



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT NYERI**

**ELC NO 5 OF 2019**

**SITAWI LIMITED.....PLAINTIFF**

**VERSUS**

**NATIONAL LAND COMMISSION-NAIROBI.....1<sup>st</sup> DEFENDANT**

**COUNTY GOVERNMENT OF LAIKIPIA.....2<sup>nd</sup> DEFENDANT**

**LAIKIPIA COUNTY LAND MANAGEMENT BOARD.....3<sup>rd</sup> DEFENDANT**

**JUDGEMENT**

1. By a Plaint dated 11<sup>th</sup> January 2019, the Plaintiff herein instituted this suit against the Defendants seeking for:

i. A declaration that the Plaintiffs are the legal owners and absolute proprietors of all that parcel of land originally known as land reference No. 10422/11 measuring approximately 40.47 hectares and all subsequent parcels emanating from its sub-division thereof

ii. A declaration that the Defendants' act of issuing leases for the 23 agricultural portions instead of freehold titles was fraudulent, irregular, malicious hence null and void.

iii. An order directing the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to cancel the 23 leases issued to the members of the Plaintiff and to rectify the Register so as to reflect the respective members of the Plaintiffs as the absolute proprietors and legal owners of the resultant 23 portions in a freehold capacity.

iv. An order compelling the Defendants to issue freehold titles to the 23 agricultural portions to the respective owners.

v. A permanent injunction to restrain the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants from selling, transferring, sub dividing, excising, alienating or otherwise interfering with the Plaintiff's quiet enjoyment of the suit property or its subsequent sub-divisions thereof.

vi. An order compelling the Defendants jointly and severally to pay the Plaintiffs exemplary, general and punitive damages for their deliberate acts of omission or commission leading to the suit.

vii. The Defendants to pay costs of this suit.

viii. Any other order that the Court may issue to serve the interest of justice.

2. The pleadings as well as Summons to Enter Appearance were served upon the 1<sup>st</sup> Defendant on the 26<sup>th</sup> April 2019 and on the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, on the 15<sup>th</sup> May 2019, who despite service, neither entered appearance nor filed their statements of defence within the stipulated time from the date of service. To this effect therein, the Plaintiffs via an application dated the 23<sup>rd</sup> October 2019, and pursuant to the provisions of Order 10 Rule 2, 3, 4, 5, 6 and 8 of the Civil Procedure Rules sought for judgment to be entered against the Defendants. A notice for mention of the matter was subsequently served upon the Defendants for the 29<sup>th</sup> January 2020 but then again there was no response.

3. On the 29<sup>th</sup> January 2020, the Plaintiff sought for the matter to be placed for formal proof, the Defendants having failed to file any pleadings/documents. The court having satisfied itself that service had been effected, complied and entered judgment against the Defendants wherein the matter was set down for formal proof hearing on the 18<sup>th</sup> March 2020. However the matter did not proceed due to the Covid-19 pandemic.

4. The matter was next mentioned on the 1<sup>st</sup> July 2020 wherein again there had been no response from the Defendants and Counsel for the Plaintiff sought to dispose of the same through written submissions based on the fact that the matter was undefended and secondly due to the Covid-19 pandemic where matters were proceeding virtually.

5. The Court granted the prayers as sought and the Plaintiff filed their written submissions on the 24<sup>th</sup> September 2020 in which they raised their issues for determination as follows;

i. Whether the Defendants violated the Plaintiff's rights to legitimate expectations.

ii. Whether the Defendants' actions amounted to fraud.

iii. Whether the Defendants violated the Plaintiffs right to ownership of property

6. On the first issue for determination the Plaintiff relied on the decided case in the Supreme of Kenya in **Communications Commission of Kenya & 5 Others vs. Royal Media Services & 5 Others, Petition No 14, 14A, 14B & 14C of 2014** to submit that the Defendants in blatant violation of their rights to legitimate expectation and contrary to Article 20(1)(2) and 40 of the Constitution, arising out of the rights to ownership of property proceeded to act in contravention with the letter of approval issued on 19<sup>th</sup> May 1995 and 22<sup>nd</sup> March 1996 approving the issuance of freehold titles in respect to the 23 agricultural portions.

7. That the rights to legitimate expectation and the right to ownership of property was to be protected as envisioned in the Constitution and therefore it was expected for the Government in dealing with the public to act with certain predictability to avoid unnecessary confusion and frustration upon them.

