



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CASE NO. 2388 OF 1998

REGISTERED TRUSTEES ISLAMIA

MADRASSA COMMITTEE.....PLAINTIFF

VERSUS

JOSEPH MUIGAI MUROKI.....1ST DEFENDANT

NAIROBI CITY COUNCIL.....2ND DEFENDANT

JUDGMENT

1. The Plaintiffs are the registered trustees of Islamia Madrassa Committee, Nairobi which runs and operates Muslim Girls School. They filed suit on 30th October 1998 seeking a declaration that they are the rightful owners of the portion of land adjacent to its land (“the Suit Property”) which was to be consolidated with its land known as L.R. No. 209/5534. They also seek a declaration that the allocation of the Suit Property by the 2nd Defendant to the 1st Defendant was unlawful and should be cancelled and permanent injunctions issued to restrain the Defendants from entering or dealing with the Suit Property as well as the costs of this suit.

2. The Plaintiff claims that it was allocated the Suit Property in 1979 by the Commissioner of Lands and to have been in possession from then to date. Muslim Girls School has been in occupation of L.R. No. 209/5534 since 1937.

3. Both Defendants filed defences. The Defendants claim the allocation of the Suit Property to the Plaintiff was cancelled. Following the cancellation, the 2nd Defendant prepared a part development plan (PDP) which incorporated a portion curved out of L.R. No. 209/5458 belonging to the 2nd Defendant, and part of a disused road reserve abutting the Plaintiff’s school. The 2nd Defendant allocated part of the Suit Property to the 1st Defendant.

4. The Plaintiff was granted interim orders of injunction on 30th October 1998. On 25th October 1999, the parties agreed to extend the orders until the suit was heard and determined.

5. The Honourable Mr Justice P.J. Ransley heard the case on diverse dates between 2004 and 2006. The Plaintiff called four witnesses while two witnesses testified for the Defendants. Justice Ransley retired before he had delivered the judgment. The parties agreed that the proceedings would be typed and another judge would hear the submissions of the parties and deliver a judgment.

6. Parties filed and exchanged written submissions and highlighted these before this court. The court has

analysed the evidence tendered in the matter.

7. The Plaintiff's first witness who was a Land Officer told the court the Suit Property was government land and that it was allocated to the Plaintiff on 26.3.1979. He stated that the City Council could not have allocated the Suit Property and that the Commissioner of Lands did not consent to the allocation of the Suit Property by the 2nd Defendant to the 1st Defendant. He produced the letter dated 12.3.1993 cancelling the allocation of the Suit Property to the Plaintiff. The letter reads as follows: -

RE: EXTENSION TO (AMALGAMATION OF) L.R. 209/5534- MUSLIM LANE- OFF PARK ROAD

Reference is made to my letter of allotment ref. 24579/11/68 dated 26th March, 1979 offering the above quoted piece of land, and I regret to inform you that the government had decided to cancel the allocation. This decision has been arrived at due to some prevailing circumstances which have rendered the allocation a public nuisance.

You may claim ONLY any monies you may have paid by way of acceptance of the offer.

G.K. SOMBA-KIVALYA

FOR: COMMISSIONER OF LANDS

CC The Town Clerk

The Public Trustee

8. He confirmed to the court that he knew the location of the Suit Property and that it is fenced. He stated that the plan from the records held at the Lands Office showed that the Suit Property was a road reserve. He conceded that the City Council could allocate land within the city which it holds under a lease or absolute title but that the Council did not own the Suit Property.

9. The second witness who was one of the registered trustees of the Plaintiff confirmed that the Plaintiff paid Kshs. 405/= on being allocated the Suit Property in 1979 and that the school had been in possession of the land from that time to date. This witness maintained that the school did not receive the letter from the Commissioner of Lands cancelling the allotment of the Suit Property to the Plaintiff.

10. The third witness who was the school administrator stated in his testimony that the 1st Defendant went to see him in 1998 claiming to have been allocated the Suit Property which prompted the school trustees to file this suit. The 1st Defendant showed him the letter of allotment dated 27.10.1992.

11. The fourth witness who testified for the Plaintiff was a licensed surveyor who informed the court that he surveyed the Suit Property and prepared a survey plan and deed plan consolidating the Suit Property with the Plaintiff's land in 2000. The land was given a new number being L.R. No. 209/14203. He stated that since the school had not surrendered the original title, the deed plan was not signed by the Director of Surveys and also because of this suit. According to him, the Suit Property was a public road intended to serve the school. He stated that the roads were owned by the Government but maintained by the Council. He maintained that the Council could not allocate a road reserve but could only advise the Commissioner of Lands on whether or not the land could be allocated. He stated that the Council could only issue temporary occupation licenses for a road reserve which was not being used.

