



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. 48 OF 2013

M/S FLAVEMART ENTERPRISE LIMITED.....PLAINTIFF

VERSUS

KENYA RAILWAYS CORPORATION.....DEFENDANT

J U D G M E N T

FLAVEMART ENTERPRISE LTD (the plaintiff herein) filed this suit against **KENYA RAILWAYS CORPORATION** (the defendants herein) seeking Judgment in the following terms: -

- (a) A declaration that the plaintiff is the registered proprietor of all that land known as KISUMU MUNICIPALITY BLOCK 11/7 and that the defendants have no right and/or authority to enter, claim, alienate and/or rent out the subject land or premises to 3rd parties.**
- (b) A permanent injunction restraining the defendants either by themselves or through their agents, servants and/or employees from entering, claiming, occupying, alienating, allocating and/or renting out the subject land or premises to any 3rd parties.**
- (c) Costs of this suit and interest.**
- (d) Any other relief this Honourable Court may deem fit to grant.**

The basis of the plaintiff's claim is that at all material times relevant to this suit, it is the registered proprietor and/or grantee of the land parcel known as **KISUMU MUNICIPALITY BLOCK 11/7** (herein the suit property) having acquired the same on 11th March 2011. However, in February 2013 the defendant without the plaintiff's authority, consent and/or colour of right and under the misguided belief that it owned the suit property has threatened to enter, occupy the same and evict the plaintiff. That the defendant's said acts amount to trespass, is illegal and void ab initio. Particulars of the defendant's illegal acts are pleaded in paragraph 4 of the Plaint as follows: -

- (a) Purporting to enter and claim the said land without authority and/or power to do so.**
- (b) Claiming land which is not theirs.**
- (c) Fraudulently purporting to acquire a parcel of land that does not belong to them.**
- (d) Misleading the members of the public that they owned the subject land whereas that was not the position.**

The defendant filed a defence and counter – claim in which it is pleaded, inter alia, that they are the true registered owners of the suit property having obtained title on 10th December 1976 and have never sold, disposed off to or transferred the same to the plaintiff or **M/S RIEGATE DEVELOPMENT** the alleged previous owners. That the defendant rightfully sold the suit property to **M/S DUBE HOLDINGS LTD** on 22nd December 2011 but the transfer was not successful as the Land Registrar Kisumu declined to effect transfer for reasons that there was a Government freeze on transfer of public land. Later, the defendant discovered that the suit land had been transferred to **M/S RIEGATE DEVELOPMENT** who had allegedly purchased the same from the defendants a fact which is not true. That the acquisition by both **M/S RIEGATE DEVELOPMENT** and the plaintiff was fraudulent as the defendant never sold it to either of them and therefore the plaintiff is not entitled to the reliefs sought.

In their counter claim, the defendants enjoined **RIEGATE DEVELOPMENT COMPANY LTD** as a 2nd defendant. They repeated that they are the bona fide proprietors of the suit property which it had offered for sale in 2011 through tender **NO KRC/PLM/33/11** and **M/S DUBE HOLDINGS** were the highest bidders at Kshs. 72 million and paid a deposit of Kshs. 8,640,000/= after which an agreement was

executed and the documents were given to the purchaser's advocates. However, the Land Registrar Kisumu declined to register the transfer on the grounds that there was a Government directive prohibiting any transfer of Government property to third parties. However, on 29th May 2014, the purchaser's advocates discovered that the suit property had been transferred to **RIEGATE DEVELOPMENT LTD** and subsequently to the plaintiff. That the said transfer is null and void and was done when the defendant did not exist as a legal entity and was therefore illegal fraudulent, null and void. The defendant pleaded the particulars of fraud, illegality and/or nullity in paragraph 9 of the counter – claim as follows: -

- (a) Fraudulently and illegally acquiring the defendants land without due regard to the law and due process (grabbing).**
- (b) Purporting to have bought or procured the suit land from the defendants when they knew that was not true.**
- (c) Acquiring possession of the suit land through dubious means without following the due process of the law.**
- (d) Purporting to evict the defendant's officers and agents without any lawful eviction order.**
- (e) Using corrupt and unorthodox means to acquire the defendant's land.**
- (f) Acquiring the defendant's land without giving any monetary compensation to the defendants.**
- (g) Transferring the suit land from the defendants/ the plaintiff in the counter – claim then to the 2nd defendant in the counter – claim and again to the 1st defendant in the counter – claim fraudulently and with intent to defeat justice.**

