



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 103 OF 2009

MANGROVE INVESTMENT LIMITED.....PLAINTIFF

-VERSUS-

THE ATTORNEY GENERAL

NATIONAL WATER CONSERVATION

& PIPELINE CORPORATION.....DEFENDANTS

JUDGEMENT

1. The plaintiff commenced its suit against the two defendants vide the plaint dated 7th April 2009 and which was subsequently amended on 24th September 2014. The plaintiff seeks the following reliefs:

a. A declaration that the purported forfeiture or re-entry and taking back of the suit premises by the Commissioner of Lands and the Government of Kenya is null and void and of no effect.

b. A declaration that the Grant No. C.R. 44221 made by the Government of Kenya to the 2nd defendant in respect of the suit premises is null and void.

c. A declaration that the plaintiff is the lawful owner of leasehold interest in the suit premises for a term of ninety-nine (99) year with effect from 1st July, 1997.

d. An order directing the Commissioner of Lands and the Registrar of Titles, Mombasa to cancel Grant No. C.R. 44221 registered at Land Titles Registry, Mombasa on 27th August, 2008 as C. R. NO. 44221/1.

e. A permanent injunction restraining the 2nd defendant whether by itself or through its servants, employees, agents or through any one deriving title through it or otherwise howsoever from entering, using, occupying, leasing, transferring, charging, selling or in any manner whatsoever dealing with the suit premises namely L.R. No. MN/VI/3615.

f. In the alternative to prayers (d) and (e) above and only in the event that prayers (d) and (e) cannot be granted, an order against the defendants jointly and severally to pay to the plaintiff a sum of Kshs. 100,000,000.00 or such other proved value of its leasehold interest in the suit premises.

g. Costs of and incidental to this suit.

h. Any other or further relief that this Honourable Court may deem appropriate to award.

2. The suit is defended by both the defendants. The 1st defendant filed its statement of defence on 8th July 2009 while the 2nd defendant's defence was filed on 22nd May 2009. They have both denied the plaintiff's claim.

3. At the close of pleadings, the hearing commenced with the plaintiff calling two witnesses while each of the defendants called a witness each. Ashock L. Doshi testified as PW 1 on 10th September 2014. Unfortunately part of his recorded evidence is in torn paper. He said that he is a director of the plaintiff who are the owners of plot No. MN/VI/3615 bought in 2002 from Scelara Limited. PW 1 produced the sale agreement dated 22.2.2002 between the two parties, transfer of land duly signed & registered a copy of title in respect of the suit land in the

plaintiff's name. The witness said the grant was initially in the name of Scelara before the transfer to the plaintiff on 27/2/2002.

4. PW 1 continued that there were past proceedings over the subject matter i.e. case HCC 172 of 2006 where a ruling was made on 20.11.2007 (Pex 4) where Serگون J noted that the 2nd defendant herein came into being in 2003 while Scelara came into existence in 2002. It is stated on record that this suit is still pending. There was also filed miscellaneous application No. 360 of 2007 and a ruling delivered by Wendo J on 22.6.2007 dismissing the chamber summons. Thirdly is HCC No 123 of 2008 which is still pending. PW 1 stated that in spite of the pending suits and orders of injunction in force, a new grant was issued to the 2nd defendant on 19.8.2008 in respect of LR No MN/VI/3615 yet as at the time, the plaintiff was the owner of the suit property. The witness states that the letter revoking their allocation was not received by them since it was sent to a wrong postal address. The letter is produced as Pex 11.

5. PW 1 continued that at the time they purchased the land, nobody was in occupation of the premises but there was a wooden structure that could be used as an office. He came to know through the media during the presentation of the title to the water department by the minister on 30th August 2008 (pex 12) on cancellation of their title. He immediately informed their advocates on record who then wrote to the commissioner of lands on 1.12.2008 to cancel the 2nd defendant's grant No CR 4422/ dated 19.8.2008. They also issued a notice of intention to sue to the A. G vide letter dated 11.2.2009 sent by registered post, to the P S lands on 24.2.2009 and to water conservation department on 24.3.2009. The water department responded on 14.4.09 stating the plaintiff's claim is misplaced as their title was legal. The letters are produced as Pex 13A, B & C. The witness concluded that after serving the letters, the plaintiff filed this suit seeking the listed reliefs.

