



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 1359 OF 2016

GULF ENERGY LIMITED.....PLAINTIFF

=VERSUS=

COUNTY GOVERNMENT OF KIAMBU..... DEFENDANT

MWENGE SERVICES LIMITED.....INTERESTED PARTY

JUDGMENT

Introduction

1. The central issue in this suit is the legality of Title Number: Kiambaa/Ruaka/69/56 which the plaintiff holds as lessee for a term of 99 years from 1/1/1993. The County Government of Kiambu is the Lessor by dint of the fact that it is the legal successor in title to the defunct County Council of Kiambu. The title was issued under the repealed Registered Land Act. The plaintiff purchased the suit property from the Interested Party, Mwenge Services Limited, at Kshs 41,000,000 in 2014. Transfer to the plaintiff was consented to by the defendant.

2. This suit was triggered by the defendant's refusal to issue to the plaintiff rates clearance certificate and approve the plaintiff's building plans for the construction of a petrol station on the suit land at Ruaka in Kiambu County. The defendant declined to issue the certificate and approve the plaintiff's building plans on the ground, *inter alia*, that the suit land is still the property of the County Government of Kiambu.

3. Aggrieved by the defendant's decision, the plaintiff brought this suit seeking the following orders:-

(i) A declaration that the plaintiff rightfully holds valid leasehold interests over the property known as L. R. No. Kiambaa/Ruaka/69/56.

(ii) A declaration that the failure by the defendant to give the plaintiff information and details concerning the land rates and rents that have accrued in respect of the property known as L.R. No. Kiambaa/Ruaka/69/56 was wrongful and unjustified.

(iii) A permanent injunction restraining the defendant whether by itself, its servants, agents, contractors and any other person other than the plaintiff from constructing, fencing, developing, entering, trespassing into the plaintiff's parcel of land known as L.R. No. Kiambaa/Ruaka/69/56 or interfering in any way with the plaintiff's quiet enjoyment of the said parcel of land until the expiry of the period contained in the Certificate of Lease issued on December 17, 2014.

(iv) Any other relief as the court may deem fit.

(v) Costs of the suit.

Plaintiff's Case and Evidence

4. The plaintiff's case is set out in the plaint dated 28/10/2016, the witness statement of John Waithaka dated 30/10/2017 and filed on 31/10/2017, and in the plaintiff's written submissions filed by M/s Mohammed Muigai Advocates on 14/12/2017. The plaintiff contends that it is the registered proprietor of the suit land pursuant to a land purchase contract dated 29/9/2014, consequential transfer registered on 17/12/2014, and certificate of lease issued on even date. It further contends that neither the plaintiff's title nor the preceding title of the interested party have been challenged as by law provided. The plaintiff also contends that prior to 2015, the defendant recognized ownership of the suit land by the interested party and subsequently by the plaintiff in that: (i) its predecessor issued a lease and wrote to the Commissioner of Lands authorizing issuance of certificate of lease to the interested party; (ii) it never communicated to the Commissioner of Lands any nullification or revocation of the suit land to the interested party; (iii) it opened a file reference for the suit land and collected rates from the registered lessees for 19 years; and (iv) it authorized transfer of the suit land from the interested party to the plaintiff in 2014 at Kshs 41,000,000. To this extent, the plaintiff contends that it acquired and holds a valid title to the suit land. It urges the court to grant the prayers sought in the plaint.

5. PW1-John Waithaka's evidence is that in July 2014, the plaintiff came across the suit property which measures approximately 0.173 hectares and got interested in the property, with a view to building a petrol station on it. Representatives of the plaintiff met one Dominic Njoroge, a director of the interested party, who confirmed that indeed the suit land was on offer. The plaintiff undertook due diligence on the title, which included; (i) obtention of official search from Kiambu Lands Registry which confirmed the interested party was the registered proprietor; (ii) perusal of the Ndung'u Report on illegal and irregular allocation of public land which did not bear the suit land; (iii) obtention of rates records from Kiambu County Government which confirmed the interested party was the recognized rate payer and was up to date in rates payment; (iv) obtention of search from the Companies Registry which confirmed the directorship of the interested party; and (v) inquiry at the Kenya National Highways Authority (KENHA) which confirmed the suit land was not on a road reserve. Satisfied that the title to the suit land did not have any query, the plaintiff proceeded to enter into a land purchase contract and purchased the suit land at Kshs 41,000,000. The defendant duly consented to the transfer of the suit land from the interested party to the plaintiff and on the basis of this consent, the suit land was transferred to the plaintiff.

