



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC CASE NO. 809 OF 2003**

**TELPOSTA PENSION SCHEME .....PLAINTIFF**

**VERSUS**

**GEOFFREY NG'ANG'A NGUGI.....1<sup>ST</sup> DEFENDANT**

**COMMISSIONER OF LANDS .....2<sup>ND</sup> DEFENDANT**

**LAND REGISTRAR, KIAMBU.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**Introduction**

1. The Plaintiff instituted this suit against the Defendants on 30<sup>th</sup> July 2003. The Plaintiff was subsequently amended on 21<sup>st</sup> January 2015. In the Amended Plaintiff the Plaintiff seeks the following reliefs against the Defendants jointly and severally:

*(a) A declaration that the purported allocation and issuance of the title in favour of the 1<sup>st</sup> Defendant was fraudulent, illegal, wrongful, null and void*

*(b) An order directing the 3<sup>rd</sup> Defendant to cancel the title deed issued in favour of the 1<sup>st</sup> Defendant and issuance of a new title in favour of the Plaintiff*

*(c) Vacant possession of the suit property*

*(d) A permanent injunction restraining the Defendants whether by themselves or their agents and/or servants or otherwise from doing the following acts or any of them that is to say from interfering with the rights of possession, advertising for sale, disposing of, selling by public auction or otherwise howsoever at any other time or by completing by conveyance or transfer or any sale concluded by auction or private treaty, leasing, letting or otherwise howsoever interfering with ownership or title to and/or interest in ALL THAT piece of land known as Title No. KIKUYU TOWNSHIP/229.*

*(e) General damages.*

*(f) Costs of the suit.*

2. The 1<sup>st</sup> Defendant filed his Statement of Defence dated 6<sup>th</sup> October 2003 denying the claim.

3. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants filed their Statements of Defence dated 24<sup>th</sup> November 2003 also denying the Plaintiff's claim against them.

4. After some considerable delay the suit was set down for hearing on 9<sup>th</sup> November 2018 and each of the parties called their witnesses.

**Plaintiff's case**

5. Peter Kipyegon Rotich, the Plaintiff's Administrator and Trust Secretary who testified as PW1 relied on his witness statement dated 13<sup>th</sup> November 2012. The thrust of his evidence is that the L.R No KIKUYU TOWNSHIP/229 hereinafter referred to as the suit property was vested in the Plaintiff vide Legal Notice No. 154 of 1999 by the Minister for Finance on behalf of the Government of Kenya. He explained that the purpose of vesting the suit property among other properties to the Plaintiff was to enable the Plaintiff meet the pension needs of all pensioners of the Plaintiff scheme as well as employees who transferred their services to Telkom (K) Limited, Postal Corporation of Kenya

and Communication Commission of Kenya. The three entities split from Kenya Posts and Telecommunications of Kenya in 1999. He testified that the Plaintiff came into existence in 1999 with the sole function of paying pension to the persons who had retired from the above-mentioned parastatals. Since the scheme had no money, it was funded by transferring to it properties that were previously owned by Kenya Posts and Telecommunications Corporation. The suit property which was described as kikuyu staff quarters was one such property. He testified that the Kikuyu property consisted of a residential block with two units each and a pit latrine. He stated that they were given a file containing various correspondence relating to the suit property date back to the 1950s. It was his testimony that the plaintiff has possession of the house although part of the land which is vacant has been hived off and allocated to the defendant. He produced the Plaintiff's list of documents dated 13<sup>th</sup> November 2012. It was his testimony that the suit property was illegally alienated and allocated to the Defendant.

6. Upon cross-examination he stated that the suit property was registered in the name of one Joseph Mukirae in 1998. He stated that neither the Plaintiff nor the other Telecoms agencies had been issued with a letter of allotment. However, he pointed to a letter at page 37 of the Plaintiff's bundle of documents requesting the Commissioner of Lands to reserve a site for staff quarters. He said the suit property was the only one that had been vested to the Plaintiff in Kikuyu town though apparently no allotment letter had been issued to the plaintiff. He stated that the houses were constructed by the East African Posts and Telecommunications. He stated the current tenant was a former employee of Kenya Posts and Telecommunications Corporation. He testified that the letter of allotment issued to the 1<sup>st</sup> Defendant was fraudulent.

