



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 215 OF 2013

JARED BENSON KENAGWA PLAINTIFF

VERSUS

KENYA AGRICULTURAL RESEARCH INSTITUTE (KARI) DEFENDANT

J U D G M E N T

1. The Plaintiff commenced this suit by way of plaint dated 13th May 2013 filed in Court on the same date. The Plaintiff averred that he was the registered proprietor of **LR No. 17666** situate within Kisii Municipality within Kisii County measuring approximately 2.032 Hectares (hereinafter referred to as **“the suit land”**). The Plaintiff stated that in April 2013 the defendant without any just cause prevented the Plaintiff from carrying out developments he intended on the suit land precipitating the present suit. The Plaintiff sought judgment against the Defendant for:-

(a) A permanent injunction restraining the Defendant, its employees, servants and/or agents and any other person acting or purporting to act on behalf of the Defendant from stopping, barring, interrupting and/or interfering in any manner whatsoever with the Plaintiff’s possession, ownership and/or development of the properties known as LR No. 17666.

(b) Costs of the suit plus interest.

(c) Any other or further relief as the Court may deem fit to grant.

2. The Defendant filed a statement of defence dated 21st June 2013 on 25th June 2013. The Defendant denied the Plaintiff was the registered proprietor of the suit land and asserted that if the Plaintiff had a grant to the suit land the same was obtained irregularly and illegally and should be cancelled. The Defendant further averred that the Commission of Inquiry into illegal/irregular allocation of public land (Ndungu Report) had faulted the allocation of the suit land to the Plaintiff. The Defendant prayed for the dismissal of the Plaintiff’s suit and declaration that the suit land belongs to the Defendant.

3. The Plaintiff at the time of filing suit simultaneously filed together with the plaint an interlocutory application praying for a temporary injunction against the Defendant restraining them from in any manner interfering with the Plaintiff’s possession, ownership and development of the suit land. Upon the application being heard inter partes, Hon. Justice Okong’o granted the Plaintiff the injunctive order pending the hearing and determination of the suit on the basis that the Plaintiff had established a prima facie case with a probability of success and that he was likely to suffer loss and damage that was irreparable if the injunction was not granted.

4. The suit was on 14th November 2018 fixed for hearing on 18th March 2019 in the presence of both counsel for the Plaintiff and the Defendant. On 18th March 2019 only the Plaintiff’s counsel and the Plaintiff attended court. There was no attendance by either the Defendant’s counsel or the Defendant and there was no reason proffered for their absence. At the request of the Plaintiff, I permitted the hearing to proceed ex parte.

5. The Plaintiff testified as the sole witness in support of his case. As his evidence, the Plaintiff adopted the witness statement made on 13th May 2013 filed together with the plaint. The Plaintiff’s evidence was to the effect that he applied to the local committee to be allocated land in 1991 and that his application was approved and he was allocated land which was subsequently surveyed and he was issued with a grant number **IR 58488** of **LR No. 17666** dated 8th April 1993. The Plaintiff produced the copy of the certified grant as **“PEX.1”** and the copy of the deed plan attached to the grant as **“PEX.2”**. The Plaintiff explained that he did not at any time deal with the Defendant but dealt with the Government who allocated him the suit land.

6. The Plaintiff testified that he took possession of the land and built a temporary house for workers and fenced the land after the beacons had been identified. The Plaintiff however stated that when he wanted to carryout permanent development in 2013, the Defendant resisted and started laying claim of ownership to the land precipitating the filing of the instant suit. The Plaintiff further stated the National Land Commission (NLC) had intended to investigate the propriety of the title issued to the Plaintiff but when the pendency of the present suit was

drawn to their attention they ceased carrying out the investigations. The Plaintiff produced Kenya Gazette Notice No. 11043 of 10th November 2017 (“**PEx.3**”) which indicated that the NLC had stayed their recommendation to revoke the Plaintiff’s title to the suit land pending the decision of the Court in the present suit. The NLC was not a party in the present case.

7. The Defendant as indicated earlier in this judgment did not tender any evidence at the trial. Other than the replying affidavit dated 21st June 2013 sworn by Oscar Magenya in opposition to the Plaintiff’s interlocutory application for injunction the record does not show that the Defendant filed a witness statement and/or bundle of documents. Where a defendant offers no evidence at the hearing, the statement of defence remains merely as a statement of facts that are unproven. In the present case, the evidence by the Plaintiff remains uncontroverted. The issue that stands to be determined is whether on the evidence tendered by the plaintiff the plaintiff has proved his case on a balance of probabilities so as to be entitled to the orders sought.

