



**Fazal v Horus Limited & 6 others (Environment & Land Case 220 of 2013) [2018] KEELC 4904 (KLR) (19 July 2018) (Judgment)**

*Mohamed Salim Fazal v Horus Limited & 6 others [2018] eKLR*

Neutral citation: [2018] KEELC 4904 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 220 OF 2013**

**OA ANGOTE, J**

**JULY 19, 2018**

**BETWEEN**

**MOHAMED SALIM FAZAL ..... PLAINTIFF**

**AND**

**HORUS LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**AHMED SHARIFF ..... 2<sup>ND</sup> DEFENDANT**

**ZAINABU M. SHARIFF ..... 3<sup>RD</sup> DEFENDANT**

**SETTLEMENT FUND TRUSTEES ..... 4<sup>TH</sup> DEFENDANT**

**THE CHIEF LAND REGISTRAR ..... 5<sup>TH</sup> DEFENDANT**

**THE REGISTRAR OF TITLES, KILIFI ..... 6<sup>TH</sup> DEFENDANT**

**THE ATTORNEY GENERAL ..... 7<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**Introduction:**

1. In the undated Complaint filed on 4<sup>th</sup> December, 2013, the Plaintiff has claimed that he was issued with a Land Certificate for a parcel of land known as Kilifi/Jimba/399 on 3<sup>rd</sup> August, 1979; that he charged the land in favour of Kenya Commercial Bank on 25<sup>th</sup> November, 1982 and secured a loan of Kshs. 150,000 and that he is still servicing the loan to date.
2. The Plaintiff has averred that he later on came to learn that on 22<sup>nd</sup> August, 1986, the 5<sup>th</sup> or 6<sup>th</sup> Defendants created another green card for the suit land; that they then transferred the land to the



2<sup>nd</sup> and 3<sup>rd</sup> Defendants on 9<sup>th</sup> August, 2000 and that on 30<sup>th</sup> April, 2002, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants transferred the land to the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant is currently in possession of the land.

3. The Plaintiff averred that the registration of the suit land in favour of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants was illegal, fraudulent and wrongful and that he has been unlawfully deprived of his land. The Plaintiff is seeking for the following orders: A declaration that he is the legal owner of the suit land; a declaration that neither the government nor the 4<sup>th</sup> Defendant had any legal or transferrable interest in the suit land; a declaration that the purported registration of the suit land to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants on 9<sup>th</sup> August, 2000 and the transfer of the same land to the 1<sup>st</sup> Defendant was illegal, fraudulent, null and void amongst other declaratory orders.
4. The 1<sup>st</sup> Defendant filed a Defence in which he averred that he is an innocent purchaser for value without notice of any defect of the title; that the suit land was transferred to him on 30<sup>th</sup> April, 2002 hence became the absolute proprietor of the suit land and that he has substantially developed the land. The other Defendants neither entered appearance nor filed Defences. This matter proceeded for hearing on 15<sup>th</sup> November, 2016 when only the Plaintiff testified.

#### **The Plaintiff's case:**

5. The Plaintiff, PW1, informed the court that he was registered as the proprietor of land parcel number Kilifi/Jimba/399 (the suit property) in 1979; that he used the title to the suit land to borrow Kshs. 150,000 in 1982 and that when he visited the suit land in October, 2012, he found the 1<sup>st</sup> Defendant had erected buildings on the land. It was the evidence of PW1 that he discovered that the Chief Land Registrar had cancelled his title in 1986 and created a parallel register in which it was indicated that the government was the proprietor of the suit land and that on 1<sup>st</sup> August, 2000, the land was transferred to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants who registered a charge in favour of the Settlement Fund Trustees. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants then transferred the land to the 1<sup>st</sup> Defendant.
6. The Plaintiff informed the court that the purported acquisition of the suit land by the government and the transfer of the same to the 2<sup>nd</sup>, 3<sup>rd</sup> and 1<sup>st</sup> Defendants was illegal, fraudulent and wrongful; that the government and the Settlement Fund Trustees had not interest in the suit property because the land had already been registered in his name and that he held superior rights over the suit land.
7. None of the Defendants testified in this matter. Indeed, other than the 1<sup>st</sup> Defendant, the rest of the Defendants did not file Defences. However, the 1<sup>st</sup> Defendant was represented by counsel.

