



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO 2175 OF 2007

JOSEPH KURIA KIBURU.....PLAINTIFF

=VERSUS=

HONOURABLE ATTORNEY GENERAL.....DEFENDANT

JUDGMENT

Introduction

1. The dispute in this suit relates to two parcels of land surveyed and titled out of land that hosted and still hosts Central Police Division Headquarters, Central Police Station, Central Police Station Staff Housing Quarters and the University Way. The Department of Survey was also hosted on the same land prior to its relocation to Ruaraka. The plaintiff, Joseph Kuria Kiburu, applied for and was in 1995 allocated the land by the Commissioner of Lands. The land was subsequently surveyed and two titles, Grant Number IR 65373 and Grant Number IR 67072 were issued to the plaintiff. The plaintiff holds the two titles but has never had possession of the suit properties.

2. Through a plaint dated 1/10/2007 and amended on 11/10/2012, the plaintiff sued the Attorney General on behalf of the Government seeking the following orders:

- a) A declaration that the Government through its servants, employees and/or agents is vicariously liable and is not entitled to enter, erect, occupy, possess or use land parcels known as LR No 209/12413 and L R No 209/12722 howsoever.*
- b) A declaration that the plaintiff being the duly registered proprietor of the said parcels of land is entitled to possession and quiet enjoyment of the said properties L R No 209/12413 and L R No 209/12722 without any interference by the Government.*
- c) A mandatory order that the defendant do demolish and remove all the buildings and structures built on L R No 209/12413 and L R No 209/12722.*
- d) An order for immediate vacant possession of the premises known as L R No 209/12413 and L R No 209/12722 situated in the City of Nairobi.*
- e) An alternative prayer for Kshs 950,000,000 (950 million) being the current market value of the property.*
- f) An alternative prayer for a refund of Kshs 27,477,234/- being monies paid in lieu of land rent, rates, survey fees and premium together with interest at 12% p.a. from the year 1995.*
- g) General damages for trespass*
- h) General damages for conversion*
- i) Costs of this suit*
- j) Interest on (e) , (f), (g) and (h) hereof from the date of filing suit at court rate.*
- k) Any other relief that this honourable court may deem fit to grant*

3. The Attorney General filed an amended statement of defence and counterclaim dated 5/7/2010. He contested the plaintiff's claim and

made a counterclaim for the following orders:

i. An order dismissing the plaintiff's suit

ii. A declaration that the allocation and subsequent registration of the plaintiff as proprietor of land parcel known as L R No 209/12413 and L R No 209/12722 was illegal, irregular and tainted with fraud.

iii. A declaration that the plaintiff has never had possession of land parcels known as L R No 209/12413 and L R No 209/12722

iv. An order cancelling titles known as LR No 209/12413 and LR No 209/12722

v. Costs of this suit and the counterclaim.

Plaintiff's Case

4. The plaintiff's case is that he, through a letter dated 11/11/1994, applied to be allocated a vacant government land zoned for commercial purposes. Through a letter dated 18/8/1995, the Commissioner of Lands allocated to him and offered him a Grant for an unsurveyed commercial plot in the City Centre for a term of 99 years from 1/1/1995, which after survey became one of the suit properties. He accepted the allotment and paid Kshs 13,689,950 and a further sum of Kshs 4,229,600 (making a total of Kshs 17,919,550) to the Department of Lands. He was subsequently issued with Grant Number 65373 in which Land Reference Number 209/12413 measuring 0.3630 hectares is comprised.

5. The plaintiff further contends that through a second letter of allotment dated 25/8/1995, he was allotted and offered a Grant for an unsurveyed commercial plot designated as "B" in the City Centre for a term of 99 years from 1/9/1995. He accepted the offer and paid Kshs 9,557,684 to the Department of Lands. Subsequently, he was issued with a second title, Grant Number IR 67072 in which Land Reference Number 209/12722 measuring 0.2174 hectares is comprised.

