



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC CASE NO. 12 OF 2005

MAURICE S. M. MAKHANU.....PLAINTIFF

VERSUS

THE COUNTY GOVERNMENT OF BUNGOMA.....DEFENDANT

J U D G M E N T

By an amended plaint dated 9th February 2016, **MAURICE S. M. MAKHANU** (the plaintiff herein) sought Judgment against the **COUNTY GOVERNMENT OF BUNGOMA** (the defendant herein) in the following terms:-

- a) **A permanent injunction against the defendant, its agents, employees and/or assigns be barred from interfering into (sic) the peaceful enjoyment of L.R BUNGOMA MUNICIPALITY/801 by the plaintiff (sic).**
- b) **Costs of this suit and interest thereon.**
- c) **Any other and/or suitable relief the Court shall deem just and fit to grant.**

The basis of the plaintiff's claim is that on or about 3rd December 2004, the clerk to the defendant wrote to him purporting to take possession of land parcel **NO. BUNGOMA MUNICIPALITY/801** (hereinafter the suit land) in a manner that abrogated the plaintiff's constitutional and legal rights particulars of which have been set out in paragraph 4 of the plaint.

By an amended defence dated 18th May 2016, the defendant admitted having written to the plaintiff on or about 3rd December 2004 expressing it's intention to take over immediate possession of the suit land which belongs to it together with all the developments thereon and therefore the plaintiff, being a mere licensee, has no right to sue over it either on his own behalf or on behalf of the defunct **BUNGOMA COUNTY COUNCIL** who he claims is the legal owner.

The defendant further denied having abrogated the plaintiff's undisclosed constitutional rights, the rule of law or any provisions of the Local Government Act as alleged in paragraph 4 of the plaint. The defendant added that it's repossession of the suit land is lawful, valid and justified as it belongs to it and was not available for private alienation and/or allotment the same having been set aside for public benefit of which the plaintiff was duly notified.

The defendant also pleaded that it would apply to have the suit struck out on the grounds that the plaintiff is non – suited and the suit does not disclose any reasonable cause of action. Finally, the defendant pleaded that the plaintiff being a mere licensee has no right to remain on the suit land his licence having been revoked and this suit should be dismissed with costs.

The plaintiff was the only witness in support of his case while the defendant called as its witness **DAVID MAKOKHA (DW 1)** it's Enforcement Officer.

As part of his testimony, the plaintiff adopted his witness statement dated 15th June 2016 and his list of documents. In the said statement, the plaintiff states that he holds a lease to the suit land, yet on 3rd December 2004, the then Municipal Council of Bungoma addressed to him a letter through the Town Clerk purporting to repossess the same. That during the pendency of this case, Counsel for the defendant **MR J. O. MAKALI** indicated to him that when the letter aforesaid was written to him, the said Municipal Council of Bungoma was not aware that the plaintiff had been issued with a lease and asked him to accept another parcel of land which the plaintiff refused.

The plaintiff produced the following documents in support of his case:-

1. **Letter of allotment dated 10th February 1997.**

2. Letter dated 8th September 2004 from the Ministry of Lands and Settlement forwarding to the District Land Registrar Bungoma the lease document in respect to the suit land for registration.

3. The lease document in respect to the suit land.

4. The certificate of lease dated 1st November 2004 in the plaintiff's names for a term of 99 years from 1st March 1997.

5. Copy of an un-dated letter allegedly authored by counsel for the defendant.

6. Letter dated 3rd December 2004 addressed to the plaintiff by the then Bungoma Municipal Council expressing its intention to repossess the suit land.

On his part, **DAVID MAKOKHA (DW 1)** testified on behalf of the defendant and similarly adopted as his evidence the statement dated 16th October 2017 in which he had stated that the suit land belongs to the then Municipal Council of Bungoma on which stands a house and was not available for allocation. That the said land was part of public utilities that had been illegally acquired and were repossessed in 2004 following a Government directive. That the plaintiff attended a Town Planning Committee meeting on 6th October 2008 and agreed to withdraw this case so that he would be given an alternative plot since the suit land is currently utilized by Baptist Girls Secondary School.

The defendant availed the following documents as part of its evidence:-

1. Extract of minutes of the Town Planning and Works Committee held on 17th November 2003.

2. Letter dated 15th September 2015 addressed to the defendant by the plaintiff.

3. Letter dated 26th August 2015 addressed to the plaintiff by the defendant.

4. Minutes of meeting held on 6th October 2008.

Submissions were thereafter filed both by **MR WASWA** counsel for the plaintiff and **MR J MAKALI** counsel for the defendant.