The defendant therefore prayed for Judgment against the defendant in the following terms: -

- (a) A declaration that the acquisition of the defendants land by the 2nd defendant in the counter – claim and subsequent transfer to the plaintiff of the title to land parcel NO KISUMU MUNICIPALITY/BLOCK 11/7 are illegal, null and void.**
- (b) A declaration that the defendants are the rightful owners of the suit land and an order for the cancellation of the Certificate of Lease held by the plaintiff and an order directing the Land Registrar Kisumu to rectify the register accordingly to revert to the status prior to 31st July 2009.**
- (c) A declaration that the plaintiff's occupation of the suit land is illegal and an order for eviction against the plaintiff.**
- (d) A permanent injunction to restrain the plaintiffs, their agents and/or servants from interfering in any way with the defendants use and occupation of the suit land, transferring, selling, encumbering and/or in any other way dealing with the land parcel NO KISUMU MUNICIPALITY BLOCK 11/7.**
- (e) Costs of this suit and any other relief the Court may deem fit.**

The defendant filed a reply to the defence and defence to the counter – claim in which it reiterated the contents of its plaint and denied that the defendant had rightfully sold the suit property to **DUBE HOLDINGS LTD** on 22nd December 2011. The plaintiff similarly denied that its acquisition of the suit property from **RIEGATE DEVELOPMENT LTD** was fraudulent. In its defence to the counter – claim, the plaintiff denied the defendant's allegations including the claim that the defendant is the bona fide registered proprietor of the suit property and the counter – claim should be dismissed.

On 21st June 2017, the defendant withdrew the suit as against **RIEGATE DEVELOPMENT COMPANY LTD**.

Together with their pleadings, both parties as is required by the Civil Procedure Rules filed their respective witness statements as well as the list of documents to be relied on during the trial. The suit having been confirmed a ready for trial, it was placed before me for hearing on 29th October 2018 during the **ELC KISUMU SERVICE WEEK**.

PETER OCHIENG KORE (PW 1) who is the plaintiff's Director and **STANLEY GITARI (DW 1)** who is defendant's Senior Legal Officer were the only witnesses called by the parties in support of their respective cases. Both of them adopted as their evidence their respective witness statements and produced as part of their evidence the list of documents filed herein.

PETER OCHIENG KORE (PW 1) adopted as his evidence his two statements dated 20th February 2013 and 2nd April 2018. In his statement dated 2nd April 2018, the witness says he is a businessman in **KISUMU COUNTY** and that some time in early August 2010, his late father informed him that his lawyer **MR JOHN ONGELE** had a client who wanted to dispose of the suit property. A meeting was therefore arranged between one **MR SHANTILAL RAISHI DHANANI** a director of **RIEGATE DEVELOPMENT LTD** and the witness and his father agreed to purchase the said property. A sale agreement was executed with **MR JOHN ONGELE** acting for both parties and a down payment of Kshs. 35,000,000/= was paid to the vendor. In January 2011 the witness's father passed away and so the witness sold his property **NO KISUMU MUNICIPALITY/ BLOCK 7/98** to enable him pay the outstanding balance and another agreement was drawn on 22nd February 2011 between the plaintiff and **RIEGATE DEVELOPMENT LTD**. Transfer documents were executed and a Certificate of Lease was issued to the plaintiff on 11th March 2011 and the witness and his family took possession of the suit property and put up residential houses.

In January 2013 one **MR WAGALA** from **KENYA RAILWAYS** went to the suit property and enquired from the witness how he had acquired it and in the same week, the said **MR WAGALA** tried to evict him but was repulsed by plaintiff's guards. The plaintiff then instituted this suit. The witness adds in his statement dated 20th February 2013 that the defendant's acts of trying to evict it from the suit property is illegal as it is the registered proprietor thereof and that the defendant has no colour of right to do so and it's acts amount to trespass.

