



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. MISC. CASE NO. 25 OF 2017 (OS)

JAMA MUSA HUSSEIN.....PLAINTIFF

VERSUS

THE REGISTRAR OF GOVERNMENT LANDS1 ST DEFENDANT

THE ATTORNEY GENERAL.....2ND DEFENDANT

ETHICS AND ANTI-CORRUPTION COMMISSION.....3RD DEFENDANT

JUDGMENT

1. On 24/2/2017, the plaintiff took out an originating summons seeking the following orders:

2) A declaration that the plaintiff is the legal and beneficial owner of the properties known as LR No 36/VII/225, LR No 36/VII/256 and LR No 36/VII/257 situated in Eastleigh Estate in Nairobi.

3) A declaration that the caveats dated 8th May 2012 purportedly registered against the said properties by the 1st defendant is arbitrary, illegal, irregular, null and void.

4) An order directing the 1st defendant to remove the caveats dated 12th May 2012 purportedly registered against LR No 36/VII/255, LR No 36/VII/256 and LR No 36/VII/257.

5) An order directing the 1st defendant to register all pending and future transfers of units of the apartments erected on LR No 36/VII/255, LR No 36/VII/256 and LR No 36/VII/257.

6) The plaintiff be awarded the costs of the suit.

2. The originating summons is supported by the two affidavits of the plaintiff sworn on 24/2/2017 and 13/3/2018 respectively. His case is that he is the registered proprietor of three parcels of land namely, Land Reference Numbers 36/VII/255, 36/VII/256 and 36/VII/257 (hereinafter referred to as the “**suit properties**”). He bought the suit properties for valuable consideration on diverse dates, free from any encumbrances. The previous registered proprietors were R.S Wambugu t/a Sunrise Reprographics, R.S Wambugu t/a Panjinya and Francis Mburu Kimani t/a Wakanoru Construction Company respectively. He was issued with an indenture registered on 5th June 2009 in respect of Land Reference Number 36/VII/255; an indenture registered on 8th February 2010 in respect of Land Reference Number 36/VII/255; and indenture registered on 29th July 2010 in respect of Land Reference Number 36/VII/257. He has developed 40 apartments on the suit properties and sold them to third parties. In the process of transferring the apartments to the purchasers, his advocate discovered that the Land Registrar had placed caveats on the suit properties on 8th May 2012. He did not receive any notice and/ or reasons why the caveats were registered against the suit properties. The caveats were registered on 8/5/2012 under Section 116(1) (a) of the Government Lands Act, Cap 280 which had since been replaced with the Land Registration Act No. 3 of 2012 which came into force on 2/5/2012. His position is that, registering the caveats against the suit property without inquiry and notice was arbitrary, unprocedural, illegal and infringed on the right to own and dispose the property.

3. The 1st and 2nd defendants responded to the originating summons through a replying affidavit sworn on 4/12/2017 by Edwin Munoko Wafula. He contends that he is a senior land registration officer based at the 1st defendant’s headquarters at Ardhi House. He deposes that the 3rd defendant (EACC) vide a letter dated 2/6/2011 sought records in respect of the suit properties. The letter stated that the suit properties were situated at Pumwani Area and belonged to the City Council of Nairobi and had been set aside for expansion and development of the Pumwani Maternity Hospital. He added that another letter dated 14/3/2012 from the 3rd defendant to the Chief Lands Registrar stated that investigations by the 3rd defendant concerning allegations of irregular allocation and subsequent transfers of the suit properties established that the properties were acquired by the City Council of Nairobi in the late 60s and early 70s and had been set aside for expansion of Pumwani Maternity Hospital. The letter further stated that the parcels had been irregularly allocated and sold to individuals who were putting up buildings on the properties and charging the properties to other parties. The third defendant sought the urgent placing of caveats

on the eight properties.