6. PW1 further testified that after purchasing the suit land, the plaintiff commenced plans to construct a petrol station on it. The plaintiff needed funding from a financial institution using the title of the suit land as a collateral. Consequently, the plaintiff commenced the process of obtaining current rates clearance certificate, building approvals and consent to charge. At that point, the defendant informed the plaintiff that the suit land had been irregularly allocated to the interested party in 1992 and that the County Council of Kiambu had subsequently, in a meeting held on 17/9/1996, resolved that the allocation was irregular. The defendant contended that, based on the resolution, the suit land was still under the County Government of Kiambu. The defendant accordingly declined to grant the plaintiff the rates clearance certificate and the approvals, prompting this suit.

Defendant's Case and Evidence

7. The defendant's case is contained in the defence filed on 13/12/2016, witness statement by Mr. Dennis Abuya and written submissions by the defendant's legal counsel, Keziah Mbugua. The defendant contends that the allotment to the interested party was done irregularly because the suit land had been set aside as a public utility plot reserved for a market and that it was not available for allotment. Secondly, the defendant contends that payment of rates and issuance of a clearance certificate does not guarantee title to property and neither does it sanctify the title. Thirdly, the defendant contends that the Kenya National Highway Authority (KENHA), through a letter dated 24/6/2014, intimated that the suit land had been compulsorily acquired and earmarked as a road reserve. Fourth, the defendant contends that apart from portions of the suit land being a road reserve and some other parts being a public utility plot, the rest of the suit land sits on a riparian reserve.

8. DW1, Dennis Abuya, testified that he works as a physical planner in Kiambu County. In November 2015, while serving as a planner in Kiambaa Sub County, he received an application from the plaintiff for a change of user, architectural plans and structural drawings for the development of the suit land. On perusal of records, he discovered that the suit land is being claimed by area residents as public land set aside for a trading centre. From records, he established that the suit land is a subdivision from Kiambu County Council Plot No. 69. He further testified that part of Plot No. 69 was acquired for the realignment of the Ruaka - Limuru Road (C 69).

9. DW1 further testified that the allocation of the suit property to the interested party was nullified by the Works, Town Planning, Education, Housing and Social Services Committee of the County Council of Kiambu on 17/9/1996 and the resolution was adopted by the full Council on 23/10/1996. He further testified that KENHA had through a letter dated 24/6/2014 advised that part of Kiambu/Ruaka/69 measuring 2.325 Acres was acquired through Gazette Notice No. 3438 of 20/11/1970 for the purpose of realigning the Ruaka – Limuru Road.

Plaintiff's Submissions

10. Through written submissions, Mr. Angwenyi, counsel for the plaintiff, argued that registration under the Registered Land Act (now repealed) offered certain protections to titles registered under that law. He added that the title held by the interested party and subsequently transferred to the plaintiff has never been revoked. He further submitted that the defendant was party to the transfer of the suit land to the plaintiff. Mr. Angwenyi further submitted that a title registered under the Registered Land Act would not be revoked by a resolution of the committee of the County Council but by a court order on a proper motion. He added that revocation of a title requires due process as laid down by the law.

11. On whether or not the suit land forms part of a road reserve, Mr. Angwenyi referred the court to a letter dated 24/6/2014 from KENHA in which the KENHA confirmed that they had carried out investigations and had established that the beacons erected on the suit land did not encroach on the road reserve.

Defendant's Submissions

12. Through written submissions dated 5/1/2018, the defendant's Legal Counsel, Keziah Mbugua, argued that the title held by the plaintiff was unprocedurally issued in that the five mandatory steps involved in the processing of title pursuant to an allotment were not followed. He listed the five mandatory steps as (i) preparation of a physical plan; (ii) issuance of public notice; (iii) issuance of letters of allotment; (iv) survey and preparation of registry index map and; (v) issuance and forwarding of a duly executed lease to the Commissioner of Lands to enable the Commissioner of Lands prepare a certificate of lease. Counsel added that the resolution of the committee of the local authority had to be effected through adoption by full council. He added that it was not procedural for the Commissioner of Lands to issue a certificate of lease without minutes of the full council.

13. Counsel further submitted that payment of rates is not proof of ownership. She added that the plaintiff had not produced copy of the relevant allotment letter which would form the basis of the certificate of lease. Counsel added that according to the Registry Index Map (RMI), the suit land was set aside as a public utility as a trading centre. Counsel further submitted that full council properly nullified the allocation on 23/10/1996.

14. On whether or not the suit land was surrendered to the government for the realignment of Ruaka - Limuru Road, counsel relied on the Letter dated 24/6/2014 from KENHA and contended that the suit land was a road reserve. She urged the court to dismiss the plaintiff's suit.

