



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC PETITION NO. 18 OF 2018

GODFREY GITHINJI KAMIRI.....PETITIONER

=VERSUS=

THE HONOURABLE THE ATTORNEY GENERAL.....1ST RESPONDENT

THE HONOURABLE COUNTY ATTORNEY.....2ND RESPONDENT

NAIROBI CITY COUNTY.....3RD RESPONDENT

THE NATIONAL LAND COMMISSION.....4TH RESPONDENT

THE CHIEF LAND REGISTRAR.....5TH RESPONDENT

JUDGEMENT

1. This is a petition dated 6th March 2018 filed in court on 15th March 2018. The petitioner Godfrey Githinji Kamiri states that he is the registered proprietor of the suit property known as LR Number 209/13539/79 (IR 81544/1) which he purchased from the original allottee, John Njenga Mungai for the sum of Kshs.1,500,000 in a transfer dated 15th May 2002 and registered at the Land Registry on 15th May 2002.

2. He further states that he is the Decree Holder pursuant to a judgement delivered in his favour by Hon. Okwengu J on 15th October 2010 in HCCC 173 of 2003 against the City Council of Nairobi.

3. The petitioner seeks the following reliefs:-

(1) A declaration be and is hereby issued that the County Government of Nairobi acted in contempt of court orders dated 21st January 2011 by initiating a review of the original grant/disposition of LR Number 209/13539/79 situate at Woodley/Joseph Kangethe Estate Nairobi.

(2) A declaration be and is hereby issued that the National Land Commission acted in contempt of court orders dated 21st January 2011 by conducting a review of the original grant/disposition to LR Number 209/13539/79 situate at Woodley/Joseph Kangethe Estate Nairobi.

(3) A declaration be and is hereby issued that the National Land Commission acted in contempt of court orders dated 21st January 2011 by purporting to revoke the grant/disposition of LR Number 209/1359/79 situate at Woodley/Joseph Kangethe Estate Nairobi.

(4) A declaration be and is hereby issued that Godfrey Githinji Kamiri's right under Article 40 of the Constitution on ownership of property were violated as aforesaid.

(5) A declaration be and is hereby issued that Godfrey Githinji Kamiri is entitled to aggravated damages as redress in respect of the breaches aforesaid of his constitutional right to property.

(6) An order of certiorari be and is hereby issued removing the proceedings of the National Land Commission conducted on 15th November 2017 and the Gazette Notice dated 17th July 2017 to the High Court and be quashed.

(7) An order of mandamus be and is hereby issued compelling the County Government of Nairobi to update its register to indicate Mr. Godfrey Githinji Kamiri as the lawful and duly registered owner of LR Number 209/13539/79 situate at Woodley/Joseph Kangethe Estate Nairobi.

(8) An order of mandamus be and is hereby issued directing the 5th respondent to forthwith and in any event no later than 7 days of this honourable court's order to remove the inhabitation placed over the petitioner's property.

(9) Costs of the suit on an advocate-client basis and interest thereon at court rates until payment in full.

(10) Any other orders as the court may deem just.

4. The petition is supported by the affidavit of Godfrey Githinji Kamiri the petitioner herein sworn on the 6th March 2018 and a further affidavit sworn on the 13th November 2018.

5. The petition is opposed. There are grounds of opposition filed by the 1st and 5th respondent through the deputy chief state counsel. The grounds of opposition are dated 14th May 2018.

6. There is also a replying affidavit sworn by Isaac Nyoike, the Chief Valuer of the 3rd respondent, sworn on the 22nd October 2018.

7. In the 25th July 2018 the court directed that the petition be disposed by way of further submissions..

The petitioner's submissions

8. The petitioner's submissions are dated 13th November 2018. He submitted that, subsequent to the purchase of the suit property for value without notice from the original allottee, a transfer was effected in his favour pursuant to a suit filed in HCCC 173 of 2003 Judgment was delivered in the petitioner's favour. He is the legal owner of the suit property.

9. The act of the 3rd respondent initiating review of grants by the 4th respondent was in direct contravention of the permanent injunction issued by the High Court in HCCC 173 of 2003. He has put forward the cases of **Shimmers Plaza Limited vs National Bank of Kenya Limited [2015] eKLR; Argos Furnishers Ltd vs Municipal Council of Mombasa [2014] eKLR.**

10. The petitioner is a bona fide purchaser for value. There is no evidence of to his involvement in illegalities. He relies on Section 23 and 60 of the Registration of Titles Act and Article 40 of the constitution. He also relies on the case of **Sound Equipment Ltd vs Registrar of Titles & Ano. [2011] eKLR; Satima Enterprises Ltd vs Registrar of Titles & 2 Others [2012] eKLR; David Peterson Kiengo & 2 Others vs Kariuki Thuo [2012] eKLR.** The decision having been made before the National Land commission Act came into force, the subsequent revocation of title was illegal and in contempt of the court orders. He prays that the orders sought be granted.

