



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENT AND LAND COURT
ELC CASE NO. 181 OF 2012

MOSES OKATCH OWUOR

(Suing as Trustee of Dandora disabled group).....1st PLAINTIFF

PAUL WAREIRE MUNGA

(Suing as Trustee of Dandora disabled group).....2nd PLAINTIFF

=VERSUS=

ATTORNEY GENERAL.....1ST DEFENDANT

CITY COUNCIL OF NAIROBI.....2nd DEFENDANT

JUDGEMENT

By a Plaint dated **4th April 2012**, the Plaintiffs herein have sought for various reliefs. The Plaintiffs are suing as the **Trustees of the Dandora Disabled Group** and have sought for the following orders:-

- a) A Declaration that the 1st Defendant /Agent (Dandora Police Station)either by itself, its servants agents, employees, accomplices and or anyone claiming under them be restrained from encroaching upon occupying, fencing, invasion, trespassing and/or in any way developing or selling or disposing off the parcel of land number NAIROBI BLOCK 84/1221.***
- b) Damages for trespass including aggravated damages and an eviction Order.***
- c) Costs of the suit at Court rate.***

The Plaintiffs pleaded that they were the beneficial owners of the parcel of land known as **NAIROBI BLOCK 84/1221(hereinafter the “suit property”)** measuring **0.4621HA for 99 years** from **1997**, situated at **Dandora Phase 2** along **James Gichuru Road** within the **County of Nairobi**. The Plaintiffs averred that they purchased the suit property from the 2nd defendant. However the Police (suing through the 1st Defendant) have two acres of undeveloped common boundaries with the Plaintiffs. The 1st Defendant, Police Post is marked as **B** and the Plaintiffs was marked as **A** according to the Part Development Plan proposed site marked by the 2nd Defendant. The Plaintiffs contend that the 1st Defendant has always encroached on the suit premises despite being aware that it belongs to the Plaintiffs and engaging in acts of degradation and wasting away the suit property by erecting iron structures and a stone wall on the

property thus depriving the Plaintiffs of use of their land.

The 1st Defendant filed their **Statement of Defence** on **31st July, 2012**. In their response they denied the Plaintiffs ownership over the suit property and trespassing over the same. The 1st Defendant included a **Counter-Claim** seeking for orders that the Plaintiffs' **title over the suit property be cancelled on account of fraud**. They stated that the land was not available for alienation as the same was public land and the Plaintiffs purported ownership was null and void. In the Counter-claim, the 1st Defendant sought for the following orders:-

a) An order that the Plaintiffs do surrender to the Land Registrar the certificate of lease held by it purporting to be in respect of the suit property for immediate cancellation.

b) A declaration that the suit parcel belongs to the Kenya Police.

c) Costs.

c) Any other relief the Court deems fit to grant.

The 2nd Defendant entered appearance and filed their **Statement of Defence** on **16th July 2012**. In brief they contended that the suit property was allocated to the Plaintiffs legally and the suit as filed did not disclose a cause of action against them. They did not participate in the proceedings.

Plaintiffs Evidence

The Plaintiff's called two witnesses who testified that they were hawkers selling various wares within the Nairobi Central Business District (CBD) in the **1990s**. The Government implemented a policy wherein it required the hawkers to leave the CBD and consequent thereto, the 2nd Defendant in **1998** allocated to them the suit property to make out a living. **PW1** testified that the 2nd Defendant issued them with a letter of allotment on **10th February 1998**, at a consideration of **Kshs.60,000/=** as a stand premium and **Kshs.6,000/=** as annual rent. Subsequently, the suit property was granted to them on **21st August 2003**, vide a **Lease Agreement** executed between the Plaintiffs trustees and the 2nd Defendant for **a term of 99 years** from **1st January 1977**. Consequent thereto, a **Certificate of Lease** was issued to them on **11th September 2003**. Upon issuance of the Certificate of lease, the Plaintiffs embarked on construction of shops/stalls in the **year 2005**. However, before they could commence the same, the Director, City Planning & Architecture, prepared a Part Development Plan (PDP) for approval by the Ministry of Lands. The PDP was advertised in the local **Daily Nation Newspaper** on **26th September 2001**, inviting Public objections. There being no objection, the PDP was approved by the Ministry of lands. Immediately thereafter, the 1st Defendant invaded the suit property and halted all intended constructions on the suit property by interlia, fencing the Plaintiffs land with barbed wire and erecting structures on the premise that, the land was earmarked for construction of **Dandora Police Station**. This constrained the Plaintiffs to file **Milimani CMCC No. 10593 of 2005**, wherein they obtained temporary injunctive orders against the 1st Defendant.

However, the suit was subsequently **dismissed for lack of jurisdiction**. The Plaintiffs in their submissions raised one issue for determination before this Honourable Court. Who was the registered proprietor of **Nairobi Block 84/ 1221**.

