



**REPUBLIC OF KENYA**

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

**ELC CASE No. 210 OF 2008**

**DAVID ANUNDA.....PLAINTIFF**

**VERSUS**

**JOHN KARU (Sued in his own capacity and as the Chairman  
of Kileleshwa Githunguri Road Residents Association).....1<sup>ST</sup> DEFENDANT**

**MARGARET OWINO ( Sued as the Secretary of the Kileleshwa  
Githunguri Road Residents Association).....2<sup>ND</sup> DEFENDANT**

**EUNICE MIMA ( Sued as the Treasurer Kileleshwa Githunguri  
Road Residents Association).....3<sup>RD</sup> DEFENDANT**

**TITLE FOR THE COUNTERCLAIM**

**JOHN KARU.....1<sup>ST</sup> PLAINTIFF**

**MARGARET OWINO.....2<sup>ND</sup> PLAINTIFF**

**EUNICE MIMA.....3<sup>RD</sup> PLAINTIFF**

**Suing as official of KILELESHWA GITHUNGURI ROAD**

**RESIDENTS ASSOCIATION.....4<sup>TH</sup> PLAINTIFF**

**VERSUS**

**DAVID ANUNDA.....1<sup>ST</sup> DEFENDANT**

**ATTORNEY GENERAL (Sued on behalf of the Principal Registrar of Titles.....2<sup>ND</sup> DEFENDANT**

**COMMISSIONER OF LANDS.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

By a Plaint dated the 7<sup>th</sup> May, 2008, the Plaintiff prays for judgement against the Defendants jointly and severally for:

a) A permanent injunction restraining the Defendants by themselves and or their agents or any other person from entering into, erecting a structure or structures and or doing anything detrimental to the Plaintiffs Plot Number LR NO 209 /13260.

b) The cost of the Plaintiff’s perimeter fence brought down by the Defendants.

c) An order that the Defendants do remove the building materials, the perimeter fence and structures being erected on the Plot at

their cost.

d) An order barring the Defendants and all other members of Kileleshwa Githunguri Road Residents' Association from trespassing in the Plaintiff's Plot Number LR NO 209 /13260.

e) Costs of this suit.

f) Other or further relief this court might deem fit to grant

The Defendants filed an Amended Defence and a Counterclaim dated the 23<sup>rd</sup> August, 2012. In their Defence, they deny all the allegations in the Plaintiff's suit except for the formal descriptive part. They deny that the Plaintiff is the registered owner of Plot Number LR NO 209 /13260 hereinafter referred to as the 'suit land'. They aver that the suit land was set aside for public use and as per the Survey Plan Folio No. 343 Register No. 90, the said land has been marked as public open space. They contend that the Commissioner of Lands did not have power to alienate the said land or allocate it to a third party. Further, that even if the Plaintiff holds a Grant to the suit land, he does not have proprietary interest over the same as this is public land. They insist the Plaintiff's Grant is defective. They explain that the Defendants were constructing a perimeter wall as part of community policing and that they have been in existence for a long time but only got registered in 2008 to formalize it. They reiterate that the Plaintiff's suit is fatally defective as the same does not disclose a reasonable cause of action against them. They have filed a counterclaim where they seek the following prayers against the Defendants therein:

i) A declaration that the 1<sup>st</sup> Defendant has no right or interest in the suit premises and that the said land is public land which cannot be subject matter of an individual title.

ii) A declaration that the 3<sup>rd</sup> Defendant had no power to alienate public land and more particularly the land now known as LR NO 209 /13260 to the 1<sup>st</sup> Defendant for any use other than that such which that public land had been reserved and that the alienation and allocation of LR NO 209 /13260 to the 1<sup>st</sup> Defendant is null and void ab initio.

iii) A permanent injunction restraining the 1<sup>st</sup> Defendant by himself and/or his agent from erecting a structure or structures on the said piece of land.

iv) An order of delivery of the Grant dated 1<sup>st</sup> December, 1997 and registered as Grant No. I.R 75285/1 to the 2<sup>nd</sup> Defendant for cancellation.

v) Costs of this suit.

vi) Any other remedy that this Honourable Court may deem fit to award.