6. In cross – examination by Mutiso, PW 1 said the grant was signed on 8.2.2002 and the lease hold interest is from 1st July 1992. That nothing in the sale agreement stated that the money changed hands on the same date. That item 11 says it is sold with vacant possession. That the transfer and agreement were executed on the same day. In HCC 172 of 2006 paragraph 14 sought possession of suit land. That the application in that suit also sought injunction (page 19 of the ruling) which demonstrates the defendants were in occupation. At page 21 of plaintiff's documents is a circular to repossess illegally acquired lands. That the defendants were in occupation from the time of the order of 14.2.2007 when the property was handed over to 2nd defendant, they were not in possession of the suit land. Miss Kiti for the 1st defendant relied on questions asked by Mr Mutiso. In re – examination, PW 1 said the second defendant entered the land in 2003. That no Court has made a finding that Scelara was not the legal owner of the land. That as at the date of the letter of 27.8.2008, all the suits were pending. That parties in 123/08 and 103 of 2008 were not the same although the prayers appear similar. PW 1 denied being a director of Scelara.

7. Edwin Mtwiri Mbungu testified as PW 2 on 24.9.14. He is a registered valuer. He referred the Court to the valuation report dated 12.2.2009 valuing the property at Kshs 100,000,000=. He later valued the property in 2011 at Kshs 145 Million and in 2014 at Kshs 175 Million. He produced the reports as Pex 17 – 19. He said the valuation does not include the 2nd defendant's structures. In cross – examination, PW 2 said he did not carry out any interviews. This marked the close of the plaintiff's case.

8. The Court made a site visit on 23.10.14 and noted that there was a 10 rooms which were dilapidated used by Mombasa water, and one block with 2 offices built in 2010. The area also has stagnant water fenced on both sides except the side abutting the tarmac road. The plaintiff then closed its case.

9. The defendants opened their defence on 29th September 2015. JEAN FRANCIS MUTIO MUTISYA testified as DW 1. She works as the senior legal officer of the 2nd defendant. She adopted her written statement dated 9th September 2014 and the documents listed as No 1 – 6 filed on 20th May 2013. DW 1 stated that from the records held by the 2nd defendant, the suit plot has always been a public utility previously used by the 2nd defendant and now Coast Water services pursuant to the 2002 water reforms. That it houses the water infrastructure which includes offices. It's DW 1's evidence that the property was not available for allocation and that the transfer to the plaintiff was done in unclear circumstances. Consequently the cancellation of the plaintiff's title was justified. She urged the Court to uphold the action by the Registrar and dismiss the present claim with costs.

10. In cross – examination, DW 1 admitted their title was issued during the pendency of the previous suits thus a breach of the doctrine of *is pendens*. The witness also conceded that the letter dated 27th August 2008 addressed to the plaintiff was also made after the issuance of their title. That she did not produce any document by way of an application for allotment of the land or PDP approvals from the physical planning. That she had also not shown any entry showing cancellation of the plaintiff's title. In re – examination, the witness maintained the property has been in use by the ministry for long and probably they have some documents kept in their records. This marked the close of the 2nd defendant's case.

11. The Land Registrar Mr Samuel Mwangi testified as DW 2 on 28.1.2018. He adopted as his evidence the affidavit dated 12.5.2016. Having traced the parcel file for the suit property, he confirmed there were two files i.e. for No CR 35200 registered on 12.2.2002 and CR 44221 registered in 2nd defendant's name. DW 2 said that the correspondence file which gave a history of the plot showed it was originally unsurveyed. Upon survey, the suit plot was marked in the PDP as No E. That plots A, B, C & D in the PDP No 1.12.22.86.4 were allocated to private individuals while plot E was reserved for the defendant. That no process of title was undertaken but it was marked as reserved thus it was not available for allocation to any individual.