8. The Defendants having acted in a manner to suggest that they were capable of issuing freehold titles and the Plaintiffs having followed the proper procedure to acquire the same, the Plaintiffs were entitled to the freehold titles and the Defendants should therefore be ordered to discharge the duties as per the letters to the Plaintiffs herein annexed in the list of the Plaintiffs documents.

9. On the issue for determination as to whether the Defendants violated the Plaintiffs' rights to ownership of property, it was the Plaintiff's submission that the Defendants' actions were marred with malice in denying them freehold titles despite having promised to do so. That having been issued with lease hold titles instead of freehold titles as per the letters of approval, the Plaintiffs had subsequently made a series of reminders to which the Defendants had ignored and/or refused to consider thereby registering the 23 portions of agricultural land into leasehold titles which was in bad faith and a contravention of the Plaintiffs rights to ownership, use and enjoyment of the property under Article 40 of the Constitution.

10. That the Defendants' action had exposed members of the Plaintiff company to mental anguish and financial constraints wherein they have had to utilize their resources to regularize the process of registration of freehold titles and also seek legal recourse to the honorable Court. That further, they could not develop and make use of the suit property as they wished in a way freehold titles were allowed. That the actions of the Defendants were unlawful and intended to deprive the Plaintiffs off their allotted parcels of land without any legal basis.

11. The Plaintiffs' submission on the third issue for determination as to whether the Defendants' actions were fraudulent was that in reiteration of the particulars of fraud and malice as highlighted under paragraph 19 of their Plea, that it was clear from the evidence on record, that the suit land upon surrender for the conversion of title regime, was not to revert to the Government to be administered as an unalienated Government land but was to be registered in the names of the members of the Plaintiff company as freehold titles.

12. The Plaintiff relied on the **Black Law Dictionary** definition of *fraud* to further submit that after the Plaintiffs had adhered to the conditions set by the Defendants and even made the necessary payments as requested, no attempt had been made by the Defendants, to uphold their end of the bargain, but instead they had maliciously altered the records and documents and thereafter issuing the wrong titles. The Plaintiffs relied in the decided case in **Gichinga Kibuta vs Caroline Nduku [2018] eKLR** to further define fraud.

13. That through the Defendants acts of omission and commission the 1<sup>st</sup> Defendant had gone against the mandate enshrined in Article 67(2) (a) (b) (c) (f) and (h) and Article 67(3) of the Constitution, which actions amounted to fraud. The Plaintiffs relied on the list of documents being correspondences between the Ministry of Lands and the Plaintiffs in support of their submissions.

14. They further submitted that they had surrendered their leasehold grants and their rights to the Government for the purpose of conversion to freehold titles wherein the Defendant ought to fulfill their promise as there was a real danger of the subject parcels of land being alienated to the 2<sup>nd</sup> Defendant if the Court did not grant orders sought so as to protect their rights and interests in the subject parcels of land.

#### **Determination.**

15. Article 50(1) of the Constitution on the right to fair hearing exclusively applies to trial inquires in judicial proceedings where a final decision is to be made through the application of law and facts. This right under the Constitution is set out that;

***Every person has a right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or if appropriate another independent and impartial tribunal or body.***

16. The right to fair hearing is further employed by the Court of Appeal in **Judicial Service Commission v Gladys Boss Shollei & Another [2014] eKLR** where it was held that;

*This provision of law [Article 50(1) of the Constitution] clearly refers to legal proceedings. It decrees that legal proceedings should be heard fairly and held in public. It is because they are legal proceedings that the locus is identified as a Court. Courts are to hear disputes in the manner prescribed. Since they are disputes determinable by the application of law, they are generally disputes that would fall under the wider rubric of civil proceedings. In appropriate cases the disputes may be heard in the same fair and public manner, before tribunals which must, even as courts are (or ought to be), both independent and impartial.*

17. Article 50 of the Constitution must therefore be understood in its full text and context. The right to fair hearing requires disputes to be resolved by application of the law by the Court or if applicable by an independent tribunal.

18. Following the service of pleadings as well as Summons to Enter Appearance upon the Defendants and neither of them having entered appearance nor filed their statement of defence within the stipulated time from the date of service, the Plaintiff sought for judgment to be entered against them and matter proceed for formal proof through written submissions. The Defendants were dully accorded the right to fair hearing secured under Article 50(1) of the Constitution but chose to waive the said right.

