



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT OF KENYA

AT MILIMANI

ELC CASE NO. 567 OF 2015

SWAMINARAYAN FLATS LIMITED.....PLAINTIFF

VERSUS

THE ATTORNEY GENERAL.....DEFENDANT

JUDGEMENT.

1. The Property in dispute in this case is LR No.209/12854 measuring 0.4392 hectares (suit property). The suit property abuts WestPark Estate which is a civil servant Housing Scheme which started in the 80's and is now complete and occupied by civil servants who are mainly police officers. The suit property had been allocated to S K Maru, Lynn Ikadigor and Dorothy Wacera who later transferred it to Ejupe Company Limited by way of informal transfer.
2. The suit property was registered in the name of Ejupe Company Limited on 5th May 1998. In 2006, the then Ministry of Roads and Public works moved into the suit property and started construction of a Cabro paved road across the suit property. The directors of Ejupe Company Limited protested the action by the Ministry but the construction of the road did not stop as it was argued that the suit property was on a road reserve.
3. In the same year, Ejupe Company Limited started selling the suit property to the plaintiff. In the meantime, Ejupe Company Limited moved to the High Court where it filed constitutional Petition No.248 of 2007 against the permanent Secretary Ministry of Roads and Public Works alleging that its constitutional rights had been infringed as a result of the encroachment of its property. This Petition was fully heard and in a judgement delivered on 28th may 2010, the Petition was dismissed with costs to the respondent. Unbowed by the result of the litigation, the plaintiff carried on with the sale transaction which culminated in the suit property being transferred to it on 7th December 2012.
4. By an amended plaint leave of which was granted on 17th January 2017, the plaintiff claims kshs.92,000,000/=being the market value of the suit property, Kshs.60,000/= being survey charges and Kshs.60,000/= being valuation charges. The plaintiff also claims mesne profits as well as costs and interest of the suit. The suit property was purchased on 9th February 2006 by Karsan Lalji Patel who is a director of the plaintiff company. The suit property was however registered in the name of the plaintiff as clause 11 of the agreement gave liberty to the vendor to transfer the suit property to a nominee of the purchaser. The suit property was bought for Kshs.4,800,000/=.
5. The Plaintiff's director Karsan Lalji Patel testified that before he purchased the suit property, he went to the ground and found that the property was okay. A confirmation was received from the lands office confirming that the suit property was registered in the name of Ejupe Company Limited. As the sale process was underway, construction of a road across the suit property started. He went and asked the directors of Ejupe Company Limited to stop the encroachment. Ejupe Company Limited tried to stop the encroachment in vain. He was advised by his lawyers to go ahead and have the sale concluded after which he would claim compensation. This is because as at the time the suit property was registered in the name of the plaintiff company, a road had already been constructed across it. There were also power lines which passed through the property and drainage had also been completed. There were also underground cables laid across the suit property.
6. The plaintiff engaged the services of Realty Valuers East Africa Limited who first valued the suit property in March 2014 and later on in December 2016. The valuation was done by Stephen Waweru Maina who produced the two reports . In March 2014 , the suit property was valued at kshs.60,000,000/= . In December 2016, the same property was valued at Kshs.80,000,000/= . The suit property is not built. This value was arrived at in accordance with the principles set out in the relevant Acts and the location of the property.
7. The Plaintiff called Priscilla Njeri , a Land Surveyor who works in the survey Department . When this witness received summons to come and testify, she went to the ground to gather more evidence regarding the subject matter for which she was to testify in Court. She found out that the suit property existed in the maps as from 1996. She noticed that there was a road which had been constructed across the suit property. Also passing through the property is a drainage system and power lines. A google map obtained by her showed that the suit property existed before the road was constructed.

8. The surveyor testified that she was not able to identify all the beacons of the suit property because the area had been built up. She however used a neighboring plot that is LR No. 209/11418 to identify the beacons of the suit property. She was unable to say whether the suit property was on public land.

9. The defendant called Edwin Wafula Munoko a Registrar of Title who adopted a statement which he recorded. The statement which he recorded basically gives the history of the registration of the suit property which is currently registered in the name of the plaintiff. This witness stated that he was not aware of any road which traverses the plaintiff's property and if there is any, then it is the department of survey which will be in a position to do so. This witness nevertheless proceeded to produce the documents relied on by the defence.

