



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL CASE NO. 141 OF 2010

JOHN PETER KAMAU RUHANGI.....PLAINTIFF

VERSUS

KENYA FOREST SERVICE.....DEFENDANT

JUDGEMENT

1. By a plaint dated 24th March 2010 the plaintiff has sued the defendant seeking:-

(a) A permanent/perpetual injunction restraining the defendant, its servants or agents from trespassing or interfering with the plaintiff's quiet enjoyment of the suit property.

(b) General and exemplary damages, the exact amount to be determined at the hearing of this suit.

(c) Cost of the suit and interest at court rates.

(d) Such other or further relief as this court may deem fit to grant.

2. Upon being served with copies of plaint and summons to enter appearance the defendant filed a statement of defence dated 28th June 2012 and filed in court on 29th June 2012.

3. PW1 John Peter Kamau Ruhangi the plaintiff, told the court that he is the registered owner of LR 17942 situated along Nairobi Kiambu road. He told the court that there was no objection from the Commissioner of Lands and transfer was effected in his name. That in the year 2010 the defendant started interfering with occupation of the suit property despite not having registered any interest on the property. He prays that the prayers in the plaint be allowed.

4. The defence called one witness, DW1 Evans Kegode told the court he is the head of survey and mapping at the defendant's corporation. He told the court that the suit property is within Karura forest which is a gazetted forest. He produced a map showing the extent of the forest as exhibit. Further that the portion between the old and new Kiambu road did not cease to be forest land. There was no legal notice degazetting the same. The suit property being one of the titles recommended in "the Ndung'u Report" for revocation. He prays that the plaintiff's suit be dismissed with costs.

5. At the close of the plaintiff's and defence case the parties put in written submissions.

The Plaintiff's submissions

6. The plaintiff purchased the suit property LR NO. 17942 (IR NO 57926) for value from the original registered owners Mr. Sandul Singh Viridi and Gursharan Kaur Viridi for a sum of Kshs.2,500,000. The parties entered into a sale agreement on 11th August 2006 and later signed a transfer on 30th July 2007 which was duly registered. The Commissioner of Lands gave the necessary consent to the said transfer. The plaintiff then took possession of the suit property. He has charged the property to secure a loan from Equity Bank Limited whereof the necessary consent was given and the charge document was legally registered.

7. The suit property lies on the old Kiambu road. This is as a result of the government notice No.237 of 1951 which degazetted the said area as a forest where the Nairobi Kiambu Road was to be constructed. The area ceased to be a gazetted forest area. The National Land Commission has not made any determination with respect to the suit parcel of land; that the title be revoked nor has the Registrar of Title been directed to revoke the plaintiff's title.

8. The plaintiff sought various approval from the ministry of lands and various other government departments before he was allocated the property. His right to property is enshrined under Article 40 of the Constitution. The defendant's unlawful action of fencing off the suit property was meant to block the plaintiff from accessing the suit property.

9. The defendant has not laid any claim on the adjacent properties which are currently developed by private individuals. He has put forward the case of **Commissioner of Lands vs Kunste Hotel Limited [1997] eKLR**. The defendant is not entitled to lay claim on the suit property. It has no counterclaim seeking to be declared the owner of the suit property. He prays that the prayers in the plaint be allowed.

The Defendant's submissions

10. The purported allocation of land to the original owners was coloured on fraud and illegality. The suit property was part of Karura Forest and being forest land was prior to the enactment of the Forest Act, 2005 vested on the Ministry of Lands and Natural Resources. There is no indication that any consultation was done with the said ministry prior to the allocation of the title.

11. Upon enactment of the Forest Act 2005, the defendant was vested with the authority over the Karura Forest. The defendant did not need to register any interests in the forest since its mandate over the forest was by virtue of an Act of parliament granting the said mandate over forests demarcated and gazetted as aforesaid.

12. It was incumbent on the plaintiff to carry out due diligence prior to any such acquisition of the property. The defendant has put forward the cases of **Daniel Maina Kibage (Duly Registered Attorney of Gabriel Githaiga) vs Kenya Forest Service (unreported); Munyu Maina vs Hiram Gathiha Maina (2013) eKLR; Lazarus Estates Limited vs Beasley [1956] 1ALL ER 341 at 193**.