19. Judgment was thus entered against the Defendants and directions adopted by the Court that the matter be disposed of by way of written submissions. The Plaintiffs filed their submissions dated 22<sup>nd</sup> September 2019 and none of the Defendants filed their written submissions.

20. The brief facts of the case as set out in the Plaintiffs' Pleint is that in the year 1960, the Plaintiffs were registered as the lessors of the leasehold interest in land originally known as Nyeri land reference No. 10422/11 certificate of Title No IR 60237 measuring approximately 40.47 hectares having purchased the same for consideration on or about the year 1993.

21. That pursuant to a transfer registered as LR 17358/25 the Plaintiffs were registered as proprietors in the capacity of lessors and a certificate of title issued on 1<sup>st</sup> April 1993 for a period of 958 years from 1<sup>st</sup> February 1960.

22. That subsequently the Plaintiffs made an application to the Central Authority, Department of lands within the Ministry of Lands and Settlement seeking subdivision and change of user of No. 10422/11 to create 23 agricultural portions of land and 14 commercial plots varying in size. That on 31<sup>st</sup> March 1995 the Central Authority considered and approved the application subject to the Plaintiffs complying with conditions captured in a letter dated 6<sup>th</sup> April 1995, to wit that:

*‘I refer to your application as above and I am happy to inform you that the Central Authority at its 95<sup>th</sup> meeting held on 31<sup>st</sup> March 1995 considered and approved the same subject to the following conditions;*

*a. The areas set aside for commercial plots being surrendered to the Government in exchange for 99 years of lease hold titles at rents to be assessed by his office on completion of survey and also be subject to sub division approval letters that will be issued.*

*b. The applicants to take necessary precautions to ensure environmental protection*

*c. New annual rent for each agricultural portions being assessed by this office on completion of survey*

*d. Developmental conditions for each agricultural portion being apportioned on prorata basis*

*e. No new access roads being constructed to classified road network without prior approval from the chief engineer/Roads.*

*f. Payment of Ksh 4,625/= being subdivision approval fees*

*Please if the above is acceptable to you, let me know in writing to enable me to take further action’’.*

23. That the Plaintiff had dutifully complied with the conditions and even paid the requisite amount of Ksh 4,625/= to the Commissioner of Lands wherein vide a letter dated 19<sup>th</sup> May 1995 a final approval to the proposed sub division and change of user as applied for by the Plaintiffs was confirmed by the Central Authority in the following terms.

*‘Further to my provisional approval letter ref 7318/11/12 of 6<sup>th</sup> April 1995 and your acceptance letter dated 11<sup>th</sup> April 1995, my final approval is hereby accorded.*

*Enclosed herein find a copy of the plan duly endorsed for your survey work.’’*

24. Via a letter dated 22<sup>nd</sup> March 1996 the Central Authority informed the Plaintiffs that they had amended their conditions (c) (d) and (f) in the letter dated 19<sup>th</sup> May 1995 herein above to read as follows;

*‘The head title being surrendered to the Government to be issued with freehold titles in respect of the agricultural sub plots’’*

25. The Plaintiff subsequently through a surrender of lease document dated 6<sup>th</sup> May 1996 effectively surrendered all the rights, title and interest upon land reference No. 10422/11 to the Government of Kenya and were subsequently freed and discharged from the surrender in consideration of being granted a freehold title in respect of the Registered Land Act. Land which was then to be sub divided into smaller freehold titles.

26. The Plaintiffs' claim against the Defendant is therefore that despite many correspondences and actively engaging the Defendants to bring a closure to the process, the Defendants had only issued lease hold titles for the 14 commercial plots but had deliberately and adamantly refused to issue freehold titles for the 23 agricultural portions and had instead mischievously issued leases for the 23 agricultural plots against the Plaintiffs' application thereby denying them their legitimate expectation to freehold ownership of the 23 portions of land.

27. The Plaintiff's further claim is that at all material times, its members have been in uninterrupted actual and physical possession of the suit premises upon which they have developed the same in varying degrees, paid all the requisite charges, rents and rates to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants including the Lands office in Nairobi.