12. The 1st Defendant gave evidence and stated that he was allocated the plot marked K situated off Quarry Road in September 1992. He was shown the beacons and certificate after which he obtained a lease signed on 9.4.1999. He paid the specified charges to the Council. He confirmed that the Plaintiff was only claiming a portion of the plot that had been allocated to him.

13. A surveyor who works for the 2nd Defendant also gave evidence. He was instructed to survey the 1st Defendant's plot in 1998. He stated that when he visited the land he found that the Plaintiff's wall was 17 meters into the plot K allocated to the 1st Defendant. He reiterated that the allocation to the Plaintiff was cancelled in 1993. He believed the road was owned by the City Council and that the Council was at liberty to allocate it. He conceded that the 1st Defendant's part development plan was prepared in 1992 yet the cancellation of the allocation of the Suit Property to the Plaintiff was done in 1993. He confirmed that the 2nd Defendant granted a lease to the 1st Defendant. He stated that the Suit Property could be allocated for commercial purpose even if the user was different with the consent of the Commissioner for Lands. This witness also confirmed that the plot in dispute was part of a road reserve.

14. The Plaintiff and the 2nd Defendant each prepared its statement of issues. From the submissions made, the court sees the issues in dispute as these:

- i. Does the Suit Property belong to the Government or the City Council of Nairobi?
- ii. Who had power to allocate the Suit Property?
- iii. Should this court grant the Plaintiff the reliefs sought in the Plaintiff?

15. It is not disputed that as at 1979 the Suit Property was government land when the Commissioner for Lands allocated it to the Plaintiff. No evidence was given to show how the Suit Property which was owned by the Government in 1979 changed hands to become the 2nd Defendant's land in 1992. A local authority such as the 2nd Defendant herein could acquire land for its functions under Section 144 of the Local Government Act (now repealed).

16. It is not in dispute that the plot the 2nd Defendant allocated to the 1st Defendant in 1992 included the portion that the Commissioner of Lands had allocated to the Plaintiff in 1979.

17. The reasons given for the cancellation of the Suit Property to the Plaintiff was public nuisance. The 2nd Defendant allocated the Suit Property to the 1st Defendant to use for commercial purposes. It is not clear what the Commissioner of Lands meant by public nuisance on the part of the school since the same land was allocated to the 1st Defendant for commercial use a year before the Commissioner of Lands cancelled the allocation to the Plaintiff.

18. Section 85 of the Government Lands Act protected roads, thoroughfares, outspans and road reserves that existed under that Act. These were to remain free and uninterrupted unless they were closed or altered by a competent authority. Parties admit that the Suit Property was hived out of a disused road.

19. Section 182 of the Local Government Act vested the general control and care of public streets in local authorities such as the 2nd Defendant, to hold in trust and keep and maintain for the use and benefit of the public.

20. Section 185 of the Local Government Act empowered a municipal council to permanently close, divert or alter a road vested in it under the Act. Section 192 defined "vesting" in relation to a road as the transfer of the possession of the surface of the land in question. The section expressly stated that vesting did not mean the transfer of the ownership of the land. The 2nd Defendant therefore had no power to transfer ownership of the disused road.

21. The court finds that the Suit Property and the disused road formed part of government land and could not be allocated by the 2nd Defendant.

22. The powers exercisable by the President to alienate public land under Section 3 of the Government Lands Act could be exercised by the Commissioner of Lands in certain instances which included religious, charitable, educational or sports purposes on conditions that accord with the general policy of

the Government. Muslim Girls School whose Trustees brought this suit serves both educational and religious purposes in the community.

23. The Commissioner of Lands could cause any portion of a township which was not required for public purposes to be divided into plots and sold for erection of business or residential purposes pursuant to Section 9 of the Government Lands Act. There is no evidence that the Commissioner of Lands has sold the Suit Property.

24. The Commissioner of Lands cancelled the allocation of the Suit Property to the Plaintiff vide the letter of 12.3.1993. It was the Plaintiff's evidence that it learnt of the cancellation of the allotment of the Suit Property in 1998. The Commissioner of Lands was not made a party to this suit. The court cannot declare that the Plaintiff is the owner of the portion of land that was allotted to it in 1979, the Commissioner of Lands having cancelled that allocation in 1993. The Plaintiff's recourse lies in pursuing the successor of the Commissioner of Lands to allocate it the Suit Property to use for public purposes which by the definition at Section 2 of the Land Act of 2012 include public schools and religious institutions.

25. Having found that the Suit Property was government land, the court declares the allocation of the Suit Property by the 2nd Defendant to the 1st Defendant illegal. A permanent injunction is issued restraining the Defendants from dealing with the Suit Property.

26. Since the Plaintiff has succeeded partially on its claim, it will have the costs of the suit.

Dated and delivered at Nairobi this 20th day of July 2017.

K. BOR

JUDGE

In the presence of: -

Mr Ongicho for the Plaintiff

Ms Lipwop for the 1st Defendant

Mr Ilako for the 2nd Defendant

Mr V. Owuor- Court Assistant