



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 561 OF 2018

(FORMERLY HIGH COURT CIVIL SUIT NO 1205 OF 2005)

HORTICULTURAL CROPS DEVELOPMENT AUTHORITY.....PLAINTIFF

- VERSUS -

SAKIR PROPERTIES LIMITED.....1ST DEFENDANT

THE HONOURABLE ATTORNEY GENERAL.....2ND DEFENDANT

DOUBLE ESS DEVELOPMENT COMPANY LTD.....3RD DEFENANT

JUDGEMENT

1. By a plaint dated 6th October 2005, amended on 23rd May 2007 and further amended on 31st July 2007 and on 8th March 2010, the plaintiff seeks judgement against the defendants jointly and severally for:-

a. A declaration that the grant to the 1st defendant by the 2nd defendant and subsequent transfer to the 3rd defendant was fraudulent null and void and that the plaintiff is the bonafide allottee of the parcel presently known as LR No 209/12490.

b. A permanent injunction restraining the 1st defendant or 3rd defendant either by itself, servant and or agent from developing, wasting, disposing of, alienating an dor in any way dealing with all that piece or parcel of land known as LR NO 209/12490.

c. A mandatory injunction compelling the 2nd defendant to order the Registrar of Titles, Nairobi to cancel the grant to the 1st defendant and transfer to the 3rd defendant and the parcel revert back to the plaintiff.

d. In the alternative to (a) and (b) above, an award of damages for the loss of the value and use of the parcel of land presently known as LR No 209/12490.

e. Costs.

f. Any other relief that this honourable court may deem fit and just to grant.

2. By a chamber summons dated 14th November 2005, the plaintiff sought and was granted leave to serve the 1st defendant by way of advertisement in one of the local dailies. The same was granted by an order issued on 7th December 2005.

3. The 1st defendant then entered appearance through the firm of Wamwayi & Co. Advocates and filed a statement of defence.

4. The 2nd defendant entered appearance and filed statement of defence dated 13th July 2007. In paragraph 8 of the said statement of defence it is stated:-

“Further in the alternative and without prejudice the foregoing the 2nd defendant avers that if there was a Grant to the 1st defendant, which is denied then the same was fraudulently acquired by the 1st defendant and hence null and void ab inito.”

Particulars of Fraud

- a. The 1st defendant knew the land was not available for alienation.
- b. The 1st defendant did not carry out a survey of the suit land.
- c. The 1st defendant knowingly presented a deed plan that was meant for the Grant to the plaintiff.

The 2nd defendant also filed an Amended Statement of Defence dated 29th November 2007.

5. The 3rd defendant, Double Ess Development Limited entered appearance through the firm of P. M. Kamaaru & Associates on the 18th March 2010. It also filed a statement of defence dated 6th April 2010.

6. The matter was set for hearing on 10th February 2020. There was no appearance for the 1st and 2nd defendants. The court was satisfied that they had been served and directed that the matter proceeds ex parte.

7. The plaintiff called one witness. PW1 Isaac Cherwon Meto told the court he is the head of audit at the Agricultural Food Authority. That the plaintiff is one of the directorates within Agricultural Food Authority. He adopted his witness statement dated 24th February 2012. He told the court he worked with the plaintiff as an internal auditor for sixteen (16) years. He also relied on the plaintiff's list of documents dated 14th June 2007. He produced the documents in the list of documents as exhibits P1 to P12 respectively. He further stated that the suit land is now valued at Kshs.400,000,000/-.

8. PW1 relied on the letter of allotment dated 29th January 1987 addressed to Horticultural Crops Development Authority (the plaintiff herein). It refers to an unsurveyed industrial plot NO "C" opposite Firestone Nairobi. This was produced as exhibit P1. There is a sketch attached showing the said Plot "C". by a letter dated 25th February 1987, the Managing Director of the plaintiff wrote to the Commissioner of Lands the plaintiff accepting the offer and enclosed a cheque of Kshs.152,608/30 being rent for 1st February 1981 to 31st December 1987. The receipt is attached. Thereafter a title was issued to the plaintiff with effect from 1st February 1987. There is also a letter from the 1st defendant claiming the suit property as theirs. They claimed to have purchased from the allottees in January 1999. The suit property is given as LR No. 209/12490. There is a valuation report dated 30th April 2004, showing that the suit property was then valued at Kshs.80,000,000/-.

