



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 97 OF 2007

JOSEPH MANGA MUGWE.....PLAINTIFF

VERSUS

THE HON. ATTORNEY GENERAL.....1ST DEFENDANT

COMMISSIONER OF LANDS.....2ND DEFENDANT

CHIEF LAND REGISTRAR.....3RD DEFENDANT

LAND REGISTRAR KILIFI & MALINDI DISTRICT.....4TH DEFENDANT

LEONARD RUWA.....5TH DEFENDANT

LA MARINA LIMITED..... 6TH DEFENDANT

THE SETTLEMENT FUND TRUSTEES.....7TH DEFENDANT

HOLBORN PROPERTIES LIMITED..... 8TH DEFENDANT

WINNIE JUMWA MUFULO.....9TH DEFENDANT

JUDGMENT

Introduction:

1. In his Complaint dated 20th November, 2007, the Plaintiff averred that at all material times, he was the registered proprietor of land known as Chembe/Kibabamshe/391 which he purchased from James Masika in the year 1980; that the area was declared an adjudication section in the year 1970 and that in 1986, the government, through the offices of the 2nd, 3rd and 4th Defendants, purported to nullify the said adjudication and required all the registered proprietors to surrender their title documents.

2. The Plaintiff has pleaded in the Complaint that he surrendered his title to the 2nd Defendant on 1st April, 2012 and that he was issued with a letter of allotment in respect to the same land dated 24th April, 1992.

3. The Plaintiff averred that he paid the requisite fees upon being issued with the letter of allotment dated 24th April, 1992; that on 18th October, 2006, the 4th Defendant informed him that the title to his land had been cancelled vide gazette notice number 2905 of 30th May, 1986 and that the said land had been allocated to the Settlement Fund Trustees.

4. The Plaintiff has averred that he later learnt that the suit land had been sub-divided to create parcels numbers 637, 638 and 723; that the said sub-plots were allocated to the 5th Defendant who transferred parcels numbers 637 and 638 to the 6th Defendant. The Plaintiff has stated that the actions of the Defendants are in breach of trust, agreement and are fraudulent in nature.

5. It is the Plaintiff's case that the suit land was Trust land under the Gedi Settlement Scheme; that the cancellation of his Title Deed was null and void and that the Defendants' actions have denied him the suit land. The Plaintiff has prayed for a declaration that the suit land has

always been Trust land; an order for the rectification of the register by cancelling all the registrations from 30th May, 1980 to the date of Judgment and register him as the registered proprietor of the suit land and that in the alternative, special damages to the tune of 41,904, 697.20 to be paid to him.

6. The Plaintiff joined the 7th, 8th and 9th Defendants in the suit. The 8th Defendant filed a Defence in which it averred that it holds valid titles in respect of parcels numbers 637 and 638; that it purchased the said parcels of land from the 6th Defendant after conducting official searches and that it is an innocent purchaser for value.

7. In his Statement of Defence, the 6th Defendant averred that it owned parcels of land known as Chembe/Kibabamshe/637 and 638 lawfully and that it has since sold the two parcels of land to the 8th Defendant.

8. The 8th Defendant further averred that there is a pending suit in respect of Chembe/Kibabamshe/637 and 638 being Malindi Constitutional Petition Number 11 of 2012 and that this suit should be dismissed.

The Plaintiff's evidence:

9. The Plaintiff, PW1, informed the court that the Chembe/Kibabamshe was declared an adjudication section in the year 1980; that he purchased the suit land from Mr. James Masika and was issued with a Certificate of Title on 15th January, 1980.

10. It was the evidence of PW1 that the government purported to nullify the titles in the area and required all the people who were in possession of the titles in the area to surrender them; that he surrendered his title on 1st April, 1992 and was issued with a letter of allotment for the same land dated 24th April, 1992; that he then paid the required fees of Kshs. 35,920 and that he continued paying the requisite annual rent to the government.

11. PW1 stated that it was not until 18th October, 2006 that the 4th Defendant informed him that the government had cancelled his title alongside others vide gazette notice number 2905 of 30th May, 1986 and that the suit land was then allocated to the Settlement Fund Trustees.

12. PW1 informed the court that the land was then allocated to the 5th Defendant who sub-divided it to create parcels numbers 637, 638 and 723 and sold them to the 6th Defendant. Parcel number 723 was transferred to the 9th Defendant while parcel of land numbers 638 and 637 were transferred to the 8th Defendant.

13. It was the evidence of PW1 that the cancellation of the original title for Chembe/Kibabamshe/391 and the creation of sub-division numbers 637, 638 and 723 and the transfer of the same to the 5th, 6th, 7th, 8th and 9th Defendants was unlawful and fraudulent. The Plaintiff produced in evidence the documents in support of his claim.

14. In cross-examination, PW1 stated that he never received any replacement of the Title Deed that he had surrendered in 1992.