7. PW 2 a private land Surveyor who was engaged by the Plaintiff testified that he visited the suit property and established that it had been sub-divided into two portions and the vacant portion measuring 0.16 acres had been hived off and registered as Kikuyu Township/229. The remaining portion which measures 0.3 of an acre has a residential house comprising of 2 units and pit latrines. He stated that the area on the ground was more than what was indicated in the letter of allotment (0.016 hectares). He said it was unusual for the measurements on the ground not to conform with the ones in the letter of allotment. He stated that the Part Development Plan used to alienate the land was not genuine as it had not been circulated to the relevant officers nor was it gazetted. He stated that there was no survey plan specific to the suit property.

8. Upon cross-examination he stated that there was an undeveloped portion of the suit property which has a disused water tank. He maintained that the alienation of the suit property was unlawful as it was not vacant land since it had staff quarters which were occupied by tenants. He stated that he was shown the letter of allotment for parcel no. 229 but he did not visit the Lands office to confirm its authenticity. He stated that the Plaintiff gave him a copy of the vesting order and correspondence giving the history of the suit property but he did not give him any title deed. He produced the survey report as an exhibit.

#### **1<sup>st</sup> Defendant's case**

9. The 1<sup>st</sup> Defendant testified that he was the son of Margaret Watiri Ngugi –deceased who was the original defendant. He relied on his witness statement dated 17.7.2017 and the Defendant's bundle of documents filed on 18.7.2017. He stated that his later mother bought the suit property from one Joseph Njunge Mukirae in the year 2000 at a price of Kshs. 650,000. He produced a copy of the green card which showed that the property was first registered in the name of John Njunge Mukirae on 30.12. 1998 after which it was transferred to Margaret Watiri Ngugi on 31.7.2000. He said he had been paying land rent on behalf of his mother and he produced the demand note and receipts for the same as exhibits. He said he had conducted an official search on 31.2.2016 which indicated that the suit property was registered in the name of Margaret Watiri Ngugi.

10. Upon cross-examination he stated that he was testifying on behalf of his late mother although he did not produce the grant of letters of administration. He admitted that he had not produced any sale agreement, transfer instrument or title deed. He stated that he did not have the title deed as it was lost. He stated that a restriction had been placed on the suit property on 17.5. 2002, but he had not applied to have it removed.

#### **2<sup>nd</sup> and 3<sup>rd</sup> Defendants' case**

11. Gordon Ochieng, a Senior Assistant Director, Land Administration at the Ministry of Lands and Physical Planning testified as PW 2 on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. He relied on his witness statement and bundle of documents dated 15.3.2016. He testified that the suit property was allocated to John Njunge Mukirae on the understanding that it was uncommitted Government land which was available for allocation. He stated that he had not come across any document to show that the property was registered in the name of the Plaintiff nor had he seen any letter reserving the property for the Plaintiff. He stated that the letter of allotment was issued on 19.1.96 and it was accepted and paid for. He said that it was not a mandatory requirement that a ground report be prepared by the Physical Planner before an allotment is done. He stated that the vesting order in Legal Notice No. 154 of 1999 did not specifically refer to the suit property as it did not specify the dimensions and coordinates.

12. Upon cross-examination he stated that he had nothing to show that the suit property was not alienated. He stated that the Physical Planning officer had been asked to prepare a plan for an unalienated land. He stated that the allottee was required to comply with the conditions in the letter of allotment. It was his testimony that the allottee did not submit building plans within 6 months as required. He said that by the time the letter of allotment was issued, the conditions in the letter of allotment had not been complied with. He denied that there was collusion with the 1<sup>st</sup> Defendant. At the close of the Defendants' counsels were given time to file their submissions which they did.

