



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

ELC Case 1403 of 2007

TULIP PROPERTIES LIMITED.....PLAINTIFF

VERSUS

MOHAMED KORIOW NUR

SIMON KIPRONO LABOSO

MACDONALD LIJOODI MARAKA

NOOR MOHAMED HASSAN.....1ST DEFENDANTS

DAVID MWENJE.....2ND DEFENDANT

THE COMMISSIONER OF LANDS.....3RD DEFENDANT

THE REGISTRAR OF TITLES.....4TH
DEFENDANT

R U L I N G

The Plaintiff brought this suit against the Defendants by way of a plaint seeking:-

- (a) A declaration that the purported Grant No. IR. 46540 dated 12th August 1998 granted to the First Defendants a lease of 99 years from 1st November 1989 is a forgery and therefore null and void.
- (b) An order of eviction against the First, Second Defendant from the suit property.
- (c) An injunction to restrain the Defendants jointly and severally from any dealing in any manner whatsoever with the land comprised in Grant No IR 46540 dated 24th February 1988 in the possession of the Plaintiff.
- (d) Costs of the suit.
- (e) Any other or further relief that this Honourable Court may deem just to grant.

On being served with the summons the 1st to 4th Defendants filed a joint defence in which they declined

the Plaintiff's claim and contended that the said parcel of land was allotted to them by the President of the Republic of Kenya under the Government Lands Act on 1st November 1989; that the said LR No 46540 is registered in the Lands registry and given the folio Number IR 89556 and that by virtue of the said grant of title over LR No. 4650 they have acquire absolute and indefeasible rights over the same and that therefore the Plaintiff's claim based on trespass is unfounded.

The matter first came for hearing on 22nd July 2008 when PW1 Jaswant Singh Rai gave evidence and he continued with testimony on 23rd July 2008 when the hearing was adjourned to 24th September 2008.

On 28th August 2008 Mrs Shaw Counsel for the 1st Defendant filed a Notice of Objection to the production of the following documents by the Plaintiff unless produced by the makers thereof namely:

- (1) Agreement of Sale dated 22nd May 1996.
- (2) Transfer dated 5th June 1996.
- (3) Affidavit sworn by Zablon Agwata Mabea and filed on 8th September 2006.
- (4) Letter written by the Commissioner of Lands dated 15th September 2006.
- (5) Letter written on behalf of the Principal Registrar of Titles and dated 15th October 2004.
- (6) Letter written on behalf of the Director of Survey and dated 16th November 2004.

The objection was set down for 24th September 2008. On 24th September 2008 the witness (PW1) was stepped down to enable the Counsels to argue the objection.

Mrs Shaw Counsel for the 1st Defendant submitted that pursuant to the order of this court the 1st Defendant had filed a notice setting out the documents which the 1st Defendants objected to be produced by PW1 and she would apply that the makers of those documents be called to testify and produce them. She submitted that she based her objection on the clear provisions of Section 35 of the Evidence Act (Cap. 80) which provides that the maker of the statement should be called to produce the same. She submitted that the purposes that shall be served by calling the makers to come and produce them is that it shall afford the 1st Defendant an opportunity to cross-examine the witnesses on the contents of the documents and test the credibility of the witnesses and the veracity of those documents.

This right of cross-examination a fundamental and basic right afforded to parties in civil proceedings. The Evidence Act gives certain exceptions where the court can allow the documents in evidence without calling the witnesses thereof. It is the 1st Defendant's submission that in this case the Plaintiff has not brought itself within these exceptions which are:-

- (a) Maker of document is dead.
- (b) Maker cannot be found or incapable to give evidence.
- (c) Maker cannot be found within reasonable time.

It is the Plaintiff's case that it holds a valid Title to the suit property issued by the 3rd and 4th Defendants in their official capacity. Such is the Plaintiff's contention and so is the contention by the 1st Defendant that they hold a valid title to the suit property that was issued by the 3rd and 4th Defendants in their official capacity. Mrs Shaw went on to submit that to the extent that the issue of the documents sought to

be produced goes to the root of the title of the suit property then it would be necessary in this case to call the makers of these documents so that appropriate questions can be put to them on their contents.

The objection was opposed by Mr. Ougo counsel for the Plaintiff who submitted Counsel for the 1st Defendant relied on Section 35 of the Evidence Act but that is not the only provision in the Act.