6. The plaintiff further contends that in 2006, the Government of Kenya through the Ministry of Roads and Public Works and the Department of Police through the Office of the President illegally entered the two suit properties and took physical possession thereof, fenced them off and engaged contractors to execute works thereon, thereby preventing him from using and or obtaining access to the suit properties. He contends that the said acts on part of the Government were wrongful, illegal and constitute trespass to private properties. He adds that by virtue of the Grants issued to him under the Registration of Titles Act, he is the absolute and indefeasible owner of the suit properties. The plaintiff further contends that the action of the Government contravened his fundamental right to ownership of private property under the Constitution of Kenya.

7. The plaintiff contends further that he has been deprived the use and enjoyment of the suit properties and he has suffered and continues to suffer loss and damages.

The Defendant's Case

8. The Defendant denies the plaintiff's claim and puts the plaintiff to strict proof. In the alternative and without prejudice, the defendant contends that the allocation and registration of the suit properties in the name of the plaintiff was illegal, irregular and of no legal effect because the land contained in the Grants was not available for alienation to the plaintiff as it was public utility land occupied by the Survey of Kenya and the Department of Police; the allocation were made in contravention of planning regulations as they were done prior to planning of the area; and the allocation were not done through auction as mandatorily required by Section 12 of the Government Lands Act (**now repealed**).

9. The defendant further contends that the allocation and subsequent registration of the plaintiff as proprietor of the suit properties was obtained through fraud and misrepresentation to which the plaintiff was a party in that the plaintiff applied for allocation and registration while knowing and aware that the land was public utility land occupied by the Department of Survey and the Department of Police and had been planned as a road reserve; the plaintiff applied for allocation and registration while knowing and aware that planning of the area had not been done; and the plaintiff engaged surveyors who fraudulently created the land parcels from a road reserve. The defendant further contends that the Government has all along had possession of the suit properties. Lastly, the defendant contends that the allocation and subsequent registration of the plaintiff as proprietor of the suit properties was illegal, irregular and tainted with fraud to which the plaintiff was a party. The defendant urged the court to dismiss the plaintiff's claim and grant the defendant's counterclaim.

Plaintiff's Evidence

10. Hearing of this suit commenced on 8th December 2014 before Oguto J when the plaintiff (PW1) gave oral testimony and adopted his witness statement dated 5th April 2014. He stated that in 1994, he applied to the Commissioner of Lands for allocation of a plot which was marked 'Survey of Kenya & Social Services Department'. PW1 stated that the Commissioner of Lands responded to his application which was approved by the President. He was subsequently issued with a letter of allotment and he paid the sum of Kshs 13, 689,950/- demanded in the letter of allotment. He paid a further sum of Kshs 4,229,600/- and was on both occasions issued with respective receipts. The plaintiff stated that on 23rd February 1995, he was issued with a Grant in respect of LR 209/12413 whose acreage was less than what he had applied for.

11. PW1 testified that he wrote to the Commissioner of Lands regarding the acreage and he was issued with another allotment letter dated 25th August 1995. He made a payment of Kshs 9,557,684/- required under the letter of allotment. On 22nd September 1995, he was issued with a Grant for LR No. 209/12722 measuring 0.2174 hectares. It was the evidence of PW1 that he never moved into the suit properties

because after the Director of Surveys moved out, the Police moved into the temporary structures which belonged to the Survey of Kenya. PW1 caused a valuation of the suit properties whose value was placed at Kshs 950,000,000/-. He stated that the Commissioner of Lands never complained of any irregularity. PW1 prayed for damages for trespass as well as the market value of the suit properties. In the alternative, he sought a refund of his money to the tune of Kshs 27,477,234/- together with interest from the date of payment. He produced documents Numbers 1 to 17 in his bundle of Documents dated 8th December 2017 as plaintiff's Exhibits 1 to 17 respectively.

12. In cross-examination, PW1 stated that the property he applied to be allocated was marked 'Survey of Kenya'. He averred that he complied with the conditions in the allotment letters which culminated in the issuance of titles. He stated that Grant Number IR 20791 LR No. 209/6428 referred to a different plot. He stated that he did not develop the suit properties because as soon as the Department of Survey moved to Ruaraka, the Police moved into the premises and occupied them. PW1 stated that the temporary structures were later demolished and permanent apartments which are now occupied by the police were erected. He contended that the houses in his valuation report were developed by the Department of Police and admitted that the suit properties were occupied by the Department of Survey.

