



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
E.L.C. CASE N. 80 OF 2009

JOHN KIGURU KARUME

PLAINTIFF

-VS-

KENYA INSTITUTE OF ADMINISTRATION	1ST DEFENDANT
THE ATTORNEY GENERAL	2ND DEFENDANT
THE REGISTRAR OF TITLES	3RD DEFENDANT
THE COMMISSIONER OF LANDS	4TH DEFENDANT
THE NATIONAL LAND COMMISSION	5TH DEFENDANT

JUDGMENT

The Background;

1. The genesis of this case is the suit filed by the Plaintiff vide a plaint dated the 27th February 2009 and later amended with leave of the Court on the 6th June 2013. In the suit, the Plaintiff claims ownership of all those parcels of land known as Land Reference Nos. 11512, 11513 and 11514. The basis of the claim is that he is an innocent purchaser for value without notice from one Walter Mugangasia trading as EAW Enterprises.
2. The Plaintiff's cause of action against the 1st Defendant is for illegal and unlawful trespass into the suit properties. He claims vacant possession and special damages amongst other reliefs itemized under 18 (a) – (h) of the Amended Plaint. The Plaintiff blames the 2nd – 5th Defendants for the purported revocation of the suit titles through Gazette Notice No. 15580 in the Kenya Gazette dated 26th November 2010. He asserts that the action of the 2nd – 5th Defendants is contrary to the law as it sought to deprive him of his rights in the suit properties.
3. The 2nd -5th Defendants filed their defence and denied the Plaintiff's claim in its entirety and urged this Honorable Court to dismiss it with costs. While resisting the Plaintiff's claim, the 1st Defendant went further to assert its rights to the suit properties through a counterclaim in its defense. It beseeched this Court to dismiss the Plaintiff's case with costs and order for the cancellation of the suit titles for Plot numbers 11509-11514 issued to private developers, the Plaintiff included, and reissue new titles in respect to the same to the 1st Defendant, its rightful owner.

4. When this suit came up for hearing on the 23rd March 2017, the Plaintiff and the 2nd – 5th Defendants were absent. The Learned Counsel for the 1st Defendant, Mr. Nyanga informed the Court that the parties were duly served with the day's hearing notice. The Court record indicates that the Plaintiff was served with the hearing notice on the 9th March 2017 and there is an acknowledgement to that effect from the Law firm of Kimamo Kuria & Company Advocates dated the same date and received at 12.54 p.m. The 2nd – 5th Defendants being represented by the Honourable the Attorney General were served on the 3rd March 2017 and acknowledged receipt at 3.09 pm on the same day. The Court having been satisfied that service of the hearing notice on the Plaintiff and the 2nd -5th Defendants, dismissed the Plaintiff's suit for want of prosecution. This action paved the way for the 1st Defendant to prosecute its Counterclaim undefended by way of formal proof. The 2-5th Defendants defence became moot.

5. The learned State Counsel, Ms Fuchaka for the 2nd – 5th Defendants affirmed that if the alleged titles to the suit properties were revoked, the 2nd -5th Defendants would be within the confines of the law acting under their statutory duty to so revoke any title that was acquired fraudulently, illegally and or unlawfully. That there was no breach of the law or any rights to the credit of the Plaintiff in any way.

The 1st Defendant's Evidence.

6. The chronology of the 1st Defendant's evidence both in the oral and written form is as follows: -

(1) The 1st Defendant called one Witness, Dr. Nura Mohammed, who is the Director/ Acting Director - Finance and Administration of the 1st Defendant. He deponed that on or about the 10th April 1961 the Government of Kenya took over the then Jeanes School, Kabete for training of the Administrative Staff in the Civil Service. This later became Kenya Institute of Administration (KIA) and currently the Kenya School of Government (KSG). The suit properties are averred to be part of the land inherited by the Government of Kenya from Jeanes School and handed over to the 1st Defendant when Kenya attained Independence in 1963.

(2) Shortly thereafter the 1st Defendant sought the approval of the then Commissioner of Lands to develop *inter-alia* a Shopping Centre for the Kenya Institute of Administration community. The approval was granted vide a letter dated the 7th October 1963 addressed to the Director of Survey as follows: -

“Lower Kabete -L. R No 189/3 Proposed excision for shopping Centre.

