



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

KERICHO ELC NO. 53 OF 2014

KIPSIGIS TRADERS LIMITED.....PLAINTIFF

VERSUS

MWANGI MUHERIA.....1ST DEFENDANT

HON ATTORNEY GENERAL.....2ND DEFENDANT

AND

NATIONAL LAND COMMISSION.....2ND DEFENDANT IN THE COUNTERCLAIM

JUDGMENT

Introduction

1. This suit relates to the ownership of two parcels of land within Kericho town namely; L.R NO. KERICHO MUNICIPALITY/ BLOCK 5/441 and NO. KERICHO MUNICIPALITY/ BLOCK 5/442. The said parcels of land were originally Government land occupied by the Department of Culture and Social Services on which staff quarters for Kericho Vocational and Rehabilitation Centre were erected before they were allocated to an individual who in turn sold them to the Plaintiff. In his Amended plaint dated 13th May 2015 the Plaintiff has sued the 1st Defendant seeking the following reliefs:

(a) A Declaration that the Plaintiff is the sole registered proprietor of L.R NO. KERICHO MUNICIPALITY/BLOCK 5/441 and BLOCK 5/442.

(b) A Declaration that the 1st Defendant is a trespasser on the Plaintiff's aforesaid parcels of land.

(c) An Order of eviction be issued against the 1st Defendant.

(d) A permanent injunction restraining the 1st Defendant, his agents and servants from entering and remaining in the suit lands or in any manner interfering with the Plaintiff's exclusive use and possession of the said parcels of land.

(e) The Defendants jointly and severally pay the Plaintiff massive (sic) profits of Kshs. 720,000 being the sum of unpaid rent since January 2003 to date at the rate of Kshs 5,000 per month.

(f) Costs of the suit.

(g) Interest on (e) above from the year 2003.

2. The 1st and 2nd Defendants filed an Amended Defence and Counterclaim dated 29th December 2016 in which they deny that the Plaintiff is the registered owner of the suit properties as they form part of the institutional staff quarters for Kericho Vocational and rehabilitation Centre and that the purported allocation and subsequent registration of the same to the Plaintiff was unlawful and irregular. The 1st Defendant maintains that he is occupying the suit property by virtue of his employment in the Ministry of East African Community, Labour and Social Protection.

3. In their Counterclaim against the Plaintiff and the National Land Commission, the 1st and 2nd Defendants reiterate that the suit properties

are public lands set aside for use by the Ministry of East African Community Labour and Social Protection and that any purported allocation to the Plaintiff is unlawful and irregular. They pray for the following orders:

- a) *A declaration that the parcels of land known as L.R NO. KERICHO MUNICIPALITY/BLOCK 5/441 and BLOCK 5/442 respectively are public lands set aside for staff quarters of Kericho Vocational and Rehabilitation Centre.*
- b) *Cancellation/ revocation of the title documents purportedly issued to the plaintiff with respect to the parcels of land aforesaid.*
- c) *A permanent injunction restraining the plaintiff by himself, and/or his servants from interfering with the 1st Defendant's and other public officers' peaceful occupation of the parcels of land aforesaid.*
- d) *Costs of the suit.*

4. In its Defence the National Land Commission which is the 2nd Defendant in the Counterclaim associates itself with the 1st and 2nd Defendant's claim against the Plaintiff by reiterating that the suit properties are public lands in occupation and use by a public entity and supports the orders sought in the Counterclaim.

5. In its Defence to the Counterclaim dated 9th February 2017, the Plaintiff refutes the contents of the Counterclaim and states that the staff quarters for Kericho Vocational and Rehabilitation Centre are separate and distinct from the suit properties as they are separated by an access road. It further states that the National Land Commission is not a necessary party to the proceedings.