Issue

15. The key issue in this suit is whether or not the leasehold title held by the plaintiff to wit, Kiambaa/Ruaka/69/56, is valid. I have considered the parties' pleadings, evidence and rival submissions

on this issue. Under Section 26 of the Land Registration Act, a certificate of title issued by the registrar is to be taken by this court as prima evidence that the person named in the title is proprietor of the land. The burden of proving the contrary shifts to the party seeking to impeach the title.

Determination

16. It is not disputed that the certificate of lease which the plaintiff holds was issued by the land registry at Kiambu at the instance of the Commissioner of Lands. The Commissioner of Lands acted on a letter dated 10/12/1992 from the County Clerk of the County Council of Kiambu to the Commissioner of Lands through the Permanent Secretary, Ministry of Local Government. The Letter reads as follows:-

The commissioner of Lands

P. O. Box 30004

NAIRIOBI

Thr'

The Permanent Secretary

Ministry of Local Government

P. O. Box 30089

NAIROBI

Dear Sir,

RE: KIAMBU COUNTY COUNCIL LEASE APPLICATION

The lease application for the under mentioned has been approved by the council vide Min.67/92 of the Works, Town Planning, Education, Housing and Social Services Committee Meeting held on 7th October 1992 in the Council's Committee Room starting at 9.30 am.

I therefore forward the lease documents for your further necessary action.

Plot No. Kiambaa/Ruaka/69/56

M/s Mwenge Services Ltd

P. O. Box 49244

NAIROBI

Yours faithfully,

KAMAU P. M. G

COUNTY CLERK

Cc The Land Registrar

P. O. Box 291

KIAMBU

M/s Mwenge Services Ltd

P. O. Box 49244

NAIROBI

17. Suffice to say that, the above communication forwarded to the Commissioner of Lands two instruments; (i) Minutes of the Council Committee Meeting which sanctioned the allocation of the suit land to the interested party; and (ii) duly executed lease between the County Council of Kiambu (lessor) and the interested party (lessee). Satisfied that the laid down procedure had been followed, the Commissioner of Lands instructed the land registrar at Kiambu lands registry to process and issue a certificate of lease in the name of the interested party. A parcel register was opened on 3/6/1994 and a certificate of lease issued in the name of the interested party on the same day. These facts are not contested by the defendant. The defendant's contention is that 2¼ years subsequent to the issuance of the title in the name of the interested party, a committee of the Council met (on 17/9/1996) and resolved to revoke the allocation of the suit land. The resolution of the Committee was subsequently adopted by the full Council on 23/10/1996.

18. There is however no evidence that any legal process was ever initiated to actualize these subsequent resolutions by the Council. Similarly, there is no evidence that the Interested Party, the Commissioner of Lands and the District Land Registrar at Kiambu were ever notified about the subsequent resolutions of the Council. More important, no encumbrance was lodged by the Council against the title to forewarn the public that the Council still considered the suit land to be its property.

19. The net result of this inaction on part of the Council is that the interested party continued to hold the certificate of lease as a valid instrument of title. And twenty years after the title was issued, the interested party, with the written consent of the defendant, sold and transferred the suit land to the plaintiff at a consideration of Kshs 41,000,000. The plaintiff was issued with a certificate of lease.

20. Through this suit, the plaintiff wants the court to find that it holds a valid leasehold title to the suit land. On its part, the defendant has urged the court to find that the suit land is property of the defendant and reject the plaintiff's plea. It is noteworthy that the defendant has not brought a counterclaim to nullify the title held by the plaintiff although it contends that it considers the suit land to be its property.

21. The substantive law governing the material title prior to 2012 was the Registered Land Act (now repealed). The land is now governed by the Land Registration Act. Section 27 and Section 28 of the repealed Registered Land Act provided the following protection to a leasehold title issued under that Act.

Section 27

(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;

(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 and expressed agreements, liabilities and incidents of the lease.

Section 28

The rights of a proprietor, whether acquired on first registration or whether acquired 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) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register.

22. Section 143 of the repealed Registered Land Act provided the following framework on how a register of land registered under the Act would be rectified, cancelled or amended:

143 (1) 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.

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.

23. The foregoing framework was re-enacted in Sections 24, 25 and 26 of the Land Registration Act in the following terms:

24. Interest conferred by registration

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.

25. Rights of a proprietor

(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.

26. 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.

24. Under Section 26 of the Land Registration Act, the only grounds upon which a registered land proprietor's title can be impeached are: (i) fraud or misrepresentation to which the title holder is a party; and (ii) the ground that the title was issued illegally, unprocedurally or through a corrupt scheme. As stated above, the burden of proof of any of the above grounds lies with the party seeking to impeach the title.