I enclose herewith drawing No. 156/63/2 being the approved development Plan of an excision from the above land to be developed as a shopping centre. The land is part of the area reserved as a shopping centre. The land is part of the area reserved to the Ministry of Education and occupied by the Kenya Institute of Administration. I shall be grateful if the necessary survey can be undertaken at an early date as the Institute are extremely anxious for the area to be excised from the plot.

Commissioner of Lands”.

(3) The witness further averred that indeed the Shopping Centre was developed by KIA and leased to various traders and small businesses such as the bakery, barber, shoe repair, general stores, canteen, petrol station among others as evidenced by copies of lease agreements between them and the KIA.

(4) That the only two instances when the 1st Defendant's land was alienated was in 1988 when part of KIA land was formally transferred to The University of Nairobi- Lower Kabete Campus. A title was issued to the University of Nairobi for this land. Another portion (L.R NO 11508 -0.358 acres) was excised to create a dispensary under the management of the City Council of Nairobi, (then) which dispensary served the KIA community. These two portions were allocations or transfers from one public body to another for public purposes; a university and health facility.

(5) That around September 1995 the 1st Defendant through its then principal received requests from interested parties also known as “land grabbers” seeking part of the KIA land allocated to them by the Commissioner of Lands. It is alleged that a former staff member of the KIA was part of them. This prompted the 1st Defendant to send an alert letter to the then Head of Public Service & Secretary to the Cabinet who in turn wrote to the PS – Ministry of Lands seeking clarification. The then PS – Ministry of lands wrote a letter to the Commissioner of lands asking him to investigate the allegations and to forestall any mischief, directed him to issue “a formal letter of reservation for all land legally occupied by the KIA pending the surveying and issuance of title deed to the same”. This was meant to secure the 1st Defendant’s land and keep the marauding land grabbers at bay.

(6) The Commissioner of Lands neither acted on the above letter nor did he issue a formal letter of reservation to the 1st Defendant to secure their land. It would also appear that notwithstanding the above the said office of the Commissioner of Lands sought views of the Chief Architect, Ministry of Public Works and Housing in respect to a proposed allocation of a residential plot LR No 15082/2/A- Lower Kabete -KIA to a private developer. Despite the 1st Defendant’s vehement objection, this parcel was allocated to private developers for private use.

(7) This prompted, for the second time, the PS – Ministry of Lands and Settlement vide a letter dated the 16th May 1997 to the Commissioner of Lands to “issue a letter of allotment to KIA as it awaits arrangements by the Director of Surveys to have the KIA land surveyed for purposes of preparation of title”. In objecting to the allocations, the 1st Defendant justifications were; firstly, the 3 plots were part of KIA land and thus public land not available for alienation for private use, and secondly, the KIA needed these plots for the development of its Shopping Centre and attendant amenities which would benefit the KIA in the delivery of its public mandate of training Civil Servants.

(8) At this point, the 1st Defendant realized that despite its lengthy protestations, part of its land had indeed been allocated by the Commissioner of Lands. This was evidenced by a letter from the Director of survey to the PS- Ministry of Lands and Settlement dated the 7th November 1997 that stated; -

“he had carried out the survey of the shopping Centre (in 1963) and created 7 plots numbered 11508-11514 and according to the records all the plots had been allocated by the Commissioner of Lands as follows;

- i). L.R No 11508- was allocated to the Town Clerk, City Council of Nairobi in a letter dated Ref. 18869/11/64 dated the 15th May 1968 as a dispensary site.
- ii). L.R No. 11509 was allocated to Mrs J N Nyawira Mathenge of P.O Box 23036, Nairobi in a letter Ref 18869/11/108 dated 19th June 1981.
- iii). L.R No. 11510 was allocated to Mr J N Mathenge of P.O Box 23036, Nairobi in a letter Ref 18868/11 dated 7th June 1997.
- iv). L.R No. 11511 was allocated to Mr J N Mathenge of P.O Box 23036, Nairobi in a letter Ref 18868/11 dated 7th November 1996.
- v). L.R No. 11512 & 11514 was allocated to Messrs EAW Enterprises of P.O Box 68189, Nairobi in a letters Ref 18868/11 dated 7th November 1996.
- vi). L.R No. 11513 was allocated to Messrs EAW Enterprises of P.O Box 73139, Nairobi in a letters Ref 18869/11 dated 7th November 1996.”

