REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 546 OF 2014

CHARLES LUTTA KASAMANI.....PLAINTIFF

VERSUS

ATTORNEY GENERAL

NATIONAL LAND COMMISSION.....DEFENDANTS

JUDGEMENT

The plaintiff avers that, on or about the 25th August, 1995, the defendant allocated unsurveyed residential plot No. 36 – Mumias town to one Esther N. Maina of P.O. Box 277, Mumias. By a transfer dated 25th August, 1995, the said Esther N. Maina sold and transferred the said parcel of land to the plaintiff, who paid the stand premium, rent and all other fees payable on 29th August, 1995. On or about 9th July, 2002, a survey was carried out and a title – L.R. 8056/314-Mumias, was issued by the 2nd defendant. On or about February, 2003, the plaintiff sought to develop the land, having acquired the land title documents. Consequently, the land was not available as it was reallocated for the construction of the District Commissioner's office. On or about 7th of august, 2008, the plaintiff asked the 2nd defendant to allocate him and alternative parcel of land within Mumias Municipality. The plaintiff claims that the 2nd defendant has neglected and/or refused to allocate him an alternative parcel of land in the Republic of Kenya. The plaintiff prays for judgment against the defendant jointly and severally for:-

(i) Vacant possession of land reference 8056/314 Mumias Township.

(ii) In the alternative land equivalent to L.R. 8056/314 Mumias Township in the Republic of Kenya.

(iii) Mesne profits from 9th July 2002 till the hearing and determination of this case, at a rate of Kshs. 80,000/= per month.

The 1st and 2nd defendants aver in their defence that the said plot of land had been set aside for government use and that the said allocation was irregular from the very beginning. The 1st and 2nd defendants prays that the plaintiff's suit be dismissed with costs.

This court has considered the evidence and the submissions therein. The defendants did not give any oral evidence. The defendants claim that the plaintiff's leasehold interest to the suit property was unlawfully acquired. That the suit property herein was obtained fraudulently as the allocation was irregular. That the said plot was set aside for government use. The burden of proof on the allegation of fraud or irregularity is on the defendants. Section 107 of the Evidence Act stipulates as follows:

(1)Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2)When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

Looking at the provisions of Section 107 of the Evidence Act above, the duty of proving that title to the suit land referred to herein had been obtained through fraud lay with the Respondents. In the case of Joseph N. K. Arap Ngok…Vs…Justice Moijo Ole Keiuwa & 4 Others, Civil Appl. No.60 of 1996, the Court of Appeal held that:-

"It is trite that such title to landed property can only come into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of a title document pursuant to the provisions of the Act under which the property is held."

The above position was also held in the case of Wreck Motor Enterprise vs The Commissioner of Lands & Others (1997), where the Court of Appeal also held that:-

"Title to landed property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of title document pursuant to provisions held."

This is the position held by the Court of Appeal in the case of Dr. Joseph Arap Ngok Vs Justice Moijo Ole Keiwua & 5 Others (supra), where the Court held that:-

"Section 23(1) of the Act gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and the law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of title and the entire system in relation to ownership of property in Kenya would be placed in jeopardy".

See the case of David Peterson Kiengo & 2 Others Vs Kariuki Thuo, Machakos HCCC No.180 of 2011, where the Court held that:-

"The Registered Lands Act is based on the Torrens System. Under this system, indefeasibility of title is the basis for land registration. The state maintains a Central Register of land title holdings which is deemed to accurately reflect the current facts about title. The whole idea is to make it unnecessary for a party seeking to acquire interest in land to go beyond the register to establish ownership. The person whose name is recorded on the register holds guaranteed title to the property. Since the state guarantees the accuracy of the register, it makes it unnecessary for a person to investigate the history of past dealings with the land in question before acquiring an interest".

In the instant case, the certificate of title herein was issued by the lands officials. There was no evidence availed that the plaintiff was involved in fraud or irregular registration of the suit property. The plaintiff testified that, on or about the 25th August, 1995, the defendant allocated unsurveyed residential plot No. 36 – Mumias town to one Esther N. Maina of P.O. Box 277, Mumias (copy of the allotment letter PEx1). By a transfer dated 25th August, 1995, the said Esther N. Maina sold and transferred the said parcel of land to the plaintiff, who paid the stand premium, rent and all other fees payable on 29th August, 1995 (copy of the agreement for sale, receipts of payment, consent to transfer and form of transfer were produced as PEx 3,4,5&6). On or about 9th July, 2002, a survey was carried out and a title – L.R. 8056/314-Mumias, was issued by the 2nd defendant. On or about February, 2003, the plaintiff sought to develop the land, having acquired the land title documents (copy of the lease PEx10). Consequently, the land was not available as it was reallocated for the construction of the District Commissioner's office. Given that the history and root of this title can be traced, the Court finds and holds that the plaintiff herein holds a good title to the suit property which title has not been cancelled and/or revoked. In the case of Munyu Maina Vs Hiram Gathiha Maina, Civil Appeal No.239 of 2009, where the Appeal Court held that:-

"We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register."

