



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**MILIMANI LAW COURTS**

**ELC NO. 556 OF 2012**

**HONOURABLE ATTORNEY GENERAL.....PLAINTIFF**

**=VERSUS=**

**ELECTRICAL OPTIONS LIMITED.....DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

1. The Plaintiff is the Principal Legal advisor of the Government of Kenya (The AG). The Defendant, Electrical Options Limited is a Limited Liability Company incorporated under the provisions of the Companies Act and is the registered owner of LR No. 209/14146 measuring 0.2065 hectares (suit Property). The Defendant was allocated the suit property for a term of 99 years with effect from 1<sup>st</sup> January 1999 vide a letter of allotment dated 17<sup>th</sup> December, 1998.

2. The suit property is at the junction of Limuru and Muranga Road at Ngara area of Nairobi. Currently, the suit property is the place where a bus terminus has been constructed and the Public toilet which was part of the suit property is still intact and open for use to the public. During the construction of the Nairobi Thika Road Project, the commissioner of Lands published Gazette Notice No. 6034 dated 27<sup>th</sup> June 2008 expressing intention to acquire 0.0092 hectares of the suit property for purposes of the project. The Defendant was asked through Gazette Notice dated 8<sup>th</sup> July 2008 published on 11<sup>th</sup> July 2008 to go to D.O's office Kariokor for hearing of claims on compensation which had been scheduled for 18<sup>th</sup> September 2008. On 20<sup>th</sup> February 2009, the Commissioner of Lands published a Gazette notice dated 12<sup>th</sup> February 2009, which asked the Defendant to go to the D.O's office Kariokor on 6<sup>th</sup> July 2009 for hearing of compensation claim in respect of the remainder of the suit property measuring 0.1974 hectares.

3. The Commissioner of Lands subsequently published Gazette Notice No. 454 on 21<sup>st</sup> January 2011 in which the suit property was deleted from those properties which had been earmarked for acquisition. This is what prompted the Defendant to file Constitutional Petition No 23 of 2011 Electrical Options Limited –vs- The Attorney General & another in which it sought for among other orders quashing of Gazette Notice No. 454 of 21<sup>st</sup> January 2011. After the conclusion of the hearing of the Petition, justice Majanja declared Gazette Notice Nos. 6034, 6035, 1396 and 454 null and void for contravening the Petitioner's rights under Article 47(1) and (2) of the Constitution. The Judge granted the state 6 months within which to bring legal proceedings to establish the legality or otherwise of the suit property. It is pursuant to the directions of the court that the A.G. filed the present case in which the A.G. sought the following reliefs:-

***a) A declaration do issue that the issuance of the letter of allotment dated 17<sup>th</sup> December 1998 in respect of LR No 209/14146 to the Defendant was illegal and unprocedural and based on fraud.***

***b) An order of this court do issue cancelling of the Grant No. IR 34063 title number LR No 209/14146 issued in the name of the Defendant.***

***c) Costs of this suit and interest thereon.***

4. The Defendant filed a defence to the Plaintiff's claim and raised a counter claim in which it sought the following reliefs:-

***a) Kshs.85,000,000/=***

***b) Damages***

***c) Costs of this suit.***

5. There was an attempt to mislead the court that the claim by way of counter claim was Kshs.170,000,000/=. This attempt was by way of sneaking in the last two pages of the counter claim which had been retyped. I do not wish to say any more on this save to add that there were no amendments to the counterclaim or any pleading in this matter.

#### **PLAINTIFF'S CASE.**

6. In or around June 2008, the Commissioner of Lands wanted to acquire land from the construction of Nairobi-Thika Road project. The Commissioner gazetted the suit property for compulsory acquisition in accordance with the provisions of the Land Acquisition Act Cap 295 (now repealed). A gazette notice was published on 11<sup>th</sup> July 2008 that a portion of the suit property measuring 0.0092 was to be acquired. Though the Defendant was informed through gazette notice to go to the D.O.'s office at Kariokor for hearing of compensation claims, the Defendant did not go.