The Plaintiff as 1<sup>st</sup> Defendant in the Counterclaim filed a Defence where he denied that the suit land is a wayleave and insisted the Grant was properly issued by the 2<sup>nd</sup> as well as 3<sup>rd</sup> Defendants upon adhering to the proper legal mechanisms. He denied the allegations of negligence, mistake and error attributed to him in the Counterclaim. He reiterated that he was properly allotted the suit land, which has never been reserved as a way leave. He contended that the Plaintiffs in the counterclaim do not have locus to file the same and the said Counterclaim is bad in law, defective and prayed the same should be dismissed with costs.

Plaintiff had one witness while the Defendant also had one witness.

### **Evidence of the Plaintiff**

The Plaintiff as PW1 claimed to be the registered proprietor of the suit land, which he purchased from one Samuel Maneno for Kshs. 1.3 million. The vendor provided him with a letter of allotment, which he used to process a Grant to the suit land that was issued to him on 17<sup>th</sup> December, 1997.

He contended that the Defendants have denied him access to the suit land claiming it is a public utility plot reserved for a playground. Further, that the Defendants have pulled down his fence and his efforts to get support from the local police proved futile. It was his testimony that he had been in occupation of the suit land for over 10 years but no one had interfered with him. He confirmed that the suit land is situated in a locality where there are civil servant houses. Further, that the said houses are in a circular manner and the suit land is in between two houses. He testified that on 30<sup>th</sup> April, 2008, the Defendants attempted to erect a perimeter fence in furtherance of their acts of trespass and he reported the matter to the Police. The Plaintiff produced the Sale Agreement, Grant and correspondence as exhibits.

### **Evidence of the Defendants**

The Defendants are officials of the Githunguri Road Residents Association. They contended that the suit land is a public utility plot reserved as a wayleave for purposes of having a playground. They disputed the Plaintiff's Grant and Deed Plan and claimed the Commissioner of Lands issued the same irregularly. It was DW1's testimony that according to the Survey of Kenya Plan Index Series SK 50 Block 26 Sheet 2 of 2002, the suit land was marked as a way leave. He explained that the suit land is situated between Plot Nos. Nairobi Block 26(Arboretum) 219 and 220 which as per the survey plan constitutes a way leave. He insisted the Commissioner of Lands did not have capacity to allocate it and the Plaintiff's alleged Grant to the suit land is defective. He disputed that the Plaintiff had put up a perimeter wall around the suit land but insisted it is the Defendants who were constructing a security wall on one side as part of community policing. He contended that they have been in existence for a while but only formalized their registration in 2008. He disputed that Kileleshwa Police Station failed to take

action after the Plaintiff made a report to them and explained that the Police from the said Station removed a signpost that had been erected on the suit land by the association designating the place as a playground and directing residents not to dump rubbish thereon. Further, following a letter dated the 15<sup>th</sup> January, 2008 from the Association to the OCS Kileleshwa Police Station, the said signpost was restored. He referred to a letter dated the 22<sup>nd</sup> January, 2008 from the Ministry of Housing addressed to the OCS Kileleshwa Police Station and copied to the Chairman of the Association where the Ministry intimated that the suit land is a wayleave. Further that the Ministry of Housing wrote a letter dated the 22<sup>nd</sup> January, 2008 to the Commissioner of Lands intimating the suit land is a wayleave and asking the said Commissioner to confirm the authenticity of the Plaintiff's title.

The Plaintiff and the Defendants filed their respective submissions that I have considered.

### **Analysis and Determination**

Upon consideration of the pleadings filed herein including testimonies of the witnesses, their exhibits and submissions, the following are the issues for determination:

- Whether the Plaintiff legally acquired LR NO 209/13260 IR 75285.
- Whether the Plaintiff is entitled to the orders sought in the Plaintiff.
- Whether the Defendants are entitled to the orders sought in the counterclaim.

As to whether the Plaintiff legally acquired LR NO 209/13260 IR 75285 ( suit land).

