; (iii) whether the defendants' counter-claim had merit; (iv) whether the plaintiff was entitled to the reliefs sought; and (v) whether the plaintiff was without a remedy.

17. On the first issue, counsel submitted that the plaintiff's title related to a government house and disposal of the house was subject to the laid down Procedures and Regulations. It was counsel's position that failure to comply with the laid down regulations relating to government houses rendered the disposal and the resultant title illegal. Relying on the Court of Appeal decisions in: (i) **Chemney Investment Limited v Attorney General & 2 others [2018] eKLR**; (ii) **Funzi Island Development Ltd & 2 others v County Council of Kwale [2014]**; and (iii) **Munyu Maina v Hiram Gathiha Maina [2013] eKLR**, counsel submitted that illegal transactions did not confer indefeasible title and that public interest should always prevail.

18. On whether the 1st defendant's continued occupation of the suit property amounted to trespass, counsel submitted that the 1st defendant had led evidence to demonstrate that it had been in possession of the suit property since 1950s and it was not aware of the illegal alienation until 2013 when it received a letter from the plaintiff's advocates. Counsel urged the court to note that whereas the purported sale agreement between Mr Ngetich and PW1 required Mr Ngetich to hand over vacant possession of the suit property to PW1, the plaintiff had not bothered to pursue Mr Ngetich for vacant possession between 2003 and 2013.

19. Relying on the decision in **Emfil Ltd v Registrar of Titles Mombasa & 2 others [2014] eKLR**, counsel submitted that the defendants had demonstrated that the title relied upon by the plaintiff was acquired fraudulently and illegally and should be cancelled.

20. On whether the counterclaim had merit, it was submitted that the defendants had met the threshold of proving fraud as was held in the decision in **Emfil Limited v Registrar of Titles Mombasa & 2 others [2014] eKLR**. Counsel submitted that the decision in **Mbuthia Macharia v Annah Mutua Ndwiwa Mutua & another [2015] eKLR** relied on by the plaintiff should not be considered by this court because the facts and evidence were different. Counsel further submitted that the plaintiff did not challenge the fact that the defendants were in occupation of the suit property at the time of conveyance of the suit property to the plaintiff.

21. On the issue as to whether the plaintiff was entitled to the reliefs sought in the plaint, counsel submitted that the plaintiff had no legal right over the suit property because the Grant was acquired unprocedurally. It was submitted that where a title is under challenge, the registered proprietor should go beyond the instrument and prove the legality of how he acquired the title. Reliance was placed on the decision in **Munyu Maina v Hiram Gathiha Maina [2013] eKLR**.

22. Counsel added that the plaintiff was not entitled to *mesne profits* because no specific amount was pleaded. He added that *mesne profits* were like special damages which had to be specifically pleaded and proved. Reliance was placed on the decisions in **Karanja Mbugua & another v Marybin Holding Co Ltd [2014] eKLR** and the Court of Appeal decision in **Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others [2018] eKLR**.

23. Counsel further submitted that the plaintiff was not entitled to Kshs 50,000,000 as the estimated market value of the suit premises because it did not provide a valuation report to justify that amount. Counsel added that the only remedy available for the plaintiff was to pursue Edwin Kiprotich Ng'etich for damages. Reliance was placed on the decision in **Kenya National Highways Authority v Shaileen Moughal & 5 others [2017] eKLR**. Counsel urged the court to dismiss the plaintiff's suit with costs and allow the defendant's counterclaim.

Analysis and Determination

24. I have considered the parties' pleadings, evidence and submissions. I have also considered the relevant legal framework and jurisprudence on the key issues falling for determination in this suit. Parties did not frame a common statement of issues. Based on the pleadings, evidence and rival submissions presented to the court, the following are the four key issues falling for determination in this suit: (i) whether the plaintiff holds a good title to the suit property; (ii) whether the plaintiff is entitled to the reliefs sought in the plaint; (iii) whether the counter-claim herein has merit; and (iv) what order should be made in relation to costs. I will make brief sequential pronouncements on the four issues in the above order.