7. The Kenya National Highways Authority (KENHA) who were in charge of construction of the road started verifying the genuineness of some of the titles of properties which had been earmarked for compensation. This is the time it was discovered that the suit property was irregularly created partly from a road reserve and partly out of the area reserved for a public toilet which had actually been constructed and was being used by members of the public. It is after this discovery that Gazette Notice number 454 of 21<sup>st</sup> January 2011 was published deleting the suit property from those which were to be compulsorily acquired. The reason for the deletion was that the government could not acquire what was already public land.

#### **DEFENDANT'S CASE**

8. The Defendant's case is that it applied for allocation of land on which it had intended to put up a petrol station. It was given an allotment letter dated 17<sup>th</sup> December 1998 for an unsurveyed petrol service station site at Ngara Nairobi. It paid the requisite amount after which grant number 84063 was given. The land reference No. was LR No.209/14146 measuring 0.2065 hectares which translate to about half an acre.

9. The Defendant did not immediately develop a petrol station as it did not have funds. In 2008, the Commissioner of Lands through a Gazette Notice published intention to acquire part of the suit property measuring 0.1974 hectares which was valued at Kshs. 61,000,000/=. The state later acquired the remaining portion measuring 0.0092 hectares but declined to value it. A Gazette Notice was later published deleting the suit property from those whose owners were to be compensated.

10. It is the Defendant's contention that the state dealt with its case in a discriminatory manner because BP Kenya Limited which operated a Shell Petrol station nearby was compensated but the Defendant was not. The Defendant contends that it acquired the suit property lawfully and that now part of Muranga Road is constructed on its land and the remainder is a public bus terminus, and therefore it should be compensated the sum of Kshs.85,000,000/= which is the market value of the property. The Defendant contends that the bus terminus is being operated by the Nairobi City County who have also put up kiosks which they lease out to tenants who pay the County to operate them.

#### **ANALYSIS OF EVIDENCE AND ISSUES FOR DETERMINATION**

11. I have carefully gone through the evidence adduced by the Plaintiff as well as that of the Defendant. I have also considered the submissions filed by the parties. There is no contention that the Defendant is the registered owner of the suit property. There is also no contention that at some stage, the suit property had been gazetted for compulsory acquisition and that this was later deleted through a Gazette Notice.

The following are the issues which emerge for determination.

1. *Was the suit property regularly allotted to the Defendant?*
2. *Was there discrimination when the Defendant's land was deleted from the list of those to be compensated?*
3. *Can the Defendant's title be cancelled.*
4. *Is the Defendant entitled to compensation?*
5. *Which order should be made on costs?*

#### **Was the suit property regularly allotted to the Defendant.**

12. The allotment letter which the Defendant produced shows that it was allotted an unsurveyed Petrol Service Station site at Ngara in Nairobi. It paid a total of 477,000/- on 18<sup>th</sup> July 2000. A title deed was issued on 27<sup>th</sup> July 2000. The evidence adduced by the Plaintiff is that the entire area where the suit property lies had been surveyed in 1963. PW1 Thomas Gachoki who is a surveyor by profession and currently attached to KENHA produced survey plan No. FR 100/144 which was carried out for purposes of a Petrol Station on LR 209/6397. This Survey Plan shows Limuru Road and Forthall Road which is now called Muranga Road. In this Survey Plan, a Public convenience area was reserved. The area reserved for Public convenience is now the public toilet. In 1974 another survey plan was carried out. This survey was for purposes of LR No. 209/8547. This is the plot where Jamhuri High School is currently located. The survey plan No. is FR No. 132/116.

13. The survey plan which resulted in the suit property is FR No. 380/114. This survey plan was received on 5<sup>th</sup> July 2000. The survey plan shows that the suit property has encompassed the public toilet which had been set aside in the 60's as well as the road reserve for Muranga Road and Limuru Road. The Plaintiff's witness pointed out that unlike the previous two survey plans which were authorized and the date of authorization indicated, the survey plan which created the suit property had no such authority.

14. When the Ministry of Lands was contacted to confirm the authenticity of the title to the suit property, the Director of Physical Planning wrote to the Director of Surveys indicating that they could not find any evidence that a Part Development Plan (PDP) was prepared which would have facilitated the alienation of the suit property. The Survey of Kenya had also been asked to confirm if survey plan No. FR 380/114 was approved. The Director of survey indicated that the Survey plan was approved on the basis of a letter of allotment and that the actual technical file was missing. The Director however indicated that investigations had shown that the suit property encompassed a public toilet which was already in use by the public. The toilet had been put up by the Nairobi City Council pursuant to Survey plan No. FR No. 100/144. The Director of Surveys recommended for cancellation of the survey plan.