The Plaintiffs contended that they were the registered proprietors of the parcel of land by dint of **Article 40 of the Constitution of Kenya, 2010** as read with **Section 26(1) of the Land Registration Act**. It was their contention that the 1st Defendant could not seek to annul their title by virtue of Fraud when all along the 1st Defendant would have charged them with fraud which is criminal in nature. It was the Plaintiffs contention that the 1st Defendant had not proved fraud and that the suit property was lawfully theirs. The Plaintiffs attached the case of **MahatKuno Roble & Others ... Vs... The Permanent Secretary of Ministry**

of Defense, Kerugoya Petition No. 10 of 2015 and Kinunga Njiraini..Vs.. Njuguna Nyambura and Ano. Milimani ELC case No. 716 of 2011.

Both cases cited **Article 40 of the Constitution** which protects the right of the owner of the property from being arbitrarily deprived of his property and that Fraud must be proved not merely stated.

1st Defendant's Submissions

The 1st Defendant filed their **submissions** on **16th December 2015**. They highlighted 3 issues for determination by this Honorable Court;

- a) Whether the suit land was reserved for a public utility,**
- b) Whether the allocation of the suit property by the 2nd Defendant to the Plaintiffs was fraudulent, and**
- c) Whether a non-legal entity could own property in its own name.**

On the 1st ground, the 1st Defendant submitted that the suit property was set aside for the Police Station as was buttressed by the Map produced by **DW3**, who was a member of the Committee allocating land to residents of Dandora. He contended that the 2nd Defendant did not confirm that it had authority to allocate the land to the Plaintiffs. In support of this contention Counsel quoted the case of **Norbixin Kenya Limited vs The Hon. AG in HCCC Case No. 1814 of 2002** wherein the Court dismissed a claim of public land on the ground that:-

“ Once a suit property was designated as a Police Station, it ceased to be un-alienated Government land as it was set aside for use as a public utility for the general public. The Commissioner of Lands henceforth became a trustee with regard to this public utility plot.....the suit property having been set aside and planned as a police station for public use... was not therefore available for further alienation or allocation.”

This principle was regurgitated in the cited case of **Republic Vs. Land Registrar Kilifi & Another Ex-parte Daniel Ricci (2013) eKLR Mombasa HC Misc Appl. No. 70 of 2010 R Vs. Commissioner of Lands and ex-parte Applicant COMEN LTD**

On the second ground the 1st Defendant submitted that the Plaintiffs did not have capacity to own the land as they came into existence in the **year 2005** legally when they were formally registered as a self-help group in the **year 2005**. Hence the 1st Defendant submitted that a Certificate of Lease could not have been issued in their name in the **year 2003**. This was alluded as complicity to Fraud perpetrated by the Plaintiffs in obtaining the Certificate of Lease. Counsel cited the Case of **Comen Limited(Supra)**. It was submitted that according to the testimony of DW1, the **PDP CP/FP Zone 18/009/08/01**, was never forwarded to the Ministry of Lands for approval contrary to the assertions by the Plaintiffs. This was a prerequisite to issuance of an allotment letter. He therefore submitted that the allotment letter claimed by the Plaintiffs was fraudulent as the proper procedures were not followed. It was further submitted that the advertisement of the PDP on the **Daily Nation Newspaper** dated **26th September 2001**, was erroneous as it captured the suit land as being opposite **Kianyago Police Station** instead of being in Kianyago Police Station. This was therefore submitted that it was contrary to **Physical Planning Development Plans Regulations 1998** as prescribed in **form P.P. A.3**.

Lastly the 1st Defendant submitted on the ground as to whether a non-entity could purport to own property in its own name. It was submitted that the Plaintiffs produced a **Certificate of Lease** in the name of **Dandora Self-Help Group**, whereas it was unincorporated entity which had no capacity to own property. The 1st Defendant cited the case of **Nairobi HCC No. 813 of 2005 Joseph Gitau Isaac Mburu –Wilson Mitumba Women Group.. Vs... Ukay Estate Ltd**, wherein the court held that a Women's Self-

Help Group lacked juridical status to own and hold a title in its name.

The 1st Defendant in brevity responded to the Plaintiffs' submissions and stated that **Article 40** could not come to the aid of the Plaintiffs as the suit land was public land. The 1st Defendant cited the case of **Eunice Grace Njeri & Ano.. Vs. ..The Hon. AG & 5 Others**, wherein the court held that the only instance the sanctity of the property under Article 40 could not be protected was when the title was shown to be unlawfully acquired. This was submitted on the same breadth as **Section 26** of the **Land Registration Act** wherein Counsel cited the case of **Mr. Koinange... Vs... Joyce Ganchuku & 2 others KLR (2015)** to enunciate that an indefeasible title could be cancelled on grounds of fraud. In conclusion the 1st Defendant sought that the Plaintiffs suit be dismissed with costs to the 1st Defendant.