6. The case proceeded for hearing on various dates between 13th November 2017 and 28th January 2019.

Plaintiff's case

7. The Plaintiff called one of its directors Prakash Patel who testified as PW1. He relied on his witness statements dated 6th October 2014 and 15th February 2017. He produced the Plaintiff's bundles of documents filed on 6th October 2014 and 15th February 2017 as his exhibits.

8. In his oral testimony, he stated that the Plaintiff purchased the suit properties in 1994 pursuant to a sale agreement between itself and John Kauria and Musyimi Muthoka who were the original allottees thereof at a purchase price of Kshs. 800,000 and Kshs.900,000 respectively. The Plaintiff was subsequently registered as the proprietor of the suit properties under the Registration of Titles Act on 1st March 1995. The same were later converted to Lease Certificates under the Registered Land Act (repealed) in 2014 upon payment of Kshs. 448,000 being the value of the houses to the Commissioner of Lands. He stated that the houses are occupied by officers from the Department of Culture and Social Services.

9. Upon cross-examination by counsel for the 1st and 2nd Defendants, PW1 stated that the Plaintiff had not received any letters cancelling or nullifying the Plaintiff's title. The plaintiff did not produce the letters of allotment or sale agreements. He said he was not aware that the allocation of the suit properties had been cancelled. Upon cross-examination by counsel for the National Land Commission, he stated that even though there was a requirement that the properties be advertised before sale, he did not see any advertisement. He stated that before he paid for the two properties, he did not see any surrender of the same to the Ministry concerned. He said that the Plaintiff had never taken possession of the houses since they were purchased.

Defendant's case

10. The Defendant called two witnesses. The 1st Defendant who testified as DW1 relied on his witness statement and produced the Defendant's bundle of documents filed on 24.2.2016. He stated that he had been allocated the house by virtue of being the Manager of Kericho Vocational and Rehabilitation Centre. He stated that he was aware that five residential houses belonging to the Rehabilitation Centre had been allocated to private developers. He indicated that the other three houses on the suit property were occupied by Government officers who had not been sued. He stated that he pays a monthly rent of Kshs. 2,500 to the Government of Kenya. He stated that the Plaintiff had tried to evict him using auctioneers but he was stopped by an order of the court. He stated that he was of the view that the Plaintiff's documents were not acquired legally.

11. Upon cross examination he stated that he did not know if the suit properties had been singled out in the Ndungu report as having been illegally acquired. In re-examination he confirmed that the letter dated 27.9.99 in the Defendant's list of documents indicates that the allocation was irregular. He stated that the suit properties were listed in the Orengo report as having been illegally acquired.

12. DW2 who is the County Director of Housing testified that the suit property belongs to the Government and that the Ministry of Housing continues to collect rent from the officers occupying the houses on the suit property by virtue of being civil servants. He confirmed that the houses had never been deleted from the Government records as happens when Government houses are off-loaded. He stated that the houses were constructed in 1979 by the Ministry of Public Works on behalf of the Ministry of Culture and Social Services.

13. After the Defendants closed their case the parties were given time to file their submissions and submissions were filed on behalf of the Plaintiff, 1st and 2nd Defendants.

Issues for determination

14. Having considered the pleadings, evidence and rival submissions the following issues fall for determination:

- i. Whether the Defendants failed to comply with the provisions of Order 2 Rule 4 of the Civil Procedure Rules.
- ii. Whether the Plaintiff has good title to the suit properties
- iii. Whether the 1st Defendant is properly sued in this matter
- iv. Whether the Plaintiff is entitled to the reliefs sought in the main suit.
- v. Whether the 1st Defendant is entitled to the reliefs sought in the counterclaim.