13. In re-examination, PW1 stated that the suit properties were available for allocation after the Survey of Kenya moved out. He contended that any allocation to the Department of Police could only have been done after the land had already been allocated to him. PW1 stated that following the allotment, he paid more than Kshs 27,000,000/- to the government. He averred that the suit properties were distinct from the land which was occupied by the Central Police Station in terms of the reference numbers, acreage and location. PW1 contended that the suit properties were outside LR No. 209/6428 and stated that the hiving of part of his land to create a road ought to have been done in accordance with the law governing compulsory acquisition of private land.

14. Isaac Njuguna Nyoikeh testified as PW2. He stated that he was a registered and licenced valuer working within Nairobi County. In January 2012, he received instructions from the plaintiff to carry out valuation on the suit properties. PW2 stated that he visited the suit properties and prepared a valuation report dated 10th January 2012 indicating the value of the suit properties was 950,000,000/-. He averred that an earlier valuation carried out on 26th August 2009 placed the value of the suit property at Kshs 1,290,000,000/-. The evidence of PW2 was that the variance in the two reports was as a result of the prevailing economic circumstances. He produced the two valuation reports as exhibits.

15. In cross-examination, PW2 stated that the basis of all valuations was the open market value of the property. He averred that there were six blocks of flats each with about 48 apartments. PW2 did not know if the apartments had been developed by the government and he proceeded from the premise that the improvements consisting of six blocks of apartments had been carried out by the plaintiff.

Defendant's Evidence

16. The defendant called two witnesses. DW 1 was Police Officer No. 216618; Paul Wanjama (DW1). He stated that he was a police commissioner. He testified that between April 2014 and December 2016, he served as the OCPD of Central Police Division. He adopted his statement dated 8th December 2014 as part of his shown evidence in chief and produced documents in the defendant's bundle of documents as Defence Exhibits 1 to 26. He testified that the Central Police Station which was in existence since pre-independence was allocated government land which was shared with Survey of Kenya.

17. DW1 stated that in 1980, the Administrative Secretary of the Kenya Police Force requested for securing of the land which the Survey of Kenya was vacating. He stated that the Commissioner of Lands acceded to that request and the disputed land was occupied by the Central Police Station, Police Division Headquarters and served as a Police Parking Yard where police vehicles and accident vehicles are parked. Further, the suit properties contain Police Living Quarters. He averred that during the expansion of the University Way, part of the land was hived off to accommodate the expanded University Way. DW1 stated that during his tenure as OCPD, nobody claimed ownership of the disputed land. He contended that the small portion of land indicated in the maps as belonging to the Police Department had only a few police houses while the rest of the houses were in the disputed land. DW1 made reference to a letter dated 22nd July 1980 by the Commissioner of Lands confirming that the land had been reserved for the police.

18. In cross examination, DW1 stated that the small piece of land surveyed in the name of the Central Police Station, LR No. 209/6428, was different from the suit properties. He averred that the suit properties have never been vacant as they were in occupation by the Central Police Units and the Survey of Kenya. DW1 could not tell what steps had been taken to process title after the land was reserved for the police. He informed the court that the Central Police Station did not have title to the land.

19. Mr Gordon Ochieng testified as DW2. He stated that he was a senior assistant director in the Ministry of Lands, Housing and Physical Planning. He adopted his witness statement dated 28th October 2014 as his sworn evidence in chief and produced the documents attached to his statement as Defence Exhibits 27 to 33. His evidence was that the suit properties which were part of the Central Police Station had not been surveyed and did not have a number at the time of alienation. He contended that the alienation of the suit properties to the plaintiff in 1995 was irregular and illegal since the said properties were not unalienated government land. He stated that the land had been committed and was in use as part of Central Police Station and was not available for alienation.