25. The gist of the defendant's defence is that the allotment of the suit property to the plaintiff by the defendant's successor was done irregularly as the suit property had been set aside as a public utility plot. Secondly, the defendant contends that part of the suit property is a road reserve and part of it is a riparian reserve.

26. There is no doubt that the defunct local authorities had powers to grant leases. There is also no dispute that the lease held by the plaintiff was granted by the defunct County Council of Kiambu and the suit land is one out of 56 plots which were subdivisions out of Parcel No. Kiambaa/Ruaka/69 which previously belonged to the County Council of Kiambu. A portion of that parcel was acquired by the Government as a road reserve. The rest of the land was leased out through 56 Allotments for a period of 99 years.

27. The defendant did not present any area physical plan or part development plan which prevailed at the time the allocations were made to support the contention that the suit land had been earmarked for a different use. The registry index map (RIM) which DW1 Dennis Abuya produced as Defence Exhibit No. 1 was a registry index map for Ruaka market, Plot No. Kiambaa/Ruaka/69 and on it the suit land (sub plot No. 56) is captured as having been earmarked for a petrol service station and allocated to Mwenge Services. The plot is the last one on the list on the registry index map. The index map only serves to support the plaintiff's contention that the suit land was allotted to the interested party for the construction of a petrol station.

28. Paragraph (c) of the Minutes which the defendant contends revoked the allotment of the suit land to the plaintiff proposed that the Council Clerk would write to the Commissioner of Lands to revoke the title and leases of the affected plots. There is however no evidence that the Council actualized that resolution. To actualize the resolution, the Council would have been required to initiate appropriate proceedings to revoke the titles.

29. On the contention that the suit land is a road reserve, the Defendant produced letters and a layout map from KENHA which indicates that only part of Plot No. 69 was acquired by the roads department. The Letter from Kenya Highways Authority dated 24/6/2016 which was relied upon by both the plaintiff and the defendant states as follows:-

“Without prejudice”

Muchemi & Co. Advocates

P. O. Box 2699-00100

NAIROBI

RE: Regarding the property: Kiambaa/Ruaka/69/56

Your letter ref: MM/2014/200/97 ENW & PWK dated 17th June 2014, on the above suit matter.

The above parcel of land (Kiambaa/Ruaka/69/56) resulted from the subdivision of parcel Kiambaa/Ruaka/69. Part of Kiambaa/Ruaka/69 was acquired for the realignment of the Ruaka-Limuru road (C62). Indeed a total of 2.325 acres was acquired from Kiambaa/Ruaka/69 through Gazette Notice No.3438 of 20th November 1970. Kindly ensure that the area acquired has been surrendered to the Government accordingly.

Our investigations reveal that the beacons erected on the property to mark the extents are not encroaching on the road reserve. You are however advised that this Authority shall not warrant or guarantee neither the correctness of any land records, nor suitability of the land for any purpose whatsoever, in relation to the above road.

We further advise that development/construction of an access to/from the above road shall be subjected to approval of this Authority.

James Bowen

FOR: DIRECTOR GENERAL

30. From the above letter, I understand KENHA to be saying that they have gone to the suit property and they have established that the beacons of the suit property do not encroach on the road reserve. This is evidence presented by the defendant to support a finding that the suit property is a road reserve.

31. Above all, both the defendant and its predecessor have done nothing in the last 22 years to invalidate the title previously registered in the name of the interested party and now registered in the name of the plaintiff. As late as 2014, the defendant affirmed the validity of the interested party's title by consenting to the sale and transfer of the suit land to the plaintiff.

32. No evidence was tendered to support a finding that the suit land is a riparian reserve. I would say no more on this issue.

33. The plaintiff is a purchaser for value. No evidence has been tendered to indicate that it has been privy to any of the vitiating conduct set out in Section 26 of the Land Registration Act.

34. In light of the foregoing, I am satisfied that the plaintiff has demonstrated that the certificate of lease which it holds in respect of Kiambaa/Ruaka/69/56 was properly issued pursuant to a lease duly executed and issued by the defunct County Council of Kiambu. The defendant has not satisfied the criteria for the impeachment of that title under Section 26 of the Land Registration Act. Consequently, I find that the plaintiff is entitled to the prayers sought in the plaint. I accordingly grant the plaintiff's plea in terms of Prayers (i), (ii), (iii) and (v) of the Plaint.

Dated, signed and delivered at Nairobi on this 9th day of February 2018.

.....

B M EBOSO

JUDGE

In the presence of:-

Mungai holding brief for Angwenyi Advocate for the Plaintiff

M/s Mbugua Advocate for the Defendant

Halima Court clerk