Analysis and Determination

15. With regard to the first issue, it has been submitted by counsel for the Plaintiff that the Defendants did not comply with the mandatory provisions of Order 2 Rule 4 of the Civil Procedure Rules as they failed to plead and particularize the allegations of fraud attributed to the Plaintiff and their pleading are therefore defective and unsustainable. In support of this proposition, counsel cited the case of **Bruce Joseph Bockle v Cocquero Limited (2014 eKLR)**. He further cited the case of **Maithehe Malindi Enterprises Limited v Kaniki Karisa Kaniki & 2 Others (2018) eKLR** where the Court of Appeal relied on the case of **Vija Morjaria v Nansingh Madhusingh Darbar & Another (2000) eKLR** for the proposition that fraudulent conduct must be distinctly alleged and distinctly proved and it is not allowable to leave fraud to be inferred from the facts.

16. I have looked at the 1st Defendant's Further Amended Statement of Defence and Counterclaim filed on 3rd January 2017 and what is pleaded at paragraph 16 thereof is that the suit properties were set apart for use by the Ministry of Labour, Social Security and Social Services (Now Ministry of East Africa Community, Labour and Social Protection) for staff quarters of Kericho Vocational and Rehabilitation Centre by the Municipal Council way back in 1972 and therefore any purported allocation to the Plaintiff is unlawful and irregular. The 1st Defendant's main claim against the Plaintiff is that he is challenging the legality of the purported allocation of the suit property to the plaintiff in view of the fact that it was not unalienated public land. The instant case is therefore distinguishable from the above cited cases.

17. The second issue for determination is whether the Plaintiff has good title to the suit properties. Counsel for the 1st and 2nd Defendants submitted that the allocation of the suit properties to the Plaintiff without following the laid down procedures was illegal, null and void. She submitted that the procedure for allocating plots in urban areas and off-loading government houses was not followed. She submitted that the houses had not been surrendered by the Ministry of Culture and Social Services which led to correspondence between the Ministry of Culture and Social Services and the Ministry of Lands and Settlement over the irregular sale. The letter dated 9th February 2001 in the Defendants' list of Documents clearly indicates what transpired and confirms that in December 1996, the Ministry of Culture and Social Services complained that their Land had been allocated irregularly leading to caveats being registered on 23rd September 1999 as it was found that there was no indication that the developments on the said land had been paid for. The letter goes on to state that the District Physical Planner had been informed to identify alternative land for the allottees and the area to be retained by the Kericho Vocational Rehabilitation Centre. The Town Clerk was also informed not to approve any Building Plans for the plots.

18. Counsel further submitted that the letter dated 10th July 2003 written by one M .M Kanake (Ms) on behalf of the Commissioner of Lands addressed to the District Lands Officer, Kericho cancelled the allocation of the plots. This therefore meant that the Certificates of Lease issued to the Plaintiff on 12th February 2014 were issued irregularly as there were no allocations in existence. This was confirmed by the PW1 when he admitted that he did not have any documents in support of the transfer of the suit properties from the previous owner. Counsel submitted that the payment of Kshs. 448,000 made by the plaintiff pursuant to a letter dated 11.12.2001 from the Ministry of Lands was merely intended to sanitize an illegal process. This is because the payment was made long after the titles had been issued to the Plaintiff.

19. Counsel cited the case of **Daudi Kiptugen V Commissioner of Lands (2015) eKLR** where Justice Munyao Sila stated as follows:

“In order to determine the question whether the lease held by the plaintiff is valid, it must be demonstrated that it was properly acquired. It is not enough that one waves a Lease or Certificate of lease and asserts that he has good title by the mere possession of the lease or Certificate of lease. Where there is contention that a Lease or Certificate of lease held by an individual was improperly acquired, then the holder thereof, must demonstrate, through evidence, that the Lease or Certificate of Lease that he holds, was properly acquired. The acquisition of title cannot be construed only in the end result, the process of acquisition is material. It follows that if a document of title was not acquired through the proper process, the title itself cannot be said to be a good title. If this were not the position then all one would need to do is to manufacture a Lease or Certificate of Title, at a backyard or the corner of a dingy street, and by virtue thereof claim to be the rightful proprietor of the land indicated therein. It is therefore necessary for this court to determine how the plaintiff ended up having a lease and Certificate of Lease in his name, and further to determine if the Government did intend to issue the plaintiff with a Lease over the suit land”

20. Counsel for the Plaintiff submitted that upon being registered as the owner of the suit land on 1st March 1995, the titles of the Plaintiff are protected by section 26(1) of the Land Registration Act, 2012. The said section provides as follows:

Section 26 (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”.