20. DW2 stated further that alienation of the suit properties would have necessitated the preparation of a part development plan (PDP) which would have served as an advisory. This did not happen. DW2 contended that a sketch plan was used at the time of the disputed allocation, which was irregular. It was the evidence of DW2 that the allocation was illegal and was based on misrepresentation of facts by the plaintiff who failed to disclose that there stood a police station on the ground. He stated that at the time of the purported allocation, there was undue political pressure on the Department of Lands and urged the court to declare the titles illegal and nullify them. He contended that the monies paid by the plaintiff following the allotment should be refunded in accordance with condition no. 4 of the grant since the plaintiff did not present building plans within the stipulated period.

21. During cross examination DW2 stated that the suit properties were excised from land occupied by the Central Police Station. He averred that the map on page 6 of the plaintiff's bundle showed the area occupied by Central Police Station, Survey of Kenya and the Police Car Park. He stated that LR No. 209/6428 was for the narrow strip where two blocks of police lines had been erected. He conceded that the

plaintiff paid amounts totaling Kshs 27, 477, 234/- to the government as specified in the separate allotment letters for both parcels.

22. DW2 reiterated that there was no part development plan (PDP) showing the exact area of the disputed parcels and the intended user. He averred that the monies paid by the plaintiff can be refunded but that the plaintiff who knew that the land was occupied when he applied for allocation played a key role in the acquisition of the irregular titles and was therefore not entitled to interest. In re-examination, DW2 stated that the allocation should not have been made in the absence of a proper part development plan (PDP).

Submissions by the Plaintiff

23. The plaintiff filed submissions dated 28th February 2018. He relied on Section 26 of the Land Registration Act in submitting that a title can only be impeached if it was procured by fraud or misrepresentation to which the proprietor was a party, or where the same was procured illegally, unprocedurally or through a corrupt scheme. Counsel submitted that the evidence before court absolved the plaintiff of any fraud or misrepresentation and was a further confirmation that the titles were not procured illegally, unprocedurally or through a corrupt scheme. The plaintiff referred the court to the case of **Kenya National Highway Authority vs. Shalien Masood Mughal & 5 others(2007)eKLR** and urged the court to order compensation in the sum of Kshs 950,000,000/-

24. The defendant filed submissions dated 15th March 2018. He stated that the suit properties had been reserved for the Kenya Police long before the plaintiff commenced the process of registration as proprietor. He submitted that the plaintiff had failed to demonstrate occupation, possession or development of the suit properties. The defendant submitted that the allocation of the suit properties were not in tandem with the planning regulations and was irregular and that any allocation of unalienated government land without a planning plan was unprocedural and illegal.

25. In further submission, the defendant argued that the alienation of the suit properties required re-planning which required the preparation of a part development plan which would have acted as an advisory before the alienation. The court was referred to the case of **Norbixin Ltd vs. Attorney General nrb HCCC NO. 1814 of 2002** where the court observed that elaborate provisions on the process to be followed in the amendment of a PDP when re-planning an area existed under Sections 24 to 28 of the Physical Planning Act.

26. The defendant referred to a disclaimer at page 2 of the letters of allotment where the government denied liability in the event of prior commitment and submitted that the condition served as an estoppel on the plaintiff's claim against the government. The case of **Norbixin Ltd vs. Attorney General NRB HCCC No. 1814 of 2002** where the court stated that the suit property which was designated as a police station had ceased to be un-alienated government land was cited. The defendant relied on Articles 62(1) and 40(6) of the Constitution as well as Section 23 of the Registered Land Act (repealed) and submitted that the plaintiff's title was acquired illegally. The defendant relied on the case of **Kenya National Highway Authority vs. Shalien Masood Mughal & 5 others** and **Chemey Investments Ltd vs. Attorney General & another (2017) eKLR**.

Determination

27. I have considered the plaintiff's amended plaint and the Attorney General's statement of defence and counterclaim. I have also considered the evidence led by the parties to this suit and their respective submissions. Similarly, I have taken into account the legal framework applicable to this dispute and the relevant jurisprudence on the key issue in this suit. Similarly, I have carefully analyzed the documents presented to the court as evidence in this suit. The key issue in the suit is the validity of the allocation and subsequent registration of the plaintiff as proprietor of Land Reference Number LR No 209/12413 comprised in Grant Number I.R 65373 and Land Reference Number 209/12722 comprised in Grant Number I.R 67072 (the **suit properties**).