I have considered the evidence by both parties and the submissions by counsel.

It is common ground that the plaintiff holds a leasehold interest in the suit land for a period of 99 years from 1st March 1997 from the then Municipal Council of Bungoma as lessor. In that respect, the plaintiff holds a Certificate of Lease issued by the Land Registrar Bungoma on 1st November 2004 under the repealed Registered Land Act. The plaintiff has also produced as part of his evidence, the letter of allotment dated 10th February 1997 and a letter dated 8th September 2004 forwarding the lease documents in respect to the suit land to the District Land Registrar Bungoma for registration. Therefore, under **Section 27(b) of the repealed law** under which the plaintiff's Certificate of Lease was issued, the said registration conferred on the plaintiff.

“..... the leasehold interest described in the lease together with all implied and expressed rights and privileges belonging or a appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the leased.”

The plaintiff's title could therefore only be cancelled as provided for in **Section 143(1) of the repealed law** which provides that:-

“Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.” Emphasis added.

In urging this Court to find that the plaintiff's registration as proprietor of the suit land be revoked for having been obtained illegally, counsel for the defendant submitted that the said land was Trust land and therefore under **Section 13 of the Trust Land Act**, had been set aside for public purposes. However, no evidence was led in that regard. Counsel further submitted that no evidence had been led to show that:-

“ ... The plaintiff herein obtained the use of the said plot with the consent of the then Municipal Council or even County Council and that the same was put to any of the purposes set out in section 13(1) of the Trust Lands Act.”

The lease document availed by the plaintiff is very clear that the then Bungoma County Council, as lessor, granted him a 99 year lease on 1st March 1997. The lease is duly signed by the Land Registrar Bungoma and there is no evidence to suggest that the said council challenged the said lease. Indeed the minutes dated 6th October 2008 produced by the defendant show that the then Municipal Council of Bungoma acknowledged the plaintiff's proprietary right over the suit land. This is captured in **MIN/TPW/14/2008 COMMUNITY LIBRARY** as follows:-

“The Town Clerk informed the committee that there used to be a community library opposite Bungoma Law Courts but there is a case in Court over ownership. Members observed that a plot allocated to former P.C MAKHANU can be utilized for the said project but the former P.C had taken legal proceedings against the council over ownership but was willing to surrender it if given

a suitable alternative plot.

The Chairman invited the former P.C Makhanu, after a brief discussion he accepted to withdraw the case if given a suitable alternative plot.

Members discussed the matter in detail after discussion it was proposed by Cllr Godfrey Sichangi seconded by Cllr Henry Majimbo H.W the Mayor and RESOLVED that an alternative plot be given to former P.C Makhanu and the Council to utilize his plot for a community library. Emphasis added.

If therefore the then Municipal Council of Bungoma had averred, as submitted by the defendant's counsel, that the suit land had been set apart for public purposes and that the allocation to the plaintiff was "*irregular*" and "*unlawful*", it does not make sense that in its meeting on 6th October 2008, the same council would not only be recognizing the plaintiff as the owner thereof but also resolve to offer the plaintiff an "*alternative plot*" so as to utilize the suit land "*for a community library.*" Shouldn't that have been the right time to propose for the cancellation of the lease for having been obtained unlawfully and/or irregularly?

In the course of the trial, counsel for the defendant suggested to the plaintiff that the suit land was among those properties mentioned in the Ndungu report as having been unlawfully acquired. No attempt was made to produce a copy of the said Ndungu report and so the Court has no evidence placed before it to suggest that the suit land is among those properties that were illegally acquired. A Court of Law cannot act on conjecture and **Section 109 of the Evidence Act** states in very clear terms that:-

"The burden of proof as to any particular fact lies on the person who wishes the Court to behave in its existence, unless it is provided by an law that the proof of that fact shall lie on any particular person."