(9) The Director of Survey pursuant to the instructions of the 1st Defendant in 1963 had carried out survey and excision of the 7 plots for purposes of building a shopping mall and other common facilities for use by the 1st defendant community.

(10) Further he tabled a report, the Commission of Inquiry into the illegal/Irregular allocation of public land (commonly known as the “Ndungu Report”) which recommended the title to the suit properties be revoked and new title issued to the 1st Defendant. A Gazette Notice No. 14564 of 26th November 2010 revoked the title deeds for the suit properties. He pointed out to the Court that the said revocation still stands unchallenged to date. The 1st Defendant caused caveats to be registered on the suit properties on the 23rd December 1998. Whilst urging the Court to declare the 1st Defendant as the rightful owner of the suit properties, the witness stated that the Plaintiff’s purported acquisition of the suit properties is tainted with illegality and thus not entitled to any of the reliefs sought.

The issue for determination

7. The key issue that commends itself for determination is: -

i). Whether the Plaintiff has valid titles in respect to Land Reference Numbers; 11512, 11513 and 11514?

Analysis

8. The 1st Defendant is the Kenya School of Government (KSG) established under the Kenya School of Government Act, No. 9 of 2012. It is the successor in title to the Kenya Institute of Administration (KIA) established by the Kenya Institute of administration Act, No. 2 of 1996 (now repealed). The 1st Defendant is a body corporate with perpetual succession and a common seal. All the rights, duties, obligations, assets and liabilities of KIA automatically stood fully transferred to Kenya School of Government and any reference to KIA in any document or contract shall for all purposes be deemed to be a reference to KSG. The 1st Defendant therefore is a Public body whose mandate is to provide learning and development programmes to build capacity for the Public service. It is a Public body providing public good/services to the Public Service in Kenya.

9. It is commonly acknowledged that the suit properties were all allocated to EAW Enterprises vide Reference Nos 18869/11 dated the 7th November 1996 as shown in the letters of allotment evidenced on record. It is not in dispute that the titles for the suit properties are now registered in the name of the Plaintiff, the same having been acquired by the Plaintiff through an undated informal transfer from EAW Enterprises, the original allottee herein. The same was consented by the Commissioner of Lands on the 5th June 1997. It is also not in dispute that the possession of the suit lands is in the hands of the 1st Defendant.

10. Section 2 of the Government Lands Act Cap 280 (now repealed) defines Government Land as land for the time being vested in the Government by virtue of sections 21, 22, 25 and 26 of the Constitution of Kenya, 1964 (now repealed). In the same text unalienated Government Land means; -

“Government land which is not for the time being leased to any other person, or in respect of which the Commissioner has not issued any letter of allotment”.

The 2010 Constitution carries a comprehensive definition of Public Land in Article 62. For purposes of this case Public Land is defined in the 2010 Constitution in Art 62 (1) (a) and (b) which states as follows;

(1) Public land is; -

(a) Land which at the effective date was unalienated Government land as defined by an Act of

Parliament in force at the effective date;

(b) Land lawfully held, used or occupied by any state organ except any such land that is occupied by the state organ as lessee under a private lease.

(2). Public land shall vest in and be held by a County Government in trust for the people resident in the County, and shall be administered on their own behalf by the National Land Commission,

(3). Public land classified under clause (1) (f) to (m) shall vest in and be held by the national Government in trust for the People of Kenya and shall be administered on their behalf by the National Land Commission.

(4). Public Land shall not be disposed of or otherwise used except in terms of an Act of Parliament specifying the nature and terms of that disposal or use.

The drafters of the Constitution did their best to bring about certainty in both the definition and the operative architecture of how Public land is to be managed. The National Land Commission is the body mandated to manage public land in trust for the People of Kenya, be it at the County or National Government level. The Land Act No. 6 of 2012 has adopted the definition provided in Article 62 of the Constitution. It has gone ahead to describe what public purposes are to include schools etc which is in consonance with the public user in this instant case. Under the National Land Commission Act No.5 of 2012, no public land shall be alienated without the consent of the National and County Governments who hold the public land in trust for the People of Kenya.