25. The first issue is whether the plaintiff holds a good title to the suit property. There is common ground that the suit property is a developed government residential quarter, Number NAIR/HOUS/MG 255, located in South B, Nairobi. The plaintiff in this suit did not purchase the suit property. The plaintiff is a beneficiary of a free transfer made in its favour at the behest of PW1 and one Edwin Kiprotich Ngetich (Mr Ngetich. Although the transfer instrument dated 2/2/2011 indicates that the plaintiff paid Mr Ngetich Kshs 3,200,000 as consideration, evidence placed before court indicates that the plaintiff did not pay a penny to obtain the title it now holds. The undated sale agreement leading to the transfer was between Mr Ngetich (as seller) and PW1 (as purchaser). The two individuals are not parties to this suit. The two individuals know how the title they conveyed to the plaintiff for free was procured in the name of Mr Ngetich and subsequently conveyed to the plaintiff.

26. Secondly, the State Department of Housing and Urban Development has placed evidence before Court, and the plaintiff has not controverted the evidence, indicating that at all material times, the suit property was a developed and committed Government asset existing in the Register of Government Assets and was in the possession of the State Department of Housing and Urban Development since 1950s when the residential house thereon was developed. Further, the State Department was placed before court evidence to demonstrate that it was not privy to or aware of the alienation of the suit property by Mr Mwaita (Commissioner of Lands) to Mr Ngetich.

27. In my view, given that both the plaintiff and PW1 were aware of the above status of the suit property at the time they, together with Mr Ngetich, caused Grant No IR 90968 to be registered in the name of the plaintiff, it was the duty of the plaintiff to demonstrate to the court that the Grant they are now waving, relating to a developed Government land, was procured in accordance with the law and the laid down procedures and regulations. The plaintiff has not done that. All the plaintiff has done is to wave the Grant and invoke Section 23 of the

repealed Registration of Titles Act. There is no evidence that the relevant law, Government Regulations and Procedures, and the Ministry of Works and Housing Circular No 2/58 of 1958 were followed in the procurement of the said Grant.

28. Decisions of Superior Courts abound on the inadequacy of waving title relating to public property without demonstrating how the public property was converted into private property. Indeed, the Court of Appeal emphasized this in **Chemey Investment Limited v Attorney General & 2 Others [2018] eKLR** in the following words:

“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.

29. Similarly, the Court of Appeal in **Munyu Maina v Hiram Gathiha Maina [2013] eKLR** emphasized the inadequacy of waving a title as a defence in a claim where the root of that very title has been challenged in the following words:

“We state that when a registered proprietors’ root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances, including any and all interests which need not be noted on the register”

30. The totality of the foregoing is that the evidence before court indicates that the suit property was and is still a developed Government land vested in the State Department of Housing and Urban Development. It was not available for alienation by the Commissioner of Lands. Secondly, there is no evidence to suggest that the Grant which was generated and registered in the name of Mr Ngetich and thereafter conveyed to the plaintiff by Mr Ngetich was procured in accordance with the relevant law, regulations and procedures relating to disposal of developed government land. Consequently, it is my finding that the title held by the plaintiff is not good title. Having come to the above finding, it follows that the reliefs sought by the plaintiff against the defendants in the amended plaint fail wholly.

31. The third issue is whether the counter-claim has merit. The state Department of Housing and Urban Development has demonstrated that the title held by the plaintiff is illegal for the reason that it was procured in violation of the law and the relevant regulations and procedures relating to disposal of developed government land. In the absence of any controverting evidence by the holder of the title relating to the suit property, the court finds merit in the counter-claim and in the reliefs sought in the counter-claim.

32. Lastly, I have reflected on the appropriate order to make in relation to costs. The then Commissioner of Lands (Mr Mwaita) and Mr Ngetich were the key masterminds of the impugned Grant. They were, for unknown reasons, left out of these proceedings. They would have been the proper parties to bear costs or any damages. I will in the circumstances, order that parties bear their respective costs of the suit and counter-claim.

Disposal Orders

33. In light of the above findings, I make the following disposal orders in tandem with the prayers made in the suit and in the counter-claim.

a) The plaintiff’s suit against the defendants is dismissed for lack of merit

b) The Attorney General’s counter-claim on behalf of the State Department of Housing and Urban Development is allowed in the following terms:

i. It is hereby declared that the registration and issuance of Grant No IR 90968 in which Land Reference Number 209/14992 is comprised are illegal, irregular and nullities

ii. The Chief Land Registrar is hereby directed to cancel the said Grant and register the property in the name of the Principal Secretary for National Treasury, to hold the same on behalf of the Ministry of Lands, Housing and Urban Development.

c) Parties shall bear their respective costs of the suit and counter-claim.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 24TH DAY OF NOVEMBER 2020.

B M EBOSO

JUDGE

In the Presence of: -

Mr Machira for the Plaintiff

Court Clerk - June Nafula