In his witness statement filed herein on 2nd October 2018, **STANLEY GITARI** the defendant's Senior Legal Officer stated that since 1976, the defendant has been the legal owner of the suit property and all the developments thereon. The same was later offered for sale vide tender **NO KRC/PLM/33/11** on 8th August 2011 and **DUBE HOLDINGS LTD** were the highest bidder at Kshs. 72 million but when the transfer documents were presented to the Kisumu Land Registry, it was discovered that the suit property had been transferred to two parties the plaintiff being the current registered owner. The witness adds that the defendant never sold the suit property to any other person other than **DUBE HOLDINGS LTD** and denied further that the same was sold to **RIEGATE DEVELOPMENT LTD** or the plaintiff and termed the acquisition by plaintiff and the others as fraudulent. The witness stated further that the plaintiff acquired the suit property on 11th March 2011 yet it was only registered as a company on 16th August 2011. He urged that plaintiff's title be declared a nullity and it's claim be dismissed and the defendant's counter – claim be allowed.

Submissions have been filed both by **MR KEN OMOLLO** instructed by the firm of **KEN OMOLLO & CO ADVOCATES** for the plaintiff and **MR TOM MUTEI** instructed by **TOM MUTEI ADVOCATES** for the defendant.

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

What runs through the submissions by plaintiff's counsel is that the plaintiff's title is protected by virtue of the provisions of **Sections 24, 25 and 26 of the Land Registration Act** as well as **Section 80(2) of the Land Act**. Counsel therefore urges this Court to protect the sanctity of the plaintiff's title and if there was any malfeasance by the land officials, the party deprived of the suit land may bring an action against the state for damages. Relevant case law has been cited.

On the other hand, it is the submission of counsel for the defendant that the plaintiff obtained registration of the suit property fraudulently and specifically refers the Court to the fact that the suit property was registered in the names of the plaintiff five months before it's incorporation. Counsel also refers to the evidence by the defendant to the effect that it never sold the suit property to the plaintiff and that **Section 26 of the Land Registration Act** does not protect a title that was obtained illegally, unprocedurally or through a corrupt scheme. Relevant cases have also been cited.

In my view, this suit can easily be determined on the basis of whether or not the plaintiff was capable of acquiring any interest in the suit property by the agreement dated 12th February 2011 between it and **RIEGATE DEVELOPMENT LTD**.

It is not in doubt that the plaintiff is the current registered proprietor of the suit property. That registration was effected on 11th March 2011 when the plaintiff was issued with a Certificate of lease. As counsel for the plaintiff has rightly submitted, that certificate is prima facie evidence that the plaintiff is the absolute and indefeasible proprietor of the suit property. However, as counsel for the defendant has also rightly submitted, such protection cannot be accorded to one who acquired the property illegally, un-procedurally or through a corrupt scheme. That is the essence of **Section 26(1) of the Land Registrations Act** and **Section 80(1)** of the same Act empowers the Court to cancel such registration.

In his witness statement **PETER OCHIENG OKORE (PW 1)** states that the plaintiff and **RIEGATE DEVELOPMENT LTD** executed a sale agreement with respect to the suit property on 22nd February 2011. This is what he has stated in the relevant paragraph of the statement dated 2nd April 2018: -

· “That later on, MR ONGELE ADVOCATE advised me that we needed to do another agreement between me and the vendors of parcel NO KISUMU MUNICIPALITY/BLOCK 11/7 since the former agreement was in the joint name of both of my late father and myself.”

· “That I took the said advise and on 22/02/2011 we went ahead and did another agreement between RIEGATE DEVELOPMENT LTD and FLAVERMART ENTERPRISES LTD.”

The sale agreement between the plaintiff and **RIEGATE DEVELOPMENT LTD** with respect to the suit property is document No 2 of the plaintiff's list of documents and is infact dated 12th February 2011 and not 22nd February 2011. A lease for the suit property was subsequently issued to the plaintiff on 11th March 2011 and a copy of the same is document No. 17 of the plaintiff's list of documents. However, the plaintiff did not come into existence until 16th August 20211 when it was issued with a Certificate of Incorporation which is document No. 18 in the plaintiff's list of documents. Given those undisputed facts, it is clear that the plaintiff did not exist as an entity on 12th February 2011 when it executed the sale agreement with **RIEGATE DEVELOPMENT LTD** for the purchase of the suit property. It did not also exist on 11th March 2011 when a Certificate of Lease in respect to the suit land was issued to it. The plaintiff having only been incorporated on 16th August 2011, it could not hold any title before that day. This was considered by the Court of Appeal in **CHARLES KARAITHE KIARIE & OTHER S .V. ADMINISTRATORS OF THE ESTATE OF JOHN WALLACE MATHARE & OTHERS C.A CIVIL APPEAL NO 225 OF 2006 (2013 eKLR)** where it held as follows: -

“Further, having found as a fac that the company did not exist when it was purportedly registered as the owner of the property. We think

the learned trial Judge was right in holding that a non-existent company could not hold title.” Emphasis added.