4. He deposed that the Chief Lands Registrar vide a letter dated 7/2/2013 addressed to the Chief Executive Officer of the 3rd defendant confirmed that the government caveats had been placed on the suit properties awaiting the outcome of the investigations. Another letter from the Attorney General to EACC was sent requesting for the investigation file in respect of the suit properties. The 3rd defendant responded to the 2nd defendant vide a letter dated 19/6/2017. The letter confirmed that investigations on the suit properties was underway and that the lands were acquired by the City Council of Nairobi from P.A De Souza on February 1967 for the expansion of Pumwani Maternity Hospital and they were not available for allocation to any other party. He further deposed that from the correspondence from EACC, the investigations concluded that the allocation of the suit properties was irregular and illegal for the following reasons: (a) no applications were made by the purported allottees for allocation of the suit parcels; (b) there were no minutes or resolutions from the Town Planning Committee to approve the applications; (c) there were no minutes or resolutions from the Full Council Meeting adopting the resolution by the Town Planning Committee; (d) there was no approval sought from the Minister for Local Government; (e) no valuation were conducted to determine the stand premium and other requisite fees for the aforesaid parcels; (f) no ministerial consent was obtained for the sale of land reserved for the specific purpose contrary to Section 144(6) of the Local Government Act (Repealed).

5. He further deposed that the registration of the government caveats was not irrational or irregular but was meant to safeguard the suit properties since alienation of the suit properties was done fraudulently. He further deposed that the plaintiff did not demonstrate that he lodged any transfers of units in respect of the suit land that had been rejected or that he was unaware of the caveats at the time he was developing the suit properties.

6. The 3rd defendant responded through a replying affidavit sworn on 23/7/2018 by Pius Maithya who is a forensic investigator working with the 3rd defendant. He contended that he was tasked to investigate allegations of irregular and illegal disposal of the suit properties. The suit properties were acquired by the City Council of Nairobi from one P.A De Souza on 20/2/1967. The investigations revealed that by a conveyance dated 14/1/2007 and registered on 5/3/2008, the suit properties were illegally transferred from the City Council of Nairobi to R S Wambugu t/a Sunrise Reprographics, S Wambugu t/a Panhyna Enterprises, Francis Mburu Kimani t/a Wakanoru Construction without regard to Sections 12 of the Government Lands Act and Section 144(3) of the Local Government Act. The said transfers were in disregard of the public user and without the approval of the Minister.

7. Mr Maithya further deposed that on 14/3/2012, the 3rd defendant requested the Chief Lands Registrar to lodge caveats over the suit properties pending the conclusion of investigations and the applicable law was Section 116 (1) (a) of the Government Lands Act. He further deposed that Section 108 of the Land Registration Act provides that until the Cabinet Secretary makes regulations in terms of forms to be used in connection with the Act, any administrative acts made under any Acts of Parliament repealed by Land Registration Act or any other law, shall continue in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring them in conformity with the Act. The caveat was lodged on 8/5/2012, six days after the commencement of the Land Registration Act and the Cabinet Secretary had not yet made regulations in terms of the new forms.

8. The originating summons was canvassed through written submissions. The plaintiff filed written submissions on 13/9/2018. He submitted that the 1st defendant failed to follow due process and registered caveats without informing him. Reliance was placed on **Reuben Wambura Karoba vs. Land Registrar of Kiambu County Misc. JR Case No. 31 of 2015** where it was held that every person has the right to be given reasons for an administrative action taken. The plaintiff also submitted that he was a bonafide purchaser for value without notice. He relied on **Arthi Highway Developers Limited v West End Butchery Limited & 6 Others (2015) eKLR** where a bonafide purchaser was defined as one who buys something for value without actual or constructive notice of any defects in or infirmities, claims or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims. He further relied on **Lawrence Mukiri v Attorney General & 4 others (2013) eKLR** where the court held that to be a bona fide purchaser one must prove: (a) he holds a certificate of title; (b) he purchased the property in good faith; (c) he had no knowledge of the fraud; (d) the vendor had apparent valid title; (e) he purchased without notice of any fraud; (f) he was not party to the fraud. He finally submitted that the land registrar ought to have given him notice or an opportunity to be heard before registering the caveat. Reliance was placed on **Republic v Chief Land Registrar & another; Ex Parte Patrick Mbau Malika & 6 others (2017) eKLR** and **Itrade Company Limited v Jane Mukami Mwangi & another ELC Misc. 225 of 2014** where it was held that the applicant should have been informed of the restriction.