8. There can be no dispute that the Plaintiff is registered as proprietor of **LR No. 17666** situate within Kisii Municipality. The Plaintiff tendered in evidence a copy of the registered grant (“**PEx.1**”) which was duly certified to be a true copy of the original by the Land Registrar on 17th April 2013. The grant attests that it was made for consideration by the President of the Republic of Kenya to the Plaintiff. The grant was for a term of 99 years from 1st September, 1992 at the annual rent of kshs. 60,000/= per annum. The Plaintiff exhibited a rent clearance certificate number 312591 dated 2nd May 2013 signifying he had been paying the reserved land rent from the time he was registered as owner. Section 23(1) of the Registration of Titles Act, Cap 281 Laws of Kenya (now repealed) under which the grant was registered provided:-

23. (1) The certificate of Title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.

The Land Registration Act, 2012 which replaced the repealed Land Acts under Section 26(1) provides:-

26. Certificate of title to be held as conclusive evidence of proprietorship

(1) 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.

9. Having regard to the above referred to legal provisions, the registration of a person and issue of title to him confers upon such person absolute rights of ownership which are indefeasible. The title of a registered proprietor is not subject to challenge except on the ground of fraud and/or misrepresentation and/or if it is shown the issuance of the title was unprocedurally or illegally obtained or was a product of a corrupt scheme of which the registered owner is shown to have been a party. The Constitution of Kenya under Article 40 protects right to property unless the property is shown to have been unlawfully acquired in which case Article 40(6) takes away such protection.

10. In the instant case, although the Defendant has in its defence alluded that the plaintiff obtained the grant to the suit land illegally and/or irregularly no particulars of the alleged illegality and/or irregularity were pleaded and no evidence of any such illegalities or irregularities was adduced. Essentially, the Defendant was insinuating that the Plaintiff obtained title to the suit land fraudulently. The burden of proof lies on he who alleges to prove. Needless to state, the burden of proof where fraud is alleged in a civil matter is higher than proof on a balance of probabilities which is the standard in usual cases. Fraud is a serious allegation that borders on criminality and the threshold for proof is a notch higher than the proof required in ordinary civil cases though not as high as to require proof beyond a reasonable doubt as in criminal cases.

11. In the case of **Viran t/a Kisumu Beach Resort -vs- Phoenix of East Africa Assurance Co. Ltd [2004] 2KLR 269** the court stated:-

“...Fraud is a serious quasi-criminal imputation and it requires more than proof on a balance of probability though not beyond reasonable doubt. Sufficient notice and particulars must therefore be supplied to the party charged for rebuttal of such allegations...”

Thus mere allegations of fraud will not suffice and there must be tangible evidence to support any such allegations. In the present case, the Defendant’s allegations of illegalities, irregularities and/or fraud remain just mere allegations which are not supported by any evidence.

12. The Plaintiff in his evidence stated that in 1991 he applied to be allocated a plot in Kisii Municipality and after due consideration was allocated the suit land. After satisfying the terms of the allotment the land was surveyed and a title was processed in his favour and he was registered and issued with a grant for the suit land on 8th April 1993. There is no evidence to show that the Plaintiff did not follow due process in acquiring the suit land. There is no evidence that he colluded with anybody to be allocated the land and in the premises it is my holding and finding that he was validly allocated the land and there is no evidence on record upon which the title he was issued for the land can be impeached.

13. The National Land Commission have mandate under Article 68 of the Constitution and Section 14 of National Land Commission Act,

2012 to investigate the propriety of title and dispositions of public land. However, the National Land Commission has to follow due process in executing such mandate having due regard to the provisions of Article 47 of the Constitution and Section 4 of the Fair Administrative Action Act 2015 which require that persons be subjected to fair administrative action where administrative action taken by an authority is likely to be prejudicial to their interests. In the present case, the National Land Commission was not a party and the determination of the case would have no bearing on them.

14. On the basis of the evaluation of the evidence tendered in this matter, I am satisfied and hold that the Plaintiff has proved his case on a balance of probabilities against the Defendant. I accordingly enter judgment in favour of the Plaintiff and against the Defendant in terms of prayers (a) and (b) of the Plaint.

15. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED AT KISII THIS 24TH DAY OF MAY 2019.

J. M. MUTUNGI

JUDGE