21. The crux of the matter is whether the Plaintiff holds good title to the suit properties. It is common ground that that the Plaintiff was issued with titles under the RTA which were later converted to a Certificate of lease under the Registered Land Act (repealed). Under section 3 of the Government Land Act Cap 280 of the Laws of Kenya (repealed) the President was authorized to make grants of any estate, interest or right over unalienated government land. The President’s powers were delegated to the Commissioner of Lands.

Part 111 of the said Act provides that:

“the Commissioner of Lands may cause any portion of a township which is not required for public purposes to be divided into plots suitable for the erection of buildings for business or residential purposes and such plots may from time to time be disposed of in the prescribed manner”

Any grants of government land were to be made in accordance with the provisions of the said Act.

22. One of the conditions was that the Physical Planner was to ascertain if indeed the land in question was available for allocation and advise the Commissioner of Lands before a letter of allotment could be issued.

23. In the instant case, it is not in dispute that the Plaintiff was issued with a grant over part of the land on which the Kericho Vocational and Rehabilitation Centre stands. The said Centre provides vocational training for persons with disabilities in Rift Valley and has been in existence since 1972. A site visit by the court in the presence of the parties and their advocates confirmed that the centre is operational. The house in which the 1st defendant is accused of trespassing is the one designated for the Manager of the Rehabilitation Centre and according to correspondence in the Defendant’s bundle of documents, it was constructed with government funds in 1979. It is therefore clear that the suit property was not unalienated land at the time it was registered in the Plaintiff’s name.

24. Counsel for the Plaintiff has argued that the land where the house stands is separated from the Rehabilitation Centre by a 12-meter road. That is neither here nor there as the land is still part of the Rehabilitation centre. The fact that there are other allottees of the same land whose titles have not been challenged does not lend credence to the Plaintiff’s title. The Plaintiff may not be entirely to blame as it may have been misled into believing that its title was lawful but the truth of the matter is that it did not acquire a good title.

25. In arriving at this finding I am guided by the case of **Norbixin (K) Ltd v Attorney General HCCC No. 1814 of 2002** where the court stated that the Commissioner of Lands must bear the blame for the predicament that has befallen the Plaintiff as the said office issued it with title to the suit property despite full knowledge that the property was reserved for a public utility.

26. The court declined to make orders in favour of the Plaintiff even though he had been given title because the Plaintiff’s allotment was irregular as the land was not available for allotment.

27. Similarly, in **Niaz Mohamed Jan Mohammed v Commissioner of Lands & 4 Others HCCC N. 436 of 1996** the Court held that land acquired in public Interest cannot be alienated and allocated to individuals. See also the case of **Ethics and Anti- Corruption Commission v Macharia Nbi ELC Case No. 310 of 2014 (2015) eKLR** where the court referred to the case of **Milankurman Shah & 2 Others v City Council of Nairobi HCCC No.1024 of 2005** where in addition to holding that public rights take precedence over private rights, the court declared that the 3rd plaintiff did not have indefeasible title having acquired that same through a process that was in violation of the Government Lands Act (repealed) I fully associate myself with the above decisions.