28. To understand the kind of predicament the Plaintiff's membership finds itself in it is important to appreciate the difference between freehold property and leasehold property which is mainly the land ownership and control of the property. With freehold property, as an owner one has all rights to enjoy free ownership (sell, renovate or transfer) of the property and can reuse the property for any purpose according to the local regulations whatever one wishes by following the local regulations. There are no restrictions on the right of the property. This type of property can be transferred by sale deed registration.

29. On the other hand, in the case of leasehold property, the ownership is provided by the Government for a tenure of 99 years wherein one can extend the leasehold to 999 years if the owner of the property wishes to extend the lease, one will have to pay a price for the lease extension. One also has the right only to stay for a particular period of time. In this case, the buyer is not the owner of the property. One must pay the ground rent to the owner or the leaseholder of the property, once the lease period is expired, the property rights will go back to the owner and it is possible to extend the leasehold according to one's comfort.

30. Considering the above captioned facts which were not controverted, the documents annexed thereto as well as the authorities cited herewith, I find the matters pending for determination as being;

**i. Whether the disputed parcels of land were private or public land upon surrender.**

**i. Whether the Plaintiff had legitimate expectation to acquire and be allocated the 23 agricultural lands on freehold basis.**

31. The Plaintiff's case is founded on **Article 40** of the Constitution which guarantees protection of personal property against arbitrary acquisition by the State and in order to protect the right to property, a party must establish a proprietary right or interest in land.

32. In the case of **Joseph Ihugo Mwaura and Others v The Attorney General and Others Nairobi Petition No. 498 of 2009 (Unreported)**, the Court while referring to **Section 75** of the former Constitution which is the equivalent of **Article 40**, observed as follows;

*Section 75 of the Constitution contemplates that the person whose property is the subject of compulsory acquisition has a proprietary interest as defined by law. The Constitution and more specifically section 75 does not create proprietary interests nor does it allow the court to create such rights by Constitutional fiat. It protects proprietary interests acquired through the existing legal framework."*

33. Indeed it has not been controverted that the Plaintiff membership herein had been registered as the lessors of the leasehold interest in the suit land originally known as Nyeri land reference No. 10422/11, Certificate of Title No IR 60237 measuring approximately 40.47 hectares in the year 1993 wherein they had subsequently applied to the Central Authority, Department of lands within the Ministry of Lands and Settlement seeking subdivision and change of user of No. 10422/11 to create 23 agricultural portions of land and 14 commercial plots varying in size. Upon approval of their application and after adhering to the conditions set therein approval letters dated 6<sup>th</sup> April 1995, and 19<sup>th</sup> May 1995, and also pursuant to a letter dated the 19<sup>th</sup> May 1995 asking them to *surrender to the Government to be issued with freehold titles in respect of the agricultural sub plots*, the Plaintiff had complied and surrendered to the Government their leasehold grants for purposes of conversion of the tenure from the regime under the Registration of Titles Act Cap 281 to the freehold tenure of 23 portions of agricultural land under the regime of the Registered Land Act. The Defendants thereafter registered the 23 portions of agricultural land into leasehold titles despite the Plaintiffs having acquired the approval and paid for the freehold titles.

34. The Plaintiff's claim is therefore that the suit lands upon surrender for the conversion of title regime did not revert to the Government to be administered as un-alienated Government lands under the former Government Lands Act Cap 280 (now repealed), but was to be registered in the names of the members of the Plaintiff company as freehold titles.

35. Section 44 of the Registration of Titles Act Cap 281 (**repealed**) provides as follows;

*Whenever any lease which is required to be registered by the provisions of this Act is intended to be surrendered, and the surrender thereof is effected otherwise than by operation of law, there shall be endorsed upon the lease the word "surrendered", with the date of surrender, and the endorsement shall be signed by the lessee and the lessor as evidence of the acceptance thereof, and shall be attested by a witness; and the registrar thereupon shall enter in the register a memorial recording the date of surrender and shall likewise endorse upon the lease a memorandum recording the fact of the entry having been so made in the register, and thereupon the interest of the lessee in the land shall vest in the lessor or in the person in whom having regard to intervening circumstances, if any, the land would have been then vested if no such lease had ever been executed; and production of the lease or counterpart bearing the endorsed memorandum shall be sufficient evidence that the lease has been so surrendered:*

*Provided that no lease subject to a charge shall be surrendered without the consent of the chargee.*

36. The import of this Section is that upon surrender of lessee in respect of Government land the said reverts to the Government to be allocated by the Government pursuant to the provisions of the Government Lands Act Cap 280 (repealed).