Section 35 refers to the statement made in the document may be admissible but this does not refer to the document itself. He went on to submit that the relevant sections of providing documents are Sections 64, 65 and 67 of the Act and referred specifically to Section 67 which states that documents must be proved by primary evidence and Section 65 talks of the document itself produced before the court. It is therefore in order for a party to bring the primary document and it would then be upon the court to inspect the same to find if it is the primary document.

Counsel went further to submit that in terms of Section 67 of the Act that document meets that requirement because the primary document itself is before the court. On the Sale Agreement he submitted that it is a peculiar document because it is an agreement between more than one person. His excellence the retired President Daniel A Moi and the company he posed a question who then in the maker of that document? In answer to this he submitted that any of the persons who executed the document qualifies as the maker thereof for purposes of Section 35 of the Act. If that was not the position it would mean that when a document is signed by more than one person then all those persons must come to produce the document and that would amount to an absurdity. PW1 executed this document as a director of the Plaintiff and the Plaintiff being an artificial person cannot come to court and PW1 being one of the executors of this document PW1 is competent to produce this document. The same argument applies to the 2nd document, the Transfer dated 5th June 1996. It is on record that PW1 also executed that transfer. The primary document itself is before the court and it is the Plaintiff's submission that under the provisions of Section 66 of the Act that document can be produced as primary evidence in court. The next document objected to is the affidavit sworn by Zablon Agwata Mabea and filed in court on 8th April 2008.

Mr. Ougo submitted that this is a peculiar objection because that was done by an order of this court. The record will show that on 29th September 2004 Hon. Justice P. K. Kariuki made an order requiring the Principal Registrar of titles to file a statement in court as to the authenticity of the titles the subject matter of the suit. It is in compliance of that order that this affidavit was filed. This document is properly on record the court having ordered that it be filed and the 1st Defendant cannot now prevent the court from looking at it and even if there would be an objection it could not be made at that time and point.

On the documents No 4, 5 and 6 Counsel submitted that these are letters which the Plaintiff received on the dates stated, that is the letter written by the Commissioner of Lands dated 15th September 2006; letter written on behalf of the Principal Registrar of Titles dated 15th October 2004 and the letter written on behalf of the Director of Surveys dated 16th November 2004. Mr. Ougo submitted that these are letters which the Plaintiff received when the Plaintiff made queries to these offices and it got replies to those queries. It is the Plaintiff's submission that there is nothing in law to prevent a person to whom a document is addressed from producing the document. The Plaintiff made a query and those were the responses it received. All that the witness is saying is that we made queries and these are the responses we got. He is entitled and he is the most competent person to produce the same. In conclusion Mr. Ougo submitted that the court shall also presume that an officer who signed the documents is the officer in his official capacity and if the primary document is brought then the court is entitled and should admit the document.

Mr. Onyancha Counsel for the 3rd and 4th Defendants was in agreement with the submissions on behalf of the Plaintiff and did not object to the production of the those documents.

The Plaintiff's case is that it purchased the suit land from the original allottee and it was not allotted to it by the Commissioner of Lands. In the process of purchasing it signed a Sale Agreement with the vendor and the suit land was transferred to it. It executed both documents whereby PW1 did execute both

documents on behalf of the Plaintiff. The law protects all persons dealing or purporting to deal for valuable consideration with a proprietor and are not required to inquire or ascertain the circumstances in or the consideration for which such a proprietor was registered. In other words the Plaintiff had purchased the suit land for valuable consideration and was not bound to investigate the title. PW1 is a competent witness to produce both the Sale Agreement and the transfer having executed the same.

The next document is the affidavit sworn by Zablon Agwata Mabea and filed on 8th April 2008. The document having been filed by an order of the court, the same cannot be expunged from the record. I now come to the three letters. Those are documents emanating from the office of the Commissioner of Lands. It is trite that every document purporting to be signed by a registrar shall in all proceedings be presumed to have been signed until the contrary is proved. The Commissioner of Lands is described as the ex officio Registrar General in the Act.

Essentially the facts which gave rise to this litigation is dual registration. The Plaintiff had purchased the suit land from the original allottee who had been allotted the suit land by the Government while the 1st Defendant was allotted the suit land by the Government. Both of them are registered and have title to the suit land. The law provides that the registration of a person as the proprietor of land shall vest in that person the absolute ownership of the land with all rights and privileges belonging or appurtenant thereto.

That is the issue for determination before this court.

Having considered the objections to the production of the said documents and submissions by both Counsel and the authorities cited I find no merit in the objections.

Accordingly the 1st Defendant's objections to the production of the listed documents stated above is dismissed with costs to the Plaintiff.

Dated this 3rd day of October 2008.

J. L. A. OSIEMO

JUDGE