28. Counsel for the Plaintiff submitted that the Plaintiff’s titles ought to be protected by virtue of section 26 of the Land Registration Act 2012. He submitted that the defendants had not proved that the said title was acquired fraudulently. I am alive to the fact that fraud is not the only ground upon which a title can be impeached. Section 26 (1) (b) of the Land Registration Act provides that a title may be challenged on grounds that it was obtained **illegally, unprocedurally or through a corrupt scheme.**

29. In the case of **Alice Chemutai Too v Nickson Kipkurui Korir & 2 Others (2015) eKLR**, the Court relied on the case of **Makeri Nyangwara v Stephen Mungai Njuguna & Another** where it was held as follows:

“It needs to be appreciated that for section 26 (1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of section 26 (1) (b) is to remove the protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions”

30. Without implicating the Plaintiff in any fraud or corrupt scheme, it is my finding that the Plaintiff does not hold a good title as his title was not acquired procedurally since the suit property being land belonging to Kericho Vocational and Rehabilitation Centre was not available for allocation.

31. Moving on to the second issue, the Defendant raised a point of law that the suit as instituted contravenes the mandatory provisions of section 12 of the Government Proceedings Cap 40, Laws of Kenya. The said section provides as follows:

“Subject to the provisions of any other written law, Civil Proceedings by or against the Government shall be instituted by or against the Attorney General as the case may be.”

32. It is not in dispute that 1st Defendant in this case is the Manager of the Kericho Vocational and Rehabilitation Centre who is occupying one of the houses on the suit property by virtue of being a civil servant. It is only upon an application by the Hon. Attorney General to be enjoined in the suit that the 1st Defendant was saved from eviction. Counsel submitted that in view of the above provision of the law the suit against the 1st Defendant ought to be dismissed.

33. Counsel for the Defendants submitted that the Plaintiff sued the 1st Defendant in person instead of suing the Attorney General. In the circumstances, the suit does not lie and the same should be dismissed on that ground. Whereas I agree with counsel for the Defendants that according to section 12 A of the Government Proceedings Act it is the Attorney General who ought to have been sued, the anomaly was cured when the A.G was enjoined in the suit and at this late stage the question of misjoinder will not result in any prejudice against the 1st Defendant.

34. The third issue for determination is whether the Plaintiff is entitled to the reliefs sought. I note from the Amended Plaintiff that the first prayer sought by the Plaintiff is a declaration that the plaintiff is the sole registered proprietor of L.R NO. KERICHO MUNICIPALITY/BLOCK 5/441 and BLOCK 5/442. I have already made a finding that the plaintiff's titles are not valid and I need not belabour the point. In view of this finding, the 1st defendant cannot be said to be a trespasser on the suit property. As mentioned earlier in this judgment, the suit property was set aside for the Kericho Vocational and Rehabilitation Centre and the 1st Defendant, being its manager is entitled to stay in the Centre's institutional quarters. By the same token, the prayers for eviction and a permanent injunction to restrain the 1st Defendant from trespassing on the suit property and the prayer for mesne profits do not lie.

35. The upshot is that the Plaintiff has failed to prove its case on a balance of probabilities and it is hereby dismissed with costs to the Defendants. On the other hand, the Defendant's counterclaim succeeds. I there enter judgment for the Defendants on the counterclaim and make the following final orders:

a) A declaration is hereby issued that the parcels of land known as L.R NO. KERICHO MUNICIPALITY/BLOCK 5/441 and BLOCK 5/442 respectively are public lands set aside for staff quarters of Kericho Vocational and Rehabilitation Centre.

b) The titles in respect of L.R NO. KERICHO MUNICIPALITY/BLOCK 5/441 and BLOCK 5/442 issued to the Kipsigis Traders, the plaintiff herein are hereby cancelled and the Land Registrar, Kericho is directed to amend the register in respect of the said parcels of land accordingly.

c) A permanent injunction is hereby issued restraining the plaintiff by itself and/or its servants from interfering with the 1st Defendant's and other public officers' peaceful occupation of the parcels of land aforesaid.

d) The costs of this suit and counterclaim shall be borne by the Plaintiff.

Dated, signed and delivered at Kericho this 23rd day of May, 2019.

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J.M ONYANGO

JUDGE

In the presence of:

1. Mr. Migiro for the Plaintiff
2. Ms Sitati for Ms Langat for the Defendants
3. Court assistant - Rotich