#### **Submissions:**

8. The Plaintiff's advocate submitted that in the absence of the evidence of the Defendants, the Plaintiff's evidence is uncontroverted and his claim should be allowed; that the Plaintiff has tendered evidence to prove that the title to the suit land was extinguished fraudulently and that he was the first registered proprietor of the land.
9. Counsel submitted that if the Defendants had conducted due diligence, they would have discovered that the government did not have a valid title to pass to them.

#### **Analysis and findings:**

10. The Adjudication Record dated 15<sup>th</sup> May, 1979 shows that the Plaintiff was adjudicated as the owner of parcel of land known as Kilifi/Jimba/399 measuring approximately 2.0Ha. The Land Certificate in respect of the suit land was then issued on 3<sup>rd</sup> August, 1979 in favour of the Plaintiff. On 26<sup>th</sup>



November, 1982, the Plaintiff charged the land with the Kenya Commercial Bank and was granted a loan of Kshs. 150,000. This charge has never been discharged.

11. The Plaintiff produced in evidence a copy of the register that was opened on 18<sup>th</sup> June, 1979 which seems to have been cancelled. It is not clear the person who cancelled the said register. A new register titled “Edition II” was opened on 22<sup>nd</sup> December, 1986 for the suit land. According to the said new register, the government of Kenya was registered as the proprietor of the suit land on 22<sup>nd</sup> December, 1996.
12. The “Edition II” register shows that on 9<sup>th</sup> August, 2000, the suit land was transferred to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants by the Settlement Fund Trustees. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants transferred the land to the 1<sup>st</sup> Defendant on 30<sup>th</sup> April, 2002.
13. The Defendants did not adduce any evidence to show how the second edition of the green card was created considering that the land was registered in favour of the Plaintiff, If indeed the Plaintiff’s title was cancelled, there is no evidence to show that the Plaintiff was notified of the cancellation and the reasons for the cancellation given to him.
14. Article 40(1) of *the Constitution* provides that every person has the right, either individually or in association with others, to acquire and own property of any description and in any part of Kenya. This provision resonates with Section 75 of the repealed Constitution.
15. Article 40(3) of *the Constitution* further provides that the State shall not deprive a person of property of any description, or of any interest in, or right over, any property of any description, unless the deprivation results from an acquisition of land for public purpose in which case prompt payment in full, of just compensation is required.
16. There is no evidence before me to show that the government compensated the Plaintiff for the suit land that was initially registered in his favour. There is also no evidence that the suit land was registered in favour of the Plaintiff in 1979 fraudulently.
17. The suit land was registered in favour of the Plaintiff under the Registered *Land Act*, which is the applicable law in the instant case. Section 27 of the Registered *Land Act* (repealed) provides that the registration of a person as the proprietor of land shall vest in that person the absolute ownership of the land together with all rights and privileges belonging or appurtenant thereto.
18. The government, or any other person, cannot take away the right of a registered proprietor of land by a stroke of a pen, and moreso without compensation or due process. Where a person’s title is cancelled by the Government, and where it is shown that the subsequent proprietor was an innocent allottee or proprietor of the land, then the remedy available to the person whose title has been unlawfully cancelled is for compensation for the land, payable by the Government. The innocent allottee of the land, or purchaser for value cannot be punished for the acts of the Government like in the instant case, unless he unlawfully acquired the land.
19. However, in the instant case, none of the Defendants testified in this matter. It is therefore not clear if due process was followed by the Defendants to have the title document issued to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, who then transferred to the 1<sup>st</sup> Defendant. In the absence of such evidence, it cannot be said that the 1<sup>st</sup> Defendant is an innocent purchaser for value.
20. Consequently, and for the reasons I have given above, I allow the Plaintiff’s Plaintiff as prayed.

**DATED AND SIGNED AT MACHAKOS THIS 12<sup>TH</sup> DAY OF JULY, 2018.**

**O.A. ANGOTE**



**JUDGE**

**DATED, DELIVERED AND SIGNED AT MALINDI THIS 19<sup>TH</sup> DAY OF JULY, 2018.**

**J.O. OLOLA**

**JUDGE**