In the statement of defence the defendants aver that the lease herein was issued irregularly no document at all is annexed to demonstrate that these fraudulent dealings. The leasehold title has been in existence since the year 2002, when the plaintiff became registered as proprietor. All along the defendants have recognized this leasehold title and have been communicating with the plaintiff and suggesting that an alternative plot would be allocated. I find that the defendants have no evidence to support their claim that the suit land registered in the plaintiff's name was irregularly acquired. I find no evidence of fraud and or misrepresentation on the part of the plaintiff. I find that the plaintiff is the sole and lawful proprietor of the leasehold title comprised in the land parcel L.R. 8056/314-Mumias Township, which is a lease by the 1st defendants for 99 years from 1st April, 1995, and which land measures 0.2228 Ha. I find that this was private land and not public land.Later, the land was not available as it was reallocated for the construction of the District Commissioner's office. This to me seems to be a case of compulsory acquisition of land. Under **Section 24, 25** and **26** of the **Land Registration Act 2012** upheld the indefeasibility of title:

Section 24 stipulates as follows:

Subject to this Act—

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

Section 25 of the act provides:

(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

Section 26 is to the effect that:

Certificate of title to be held as conclusive evidence of proprietorship

(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.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

It has not been proved that the plaintiff was guilty of any fraud or misrepresentation or that they obtained the certificate of title illegally, unprocedurally or through a corrupt scheme. For the principle of indefeasibility looked at the cases of *Dr. Joseph Arap Ngok vs Justice Moijo ole Keiwua & 5 Others, Civil Appeal No. Nai. 60 of* **1997; Wreck Motor Enterprises vs Commissioner of Lands & 3 Others (1997) eKLR;** *and* **Eunice Grace Njambi Kamau & Another vs Attorney** *General & 5 Others (2013) eKLR.* From the above provisions of the law and cases cited I find that the plaintiff has disclosed a legal interest capable of protection under the law. *The plaintiff has produced a certificate of lease obtained from the County Government of Kakamega* land which this court found to be a valid and legal title. *Article 64 of the Kenya Constitution states as follows;*

"Private land.

64. Private land consists of —

(a) registered land held by any person under any freehold tenure;

(b) land held by any person under leasehold tenure; and

(c) any other land declared private land under an Act of Parliament."

The plaintiff's title is therefore private land and not public. As was stated by Mutungi, J in the case of Virendra Ramji Gudka & 3 Others –v- Attorney General (2014)eKLR,

"Rights of compulsory acquisition are conferred by specific provisions of the law being Article 40 of the Constitution and Sections 107 to 133 of the Land Act, No. 6 of 2012 which replaced the provisions previously contained in the Land Acquisition Act".

The meaning and intent of the Article 40 (3) of the Constitution. Article 40, reads in part as follows:

40. (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

(a) of any description; and

(b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the State or any person—

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).

(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—

(i) requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

The Land Acquisition Act (now repealed) provided for the procedure to be followed in the compulsory acquisition of property by the Government of Kenya. When the compulsory acquisition herein began, the Land Acquisition Act Cap 295 Laws of Kenya, Section 3 of the Land Acquisition Act provided as follows:-

"Whenever the Minister is satisfied that the need is likely to arise for the acquisition of some particular land under section 6, the Commissioner may cause notice thereof to be published in the Gazette, and shall deliver a copy of the notice to every person who appears to him to be interested in the land."

Acquisition by the Government is ordinarily direct and by processes known to the **Land Acquisition Act (now repealed) by the Land Act.** The law governing compulsory acquisition is in Part VIII, Section 107 to 133 of the Land Act 2012. The p*rocess of compulsory acquisition was laid down in* the decided case of **Patrick Musimba v National Land Commission & 4 others (2016) eKLR** where the court held as follows;

Under Section 107 of the Land Act, the National Land Commission (the 1st Respondent herein) is ordinarily prompted by the national or county government through the Cabinet Secretary or County Executive member respectively. The land must be acquired for a public purpose or in public interest as dictated by Article 40(3) of the Constitution. In our view, the threshold must be met: the reason for the acquisition must not be remote or fanciful. The National Land Commission needs to be satisfied in these respects and this it can do by undertaking the necessary diligent inquiries including interviewing the body intending to acquire the property.

Under Sections 107 and 110 of the Land Act, the National Land Commission must then publish in the gazette a notice of the intention to acquire the land. The notice is also to be delivered to the Registrar as well as every person who appears to have an interest in the land.

As part of the National Land Commission's due diligence strategy, the National Land Commission must also ensure that the land to be acquired is authenticated by the survey department for the rather obvious reason that the owner be identified. In the course of such inquiries, the National Land Commission is also to inspect the land and do all things as may be necessary to ascertain whether the land is suitable for the intended purpose: see Section 108 of the Land Act.

The foregoing process constitutes the preliminary or pre-inquiry stage of the acquisition.

The burden at this stage is then cast upon the National Land Commission and as can be apparent from a methodical reading of Sections 107 through 110 of the Land Act, the landowner's role is limited to that of a distant bystander with substantial interest.