The Court has now considered the general pleadings, oral evidence and submissions by the parties and the Court finds that there are only two issues for determination.

1. Was the suit property properly alienated

The Plaintiffs submitted that the 2nd Defendant issued them with a **Letter of Allotment** on **10th February 1998**. Subsequently, the suit property was granted to them on **21st August 2003** vide a **Lease Agreement** executed between the Plaintiffs trustees and the 2nd Defendant for **a term of 99 years from 1st January 1977**. Consequent thereto, a **Certificate of Lease** was issued to them on **11th September 2003**. It is worthwhile to note that the 2nd Defendant in their statement of Defence stated that they had allotted the suit property to the Plaintiffs legally. At no one point did the 2nd Defendant inform the Plaintiffs that the land was set aside for Public Utility. The 2nd Defendant did not appear in Court to elaborate on what basis it allotted the suit property to the Plaintiffs.

The 1st Defendant denied that there was any approval as per their records. DW1 testified that the PDP that was published showed that the land was opposite Kianyago Police Post. It was therefore not the land allocated to the Plaintiffs as the Plaintiffs' land is inside the Police Post. He also testified that the PDP was never forwarded to his Department and did not have any allocated number. Ordinarily it is he Commissioner of Lands who requests the Director to prepare the PDP and that was not the case herein. DW1 also testified that there was no reservation for Dandora Disabled Group in the map that he was referring to. In re-examination he affirmed the procedure for alienating public land but stated that the said procedure was not followed herein. On cross-examination by Counsel for the 2nd Defendant, he stated that the Plaintiff' land was within the Police Station and he was baffled on how they got a title. **DW3, Mr. Joseph Macharia** was the Chairman of the Committee that distributed land in Dandora, which was known as **Dandora Community Settlement Project**. It was his further testimony that the suit land was set aside in the bracket of security and wherein it was set aside for the Police Station. He further stated that the land in question was not set apart for the Dandora Disabled Group but for the Police Station. The Defence exhibited the Map that showed that the suit land was alienated for the Police Post.

It is trite law that under the repealed Government Lands Act, a Part Development Plan must be drawn and approved by the Commissioner of Lands or the Minister for Lands before any un-alienated Government Land could be allocated. After a Part Development Plan (PDP) has been drawn, a letter of allotment based on the approved PDP is then issued to the allottees. There was no evidence that the PDP herein was approved by the Commissioner of Lands. **Angote J in Nelson Kazungu Chai & 9 Others ..Vs..Pwani University [2014] eKLR** stated the steps of alienation of Government Land.

It is only after the issuance of the Letter of Allotment, and the compliance of the terms therein, that a cadastral survey can be conducted for the purpose of issuance of a Certificate of Lease. The process was also restated in the case of **African Line Transport Co. Ltd...Vs...The Hon. Attorney General, Mombasa HCCC No.276 of 2013**, where Njagi J held as follows:-

“Secondly, all the defence witnesses were unanimous that in the normal course of events, planning comes first, then surveying follows. A letter of allotment is invariably accompanied by

a PDP with a definite number. These are then taken to the department of survey, who undertakes the surveying. Once the surveying is complete, it is then referred to the Director of Surveys for authentication and approval. Thereafter, a land reference number is issued in respect of the plot”.

A Part Development Plan (PDP) can only be prepared in respect to Government land that has not been alienated or surveyed. It was not clear how the 2nd Defendant allotted this suit property to the Plaintiffs whereas it had been set aside for security purposes. DW2 testified that they had a project organized by the World Bank and the suit land was designated for security purposes that is the Police Post and the Police Line. The question then posed by this Court is; ***Was the right procedure for alienating the suit property followed?*** The Court finds that the right procedure was not followed at all. Once the PDP was published, the Director of Physical Planning did not submit to the Minister for approval, and there was no assignment of plan numbers and details entered into the register. This should have culminated to the approval and issuance of the allotment by the Commissioner of Lands.

2. Did the Plaintiffs have juridical status to own the suit property?

The Plaintiffs were registered formally in 2009 and by 11th September 2003, they had a ***Certificate of Title in their name Dandora Disabled Group***, not in their trustee’s name. The Court has considered the authority cited by the 1st Defendant **Nairobi HCC No.813 of 2005, Joseph Gitau Isaac Mburu – Wilson Mitumba Women Group..Vs..Ukay Estate Ltd**, where the Court held that:-

“The Plaintiffs could not own the land when they were not properly registered.”

The Court in the above case held that:-

“What is more than the truth that the Plaintiff is a self-help group and lacks juridical status to own and hold a title in its name”

Further, in the case of ***Comen Ltd (supra)***, the Court held that:-

“the orders sought cannot be granted to the Applicant mainly because as stated before, the Applicant was non-existent when the title was issued and could not rectify that position by having itself incorporated later”.