15. It is clear from the evidence adduced by the Plaintiff that there was no land in the area capable of alienation. The public toilet had been provided for vide Survey Plan No. FR 100/144 of 1963. A toilet had been put up and is a public toilet upto date. The other portion forming part of the suit property is a road reserve. Survey Plan No. 380/144 which was prepared for the suit property shows that there is a road in between the suit property and the public toilet but from the brazes on the survey plan, it is clear that the public toilet is part of the suit property.

16. The title held by the Defendant is under challenge. It was therefore incumbent upon the Defendant to demonstrate that the title was obtained legally. In **Munyu Maina Vs. Hiram Gathia Maina [2013] eKLR** the Court of appeal judges sitting in Nyeri had this to say:-

***“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 this instrument which is under 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 . . .”***

17. The Defendant submitted that it was upon the Plaintiff to call evidence from the Director of Physical Planning or the Survey Department. The Defendant argues that the Plaintiff failed to bring any of these witnesses because he knew that if he had called the witnesses, they would have confirmed that the Defendant's title was obtained legally. The Defendant has a counter-claim in which it is claiming compensation. That counter-claim cannot stand if the Defendant does not demonstrate that the title which it has was legally obtained. As per the case of Munyu Maina (Supra), the Defendant cannot dangle certificate of title which is being challenged. It was expected to prove that the same was legally obtained by adducing evidence that the entire process of acquisition was legal.

18. The Defendant is arguing that the title which it has is indefeasible and is protected under Section 23 of the Registration of Titles Act Cap 281 Laws of Kenya (Now repealed). In answer to this submission, I wish to quote from the case of **Funzi Island Development Limited & 2 others –Vs- County Council of Kwale & 2 others [2014] eKLR** where justice Maraga JA (as he then was) stated as follows:-

***“As I pointed out, the 3<sup>rd</sup> Respondent relying on Section 23(1) of the Registration of Titles Act Cap 281 Laws of Kenya, contended that the grant of the suit land conferred on it an absolute and indefeasible title. I hasten to point out that that section refers to a certificate of title issued to a purchaser. In the case of allocated land, even if the section is applicable, a registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular. A court of law cannot on the basis of indefeasibility of title, sanction an illegality or give its seal of approval to an illegal or irregularly obtained title.”***

19. The Plaintiff was under no obligation to bring witnesses from the Directorate of Survey or the Directorate of Physical Planning. The witness who was called by the Plaintiff is a qualified Surveyor of considerable experience. As at the time of testifying, he stated that he had worked as a surveyor for over 28 years. This is no doubt a man of experience. He explained the survey plans and indicated that the one which created the suit property had no letter of authority. There was a letter from the Director of Surveys and another from the Director of Physical Planning. These two letters pointed out where the problem lay and this problem was expounded by this witness.

20. When a person is in the process of purchasing land or seeking for allocation, it is expected that as the process is going on, the person has to go to the site and confirm if the site is okay with him. In the instant case, there is a public toilet which has been in existence since 1974. This toilet is part of the suit property. The rest of the suit property falls on what is currently the Ngara bus terminus along Muranga Road. The Defendant cannot claim that its officials never went to the site and saw the toilet standing there and the Matatu terminus which existed there even before the contractor of the modern bus terminus constructed it.

21. The Defendant in its pleadings claimed that it fenced the suit property after allocation. It was practically impossible to fence a public toilet and a bus park which have existed in the area for decades. Part of the suit property had been reserved for a public toilet which is running. The other part is a road reserve. The law is clear that the Commissioner of Lands had no power to dish out land which had already been set aside for a public purpose. In **Nelson Kazungu Chai & 9 others –vs- Pwani University [2014]eKLR** my brother Justice Angote had to say this regarding a similar case as in this one:-

***“Where land has been reserved for public purpose, like in this case, any allocation of such land to private persons cannot be recognized by the court. Public interest in land will always outweigh an individual's right to own the same property. It therefore does not matter that the Plaintiffs had a legitimate expectation to be allocated the suit property.”***

22. I have said enough on this issue. It is clear that the allocation of the suit property to the Defendant was irregular and unlawful. There are all indications that the Defendant's officials were aware of the situation on the ground. There was a public toilet which had stood there for decades. Despite all this, the Defendant's officials had the audacity to push on with registration documents which finally gave them a title which I can say is patently illegal and a fraud on the part of the public. The officials of the Defendant saw an opportunity to make a kill.