11. It is on record from the material evidence that the suit land under reference is land that was ceded to the Government of Kenya in succession upon independence. This land was previously used by the Jeanes School for which a section of it was occupied by the Ministry of Education under KIA. It is also on record that the survey of the suit properties was done at the behest of the 1st Defendant for its use and not for alienation or conveyance to any third parties, least of all the Plaintiff. That being the case, it is expected that the 1st Defendants legitimate expectation from the Commissioner of Lands was the receipt of deed plans and titles of the suit properties. The survey work was completed but for whatever reason nobody followed up the deed plans for the said plots. This proved a boon for the land grabbers.

12. It is clear from the record that in 1963, when the Commissioner of Lands was approving the 1st Defendants Part Development Plans for the excision of 7 plots from Land Reference No 189/3, he confirmed that the said Land is reserved for the Ministry of Education for the use by Kenya Institute of Administration. No evidence was adduced to show any change of the said status of the land to date. The 1st Defendant is consistent in its evidence that it has had possession of the land predating independence and has always secured the land through fencing. It refuted claims that it fenced it off in 1996. This lends credence to the 1st Defendants position that prior to the Plaintiff's illegal acquisition of the suit properties, the land was reserved for it and therefore any purported alienation by the Commissioner of Lands was illegal ab initio.

13. Did the Commissioner of Lands have power to alienate the suit properties? Section 3 of GLA vested the power to the President, subject to written law to make grants or dispositions of any estates, interests or rights in or over unalienated government land. The Act stipulates instances when the powers of the President were delegated to the Commissioner of Lands. Section 7 stipulates the power of the Commissioner of Lands as follows; -

“The Commissioner or an officer of the Lands Department may, subject to any general or special directions from the President, execute for and on behalf of the President any conveyance, lease or licence of or for the occupation of Government lands, and do any act or thing, exercise any power and give any order or direction and sign or give any document, which may be done, exercised, given or signed by the President under this Act:

Provided that nothing in this section shall be deemed to authorize the Commissioner or such officer to exercise any of the powers conferred upon the President by sections 3, 12, 20 and 128.”

14. The Courts in Kenya have severally expressed itself on whether or not the Commissioner of Lands had the power to alienate Public land. In the case of **James Joram Nyaga & Anor Vs. The AG & Anor HCCC Misc Application No 1732 of 2004** Justice Nyamu (as he then was) said;

“The above section (s. 7 of GLA) clearly limits the power of the Commissioner to executing leases, conveyances on behalf of the President and the proviso to the section specifically limits the power to alienate unalienated land to the President.”

15. Even before the promulgation of the Constitution of Kenya, 2010, it was appreciated by the Courts that the Commissioner of Lands had no right to singlehandedly alienate public land. This was the position in **Kenya Guards Allied Workers Union vs. Security Services & 38 Others High Court Miscellaneous Application No. 1159 of 2003** where it was held that:

“public interest must be engine of the millennium and it must where relevant occupy the centre stage in the courts...should the Land Acquisition Act give shelter to the land grabbers of public land or are courts going to invent equally strong public interest vehicles to counter this, should individual land rights supersede the communal land, catchments and forests? How far are the courts going to deal with land grabbers who stare at your face and wave to you a title of the grabbed land and loudly plead the principle of indivisibility of title? Are courts going to stay away and refuse to rise to the greater public good call of unravelling the indefeasibility by holding that such a title perhaps issued in order to grab a public utility plot such as hospital by an individual violates the public or national interest and therefore a violation of the constitution. I venture to suggest that such titles ought to be nullified on this ground and thrown to the dustbins”.

16. In this case, the suit properties were allocated by the Commissioner of Lands to EAW Enterprises on the 7th November 1996, subject to the provisions of the GLA Act and the user was stated to be shops, offices and flats. The offer contained a caveat to the effect that “The Government shall not accept any liability whatsoever in the event of prior commitment or otherwise”.

17. The powers and authority to alienate government land was the preserve of the President. That being the case the Commissioner of Lands had no authority to alienate the disputed suit properties to EAW Enterprises as he purported to do vide the letters of allotment dated 7th November 1996. It therefore follows that the Commissioner could not have made any grant to EAW Enterprises under the GLA nor could he have passed any registrable title to it under the RTA.

18. To answer the question whether the Plaintiff had a valid title, Section 23 of the Registration of Land Act (RTA), Cap 281 states as follows;

“The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party”.