Counsel for the defendant has urged this Court to be guided by the Court of Appeal's decision in **KENYA NATIONAL HIGHWAY AUTHORITY V SHALIEN MASOOD MUGHAL & OTHERS C.A CIVIL APPEAL NO 327 OF 2014 [2017 eKLR]** and make a finding that the suit land, being land set aside for public purposes cannot be alienated and therefore the plaintiff's title is not protected by **Article 40 of the Constitution** which protects one's right to own property. It is instructive to note that there is no counter – claim by the defendant seeking to cancel the plaintiff's title. There is no evidence that the plaintiff acquired the leasehold interest in the suit land through fraud or other illegal means. Unlike in the **MUGHAL** case (supra) there is no evidence that the suit land had been set aside for public purposes and was therefore not available for alienation. During cross – examination, **DAVID MAKOKHA (DW 1)** suggested that **BAPTIST SCHOOL** started using the suit land in 2012 although he later stated in re – examination that he was not sure of the exact date. What is clear however is that **BAPTIST SCHOOL** must have started using the suit plot long after it had been allocated to the plaintiff otherwise the name of the school would have come up during the meeting of 6th October 2008 yet in that meeting, the suit land was being proposed for a "*community library.*" If, as submitted by the defendant's counsel, the suit land is now being occupied by a school for public purposes, the evidence shows that the school moved onto the said land long after it had been allocated to the plaintiff as his private property. That could therefore only have been a violation of the plaintiff's property rights as protected by **Article 40 of the Constitution**. In the letter dated 26th August 2015 in which the defendant addressed the plaintiff to the effect that the suit land shall revert to **BAPTIST SCHOOL** for use as a library, the defendant was in essence cancelling the plaintiff's lease without affording him a hearing. That was in violation of **Article 47(1) of the Constitution** which provides that:-

"Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair."
Emphasis added

That letter was also in violation of **Section 4 of the Fair Administrative Actions Act** which requires that where action is likely to adversely affect the rights of an individual, he should be given an opportunity to be heard and to make representations. And even before the enactment of the 2010 Constitution and the **Fair Administrative Actions Act**, the rules of natural justice require that the plaintiff ought to have been allowed to make his presentation before the defendant addressed him as they did in their letter dated 26th August 2015 – **OLOO V. A – G 1986 – 1989 E.A 456**. It cannot be procedurally fair that the defendant, having agreed in 2008 to give the plaintiff "*a suitable alternative plot*", would turn around in 2015 and repossess the suit land on the basis that the lease was not obtained legally. If the plaintiff's lease was not obtained legally, the proper procedure for revoking it ought to have been initiated. However, the plaintiff's lease cannot be cancelled by a mere letter from the defendant. That is the preserve of the Court under **Section 143(1) of the repealed Registered Land Act** or **Section 80(1) of the new Land Registration Act**. For as long as that lease has not been cancelled, it is not proper for the defendant's counsel to submit from the bar, that the plaintiff holds a "*paper title*" or "*a flying title*" when there is no counter – claim seeking the nullification of the said lease nor any evidence of probative value to support such allegations.

It must be clear by now that for as long as the plaintiff holds a lease to the suit land which has not been declared by a Court as having been obtained through fraud, misrepresentation, illegally, un-procedurally or through a corrupt scheme, that Certificate of Title is conclusive proof of ownership of the land in dispute. The plaintiff is therefore entitled to enjoy all the rights and privileges belonging or appurtenant to the lease over the suit land as provided under **Section 25(1) of the Land Registration Act** or **Section 27(b) of the repealed Registered Land Act**. Those rights include the right to an order injuncting the defendant, its agents or employees from interfering with the plaintiff's right to a peaceful enjoyment of the suit land.

From the record herein, it is clear that attempts have been made to try and settle this matter out of Court. In my view, considering the evidence by both parties, this suit which has been in Court for the last 14 years ought to have been settled long ago. To counsels credit, I notice from the record that as far back as 8th October 2008 both **MR. WASWA** and **MR MAKALI** informed **M. MBOGHOLI J** that they were able to negotiate an out of Court settlement. It is not clear what became of that noble approach. This Court cannot over-emphasize the fact that out of Court settlements are to be encouraged as they assist parties save on costs and time and also result in win-win situations for all protagonists. The parties herein appear to have appreciated that but it is not clear when the rains started hitting them.

Ultimately however, and having considered the evidence by both parties, I am satisfied that the plaintiff has proved his case as required in

law. I therefore enter Judgment for the plaintiff as against the defendant in the following terms:-

1. An order of permanent injunction is hereby issued restraining the defendant, it's agents, employees, assigns or any person acting through them from interfering with the plaintiff's peaceful enjoyment of the land parcel NO BUNGOMA MUNICIPALITY/801.

2. The plaintiff is also awarded costs of this suit.

Boaz N. Olao.

J U D G E

9th October 2019.

Judgment dated, delivered and signed in Open Court at Bungoma this 9th day of October 2019.

Mr. Waswa for plaintiff present

Mr Murunga for defendant present

Joy/Okwaro – Court Assistants

Right of Appeal explained.

Boaz N. Olao.

J U D G E

9th October 2019.

Mr. Murunga: - I apply for copies of the proceedings.

Court: - To issue upon payment of the relevant fees.

Boaz N. Olao.

J U D G E

9th October 2019.