28. DW 1 testified that the suit properties house Central Police Station, the Central Police Division Headquarters, Central Police Parking Yard and Police Living Quarters. Part of the land was hived off to expand University way.

29. There is common ground that the suit properties were allocated to the plaintiff in 1995. The plaintiff contends that the said allocation was procedural and is valid. The Attorney General contests the allocation and contends that the allocation was illegal, irregular and tainted with fraud and misrepresentation because: (i) the suit properties had been committed and were in use by the Central Police Station hence were not available for allocation; (ii) the allocation was done in violation of planning regulations because there was no part development plan (DPP) which would inform the allocation of unalienated government land; (iii) the allocation to the plaintiff was based on misrepresentation by the plaintiff to the effect that the land was a vacant unalienated government land yet he was aware that there stood a police station on the suit properties.

30. It was the plaintiff's evidence that he was not able to take possession of the suit properties because it was occupied by the Department of Police and part of it was hived off to accommodate the expanded University Way.

31. In his Application Letter dated 11/11/1994 addressed to the Commissioner of Lands, the plaintiff stated thus:

Dear Sir,

RE: ALLOCATION FOR A PLOT – NAIROBI

I humbly apply for the plot shaded in yellow on the attached plan. The plot is a vacant Government Land zoned for Commercial purposes.

I confirm that I don't have other plot in Nairobi and I have the finances to develop the plot.

Yours faithfully

signed

Joseph Kuria Kiburu

32. It is to be noted that the above application was not supported by any approved part development plan (PDP) generated within the then existing physical planning legal framework. Secondly, the plaintiff's assertion that the suit property was vacant government Land zoned for commercial purposes was a misrepresentation. The evidence before court reveals that the land was unsurveyed government land occupied by the Department of Police. Part of it was previously occupied by the Department of Survey prior to its relocation to Ruaraka. The representation by the plaintiff to the effect that the suit properties were vacant government land zoned for commercial purpose was therefore a materially misleading misrepresentation.

33. Indeed, in his Letter to the Administrative Secretary responsible for the Kenya Police dated 22/7/1980, the Commissioner of Lands wrote as follows:

The Administrative Secretary

The Kenya Police

P O Box 30085

NAIROBI

RE: EXTENSION OF CENTRAL DIVISIONS NAIROBI AREA

Your letter Ref. DEV/3/1/Vol. II/184 dated 1st July 1980.

The contents of your above letter have been noted and I wish to inform you that the site will be reserved for you as requested once the Survey of Kenya vacates it.

Signed

P O M Wachira

for: COMMISSIONER OF LANDS

CC

The director of Surveys

Nairobi – The site in question is the one you are currently occupying as Headquarters.

N.O.O

53467/11

45305

34. It is noted from the evidence before court that the Director of Physical Planning subsequently thwarted several attempts by the Commissioner of Lands to alienate the suit properties. In a Letter dated 7/7/1994 addressed to the Commissioner of Lands, the Director wrote as follows:

Commision of Lands

P O Box 30089

Nairobi

RE: PROPOSED COMMERCIAL PLOT - HARRY THUKU ROAD – NAIROBI

Reference is made to your letter No. 53467/111/81 dated 23rd June 1994 requesting me to prepare a part development plan on a site shown edged in red on your attached plane.

The site falls within a fenced area off the junction between Harry Thuku Road and Moi Avenue. Apparently, the fencing has

been erected by the Central Police Station and the site thus appears to be within the Central Police Station. Further clarification is needed from you on this issue and I suggest that you make consultations with the Commissioner of Police on this matter.

For the time, I am unable to proceed with the preparation of the plan.

Gichuki Thogo

For: DIRECTOR OF PHYSICAL PLANNING

CC.

The Permanent Secretary

Ministry of Lands & Settlement

NAIROBI.

35. It is apparent from the above letter that the Director of Physical Planning declined to prepare a part development plan which would have informed any legitimate alienation of the suit properties. The position of the Director of Physical Planning was that the suit properties were occupied by the Central Police Station and were not available for alienation as commercial plots. Indeed, allotment to the plaintiff was not based on any approved part development plan (PDP).