9. The plaintiff's evidence has not been controverted. I find that the 1st defendant's defence amounts to a mere denial. It claims to be a purchaser for value having bought from the allottees in January 1999. The letter to the plaintiff dated 15th June 2005 is signed by Jacob Juma Managing Director Sakir Properties Limited. The 1st defendant did not file any list of documents.

10. The 2nd defendant's case is that no grant was issued to the 1st defendant and that if there was, then the same was fraudulently acquired. The same is therefore null and void *ab initio*. This confirms the plaintiff's case that the 1st defendant acquired the suit property fraudulently. PW1 prays that the suit property reverts back to the plaintiff. He further stated that a public body must seek consent from the parent ministry and the Treasury before disposing of land. No such consent was sought and/or obtained. There was also no board resolution to surrender interest in the suit property.

11. I agree with the plaintiff's submissions that the plaintiff has shown the procedure it followed in acquiring the suit property. That it is not enough for the 1st defendant to flash a title deed. It should go further to demonstrate how the land was acquired.

12. The 1st defendant's title cannot be protected by Article 40 of the Constitution. **Article 40(6)** provides that:

"The rights under this Article do not extend to any property that has been found to have been unlawfully acquired."

In the case of **Chengo Katana Koi vs Protus Evans Masinde [2013] eKLR**. It was held that:-

"..... a title deed is an end product and where there are competing interests over the same land, it is not enough for one to just state that he holds a title deed which is absolute and indefeasible. One has to show the processes that were followed on the acquisition of the title deed so as to entitle him/her to the land to the exclusion of the other claimants"

13. From, exhibit P7 which is the unregistered Grant, the same has a deed plan No. 193909. This is the same Deed Plan that was used to prepare a fraudulent grant to the 1st defendant. No other documents were presented by the 1st defendant to show that they had a different Deed Plan. The suit property was therefore not available for allocation to the 1st defendant.

14. I note that the plaintiff has an alternative prayer for compensation, PW1 stated that the land is now worth over Khss.400,000,000. It would be untenable to order the 2nd defendant to compensate the plaintiff. It would be a waste of public resources. Allowing the 1st defendant to keep the suit property at the expense of the public is an abuse of the spirit of the Constitution of Kenya. In the case of **Agnes Wanjiku Kamweti vs Thamia Investment & 2 Others [2009] KLR** it was held that:-

"indeed the 1st defendant can compensate the plaintiff by way of damages. However, in a situation where the mode of

acquisition of the said property is suspicious and cannot be defended, allowing payment of damages will be tantamount to condoning illegality, a task a court of law cannot be party to”.

I am guided by the above authority.

15. All in all, I find that the plaintiff has proved its case on a balance of probabilities as against the defendants.

16. Accordingly judgment is entered for the plaintiff as follows:-

a. That a declaration is hereby issued that the grant to the 1st defendant by the 2nd defendant and a subsequent transfer to the 3rd defendant was fraudulent, null and void and that the plaintiff is the bonafide allottee of the parcel of land Known as LR NO. 209/12490.

b. That a permanent injunction is hereby issued restraining the 1st defendant or 3rd defendant either by itself, servants and/or agents from developing, wasting, disposing of, alienating and or in any way dealing with all that parcel of land known as LR No. 209/12490

c. That a mandatory injunction is hereby issued compelling the 2nd defendant to order the chief Land Registrar Nairobi to cancel the Grant to the 1st defendant and transfer to the 3rd defendant and the parcel revert back to the plaintiff.

d. That the plaintiff shall have costs of the suit.

It is so ordered.

Dated, signed and delivered in Nairobi on this 17th day of December 2020.

.....

L. KOMINGOI

JUDGE

In the presence of:-

No appearance for the plaintiff

No appearance for the 1st defendant

No appearance for the 2nd defendant

No appearance for the 3rd defendant

Kajuju – Court Assistant