9. The 1st and 2nd defendant filed their submissions on 1/11/2018. They submitted that the titles held by the applicant are not indefeasible because they are marred with irregularities and illegalities. They also submitted that the procedure adopted in acquisition of the suit properties was illegal. Reliance was placed on **Munyu Maina v Hiram Gathiha Maina, Nyeri CA No. 239 of 2009** where it was held that it is not sufficient for a registered proprietor to produce title that is under challenge as proof of ownership; the proprietor must prove legality of how he acquired the title. They further submitted that the court should protect public interest against unscrupulous land grabbers. Reliance was placed on **Kenya Guards Allied Workers Union vs. Security Guards Services & 38 others Misc. 1159 of 2003** where it was held that public interest should be upheld. They also added that the suit properties were transferred without following due procedure. Reliance was placed on **Arthi Highway Developers Ltd v West End Butchery Limited & 6 others (2015) eKLR** where it was held that a party cannot invoke indefeasibility of title where the process of acquisition of the title is irregular. It was further submitted that technicalities occasioned during the transition of the laws operational at the time of placing the caveats cannot be a basis for faulting the caveats. They added that the applicant cannot claim protection by the Constitution under Article 40 when the titles he is holding were irregularly acquired. It was further submitted that a legitimate expectation cannot be used to protect property that has been unlawfully acquired. Reliance was placed on **Henry Muthee Kathurima v Commissioner of Lands & another (2015)**. Lastly, it was submitted that the 3rd defendant is tasked with investigation of corruption cases and the doctrine of comity between the arms of government must not be violated by unwarranted court proceedings with the aim of dictating or influencing decisions. They relied on **Ernst Young LLP v Capital Markets Authority & another High Court of Kenya at Nairobi, Constitutional and Human Rights Division Petition 385 of 2016**.

10. The 3rd defendant filed its submissions on 15/11/2018. It submitted that there was no requirement that a registrar must issue a notice where he finds it necessary to lodge a caveat for prevention of fraud under Section 116(1) (a) of the Government Lands Act. They relied on **Chauhan v Omagwa (1985) KLR** where the court dispelled the notion that a transferee of land can plead first registration under Section 143 of the Registered Land Act (repealed). Secondly, the court observed that once fraud is proved against the first registered owner, it does not matter that no wrong doing can be established against the transferee. Reliance was placed on **Republic v Minister for Transport & Communication & 5 others Ex parte Waa Ship Garbage Collector & 15 others Mombasa HCMCA No. 617 of 2003 [2006]1 KLR**

(E&L) 563 where Maraga J held that a democratic society holds public land and resources in trust for the needs of that society.

11. It was further submitted that under Article 40 (1) rights don't extend to any property that has been unlawfully acquired. Counsel added that the only remedy available to the applicant is to sue for recovery of damages against the person who acquired interest through fraud, error or misdescription. It was further submitted that the mandatory injunction sought against the 1st defendant requiring the 1st defendant to register all pending and future transfers of units erected on the suit properties should not be granted because the suit properties are public land meant for expansion of Pumwani Maternity Hospital. Reliance was placed on the Court of Appeal decision in **Kenya National Highway Authority v Masood Mughal & 5 others (2017) eKLR**.

12. I have considered the originating summons together with the supporting affidavits. I have also considered the replying affidavits by the respondents. Similarly, I have considered the constitutional and legal framework applicable to the key issues in the suit and the relevant jurisprudence. Three key issues fall for determination in this originating summons. The first issue is whether the Registrar was justified in registering the restrictions against the titles. The second issue is whether the restrictions (caveats) dated 8/5/2012 are rendered null and void by dint of the fact that the Registrar purported to claim interest under Section 116(1) of the Government Lands Act which ceased to exist on 2/5/2012. The third issue is whether failure to promptly notify the plaintiff about the restrictions renders the restrictions null and void. I will deal with the three issues in that order.