12. DW 2 continued that the letter of allotment was dated 10th July 1997 while the allottees certificate of incorporation was issued in 2001 meaning the allotment was given to a non – existent body. That plots B, C, D are registered in the plaintiff's name hence they knew plot E was not available for allocation and was using its proximity to have it registered in its name. DW 2 testified that the commissioner recalled the title for cancellation in a letter dated 17.1.2003 and a follow up letter made in 2008 confirming the title was cancelled. The plaintiff did not surrender its title but subsequently to the cancellation, the commissioner processed the 2nd defendant's title. The witness also produced the documents attached to his affidavit.

13. During cross – examination by Mr Karega for the plaintiff, DW 2 agreed that he did not annex a PDP to his affidavit and some of the documents contained in the parcel file. That there was no evidence calling for the title from either Scelara or the plaintiff. That in **SKM – 3**, the address of the plaintiff is given as 82077 Mombasa while **SKM – 5** shows the letter was sent to 43260 Nairobi. DW 2 therefore could not

ascertain whether the plaintiff was aware of the cancellation of his title. That the survey was properly done as deed plan No 239935 annexed as **SKM – 1**. The witness could not tell when the developments on the plot were put up.

14. In re – examination, DW 2 said he had not presented the PDP because they were currently in possession of the National Land Commission who is the successor in title. That if there is an intention to transfer, it is incumbent upon the transferor to submit that special condition No 2 is complied with. This also marked close of 1st defendant’s case.

15. The parties’ advocates took time to file written submissions. I have read them and will make reference to the relevant paragraphs. From the pleadings filed, evidence adduced and submissions rendered, I frame the following questions as arising for my determination:

(i) Was the plaintiff an innocent purchaser without notice?

(ii) Was there a cancellation of its title and was the process followed?

(iii) Which orders sought in the amended plaint available to the plaintiff if at all?

16. It is a well settled principle of law that he who alleges a fact must prove in order to have decisions made in its favour on the existence of those facts (sections 107 & 108 of the Evidence Act). From the pleadings, it is not in dispute that at the time the plaintiff purchased the suit title, the property was registered in the name of Scelara Limited. Another title was subsequently issued to the 2nd defendant by the Commissioner of Lands. The evidence of the defendants was that the title to Scelara was irregularly issued as the plot was not available for allocation since it was in use by the 2nd defendant as a public utility.

17. The plaintiff states that since it was not the original allottee, it would not have known whether this plot was a public utility or not. This evidence can only be ascertained from the documents of PW 1 since PW 2 only testified to give valuation of the property for purposes of compensation if at all. So did the plaintiff establish that it conducted due diligence before purchasing the land? In the plaintiff’s list of documents dated 7th December 2011 which listed 18 documents of relevance to this point is only item 1 & 2 which are the grant No CR 35200 dated 8.2.2002 and the transfer dated the same day.

18. PW 1 in his recorded statement dated 15th October 2012 mentioned at paragraph 4 that the plaintiff acquired the suit land from Scelara Limited for a sum of Kshs 6 Million. In his oral evidence, PW 1 did also not state whether the plaintiff investigated the title before purchasing it. PW 1 only talked about the sale agreement and the executed transfer. The plaintiff in my view ought to have presented to this Court copies of documents they obtained from Scelara Limited such as certificate of Incorporation, the lease document, P.I.N of Scelara consent of the commissioner to transfer, all commonly referred to as the completion documents in sale of immovable properties. That once copies of these documents were presented and having verified the same then defence of innocent purchaser for value without notice automatically became available to them.