Having now found that the suit land was not properly alienated and having found that the Plaintiffs could not own land as they were not properly registered at the time of issuance of the alleged title, the Court finds that the Plaintiffs title was not properly acquired and could therefore not be protected by Article 40 of the Constitution.

For the above reasons, the Court comes to a conclusion that the Plaintiffs have not proved their case on the required standard of balance of probabilities. For the above reasons, the Court dismisses the Plaintiffs’ claim dated 4th April 2012, entirely with costs to the 1st Defendant.

The second issue for determination is whether the 1st Defendant is entitled to the prayers sought in the Counter-claim.

The 1st Defendant had sought for cancellation of the Plaintiffs’ title and for a declaration that the parcel of land belongs to the Kenya Police.

The Plaintiffs alleged that they were allocated this suit property by the 2nd Defendant. The 2nd Defendant did admit that they allocated the suit land to the Plaintiffs herein. However, the 2nd Defendant did not adduce evidence in Court to explain how they came to own the suit land and later allocate it to the Plaintiffs herein. The 1st Defendant through DW1 alleged that the suit land had been reserved for a police station or public purpose. It was his evidence that the area was not reserved for Dandora Disabled

Group. DW1 had told the Court that when a public land is alienated, a certain portion of land is set aside for public utility and this land is reserved by the Commissioner of Lands who issues letter of reservation. However, if such land is to be allocated, then there must be consultation and in this case, consultation out to have been with the Dandora Police Station. Without that consultation, then the right procedure was not followed. Having now found that the right procedure was not followed, the Court finds that the resultant certificate of title was irregularly issued. In the case of **Kassim Ahmed Omar & Another..Vs..Anwar Ahmed Abed & Others, Malindi ELC No.18 of 2015**, the Court held that:-

“A certificate of title is an end produce of a process. If the process that followed in issuing the title did not comply with the law, then such a title can be cancelled by the Court.”

Further in the case of **Funzi Development Ltd & Others..Vs..County Council of Kwale, Mombasa Civil Appeal No.252 of 2005**, the Court held that:-

“....a registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular. A court of law cannot on the basis of indefeasibility of title sanctions an illegality or gives it seal of approval to an illegal or irregularly obtained title.”

Since the Plaintiffs alleged that the suit land was allocated to them by the 2nd Defendant and the 2nd Defendant did not appear in court to shed light on how it allocated it to the Plaintiffs and since the court has found that the procedure for allocation of this title was not properly followed, the Court finds that the Plaintiffs cannot now cling to the impeached title. In the case of **Munyu Maina...Vs...Hiram Gathiha Maina, Civil Appeal No.233 of 2009**, the Court held that:-

“court have stated that when a registered proprietor’s certificate of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is challenged and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title.”

Having now found that the Plaintiffs did not acquire the title herein regularly, the Court further finds that the Plaintiffs ownership of the suit property is not protected by Article 40 of the Constitution. Article 40 (6) of the Constitution does not offer protection to property acquired irregularly or illegally. It states as follows:-

“The right under this Article do not extend to any property that has been found to have been unlawfully acquired.”

Therefore this Court having found that the Plaintiffs title was obtained irregularly, the Court finds it null and void and further this Court finds that it has no option but to cancel the certificate of title issued to the Plaintiffs herein. Section 80(1) of the Land Registration Act grants the Court the discretion to direct that the register be rectified by cancellation of any certificate of lease. The said Section Provides as follows:-

“Subject to sub-section (2) the Court may order the rectification of the Register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made is omitted by fraud or mistake”

Consequently the court finds that the Plaintiffs registration was obtained irregularly and for that reason, the Court directs that the Register in respect of the suit property be rectified by cancellation of the certificate of lease issued to the Plaintiffs on **11th September 2005**.

Further the Court proceeds to declare that the said parcel of land belongs to the Kenya Police as there was no-evidence that there was any consultation with the Kenya Police when this land which was reserved for public purpose that is Police Station was allocated to the Plaintiffs herein.

Having now carefully considered the available evidence, the Court finds that the 1st Defendant has proved its case on the Counter-claim on the required standard of balance of probabilities. For the above reasons,

the Court enters Judgement for the 1st Defendant as prayed in the Counter-claim in terms of prayers No. (a) and (b) with costs to be borne by the 2nd Defendant herein.

It is so ordered.

Dated, Signed and delivered at Nairobi this 12th day of October 2017.

L. GACHERU

JUDGE

In the presence of

No appearance for Plaintiffs

M/S Nyawira for 1st Defendant

No appearance for 2nd Defendant though served with Notice

Hilda - Court clerk

L. GACHERU

JUDGE

12/10/2017