#### **Issues for determination**

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

1. Whether the allocation of the suit property to Joseph Njunge Mukirae was done legally and procedurally

2. Whether the 1<sup>st</sup> Defendant has a good title to land parcel No. Kikuyu Township/229

3. Whether the Plaintiff is entitled to the reliefs sought

### **Analysis and determination**

14. Peter Kipyegon Rotich, the Plaintiff's Administrator and Trust Secretary testified that the suit property was handed over to the Plaintiff by the defunct KPTC. The property which was described as old staff houses comprised of one block with two units of two rooms with a kitchen served by two shower rooms and two detached pit latrines was formerly owned by the East African Posts and Telecommunications before it was handed over to KPTC. It was subsequently vested to the Plaintiff by the Minister for Finance through Legal Notice No. 154 of 1999. This was done in order to enable the Plaintiff generate rental income to enable it meet its obligations to retired staff of KPTC. The house is currently occupied by a former staff member of KPTC and has been in the possession of the predecessors of KPTC since the 1950s.

15. It is the submission of counsel for the Plaintiff that since the suit property was reserved for the Plaintiff's predecessors as staff quarters since the 1950s, it was not available for allocation to Joseph Njunge Mukirae. It is his submission that the purported alienation and issuance of a letter of allotment to the said Joseph Njunge Mukirae was illegal and irregular.

16. On his part counsel for the 1<sup>st</sup> Defendant submitted that the Plaintiff did not produce any evidence that the suit property was allocated or reserved to it or its predecessor. He argued that the 1<sup>st</sup> Defendant had purchased the suit property from Joseph Njunge Mukirae who was the lawful allottee thereof.

17. Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants submitted that the suit property was alienated in accordance with the provisions of the Government Lands Act as an Unsurveyed land and allocated to Joseph Njunge Mukirae who subsequently sold it for valuable consideration to the 1<sup>st</sup> Defendant. It is his submission that at the time of allocation of the suit property, the Commissioner of Lands had no records of any reservation in favour of the Plaintiff. This submission flies in the face of the Plaintiff's evidence that there was correspondence dating back to the 1950s showing the suit property had been reserved for the Plaintiff's predecessors as staff quarters. The said correspondence is in the Plaintiff's bundle of documents. One such letter dated 23<sup>rd</sup> November 1978 from the Managing Director Kenya Posts and Telecommunications to the Commissioner of Lands states as follows:

*Office of the Managing Director*

*30301*

*Nairobi*

*Kenya*

*23<sup>rd</sup> November, 1978*

*27401/ Ext .146*

*48312/70*

*DF. 720/k.22*

*Commissioner of Lands,*

*P.O Box 30089*

*NAIROBI*

**KIKUYU OLD POST OFFICE AND STAFF HOUSES PLOT.**

*Your letter Ref. 48312/78 dated 1<sup>st</sup> November 1978 refers. The new Kikuyu Post office and Telephone Exchange are situated on plot L.R 231/22 and the staff housed are still situated on the old Post office plot behind the shops near the Railway station. I do not seem to have any letter of allotment for this old plot which I need to retain because of those houses. I attach three plans as per your request showing the existing Post office and Telephone exchange as per your letter 48312/67 dated 26<sup>th</sup> February 1970. The letter of allotment quoted is for the new post office but not the old one*

*S.CK. Gatu*

*For Chief Architect*

*For Managing Director.*

*The Director of Survey*

*P.O Box 30046*

*NAIROBI*

*The Clerk to Council*

*County Council of Kiambu*

*P.O BOX 170*

*KIAMBU*

*DF. 720/KIKUYU*

*DF.76*

*DF. 760/Kiambu*

*DF/ 76 Misc*

18. In view of the above letter, the 2<sup>nd</sup> Defendant cannot claim that it was not aware that the suit property was already alienated to the Plaintiff's predecessor. It is not clear why the 2<sup>nd</sup> Defendant did not find it fit to issue the plaintiff with a letter of allotment even after it was requested for it and the defendants can therefore not use this as reason to allege that they did not know that suit property was reserved for the Plaintiff. I find it preposterous for counsel to submit that the Government of Kenya was not bound by the averments with regard to alienation of government land and that it was at liberty to alienate any un-surveyed land to whoever it deemed fit. This would mean that the Government has no obligation to safeguard public land intended for public institutions and could allocate it to individuals and private entities at will.