They went on to process title. They were aware of the importance of the public toilet considering that the area is full of members of the public who frequent the facility. Whoever has passed through the area can imagine what would have happened if the Defendant had demolished that toilet and occupied the busy bus terminus.

23. Before I move from this issue, I wish to quote the words of Justice Nyamu (as he then was) in **John Peter Mureithi & 2 others –vs- Attorney General & 4 others [2006] eKLR** where he said as follows:-

***“courts of this country cannot countenance a situation where the public good is subjugated to and sacrificed at the multifarious altars of private interests. Nor will they sit idly by and see land cartels, briefcase investors and speculators with high connections use Public land as tickets to individual largesse in the wake of public inconvenience.”***

I say no more.

**Was there discrimination against the Defendant when its land was deleted from those earmarked for compensation?**

24. The Defendant contends that the deletion of its land from those which were to be compulsorily acquired was discriminatory. The basis for this is that its neighbour B.P Kenya Limited which owned LR No 209/6397 was compensated whereas it was not compensated. B.P. Kenya Limited was operating a Shell Petrol Station on its land. Black’s Law dictionary 10<sup>th</sup> edition defines discrimination as follows:-

***“Differential treatment; esp., failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured.”***

25. In the instant case the land held by B.P. Kenya Limited had been created in 1963 through Survey Plan No. 100/144. This is the same time that the place of public convenience (toilet) was set aside. This is unlike the Defendant’s land which was irregularly created almost three decades later. There is therefore no basis upon which the Defendant can claim to have been discriminated.

**Can the Defendant’s title be cancelled?**

26. In addressing the first issue herein, I dealt at length on why the Defendant’s title was fraudulent and irregular. Already the public toilet is intact. The road reserve is now a public bus terminus being operated by Nairobi City County. What the Defendants is holding now is a paper title. No bank in its right mind can have such title as security. The Defendant’s title is clearly for cancellation.

**Is the Defendant entitled to any compensation**

27. I have already demonstrated hereinabove that the title held by the Defendant was fraudulently obtained. I have also demonstrated that the Defendant’s officials were aware that what they were pursuing was defective. There were all signs for them to exercise caution but they ignored. This may have been in the hope that they could sell the land and make a quick kill or use the title as security for a loan. As I have already said hereinabove, no person in his right mind would risk to buy such a property leave alone take it as security.

28. To order compensation to the Defendant in the circumstances will amount to rewarding impunity and giving a seal of approval to illegal acquisition of public land. No court of law can offer compensation in a case where it is shown that the title to the property was irregularly obtained and that the person seeking to benefit, knew or ought to have known that the title was defective.

**CONCLUSION**

29. It is now clear from the analysis herein that the Plaintiff’s claim in the main suit has to succeed whereas the Plaintiff’s claim by way of counter claim fails. I therefore enter judgment for the Plaintiff in the main suit as follows:-

***a) A declaration that the issuance of the letter of allotment dated 17<sup>th</sup> December 1998 in respect of LR No 209/14146 to the Defendant was illegal, unprocedural and fraudulent.***

***b) An order directed to the Chief Land Registrar cancelling Grant No. IR 84063 title number LR 209/14146 issued in the name of the Defendant.***

***c) A permanent injunction restraining the Defendant or its servants or agents from ever interfering with Land Parcel No 209/14146 after the cancellation.***

***d) The Defendant shall pay costs of the main suit as well at the counter claim to the Plaintiff.***

**Dated, signed, and delivered at Nairobi on this 17<sup>th</sup> day of September 2019.**

**E.O.OBAGA**

**JUDGE**

In the presence of :-

M/s Fatuma for Mr Kamau for Plaintiff and Mr Moindi for defendant

Court Clerk : Hilda

**E.O.OBAGA**

**JUDGE**