19. In the circumstances of this case none was shown to have been availed. The Land Registrar who testified as DW 2 stated that the plaintiff owned the neighbouring plots that were marked as B, C & D. PW 1 admitted that at the time of purchasing the plot, there were some wooden structures on the suit plot. From this evidence and given that they were neighbours, I find that they cannot be excluded from the provisions of section 26 (a) of the Land Registration Act which provides thus, *“on the ground of fraud or misrepresentation to which the person is proved to be a party; or”*

20. Further, DW 2 said that from the records held in their file, the letter of allotment was issued in 1997 to Scelara Limited yet the company was incorporated in 2001 implying the allocation if any was done to a non-existent company thus null & void. The plaintiff did not annex any correspondence that they sought any background information from the lands office as regards the title before purchasing it. The plaintiff in my opinion and I so hold has not demonstrated what due diligence act he undertook to authenticate the title before purchasing the land. In its submission, the plaintiff did not touch on this aspect the submissions dealing more with the action of cancellation of their title.

21. Having found above that the title to Scelara was questionable and that the evidence of DW 2 showed the plaintiff was capable of knowing the same by virtue of being owner of neighbouring plots as well as seeing the structures on the land was the cancellation of their title irregular? In its submission, the plaintiff quoted the provisions of section 23 of the RTA (repealed) which provides that certificate of title is conclusive evidence and is only subject to challenge on grounds of fraud or misrepresentation to which he is proved to be a party. This is the same provision under section 26 of RLA. The plaintiff referred the Court to the decision of **Bruce Joseph Bockle vs Coquero Ltd (2014) eKLR** on whether he should take blame for the malfeasance of Scelara Limited. In my view, the plaintiff can only rely on the findings of this case upon satisfying the Court that it was an innocent purchaser by demonstrating he did due diligence. As I have found out in the preceding paragraphs he failed to discharge this burden.

22. The procedure for forfeiture of lease and re-entry did not apply where the allocation was being cancelled as having been irregularly issued. This submission is also not supported by the pleadings or the evidence. The main issue for me is whether the plaintiff was entitled to the right to be heard before the *“cancellation”* of his title.

23. On the right to be heard the 1st defendant issued a letter dated 17th January 2003 to Scelara Limited informing them that the allocation was erroneous. However as at January 2003, the title had passed on to the plaintiff. This letter therefore ought to have been copied to the plaintiff. The same was not done. It came out in evidence of DW 2 that there were correspondences exchanged between the plaintiff and the 2nd defendant regarding the suit property. The same were however not produced as DW 2 put it *“because they were internal memos”*. This probably forms the basis for filing of HCCC No 172 of 2006 where the plaintiff demanded for vacant possession and orders of permanent injunction issued against the 2nd defendant (pleadings in this suit were produced as item No 3 & 4 of the list of plaintiff’s documents).

24. Therefore although the letter dated 27.8.2008 cancelling the plaintiff’s title was sent to a wrong address, the plaintiff was already aware

that the defendants were challenging their title as pleaded in the statement of defence dated 20.12.2006 particularly paragraphs 4 & 5. Whether this case is still pending I cannot tell but in my opinion it formed a good basis of notice to the plaintiff and would have been a good forum to determine who had a good title to the plot no MN/VI/3615. As it turns out from the answers given in cross – examination by DW 2, the entry on cancellation was not recorded in the register hence the reason there are two title files still existing over the same parcel of land. Now that this Court has heard the plaintiff, I shall make appropriate orders to be entered in the register. The plaintiff's right to be heard was therefore partially breached but not wholly to affect him from exercising those rights.

25. Are the orders sought in the amended plaint available to the plaintiff? My answer to all the prayers is NO. In regard to prayer (a), there was no forfeiture or re-entry as the 2nd defendant never parted with physical possession. Prayer (b), the grant No CR 44221 is not void since the allocation to Scelara was the one that was null & void and the plaintiff having failed to prove that it was an innocent purchaser for value without notice is not entitled to the declaration as owner of leasehold interest in the suit premises as sought in prayer (c). Consequently the prayers (d) – (f) cannot issue. Instead this Court directs the Registrar of Titles Mombasa to record an entry of cancellation of title in the plaintiff's parcel file under grant No 356200. The plaintiff's interest and title in plot No MN/VI/3615 is hereby cancelled. The plaintiff's suit is thus dismissed with costs to the defendants.

Dated, signed & delivered at Mombasa this 20th September 2018

A. OMOLLO

JUDGE