10. The defence case is that the suit property falls on a road reserve and as such the plaintiff cannot be compensated by the defendant and that if it wishes to have any compensation, then he should direct his claim to Ejupe Company Limited which sold the property to him. It is the defendant's contention that the plaintiff bought the suit property while aware that it had issues and that there was litigation on it but he nevertheless pushed on with the transaction.

11. I have carefully considered the evidence by the plaintiff and that of the defendant. I must say from the beginning that the defendant threw a few documents to the court and left the court to go through them and make a case for them. Though a qualified surveyor had been listed as a witness of the defendant, he was not called. Instead the person who was called was of least importance considering the nature of the case before the court. However be that as it may, the issues which emerge for determination are firstly whether the suit property was created out of a road reserve. Secondly did the then ministry of Roads and Public Works illegally encroach on to the suit property? Thirdly has the plaintiff suffered any loss and if so who should be liable for the loss. Lastly is the plaintiff entitled to compensation as claimed.

12. On the first issue, I have looked at the survey plan of 1987 which was produced by the defendant's witness. The survey plan does not show the suit property. The suit property was created 9 years later at the junction of some two roads, one measuring 25 meters and the other measuring 18 meters. Prior to the creation of the suit property, the junction area where the suit property now lies was a road reserve for the two roads. The suit property was created by adding one additional beacon marked "NW" which forms a sharp corner deep into the reserved land for the two roads which meet at that point. The other beacons marking the suit property are those for LR No209/14582 marked as TN 10 and TN 9. The other two beacons which identify the suit property are beacon nos. TN1 and TN which were in existence as at 1987 and were in respect of LR NO 209/11418.

13. The suit property neighbours West Park Estate which had been set aside for a civil servant's scheme. There was no land left next to that public land other than for road reserve for the two roads which meet at that point. When the plaintiff applied for subdivision approval from the city council, the approval was given subject to the plaintiff giving truncations of 10x10 for the 25 meter road which was on one side of the suit property and 8x8 on the other side. The suit property fronts the two roads. The larger map of the area which was produced by a witness from the director of survey clearly shows that the suit property was created from a road reserve.

14. The witness from the director of survey tried to say that the cabro road was created on private property; that it ought to have been created where there was old tarmac road. This was the position held by the valuer called by the plaintiff. This is however not the position as the issue was not whether the new road ought to have followed the old one. The question was whether the suit property was on the road reserve or not. During the hearing of the Petition in the High Court, evidence of the survey plan of 1987 was given. This is where one of the exhibits produced by the defence was obtained. Whereas the witness from the director of survey wanted to create the impression that the road was built on where it was not supposed to be, what she did not say is that what they were calling the area of the old road existed. The new road was created through the suit property as that area was a road reserve which was not available for alienation for private use. This witness tried to appear to be non-partisan by claiming that she did not bother to know who was the owner of the property when she went to the ground but it is clear that she was called to testify as a witness of the plaintiff and she appeared to give evidence, in favour of the plaintiff which evidence was indefensible. She conceded that she may not know that the suit property was created from public land.

15. There was no evidence that the area was re planned as to create the suit property. Even if there would have been re-planning the re-planning would not have been done to take away what was clearly a road reserve at the junction of two roads. A road reserve is an overriding interest which does not require noting in the register. It is clear that the area where the suit property falls is a road reserve. A comparison of the survey map of 1987 and the one of 1996 which created the suit property fortifies my finding. I therefore find that the suit property was created from land reserved for the two roads which converge at that area. It was therefore not available for alienation for any private use.

16. On the second issue, I have no difficulty in finding that the then ministry of Roads and Public works did not encroach on to the suit property. The suit property lay on a road reserve. When the ministry was constructing the new road, it was not bound to construct it where the old one lay. As long as there was land reserved for a road, they were at liberty to construct the road through that area. The Ministry of Roads and Public Works cannot therefore be accused of encroaching on to the suit property.