The 3rd Respondent's submissions

11. On 14th September 1999 the City Council of Nairobi (predecessor to the County Government of Nairobi) passed a resolution revoking the disposal of Woodley Estate. The said resolution was published in the local dailies. The suit property is public land. No resolution of the City Council of Nairobi has been presented as evidence that the City Council of Nairobi surrendered that portion of the public land to the Commissioner of Lands for alienation. Grant No. IR 81544/1 in which LR NO. 209/13539/79 is comprised, registered in the name of John Njenga Mungai, was registered and issued unprocedurally and is therefore a nullity in law and that the subsequent transfer to the petitioner was tainted with illegality. They have put forward the case of **Chemey Investment Ltd vs AG & 2 Others [2018] eKLR.**

12. They have also relied on Section 26(1) of the Land Registration Act. The City Council issued a public resolution on the land on 14th September 1999 which was published in the dailies before the alleged transfer of the suit property to the petitioner on 15th May 2002. The petitioner knew the said property was unavailable for private ownership.

13. A title that is obtained fraudulently or in violation of statute is in law a nullity and the statutory defence in Section 26(1) of the Land Registration Act is available to the Respondents They have put forward the cases of **Kenya Allied Guards Workers Union vs Security Services & 38 Others HC Misc Application 1159 of 2003: Mureithi & 2 Others vs AG & 4 Others [2006] IKLR (E & L).** The prayers in the petition ought not to be granted as the petitioner is not a valid transferee of the suit property.

14. I have considered the petition and the affidavit in support. I have considered the affidavit in response and the grounds of opposition, the oral submissions and the authorities cited. The issues for determination are:-

(i) Whether the suit property is public land.

(ii) If so was the petitioner aware, the suit property is public land?

(iii) Is the petitioner entitled to the reliefs sought?

15. I have gone through the judgment in HCCC No. 173 of 2003. I note that the 3rd respondent's defence was struck out as it had been filed irregularly. The 3rd respondent also never called any witnesses to contest the petitioner's documents. At that time there was no evidence to

demonstrate that the consent to transfer had not been granted by the 3rd respondent. I also note that the issue in HCCC 173 of 2003 was with that of ownership while the notice issued on 28th October 2016 calling for public hearings to review grants by the 4th respondent goes to the root of the title rather than the validity of the transfer between the petitioner and the previous owner.

16. Where as Article 40 of the Constitution protects the right to property, this protection does not extend to title founded on an unlawful acquisition. Article 40(6) of the Constitution provides:-

“The right under this Article do not extend to any property that has been found to be unlawfully acquired”.

17. The petitioner herein states that he is a bonafide purchaser for value. He however ought to have done due diligence to establish the initial allottee had acquired the suit property legally and procedurally. In the Case of **Chemey Investment Ltd vs Ag & 2 Others [2018] eKLR** the Court of Appeal held thus:-

“We have noted that the Ekima Junior Academy never took possession of the suit property. It therefore means that when the appellants purported to purchase the same, the suit property was in the same condition it was when it was initially allocated, namely in use for public purposes. We ask ourselves, which innocent purchaser, without notice, would accept to purchase a property that is being used for public purposes, just next to the provincial headquarters and the law courts, without any form of inquiry”. As this court stated in Arthi Highway Developers Limited vs West End Butchery Limited & 6 Others (Supra), only a foolhardy, and we may add, a careless or fraudulent investor would purchase land such as the suit property “with the alacrity of a potato dealer in Wakulima Market”. And further in Flemish Investments Ltd vs Town council of Mariakani. CA No. 30 of 2015, in an appeal where the appellants who had fraudulently obtained registration of public property in his name but claimed to be an innocent purchaser for value without notice, this court stated:-

A bona fide purchaser exercising due diligence would be expected to inspect the property he is buying, to ascertain its physical location, person, if any, in occupation, developments, buildings and fixtures thereon, among others. If indeed the appellants honestly believed that plot no. 34 and the cattle dip on it were part of the suit property, he would have rehabilitated the cattle dip as his property, or simply demolished it, not to pester the respondent for its relocation. For a party who was buying a commercial property rather than a ranch, the presence of a cattle dip on the property should have rang alarm bells”.

18. In paragraph 14 of the replying affidavit of Isaac Nyoike Chief Valuer with the 3rd respondent, he deposes:-

“That this evaluation of the title by the 4th respondent purportedly owned by the petitioner was proper and in accordance with the law as the manner of allotment and acquisition was fraudulent and in breach of the law”.

19. In conclusion, I find that the petitioner has failed to prove his case for the grant of the reliefs sought. Accordingly, the petition is dismissed. Each party do bear own costs.

It is so ordered.

Dated, signed and delivered in Nairobi on this 24th day of October 2019.

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L. KOMINGOI

JUDGE

In the presence of:-

Mr. Kabugu for the Petitioner

Ms Jaoko for Msarati for the 3rd Respondent

Ms Masinde for the 4th Respondent

Kajuju - Court Assistant