19. 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.

20. The said section provides as follows:

*“The President may, subject to any other law make grants and dispositions of any estates, interests or rights in or over unalienated Government land.”*

21. Section 9 thereof 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”*

22. Under Section 3 of the Act Unalienated land is defined as:

*“land which is not for the time being leased to any other person or in respect of which the Commissioner has not issued any letter of allotment.”*

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

24. 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.

25. In the instant case, it was the evidence of DW2 that no ground report was prepared by the District Physical Planner before the letter of allotment was issued. Had the District Physical Planner, Kiambu visited the suit property, he would have realized that it was in fact not unalienated as it was occupied by the plaintiff's tenant. In order to avoid dealing with this challenge, the 3<sup>rd</sup> Defendant hived off a portion of the plaintiff's land measuring 0.05 hectares which was vacant and issued a letter of allotment for the said portion to Joseph Njunge Mukirae. This was confirmed by PW2 who explained that when he visited the suit property, he found that the boundary for land parcel number Kikuyu Township/229 was next to the staff quarters. This is supported by the Land Status report produced by PW2.

26. This is not the first case where the court has been confronted with a situation where Government land intended for public institutions or public use is allocated to an individual. In the case of **Kenya National Highway Authority v Shalien Masood Mughal & 5 Others (2017) eKLR** the Court of Appeal it would be unlawful to superimpose a grant or certificate of title on land which is already alienated for a public purpose. This was also the position in **Henry Muthee Kathurima V Commissioner of Lands and Another (2015) eKLR** where the Court of Appeal dismissed the Appellant's petition challenging the decision of the Commissioner of Lands to recall his title as the suit land was

public utility land which was in possession and physical occupation of the 2<sup>nd</sup> Respondent.

27. In the case of **Norbixin (K) Ltd v Attorney General HCCC No. 1814 of 2002 (2014) eKLR** where the court stated that the Commissioner of Lands must bear the blame for the predicament that had 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. 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.

28. 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.

29. In view of the foregoing, it is my finding that the suit property was not available for allocation at the time it was allocated to Joseph Njunge Mukirae as the Plaintiff was in possession and physical occupation thereof. The allotment letter was therefore issued irregularly.

30. The second issue for determination is whether the 1<sup>st</sup> Defendant has a good title to the suit property.

31. The 1<sup>st</sup> Defendant produced a copy of certificate of title issued on 31.07 2000 in favour of his deceased mother – Margaret Waitiri who purchased the land from Joseph Njunge Mukirae. Counsel for the 1<sup>st</sup> Defendant relied on section 23 of the Registration of Titles Act (Repealed) and Section 26 of the Land Registration Act which states 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”.*

32. He relied on the case of **Nairobi Permanent Market Society & 11 Others v Salima Enterprises & 2 Others (1997) eKLR** and **Rose Njoki King'au v Shaba Trustees Limited & Another (2018) eKLR** in which the Court of Appeal upheld the sanctity of title in line with section 23 of the Registration of Titles Act. The said section provides as follows:

*“A certificate of title issued by the registrar to any purchaser of land is to be taken by all courts as conclusive evidence the person named therein as the proprietor of land is the absolute and indefeasible owner thereof and his title is not subject to challenge except on the ground of fraud to which he is proved to be a party”*

33. The Plaintiff herein pleaded fraud against the all the Defendants. As against the 1<sup>st</sup> Defendant the Plaintiff pleaded inter alia as follows:

*Para 13. Particulars of fraud:*

*b) “Fraudulently processing and obtaining a title no. Kikuyu Township/229 in her name while knowing that the property belongs to the Plaintiff*