Section 112 of the Land Act then involves the landowner directly for purposes of determining proprietary interest and compensation. The section has an elaborate procedure with the National Land Commission enjoined to gazette an intended inquiry and the service of the notice of inquiry on every person attached. The inquiry hearing determines the persons interested and who are to be compensated. The National Land Commission exercises quasi-judicial powers at this stage.

On completion of the inquiry the National Land Commission makes a separate award of compensation for every person determined to be interested in the land and then offers compensation. The compensation may take either of the two forms prescribed. It could be a monetary award. It could also be land in lieu of the monetary award, if land of equivalent value, is available. Once the award is accepted, it must be promptly paid by the National Land Commission. Where it is not accepted then the payment is to be made into a special compensation account held by the National Land Commission: see Sections 113- 119 of the Land Act.

The process is completed by the possession of the land in question being taken by the National Land Commission once payment is made even though the possession may actually be taken before all the procedures are followed through and no compensation has been made. The property is then deemed to have vested in the National or County Government as the case may be with both the proprietor and the land registrar being duly notified: see Sections 120-122 of the Land Act.

If land is so acquired the just compensation is to be paid promptly in full to persons whose interests in land have been determined: See Section 111 of the Land Act. This is in line with the Constitutional requirement under Article 40(3) of the Constitution that no person shall be deprived of his property of any description unless the acquisition is for a public purpose and subjected to prompt payment in full of just compensation.

The Constitution dictates that acquisition be in accordance with the provisions of the Constitution itself and any Act of Parliament. The Constitution itself only provides for just compensation being made promptly.

The current procedure for acquisition of land by the State is as outlined above. As can be seen parliament took very seriously its constitutional duty to legislate on the State's powers of deprivation or expropriation. Perhaps conscious of the emotive nature of

land issues, the Legislature appeared scrupulous and contemplative.

In the present case, I find that the defendants have not followed the laid down procedure. And Justice G.V. Odunga in Republic v Council of Legal Education Ex-parte Nyabira Oguta (2016) eKLR, phrased it thus:

> *"Our Constitution embodies the values of the Kenyan Society, as well as the aspirations, dreams and fears of our nation as espoused in Article 10. It is not focused on presenting an organisation of Government, but rather is a value system itself hence not concerned only with defining human rights and duties of individuals and state organs, but goes further to find values and goals in the Constitution and to transform them into reality."*

As was stated by Scott L.J, in relation to compulsory acquisition, in the case of Horn-v- Sunderland Corporation (1941) 2 KB 26,40:

> *"The word "compensation" almost of itself carries the corollary that the loss to the seller must be completely made up to him, on the ground that unless he receives a price that fully equaled his pecuniary detriment, the compensation would not be equivalent to the compulsory sacrifice".*

In that regard, in the case of Raticliffe vs Evans (1892) QB 524 with regard to damages, the Court stated that;

> *"…The character of the acts themselves which produce the damages and the circumstances under which those acts are done must regulate the degree of certainty and particularity with which the damages done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage as is reasonable having regard to the circumstances and to the nature of the acts themselves by which the damage is done to relax old and intelligent principles, to insist upon more would be the vainest pendaty…"*

In the case of Commissioner of Lands & Another vs. Coastal Aquaculture Ltd Civil Appeal No. 252 of 1996 KLR (E&L 264) the Court of Appeal held that in cases of compulsory acquisition the government is required to strictly adhere to the provisions of the Constitution and the Land Acquisition Act (now repealed). In Arnacherry Limited v Attorney General (2014) eKLR the court held that;

> *"This is indeed a sad and distressing Petition. It is not expected that the State, in this age and time and with a robust Constitution such as ours, can actively participate in acts of impunity such as the forceful take-over of personal property without due compensation. The take-over has lasted 30 years and that makes the said action all the more disturbing."*

If land is so acquired the just compensation is to be paid promptly in full to persons whose interests in land have been determined. This is in line with the Constitutional requirement under Article 40(3) of the Constitution that no person shall be deprived of his property of any description unless the acquisition is for a public purpose and subjected to prompt payment in full of just compensation.

From the above law, cited authorities and my observations, the defendants' actions are in contradiction with Sections 2, 2(4), 3, 10, 40 and 47 of the Constitution of Kenya. The law as discussed above, provides for compensation in cases of compulsory acquisition hence the plaintiff's have a right to compensation. On the claim of mesne profits, no loss has been exhibited to this court neither have there been any expected income exhibited to this court to attract an award under this head. Hon. Justice J.L Onguto in the case of Patrick Musimba vs. The National Land Commission and 5 Others Petition No. 613 of 2014 stated in the judgment that,

> *"If land is so acquired the just compensation is to be paid promptly in full to persons whose interests in land have been determined; see section III of the Land Act. This is in line with the constitutional requirement under Article 40 (3) of the constitution that no person shall be deprived of his property of any description unless the acquisition is for a public purpose and subjected to prompt payment in full of just compensation".*

I find that the plaintiff has proved his case on a balance of probabilities and I grant the following orders;

1. In the alternative land equivalent to L.R. 8056/314 Mumias Township in the Republic of Kenya.

2. No orders as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 26TH NOVEMBER 2019.

N.A. MATHEKA

JUDGE