17. On the third issue, the evidence is clear that the plaintiff put its money in the purchase of the suit property. That property has now been taken up by a road, drainage system and some underground cables as well as overhead power lines. To this extent it is evident that the plaintiff has lost that property and hence incurred loss. The question which then follows is who is to meet the plaintiff's loss?. The plaintiff was registered as owner of the suit property on 7th December 2012. As at this time, the Land Registration Act of 2012 had come into force . Section 26(1) of *the Land Registration Act* provides as follows:-

“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—on the ground of fraud or misrepresentation to which the person is proved to be a party; or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme”

18. It is clear from the above section that the right to a registered proprietor cannot be defeated except where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. The law also protects an innocent purchaser for value without notice of any defect in title. In the instant case, the plaintiff was aware that the previous owner's title was subject to question. Despite this knowledge and more so given that the previous owner had lost a court case, it nevertheless went ahead hoping that it would file a case for compensation. The previous owner of the suit property obtained the suit property which was created from a road reserve which was not available for alienation for private use. To this extent the title which was obtained was obtained illegally. The plaintiff was not an innocent purchaser for value without notice of the defect in title. The plaintiff's director went to the ground and saw the land himself. He should have noted that the land was on a road reserve and stopped any further dealings with respect to the same.

19. In the case of **Adan Abdirahani Hassan & 2 others Vs The Registrar of Titles & 2 others (2013) eKLR** it was held as follows:-

“ The Commissioner of Lands or his subordinate cannot purport to alienate land which has already been set aside for public purpose. Any alienation of land reserved for public purpose and issuance of a title for the same, whether under the Registration of Titles Act, Cap 281 or the Registered Land Act Cap 300 is null and void ab initio. Such title does not exist in the first place because the land belonged to the public and was not available for alienation”.

20. In the case of **Milan Kumar Shah & 2 Others Vs City Council of Nairobi and Another**, it was held as follows:-

“ Title to land is absolute and indefeasible to the extent , firstly, that the creation of such title was in accordance with the applicable law and secondly, where it is demonstrated to a degree higher that the balance of probability that such registration was procured through persons or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law and the public interest”.

21. The Plaintiff had all indicators that the title to the property may have been acquired illegally but it nevertheless went ahead. If the plaintiff has suffered, it should look elsewhere for compensation because the Government cannot compensate where it is clear that the victim had notice of the defect or would have with due diligence noticed that the title was not good but nevertheless went ahead hoping to be compensated. If the Plaintiff has any claim it should direct it to the person who sold the land to it.

22. The issue in this case was not one of compulsory acquisition. The Ministry of Roads and Public Works constructed a road on the suit property on the basis that the property was on a road reserve. The property had not been built since it was acquired in 1998. Though it may sound unprocedural for the ministry to have gone ahead with the construction without ownership having been determined, the invasion by its nature was necessary as the land was clearly on a road reserve. The plaintiff has relied on the case of **Virendra Ramji Gudka & 3 Others Vs Attorney General (2014) eKLR** . This case is distinguishable from the present case in that in that case, the defendant had claimed that the land on which the plaintiffs had built their go downs was on land which the Government had acquired and reserved as road reserve for the Old North Airport Road. The court found that there was no evidence that that was the case. The court proceeded to award compensation for the demolished structures. This was not the case in the present case where the plaintiff's land clearly lay on a road reserve.

23. The last issue has been partially addressed while dealing with the third issue. I will therefore not dwell much on it save for reiterating that the plaintiff cannot be compensated for land which has been found to have been illegally acquired and the plaintiff had every reason to doubt the genuineness of the title owing to the litigation which was pending in court and had been determined against the previous owner. I however wish to state that the litigation in the High Court did not touch on whether the title was genuine or not. That was left for another forum and this is the forum which has found that the title to the suit property was illegally acquired and that being the case, the issue of compensation does not arise. I therefore find that the plaintiff has failed in its case which is hereby dismissed with costs to the defendant.

Dated, Signed and delivered at Nairobi on this 4th day of April 2018.

E.O.OBAGA

JUDGE

In the presence of :-

Mr Shirachi for Mr Wambugu for Plaintiff

Court Assistant: Kevin

E.O.OBAGA

JUDGE