15. PW2 informed the court that he is a valuer by profession; that he was engaged by the Plaintiff to do a valuation in respect of the suit land which he did on 2nd March, 2017 and that he valued the suit land at Kshs. 34,594,000.

16. In cross-examination, PW2 stated that he valued plot number 391; that he used a copy of the Title Deed which he was given by the Plaintiff and that he was unable to get an official search because of the missing file from the Ministry of Lands.

The Defendants' case:

17. The 1st to the 5th Defendants did not testify in this matter. The Director of the 6th Defendant, DW1, informed the court that all the titles that were issued prior to 1999 in Chembe/Kibabamshe were all cancelled by the government and new titles were issued; that plot number 391 was sub-divided into plot numbers 637 and 638 which were allocated to one Edward Ruwa and that he purchased the two plots from Mr. Ruwa in the year 2001. It was the evidence of DW1 that he obtained the consent of the Land Control Board before the two plots were transferred to the 6th Defendant on 17th April, 2001.

18. DW1 stated that after the said transfer, he sold the two sub-divisions to the 8th Defendant on 8th September, 2008. In cross-examination, DW1 stated that he could not trace the consent of the Board for plot number 637 and that he was not aware that the Plaintiff owned plot number 391.

19. The Director of the 8th Defendant, DW2, stated that the 8th Defendant purchased plot numbers 637 and 638 from the 6th Defendant after conducting an official search; that the Land Control Board consented to the said sale and that the 8th Defendant is an innocent purchaser for value.

20. DW2 stated the Plaintiff was notified vide a letter dated 28th May, 1986 about the intention of the government to regularize the ownership of plot number 391 and that the Plaintiff did not participate in Malindi Petition No. 11 of 2012 in which the court declared the 8th Defendant as the absolute owner of parcel numbers 637 and 638. Consequently, it was the evidence of DW2 that the Plaintiff cannot seek for the cancellation of his titles.

Submissions:

21. The Plaintiff's advocate submitted that the 6th Defendant did not exhibit any Sale Agreement between him and Edward Ruwa; that the Application for the consent of the Board and consent itself was done after the transfer of the suit properties and that the Discharge of Charge was not properly executed.

22. The Plaintiff's counsel submitted that there is evidence of collusion between the Settlement Fund Trustees, a non-existing Mr. Ruwa and the 6th Defendant; that since no good title could pass to the 6th Defendant, he could not pass a good title to the 8th Defendant and that in any event, there is no agreement between the 6th and 8th Defendants.

23. Counsel submitted that the government did not accord the Plaintiff an opportunity to be heard and that there can be no legal wrong without a remedy. Counsel submitted that in the alternative, and view of the fact that the properties have been subsequently registered in the names of other parties, the Plaintiff should be compensated to the tune of Kshs. 54,073,631.85.

24. Counsel for the 1st, 2nd, 3rd, 4th and 7th Defendants submitted that the allocation of the suit land to the Plaintiff was irregular, illegal and fraudulent, which fact was communicated to the Plaintiff; that the government was remedying an illegality and that if an act is void, then it is a nullity in law; that the suit is time barred and that in any event, a claim for compensation has to be reasonable.

Analysis and findings:

25. The Plaintiff's case is that he purchased a parcel of land known as Chembe/Kibabamshe/391 from the registered proprietor. He was then issued with a Certificate of Lease on 15th January, 1980. However, on 1st April, 1992, and relying on representations from the government, he surrendered the title document for a fresh title. He was then issued with a letter of allotment for the same land dated 24th April, 1992.

26. The Plaintiff then continued paying the annual rent while awaiting for a title document to be issued. However, on 18th October, 2006, he was notified that the title he had surrendered was cancelled by the government vide a gazette notice number 2905 of 30th May, 1986 and that the said land had been registered in favour of the Settlement Fund Trustees. The Plaintiff further learnt that the land he was waiting to be issued with the title document had been sub-divided into three (3) parcels and transferred, first to the 6th Defendant and then to the 8th Defendant. The Plaintiff wants this court to order for the rectification of the registers for the three (3) parcels of land and in the alternative, for compensation. The issues for determination therefore are as follows:

a. Whether the register for parcels of land known as Chembe/Kibabamshe/637, 638 and 723 should be rectified so as to revert to the Plaintiff;

b. Whether the 6th and 8th Defendants are innocent purchasers for value without notice and;

c. Whether, in the alternative, the Plaintiff should be compensated for land known as Chembe/Kibabamshe/391.

d. Who should pay the costs of the suit?

27. The Plaintiff produced in evidence a copy of the Land Certificate that was issued in his favour on 15th January, 1980 for parcel of land known as Chembe/Kibabamshe/391. According to the said title, the register was opened on 30th May, 1978. It is not clear from the Land Certificate who the first registered proprietor of the land was.

28. In his letter dated 16th April, 1992, the Plaintiff informed the Commissioner of Lands that he had become aware that "title number Chembe/Kibabamshe/391 had been nullified and a new one will be issued." In the said letter, the Plaintiff returned to the Commissioner of Lands the original title that he was holding. He was then issued with a letter of allotment dated 24th April, 1992 which he produced.