13. The first issue is whether the Registrar was justified in registering the restrictions against the titles. The case of the plaintiff is that he is an innocent purchaser for value without any notice of any fraud or irregularity hence his titles are protected under Article 40 of the Constitution and Section 26 of the Registration of Titles Act. The case of the respondents is that the suit properties were acquired by the Government from P. A De Souza in 1967 and transferred to the City Council of Nairobi in 1967 for the expansion of Pumwani Maternity Hospital. They contend that acquisition of the suit properties by R S Wambugua t/a Sunrise Reprographics, R S Wambugu t/a Pantinya Enterprise and Francis Mburu Kimani t/a Wakanoru Construction Company was irregular and unlawful in that: (a) no applications were made by the purported allottees for allocation of the suit parcels; (b) there were no minutes or resolutions from the Town Planning Committee to approve the applications; (c) there were no minutes or resolutions from the Full Council Meeting adopting the resolution by the Town Planning Committee, in the case of an approval; (d) there was no approval sought from the Minister for Local Government which would ensue from the resolution by the full Council meeting; (e) no valuation were conducted to determine the stand premium and other requisite fees for the aforesaid parcels; (f) no ministerial consent was obtained for the sale of land reserved for the specific purpose contrary to Section 144(6) of the Local Government Act (Repealed).

14. It is therefore the position of the respondents that the titles held by the plaintiff are not indefeasible since the root of those titles is marred with irregularities and illegalities. They contend that under Section 144(6) of the repealed Local Government Act, no valid title could pass in respect of the suit properties without the consent of the Minister for Local Government. They have urged the court to let the restrictions stay in place to give the 3rd respondent time to conclude its investigations.

15. The basis upon which the Registrar placed the caveats is contained in the 3rd defendant's letter dated 14/3/2012 which reads as follows:

EACC.6/16/1 VOL. VIII(6)

14/3/2012

The Chief Land Registrar

Ministry of Lands Ardhi House

P O Box 3045 -00100

NAIROBI

RE: CAVEATS FOR LR NOS 36/VII/253; 254; 255,256; 257; 258; 259 AND 260.

Our earlier letter to the Permanent Secretary Ministry of Lands reference KACC/INV.6/16/1/VOL XCV/(2%) DATED THE 2ND June, 2011 (copy attached) refers. The Ethics and Anti-corruption Commission (EACC) has been conducting investigations into allegations of irregular allocations and subsequent transfers (disposal) of the above parcels of land.

Investigations so far have established that these eight (8) portions of land off Munami Road in Eastleigh were purchased (acquired) by the City Council of Nairobi in the late 60s' and early 70s' and set aside for the expansion of the Pumwani Maternity Hospital. The parcels have since been irregularly "allocated"/sold to individuals who are putting up building on the plots. It is appalling that on one of the disposed lands (LR. No 36/VII/253) stands a residential flat housing staff of the City Council's Pumwani Maternity Hospital.

On establishing investigations are underway, some of the beneficiaries have gone ahead and charged their properties. To protect the interest of the public, EACC seeks the urgent placing of caveats on the eight (8) properties as we endeavor to accomplish our investigations.

Kind regards.

M. K. Bosire

for: Ag. SECRETARY/CHIEF EXECUTIVE

Copy:

Hon Minister

Ministry of Lands

Permanent Secretary

Ministry of Land

Commissioner of Lands

Ministry of Lands

MKB/fmm

16. It is now settled jurisprudence in our land justice system that where private title to public land has been acquired and that title is challenged, it is not enough for the title holder to waive the impugned title. The holder of the title to what hitherto was public land is obligated, in the circumstances, to demonstrate that the title he is waiving was acquired regularly and lawfully.

17. The Court of Appeal reiterated this position in **Chemey Investment Limited v Attorney General & 2 others (2018) eKLR** as follows:

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 Shalim 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.