The Court cited with approval the decision of the then Court of Appeal for East Africa in the case of **HAIDERAL BHIMJI MOTANI .V. N. K. THOBANI & ANOTHER (1945)12 EACA 37.**

The plaintiff cannot also benefit from a contract made before 16th August 2011. In the case of **BEACH BAY HOLDINGS LTD .V. RATIM RELATIONS & OTHERS [2014 eKLR]** the following passage from **NEWBORN .V. SENSOLID (GREAT BRITAIN) LTD 1953 ALL E.R 708** is cited: -

“The contract was made, not with the plaintiff, whether as agent or as principal, but with a limited company which at the date of the making of the contract was non – existent and therefore, it was a nullity and the plaintiff could not adopt it or sue on it as his contract.”

The same situation applies here. There is no evidence that the plaintiff, after it’s incorporation on 16th August 2011, entered into a new agreement with **RIEGATE DEVELOPMENT LTD** with regard to the purchase of the suit property. On this issue, counsel for the plaintiff submits as follows: -

*“Your Lordship, the defendant avers that the plaintiff acquired the subject property before it was incorporated. We submit that the plaintiff was previously operating as a business in the name **FLAVEMART ENTERPRISES** and later decided to change into a Limited Liability Company it went ahead to apply for the same and paid the requisite charges. In essence, the plaintiff had already been recognized as existing before a Certificate of Incorporation was issued.”*

The truth of the matter however is that in the agreement dated 12th February 2011, the plaintiff is described as **FLAVEMART ENTERPRISES LTD** and not **FLAVEMART ENTERPRISES**. Those are two different entities and it is **FLAVEMART ENTERPRISES LTD** that was subsequently incorporated. Bearing in mind the fact that the plaintiff’s case is hinged on the claim that it purchased the suit property from **RIEGATE DEVELOPMENT LTD** by an agreement dated 12th February 2011, it must now be clear that that agreement was a nullity and could not confer any interest in the suit property to the plaintiff. The plaintiff did not exist then. Everything that flows from a nullity is itself a nullity and cannot be allowed to stand – **MACFOY .V. UNITED AFRICA CO LTD (1961) 3 ALL E.R 1169**. The plaintiff’s title to the suit property is therefore not protected by the provisions of **Section 26(1) of the Land Registration Act** and can be impeached as sought by the defendant in its counter – claim.

There is also the un-controverted evidence that the defendant holds the original lease to the suit property issued on 10th December 1976 to the then **EAST AFRICAN RAILWAYS CORPORATION**. This is document No. 1 in the defendant’s list of documents filed on 3rd November 2016. The defendant’s witness **STANLEY GITARI (DW 1)** has stated in his evidence that at no time did the defendant transfer the ownership thereto to **RIEGATE DEVELOPMENT** and an attempt to transfer it to **DUBE HOLDINGS LTD** was frustrated by the Kisumu Land Registry. **RIEGATE DEVELOPMENT** is of course not a party in these proceedings but in the face of the un-controverted evidence by **STANLEY GITARI**, it is difficult to see what legitimate interest the said **RIEGATE DEVELOPMENT LTD** had in the suit property to enable it transfer the same to the plaintiff.

Ultimately therefore and having considered all the evidence herein, I am not persuaded that the plaintiff is entitled to the declaration that it is the registered proprietor of the suit property nor the orders of injunction as per its plaint. On the other hand, there is sufficient evidence led by the defendant in it’s counter – claim to show that it is the rightful owner of the suit property and the purported transfer to the plaintiff was illegal, null and void.

Judgment is therefore entered for the defendant in the following terms: -

- 1. The plaintiff’s suit is dismissed with costs to the defendant.**
- 2. Judgment is entered for the defendant as prayed in its Counter – Claim together with costs.**

Boaz N. Olao.

J U D G E

30th October 2019.

Judgment dated and signed at **ELC BUNGOMA** this 30th day of October 2019.

To be delivered at **ELC KISUMU** on 15th November 2019.

Notices to issue.

Boaz N. Olao.

J U D G E

30th October 2019.