37. Ultimately on this issue I do find that the lands in dispute reverted to the Government upon surrender and were to be managed under the regime of the Government Lands Act repealed and not to be converted to the regime of Registered Land Act Cap 300 Laws of Kenya(repealed)

38. Article 40 of the Constitution of Kenya provides as follows:-

(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

(a) of any description; and

(b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the State or any person—

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).

(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—

(i) requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

39. The import of this Article is twofold. The 1<sup>st</sup> instance is that it provides for the right to own property and the 2<sup>nd</sup> instance is that the property acquired should be protected by the state on condition that it was lawfully acquired.

40. The Court finds that since the the land in dispute was registered under The Registration of Titles Act, the surrender of lease was therefore governed by the said Act which does not provide for conversion of tenure directly from leasehold to freehold.

41. On the issue as to whether **the Plaintiff had legitimate expectation to acquire and be allocated the property**, The Supreme Court of India in **J.P. Bansal v State of Rajasthan & Anor, Appeal (Civil) 5982 of 2001** observed as follows regarding the doctrine:

*“The basic principles in this branch relating to ‘legitimate expectation’ were enunciated by Lord Diplock in Council of Civil Service Unions and Others v Minister for the Civil Service(1985 AC 374(408-409)(commonly known as CCSU case). It was observed in that case that for a legitimate expectation to arise, the decisions of the administrative authority must affect the person by depriving him of some benefit or advantage which either (i)he had in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision maker that they will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn...”*

42. It is not enough that an expectation should exist, it must in addition be legitimate, to be worthy of protection. As expressed by **HWR Wade C.F Forsyth** in **Administrative Law, Tenth Edition (2009)** page 449:

*“It is not enough that an expectation should exist; it must in addition be legitimate. But how is it to be determined whether a particular expectation is worthy of protection? This is a difficult area since an expectation reasonably entertained by a person may not be found to be legitimate because of some countervailing consideration of policy or law”*

43. 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 Schiemann 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”

44. In the case of **Haoucher v Minister for Immigration and Ethnic Affairs [1990]169 CLR** Deanne J. observed as follows;

*“Regardless of whether one can identify a right in the strict sense or a legitimate expectation, the requirements of procedural fairness must be observed in any case where, by reference to 'the particular statutory framework' (see Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation [1963] HCA 41; (1963) 113 CLR 475 at 504), it is proper to discern a legislative intent that the donee of Governmental executive power or authority should be bound by them. There is a strong presumption of such a legislative intent in any case where a statute confers on one person a power or authority adversely and directly to affect the rights, interests, status or legitimate expectations of a real or artificial person or entity in an individual capacity (as distinct from merely as a member of a section of the general public). The rationale of that strong presumption is to be found not so much in sophisticated principle as in ordinary notions of what is fair and just.”*

45. **From the present scenario, and owing to the fact that** the provisions of Section 44 of the Registration of Titles Act Cap 281 (repealed) are clear that upon surrender of lessee in respect of Government land, that the said reverts to the Government to be allocated by the Government pursuant to the provisions of the Government Lands Act Cap 280 (repealed)and further that lands in dispute reverted to the Government upon surrender and were to be managed under the regime of the Government Lands Act (repealed) and not to be converted to the regime of Registered Land Act Cap 300 Laws of Kenya(repealed). I find that the suit land were not private parcels of land and when the Defendant proceeded and registered the 23 portions of agricultural land in dispute into leasehold titles thereafter, this did not violate the Plaintiff’s membership’s Constitutional rights under Article 40 of the Constitution. In a Court of law, sympathy takes a second stand as we are governed by statutes.

46. The Plaintiffs must claim only as the law allows them to and if they say that they are in possession of the suit land, by permission of the Government, they only have mere possession, but no title, or entitlement to title. Even if they had a legitimate expectation, the legal position is that legitimate expectation cannot override the law which was the position held in the case of **Republic vs. Kenya Revenue Authority ex parte Aberdare Freight Services Limited [2004] 2 KLR 530.**

47. In the premises, I am persuaded that the Plaintiff’s suit has no merit and the same is herein dismissed.

**Dated and delivered at Nakuru this 11<sup>th</sup> day of December 2020.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**