18. The plaintiff in this suit has not placed before court any material to demonstrate how the suit properties which were public properties were subsequently converted into private properties. I will however not make conclusive pronouncements on the validity of the plaintiff's titles because at the moment this court is seized of an originating summons ostensibly taken out under Section 78 of the Land Registration Act which deals with the question as to whether or not the impugned restrictions should be vacated. It is anticipated that at a proper forum, conclusive pronouncements on the validity of the impugned titles held by the plaintiff will be made. It suffices to state in the present suit that, in the absence of evidence on how the subject public land became private property, the 1st and 3rd respondents were justified in placing the impugned restrictions against the subject titles. It is understood that the said restrictions were procured, firstly to protect public interest because the suit properties were being charged to financial institutions; and secondly, to allow the 3rd respondent sufficient time to investigate the titles and make appropriate statutory decisions. In my view, these were valid reasons. It is however expected that the 3rd defendant will complete investigations and make statutory decisions within reasonable time so that the fate of the impugned titles is determined. It is therefore this court's finding that the Registrar was justified in placing the impugned restrictions.

19. The second issue is whether the restrictions dated 8/5/2012 are rendered null and void by dint of the fact that the Registrar purported to claim interest under Section 116(1) of the repealed Government Lands Act which had ceased to exist on 2/5/2012. It is not in contest that the Government Lands Act was repealed by the time the impugned restrictions were registered. It is also not in dispute that the Land Registration Act which repealed the Government Lands Act came into force five days before the Registration of the caveats. The legal framework in Section 116 of the repealed Government Lands Act which previously empowered the Registrar to place restrictions on land was reproduced under Section 76 of the Land Registration Act. It is therefore clear that the Registrar had statutory powers to place the impugned restrictions on the titles. In my view, failure to quote the correct section of the empowering statute is a minor error which can be cured through a variation order within the framework of Section 78 of the Land Registration Act. In this regard, the variation order will require the Registrar to vary the caveats by quoting the correct provisions of the prevailing law.

20. The last issue is whether failure to promptly notify the plaintiff about the restrictions renders the restrictions null and void. The requirement for notification of a restriction is contained in Section 77(1) of the Land Registration Act which provides as follows:

“77(1) The registrar shall give notice, in writing of a restriction to the proprietor affected by the restriction.”

21. From a plain reading of the above framework, there are no statutory time lines within which the Registrar is required to give notice to the proprietor. Under Section 58 of the Interpretation and General Provisions Act, in the absence of statutory timelines, the Registrar was expected to give notice without unreasonable delay. There is however no evidence that notice was ever given. However, taking into account the gravity of the allegations leading to the placement of the caveats and considering the public interest involved in the alleged irregular disposal of public properties, I do not consider it appropriate to vacate the caveats on account of the Registrar's failure to give prompt notice. In my view, the prejudice occasioned by this particular omission can be properly indemnified through an award of damages in an appropriate action.

22. Lastly, the plaintiff has prayed for declaratory and injunctive orders sought in the present originating summons. The originating summons was ostensibly taken out under Part VII of the Land Registration Act. This court exercises jurisdiction to vacate or vary

restrictions within the framework of Section 78(2) of the Land Registration Act. That jurisdiction does not include grant of the declaratory and injunctive orders sought by the plaintiff in this suit. In my view, to get the declaratory and mandatory injunctive orders, the plaintiff ought to move the court through a proper forum where evidence will be led before a determination is made.

Disposal Orders

23. In light of the above findings, I make the following orders in disposing the originating summons herein:

a) The plea for declaratory orders conferring ownership of the suit property is declined because an originating summons taken out under Sections 116 (s) of the Government Lands Act (repealed) as read together with Sections 76, 77 and 78 of the Land Registration Act is not the proper forum for exercise of that jurisdiction.

b) The plea for immediate removal of the caveats registered against the suit properties by the Land Registrar is declined.

c) The said caveats shall be amended/varied within 60 days to reflect the correct corresponding legal provision within the Land Registration Act.

d) The said caveats shall remain in force for a period of twelve (12) months during which period the 3rd defendant shall complete investigations and discharge its mandate under the law.

e) Upon expiry of 12 months from today, the said caveats shall stand vacated and, in the absence of any preservative order duly issued by a court of law, the petitioner shall be at liberty to register dealings on the said titles.

f) Because of the history of this dispute and the nature of the above disposal orders, each party shall bear their respective costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 12TH DAY OF FEBRUARY 2019.

B M EBOSO

JUDGE

In the presence of:-

Ms Jemutai holding brief for Mrs Litoro Advocate for the Applicant

Court Clerk - June Nafula