36. Another glaringly feature of the allocation of the suit properties to the plaintiff was the flagrant violation of the legal framework in Part III of the Government Lands Act (now repealed) relating to land in urban centres. Under that legal framework, the powers of the Commissioner of Lands to alienate government land was limited to land that was not required for public purpose. Secondly, disposal of any such land was to be through by public auction. The allocation of the suit properties to the plaintiff did not accord with those requirements.

37. The totality of the foregoing is that there is clear evidence of misrepresentation by the plaintiff, leading to the issuance of the allotment letters and titles to the suit properties. It is therefore the finding of this court that the said misrepresentation renders the plaintiff's titles liable to impeachment under Section 23 of the repealed Registration of Titles Act (Cap 281) and Section 26 of the current Land Registration Act.

38. In coming to the above finding, I am guided by the following observation by the Court of Appeal in the case of **Chemey Investment Limited v Attorney General & 2 others [2018] eKLR**.

Decisions abound where courts in this land have consistently declined to recognise and protect title to land, which has been obtained illegally or fraudulently, merely because a person is entered in the register as proprietor. See for example Niaz Mohamed Jan Mohamed v. Commissioner for Lands & 4 Others [1996] eKLR; Funzi Island Development Ltd & 2 Others v. County Council of Kwale (supra); Republic v. Minister for Transport & Communications & 5 Others ex parte Waa Ship Garbage Collectors & 15 Others KLR (E&L) 1, 563; John Peter Mureithi & 2 Others v. Attorney General & 4 Others [2006] eKLR; Kenya National Highway Authority v. Shalien Masood Mughal & 5 Others (2017) eKLR; Arthi Highway Developers Limited v. West End Butchery Limited & 6 Others [2015] eKLR; Munyu Maina v Hiram Gathiha Maina [2013] eKLR and Milan Kumarn Shah & Others v. City Council of Nairobi & Others, HCCC No. 1024 of 2005. The effect of all those decisions is that sanctity of title was never intended or understood to be a vehicle for fraud and illegalities or an avenue for unjust enrichment at public expense.

39. Consequently, I decline to grant the plaintiff the declaratory and injunctive orders sought in the plaint. I similarly decline to grant him the plea for Kshs 950,000,000 (950 Million) which he contends was the market value of the suit properties as at the time of bringing this suit. Further, I decline to award him damages as prayed.

40. There is however no valid reason why the plaintiff should not be refunded the sum of Kshs 27,477,234 which he paid to the Government pursuant to the challenged land allocations. The Government having taken the view that the land was not available for alienation, it had a mandatory obligation to refund to the plaintiff the moneys it received pursuant to the contested allocation. It neither refunded the moneys nor tendered it in court. For this reason, I will grant the plaintiff the plea for a refund of the sum of Ksh 27,477,234 together with interest from the date of filing suit. There will however be no order as to costs of this suit.

41. In summary, the Court's finding on the key issue in this suit is that the allocation and subsequent registration of the plaintiff, Joseph Kuria Kiburu, as proprietor of Land Reference Number 209/12413 comprised in Grant Number I.R 65373 and Land Reference Number 209/12722 comprised in Grant Number I.R 67072 was illegal and irregular and the said titles are therefore invalid and liable to cancellation. Secondly, the plaintiff is entitled to a refund of the sum of Kshs 27,477,334, which he paid to the Government pursuant to the invalid allocations.

Disposal Orders

42. Consequently, I make the following orders in disposing the suit herein

a) The plaintiff's alternative prayer for refund of Kshs 27,477,334 is allowed and the said sum shall attract interest at court rate from the date of filing suit.

b) The rest of the prayers in the Amended Plaintiff are declined.

c) The Attorney General's Counterclaim is allowed in terms of prayers (ii) and (iv) of the Counterclaim.

d) Each party shall bear own costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 15TH DAY OF OCTOBER 2018.

B M EBOSO

JUDGE

In the presence of:-

Mr Motari Advocate for the plaintiffs

Ms Makori Advocate for the defendants

June Nafula - Court Clerk