29. The evidence before me shows that indeed the government received from the Plaintiff Kshs. 35,920 being the stand premium, together with the annual rent which the Plaintiff continued paying. The last annual rent that the Plaintiff paid was for Kshs. 38,684. After making several inquiries, the Plaintiff received a letter dated 10th October, 2006 from the District Land Registrar in which he was informed as follows:

"Chembe/Kibabamshe/391 is one among the parcels of land which were affected by the cancellation of all adjudicated titles within Chembe/Kibabamshe by the government vide the Gazette Notice of 30th May, 1986 No. 2505. A new process of allocation was carried out and thus a settlement scheme was established and new titles issued to new allottees."

30. The District Land Registrar went ahead to inform the Plaintiff that plot number 391 was transferred to Settlement Fund Trustees and then sub-divided into three sub-plots namely 637, 638 and 723. According to the said letter, plot numbers 637 and 638 were later on allocated to Ruwa and then transferred to the 6th Defendant.

31. The copy of the Green card for plot number 391 shows the above chronology of events. Indeed, the said copy of the Green card shows that the Settlement Fund Trustees was registered as the proprietor of plot number 391 on 11th April, 2001 with the first proprietor being the government of Kenya. The said Green card obliterated completely the fact that the Plaintiff ever owned the suit land.

32. The 4th Defendant did not deny in his letter of 18th October, 2006 that the Plaintiff was the initial owner of the land. Indeed, in the said letter, the 4th Defendant confirmed that the Plaintiff's title was one of the titles that had been cancelled by the government vide a gazette notice number 2505 of 30th May, 1986.

33. The 1st to the 4th Defendants did not adduce any evidence to show the circumstances under which the Plaintiff's title was cancelled, and whether he was notified of the intended cancellation.

34. Considering that the Plaintiff had surrendered the title for parcel of land number 391 on the government's misrepresentation that he will be issued with a fresh title document, and in view of the fact that the government went ahead to issue him with a letter of allotment for the same land, the Plaintiff was either entitled to the land or compensation for the land. That is what the repealed Constitution provided for.

35. The law has never allowed the expropriation of private property by the government without prompt compensation. Indeed, the Plaintiff was entitled to compensation of the land before the said land could be converted into a settlement scheme in 1986. It cannot be said, by any stretch of imagination, that the Plaintiff was holding an invalid title without due process being followed. I say so because once the government issues to a person a title document, then such a title can only be cancelled after the person has been heard and in accordance with the provisions of the law. That did not happen in respect of plot number 391. Consequently, I find the government's action of cancelling the Plaintiff's Land Certificate vide gazette notice number 2505 of 30th May, 1986 to be illegal, null and void.

36. The next issue that I should determine is the appropriate remedy that the court should issue. Considering that a new register was opened on 22nd December, 1986 whereafter the suit land was transferred to the Settlement Fund Trustees on 11th April, 2011 before the register was closed on the same day after sub-division of the land, the subsequent owners of sub-division numbers 637, 638 and 723 cannot be faulted for having acquired the land.

37. The initial register for plot number 391 was obliterated by the government to the extent that no amount of due diligence would have revealed that the Plaintiff ever owned the land. Consequently, the Plaintiff's recourse as for compensation, at the market rate, for the land that was expropriated by the government. PW2 produced a valuation report dated 2nd March, 2017 showing that the value of the land as at the date of valuation was Kshs. 34,594,000.

38. None of the Defendants produced evidence to counter the valuation report of PW2. In the circumstances, I find that the value of the suit land as at 2nd March, 2017 was Kshs. 34,594,000. The Plaintiff did not however prove damages for loss of income and exemplary damages. I shall therefore not award those damages.

39. Despite knowing that the Plaintiff herein was pursuing for compensation as against the government, the Attorney General did not call any witness to testify in this matter. Consequently, the claim for compensation was not defended at all.

40. For those reasons, I find that the Plaintiff's suit as against the 2nd, 3rd and 4th Defendants for compensation succeeds. Consequently, I make the following specific orders:

a. The 2nd, 3rd and 4th Defendants to pay to the Plaintiff Kshs. 34,594,000 being the value of parcels of land known as Chembe/Kibabamshe/637,638 and 723.

b. The 2nd, 3rd and 4th Defendants to pay interest on the above amount at court rates from the date of this Judgment until payment in full.

c. The 2nd, 3rd and 4th Defendants to pay to the Plaintiff and the 6th and 8th Defendants the costs of the suit.

DATED AND SIGNED AT MACHAKOS THIS 12TH DAY OF JULY, 2018.

O.A. ANGOTE

JUDGE

DATED, DELIVERED AND SIGNED AT MALINDI THIS 19TH DAY OF JULY, 2018.

J.O. OLOLA

JUDGE