The Plaintiff contended that he is the registered proprietor of the suit land having purchased the same from one Mr. Samuel Maneno who handed over to him the letters of Allotment after which he was issued with a Grant by the Commissioner of Lands. The Plaintiff submitted that his title was issued under the Registration of Titles Act (repealed) and relied on section 23 (1) as well as sections 25 and 26 of the Land Registration Act to support his arguments that his document of title was conclusive proof of ownership as no evidence of fraud, misrepresentation was tendered to challenge it. He further relied on the case of **Charles Karather Kiarie & 2 Others Vs Administrators of the Estate of John Wallace Mathare (Deceased) & 5 others (2013) eKLR** to buttress his argument. The Defendants opposed the Plaintiff's averments that it is the absolute and indefeasible owner of the suit land and insisted that the Grant was not legally obtained since the suit land had been set aside as a wayleave in accordance with the **Survey Plan Registry Index SK 50 Block 26 Sheet 2 of 2002**. It was DW1's testimony that the said suit land had been used for the residents' benefit and they had even put up a signpost that the same should not be used as a dumpsite. The Defendants relied on section 23(1) of the Repealed Registration of Titles Act, which was the regime in place when the Plaintiff acquired his Grant to support their claim. They further relied on the case of **Henry Muthee Kathurima V Commissioner of Lands & another (2015) eKLR** to support their argument that the Plaintiff did not acquire a good title to the suit land, as the same had been set aside for public utility. It was PW1's testimony that he adhered to the proper legal processes to acquire the title in respect of the suit land. From DW1's testimony he was emphatic that as per the **Survey Plan Registry Index SK 50 Block 26 Sheet 2 of 2002** the suit land was a wayleave. Which brings me to the issue of whether the Plaintiff adhered to the proper legal processes to acquire the suit land. Under the repealed Government Land Act at section 3 it is only the President through delegated powers to the Commissioner of Lands who was authorized to make grants of any estate, interest or right over unalienated government land. For a party to acquire a Grant from the government, the Physical Planner had to confirm the availability of the land to be allocated and advise the Commissioner of Lands before a Letter of Allotment could be issued. In the current scenario, the Plaintiff never produced any documents from the Commissioner of Lands nor a Letter from the Physical Planner confirming that the said Land had been available for allocation. The Plaintiff only flagged the document of title and receipts to prove he purchased the suit land. He insisted he had been in possession of the suit land for 10 years and the Defendants proceeded to destroy his fence which fact was disputed. However, during cross-examination, he admitted that the suit land was indeed situated in between two plots and there were two existing perimeter fence when he took occupation of the same. He contended that the Police did not properly assist him when the Defendants trespassed on the suit land and the OCS advised him to institute legal proceedings. DW1 however disputed this position and insisted the Police from Kileleshwa Police Station actually removed the signpost on the suit land at the instigation of the Plaintiff and only restored the same after the Defendants letter sent him a demand letter. The Defendants' produced a letter from the Ministry of Housing dated the 22<sup>nd</sup> January, 2008 which was addressed to the Commissioner of Lands which excerpt I wish to reproduce below where the author stated that: ***' It would appear that the parcel of land between Block 26/219 and Block 26/220 Githunguri Road, Kileleshwa has been allocated to a private developer as per attached copy of title. The plot is reserved as a way leave as per the attached Survey Plan which clearly shows it is a public utility land.***

***Would you please confirm the authenticity of the title deed for the Plot LR. 209/13260 Nairobi. In addition, please arrange to cancel the same because allowing any permanent developments on this Public Utility land would not be prudent as it is a way leave connecting the lower parts of Githunguri Road and Tabere Crescent.'***

In the map for the said estate which was produced by the Defendants as an exhibit, I note the area between block 26/ 220 and Block 26/219 is actually demarcated as a wayleave.

The Commissioner of Lands though sued in the counterclaim never came on record to controvert the Defendants' averments that he irregularly issued the Grant in respect of the suit land to the Plaintiff nor to confirm that the Plaintiff's title was a valid one. The Land Registrar despite being served with witness summons to provide evidence on the Plaintiff's title never came to court to testify. Since the said averments were not controverted, in essence it means the said averments remain uncontroverted.

In the case of **Henry Muthee Kathurima V Commissioner of Lands & Another (2015) eKLR**, the Court of Appeal held that: ***'We have considered the submissions by the appellant in this appeal and have no hesitation to state that we concur with the findings and decision of the trial court. The Commissioner of Lands had no power to alienate public land and any action taken without due authorization is a nullity. We cite the case of Said Bin Seif v. Shariff Mohammed Shatry. (1940)19 (1) KLR 9, and reiterate that an action taken by the***

**Commissioner of Lands without legal authority is a nullity; such an action, however, technically correct, is a mere nullity, and not only voidable but void with no effect, either as legitimate expectation, estoppel or otherwise.'**

Further in 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 acquire. 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”***