13. The defendant has been in possession of the property before and after the ruling of the court on 18th October 2010. The plaintiff has failed to demonstrate to the court his rightful ownership of the suit property.

14. I have considered the pleadings, the evidence on record, the written submissions of counsel and the authorities cited. It is not in dispute that the plaintiff is the registered owner of LR Number 17942 having bought the same from Mr. Sardul Singh Viridi and Gursharan Kaur Viridi. It is also not in dispute that the suit property was part of Karura Forest. It is also not in doubt that the defendant has fenced off the suit property. The issues for determination are:-

(i) Whether or not the suit property is part of Karura Forest.

(ii) Whether or not the suit property was available to the Commissioner of Lands for allocation.

(iii) Whether or not the allocation of the suit property to the plaintiff by the commissioner of lands was illegal.

(iv) Whether or not the defendant trespassed on the suit property.

15. It is the defendant's contention that Karura Forest is a state forest measuring 2580 acres (1044.11 Ha) as originally declared by proclamation No.44 of 1932 and further declared to be a central Forest by Legal Notice NO.174 of 20th May 1964. He produced copies of the proclamation and legal notice as exhibits. DW1 stated that the suit property falls within the forest boundaries. He produced a copy showing the boundaries of the forest and a copy of the boundary plan no.75/7 delineating Karura Forest Reserve. The suit property is sandwiched between the old and new Nairobi Kiambu road. The suit property remains part of Karura forest and has never been degazetted to date.

16. It is the defendant's further contention that there has never been any lawful excision of a part of the forest measuring approximately 0.8651 Ha nor has such a portion been made available to the commissioner of lands for allocation. The commissioner of lands had no authority to alienate gazetted forest in disregard of the provisions of the Forest Act 2005.

17. The plaintiff claims that the necessary approvals were given before the suit property was transferred to his name. He mentioned the Ministry of Public Works and the Director of City Planning. I note that these officers had nothing to do with the suit property which was part of Karura forest. The relevant body which ought to have been consulted was the Ministry of Natural Resources which had the mandate to manage forests. The plaintiff in his testimony told the court there was a caveat on the said title but the same was removed after he wrote a letter to the Chief Land Registrar. I have seen a copy of the said register. The caveat had been placed by the Registrar of Titles. There must have been a reason for this. I find that the suit property is part of Karura Forest. The same not having been degazetted means the same was not available for alienation.

18. The suit property was not available for allocation and or transfer to the plaintiff as there was no legal notice declaring that the same had ceased to be forest land and remains public land in the hands of the defendant in trust for the people of Kenya. Any alienation done to a private person by the commissioner of lands was null and void.

19. Section 26(1) of the Land Registration Act 2012 provides that:-

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme”

Having stated earlier that the suit property was not available to the commissioner of lands to alienate to private persons, the plaintiff cannot claim to have indefeasible title. In the case of **Munyu Maina vs Hiram Gathiha Maina [2013] eKLR** the Court of Appeal held;

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is the 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”

20. I find that the allocation of the suit propter to private persons and the subsequent transfer to the plaintiff was illegal. Under Article 40 (6) of the Constitution Protection of the right to property does not extend to land that is found to have been unlawfully acquired. The plaintiff ought to have been reasonably aware in view of the land being part of Karura forest that the same was not available for allocation or purchase.

21. The suit property is part of Karura forest and the defendant is in active exercise of its statutory functions to conserve, protect and manage the said forest including the portion that is comprised of the suit property. The defendant cannot be said to have trespassed on the suit property.

22. All in all, I find that the plaintiff has failed to prove his case on a balance of probabilities as against the defendant. He has failed to demonstrate to the court his rightful ownership of the suit property. The title to the suit property was acquired fraudulently and illegally. It is therefore null and void. The plaintiff is therefore not entitled to any prayer of injunction and for general and exemplary damages. I hereby dismiss his suit with costs to the defendant.

It is so ordered.

Dated, signed and delivered in Nairobi on this 30TH day of APRIL 2019.

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L. KOMINGOI

JUDGE

In the presence of:-

Mr. Kariuki Advocate for the Plaintiff

Mr. Ochieng for Ms Mwanzila Advocate for the Defendant

Kajuju-Court Assistant