*c) Fraudulently processing the title in her name contrary to Legal Notice No.154 of 1999*

*d) Acting in collusion with the 2<sup>nd</sup> Defendant to illegally register the suit property in her favour...”*

34. Counsel for the 1<sup>st</sup> Defendant submitted that the Plaintiff failed to prove fraud against the Defendants to the required standard. However, the evidence on record is that by the time the Plaintiff obtained her Certificate of title, the plaintiff had had possession physical occupation of the suit property for many years and the Minister for Finance had vested the suit property in the Plaintiff's name vide Legal Notice No. 154 of 1999. These are facts which were within the 2<sup>nd</sup> Defendant and presumably the 1<sup>st</sup> defendant's knowledge. It is therefore my finding that the Plaintiff has proved fraud against the defendants and the 1<sup>st</sup> Defendant cannot enjoy the protection afforded by section 23 of the Registration of Titles Act (repealed).

35. Furthermore, 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.**

36. 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.”*

37. In view of the foregoing it is my finding that the 1<sup>st</sup> Defendant does not hold a good title as her title was acquired fraudulently and unprocedurally since the suit property had been reserved for and was in possession and physical occupation of the Plaintiff.

38. The last issue for determination is whether the Plaintiff is entitled to the reliefs sought. In its Amended Plaint of 21<sup>st</sup> January 2015, the Plaintiff seeks various remedies. The first one is a declaratory order that the purported allocation and issuance of the title in favour of the 1<sup>st</sup> Defendant was fraudulent and illegal. I have already made a finding on this and I need not repeat it here.

39. The second relief sought is an order directing the 3<sup>rd</sup> Defendant to cancel the title deed issued in favour of the 1<sup>st</sup> Defendant and issuance of a new title in favour of the Plaintiff. I am satisfied that this prayer is merited.

40. The third relief sought by the Plaintiff is a permanent injunction by virtue of the title issued to the 1<sup>st</sup> Defendant, she took possession of the suit property and fenced it off. Since the court has arrived at the finding that the said title ought to be cancelled, the 1<sup>st</sup> Defendant has no business being on the suit property and should therefore vacate the same forthwith. It therefore follows that a permanent injunction will be issued to restrain the 1<sup>st</sup> Defendant from interfering with the Plaintiff's interest in the suit property. I decline to grant general damages for trespass as the Plaintiff did not bring out this aspect in its submissions.

41. With regard to costs, it is trite law that costs follow the event and since the plaintiff has succeeded in its claim I have no reason to deny it costs.

42. In the final analysis I enter judgment for the Plaintiff and make the following final orders

*(a) A declaration is hereby issued that the purported allocation and issuance of the title in respect of land parcel No. KIKUYU TOWNSHIP/229 in favour of the 1<sup>st</sup> Defendant was fraudulent, illegal, wrongful, null and void.*

*(b) The title of the 1<sup>st</sup> Defendant is hereby cancelled and I direct that the name of Margaret Waitiri Ngugi be removed from the register and a title be issued in favour of the Plaintiff.*

*(c) The 1<sup>st</sup> Defendant do forthwith vacate the suit property failing which the plaintiff shall be at liberty to apply for an eviction order.*

*(d) A permanent injunction is hereby issued restraining the Defendants whether by themselves or their agents and/or servants or otherwise from doing the following acts or any of them that is to say from interfering with the rights of possession, advertising for sale, disposing of, selling by public auction or otherwise howsoever at any other time or by completing by conveyance or transfer or any sale concluded by auction or private treaty, leasing, letting or otherwise howsoever interfering with ownership or title to and/or interest in ALL THAT piece of land known as Title No. KIKUYU TOWNSHIP/229.*

*(e) The costs of the suit shall be borne by the Defendants jointly and severally.*

**Dated and signed at Kericho this ..... day of May, 2019**

.....

**J. M ONYANGO**

**JUDGE**

**Dated, signed and delivered at Nairobi this 22<sup>nd</sup> day of May, 2019.**

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**L. KOMINGOI**

**JUDGE**