In the case of **Kenya National Highway Authority v Shalien Masood Mughal & 5 others [2017] eKLR** the Court of Appeal held that: ***‘As the dispute appears to have been provoked by the office of the Commissioner of Lands who appears to have issued the original grant and the subsequent Certificate of Title to Mughal, despite existing records in his offices showing that the plot was not available for alienation, I would order that the costs of the litigation, both here and before the High Court, shall be borne by the Commissioner of Lands,’***

Based on my analysis of the evidence as presented and in associating myself with the three cited decisions, I find that the Plaintiff did not acquire a good title to the suit land as he failed to adhere to the proper legal processes to obtain it as this was public land. Further, I find that the Commissioner of Lands irregularly allocated the suit land to the Plaintiff. I opine that the Plaintiff has a remedy against the Commissioner of land and will direct him to seek the same from him.

As to whether the Plaintiff is entitled to the orders sought in the Plaintiff.

The Plaintiff sought for a permanent injunction restraining the Defendants from interfering with the suit land; costs of the perimeter fence and removal of the building materials, the perimeter fence and structures being erected on the suit land. PW1 however in his testimony admitted that he found two walls when he purchased the suit land. It was DW1’s testimony that they had erected one side of a perimeter wall as part of community policing. The burden of proof was upon the Plaintiff to prove that he is indeed the one who constructed the perimeter wall but he failed to do so. The Plaintiff even confirmed that the residents were using the suit land as a dumping site.

Since I have already made a finding that the Plaintiff did not acquire a good title to the suit land, as it is public land. I hold that he is not entitled to the orders sought in the Plaintiff.

As to whether the Defendants are entitled to the orders sought in the counterclaim. The Defendants sought for a declaration that the 1<sup>st</sup> Defendant has no right or interest in the suit land and that the said land is public land which cannot be subject matter of an individual title. Further that the 3<sup>rd</sup> Defendant did not have power to alienate the suit land which was reserved for public use and the said alienation to the 1<sup>st</sup> Defendant is null and void ab initio. The Defendants also sought injunctive orders against the 1<sup>st</sup> Defendant. The Plaintiff’s claimed the Defendants did not have locus to institute the counterclaim since they are not registered but I note the Defendants produced a Certificate of Registration dated the 1<sup>st</sup> April, 2008 issued by the Registrar of Societies in respect of the Kileleshwa Githunguri Road Residents’ Association. I hence disagree with him on the said position and hold that the Defendants as officials of the said association had locus to institute the counterclaim. Since I have already held that the Plaintiff did not acquire a proper title, as this was public land, I find that the Plaintiff should hence be restrained from interfering with the said land. Further, I find that since the Commissioner of Lands did not adhere to the proper legal process by allocating the Plaintiff the suit land and also failed to file a Defence to controvert the Defendants’ averments, the Defendants are hence entitled to the orders sought in the Counterclaim.

It is against the foregoing that I find that the Plaintiff has failed to prove his case on a balance of probability and will proceed to dismiss it. I further proceed to enter judgment for the Defendants who are the plaintiffs in the counterclaim and make the following final orders:

- a) A declaration be and is hereby made that the 1<sup>st</sup> Defendant DAVID ANUNDA has no right or interest in LR NO 209 /13260 as the same is public land which cannot be subject matter of an individual title;
- b) A declaration be and is hereby made that the 3<sup>rd</sup> Defendant had no power to alienate LR NO 209 /13260 to the 1<sup>st</sup> Defendant DAVID ANUNDA for any use other than that such which that public land had been reserved and that the alienation and allocation of the said land is null and void ab initio.
- vii) A permanent injunction be and is hereby issued restraining the 1<sup>st</sup> Defendant DAVID ANUNDA by himself and/or his agent from erecting a structure or structures on the said LR NO 209 /13260.
- viii) The 1<sup>st</sup> Defendant DAVID ANUNDA be and is hereby directed to surrender the Grant dated 1<sup>st</sup> December, 1997 and registered as Grant No. I.R 75285/1 to the 3<sup>rd</sup> Defendant within 30 days from the date here for cancellation, failure of which the said Grant stands cancelled.
- ix) The Costs of the Counterclaim shall be borne by the 1<sup>st</sup> and 3<sup>rd</sup> Defendants

**Date signed and delivered in open court at Kajiado this 16<sup>th</sup> day of July, 2019**

**CHRISTINE OCHIENG**

**JUDGE**