19. The Land Registration Act (LRA) No. 3 of 2012 states that the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto. Section 26 of the Land Registration Act Mirrors Section 23 of the RTA but with a clearer depth states 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—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

19. It will be noted that the new Act has expanded the grounds under which a title may be challenged to include illegality, unprocedural methods or corrupt scheme. It was argued by the 1st Defendant that the allocation of the land by the Commissioner of Lands was illegal for the reason that the land was public land and therefore not available for alienation to the EAW Enterprises. Application of Section 26 to the above facts defeats the absolute and indefeasible proprietorship of the suit properties and goes to the root of the title or otherwise.

20. In the case of **Milankumar Shah and 2 Others -vs- City Council of Nairobi & Attorney General (Nairobi HCC Suit No. 1024 of 2005 (05))** the court held: -

“We hold that the registration of 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 than the balance of probability that such registration was procured through persons or a 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 concept of absolute and indefeasible ownership of land cannot be clothed with legal and constitutional protections if the interest was acquired through fraud, misrepresentation, illegality unprocedural ways or corrupt schemes. This concept cannot be used to sanitize the commissioner if it allocates or issues title in such manner. In the Case of **Champaklal Ramji Shah & 3 Anors Vs AG & Anor, HCCC No. 145 of 1997**, it was held that the Court has a duty to examine the process of acquisition of such title and if it determines that there is an illegality, should nullify the titles as required.

22. The 1st defendant's letter of November 2000 detailed how a Senior Administrative officer formerly attached to his office together with third parties pestered the Principal to part with the land for allocation. A clandestine group were seen visually surveying the land. This conjures up a scheme to deprive the 1st Defendant of its land through unorthodox means contrary to the law, hence the illegality perpetuated through their illegal schemes.

23. Noting that the titles to the suit lands were acquired illegally, unprocedurally or through a corrupt scheme, this therefore defeats the absolute and or indefeasible defence of the Plaintiff. The act of the Commissioner of lands purporting to allocate public land that was not available for alienation is in itself illegal. The suit properties had been alienated and designated for Public use under the custody of the 1st Defendant and therefore was not available for alienation. It then followed that no title was passed to the allottee- EAW Enterprises from the Commissioner of Lands. Neither did the EAW Enterprises nor the Plaintiff receive any title in the subject suit properties. Any allocation of land contrary to the Constitution is unconstitutional and is void. There is no valid grant that was created under the GLA or a valid title under RTA then and none under the current Constitution and the Land Act No. 6 of 2012.

24. The Plaintiff premised his case on being a bonafide purchaser for value without notice and that he holds an absolute and indefeasible title for the suit properties. *Bona fide* purchaser for value without notice – is a term used predominantly in [common law jurisdictions](#) in the [law of real property](#) to refer to an innocent party who purchases property without notice of any other party's claim to the title of that property. Does section 26 of the Land Registration Act protect this purchaser? For the Plaintiff to successfully rely on this doctrine, he must prove that the vendors (EAW Enterprises) had a good title and that he indeed received a good title. Going by the doctrine of *nemo dat quod non habet* (no one gives who possesses not), EAW Enterprises did not obtain good title to pass on to the Plaintiff. The Plaintiff therefore received no title at all.

25. If it is proved that the Plaintiff acquired the plots from EAW Enterprises for known value, then his claim will rest against EAW Enterprises in an ordinary civil suit for damages and compensation of the purchase price.

26. I note that the 1st Defendant has urged this Court to cancel titles for Land Reference Number 11509-11514. I decline to issue any orders for Land Reference Numbers 11509, 11510, 11511. These properties are not subject of this suit and it would be unjust and against the principles of natural justice to so make any orders which may affect parties who are not joined to the suit.

27. In Conclusion, I find that the 1st defendant has proved its counterclaim and I make orders as follows;

a). The Land Registrar, Nairobi do hereby cancel Titles No. s I.R 74615, 74614 and 74613 for Land Reference Numbers 11512, 11513 and 11514 forthwith.

b). The Land Registrar, Nairobi is hereby ordered to issue new titles for Land Reference Numbers 11512. 11513 and 11514 to the Kenya School of Government forthwith.

c). No orders as to costs.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 26TH MAY 2017.

J. G. KEMEI

JUDGE

Judgement delivered in open Court in the presence of;

Mr Mumia holding brief for Mr Nyaanga - 1st Defendant

NA - Plaintiff

NA - 2nd – 5th Defendants

Wycliffe Ojwang - Court Assistant