



Crescent Properties Development Limited v National Land Commission & 3 others (Environment & Land Case 90 of 2019) [2024] KEELC 997 (KLR) (27 February 2024) (Judgment)

Neutral citation: [2024] KEELC 997 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 90 OF 2019
NA MATHEKA, J
FEBRUARY 27, 2024**

BETWEEN

CRESCENT PROPERTIES DEVELOPMENT LIMITED PLAINTIFF

AND

NATIONAL LAND COMMISSION 1ST DEFENDANT

**MOMBASA COUNTY DEPARTMENT OF LANDS, PHYSICAL PLANNING
AND HOUSING 2ND DEFENDANT**

CHIEF LAND REGISTRAR 3RD DEFENDANT

ATTORNEY GENERAL 4TH DEFENDANT

JUDGMENT

1. It is the plaintiff's case that on 1st April 1996 it bought Plot No. Mombasa/Block XXVI/408 from Neema Gardens Flats Limited for Kshs 15,000,000/= and effected transfer on 24th April 1996. The plaintiff became the registered proprietor on 3rd May 1996 when it was issued with a Certificate of lease for a term of 99 years from 1st September 1985. The lease transferred to the plaintiff by Neema Gardens Flats Limited was a grant from the government under the now-repealed [Government Land Act](#) for a term of 99 years from 1st September 1985 and a certificate of lease issued on 15th October 1985. The plaintiff claimed that ever since its registration, it has been in physical occupation of the suit property, paying the requisite land rent to the national government and land rates to the county government of Mombasa.
2. In 2015 the plaintiff obtained permits to build a perimeter wall around the suit property from the 2nd defendant at a cost of Kshs 5,000,000/=. Later in 2019, the national government began repossession of public land forming part of Mama Ngina Waterfront Park. Since the suit property shares a boundary with the park, the plaintiff claimed that the defendants contended that the same was part of the park and proceeded to maliciously destroy the boundary wall exposing the plaintiff to loss and damage. The



plaintiff maintained that Legal Notice No. 79 of 2005 issued by the then Minister of State for National Heritage listed the land and building covering Mama Ngina Drive and the suit property was not among the listed plots in the said notice. Further to that the plaintiff maintained that the suit property was not listed in the Ndungu report as part of public land covering Mama Ngina Drive and argued that the title issued to it was valid, and indefeasible and urged the court to find as such. The plaintiff prayed for judgment against the defendants for ;

- a. A declaration that Mombasa/Block XXVI/408 is private property and does not form part of Mama Ngina Drive.
 - b. A declaration that the plaintiff is the lawful owner of all that parcel of land known as Mombasa/Block XXVI/408.
 - c. Damages for trespass.
 - d. Damages for destruction of the perimeter wall Kshs 5,000,000/=.
 - e. An order of injunction against the defendants, their servants, agents and or officers, or anybody acting on their behalf from trespassing, or in any way interfering with the plaintiff's quiet possession of a declaration that the plaintiff is the lawful owner of all that the plaintiff is the lawful owner of all that parcel of land known as Mombasa/Block XXVI/408.
 - f. Costs of the suit.
 - g. Any other remedy which the court might deem fit and just to grant.
3. It was the 1st defendant's case that the suit property was and remains public land, unavailable for sale or alienation to any private person or entity by the government to the plaintiff. Further the 1st defendant maintained that the said Legal Notice cannot be a basis for the unlawful occupation of the suit property by the plaintiff; neither was the Ndungu report exhaustive and that the mere fact that the suit property was not listed therein does not mean the suit property ceases to be public land. The court was urged to dismiss the plaintiff's suit with costs.
 4. The plaintiff produced a lease dated 8th October 1985 that was granted to Neema Gardens Flats Limited for a term of 99 years from the 1st of September 1985. The said lease was a grant from the President of Kenya for consideration of Kshs 80,000/= and was signed by James Raymond Njenga, who was the then Commissioner of Lands. While the plaintiff admits that the suit property is a government lease, no evidence has been adduced that indicated whether the same was alienated or unalienated government land at the time it was leased to Neema Gardens Flats Limited. However, what is clear before the court is that the suit property, at the time of its alienation was government land which was alienated under the repealed [Government Land Act](#). This court therefore has to determine whether alienation was done within the set parameters in the said repealed law, which at the time governed the alienation of government land.
 5. Section 2 of the repealed [Government Lands Act](#) defines "unalienated Government land" as:

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.
 6. Section 3 of the repealed [Government Lands Act](#) provides that:

"The President, in addition to, but without limiting, any other right, power or authority vested in him under this Act, may—



- a. subject to any other written law, make grants or dispositions of any estates, interests or rights in or over unalienated government land;”
7. The Act qualifies this power as follows:

“The powers of the President under this paragraph are delegated to the Commissioner in the following cases only (Cap. 155 (1948), Sub. Leg.)—

 - (a) for religious, charitable, educational or sports purposes on terms and conditions in accordance with the general policy of the Government and the terms prescribed for such purpose by the President;”
8. Section 7 donates the powers of the President to the Commissioner of Lands in alienation of unalienated government land. It provides;

“The Commissioner or an officer of the Lands Department may, subject to any general or special directions from the President, execute or 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.”
9. Though no evidence has been adduced by either party as to whether the suit property was alienated or unalienated government land at the time it was leased to Neema Gardens, there was a set-out procedure of setting out land in both cases. Firstly, if the suit property was land reserved for the creation of Mama Ngina Drive Park the same would not be classified as unalienated government land. Unalienated government land was not available for allocation by the Commissioner of Lands, by being reserved for a park made the suit property alienated and not available for allocation.
10. The second scenario was that the land was unalienated and was available for allocation. Even then the Commissioner of Lands had only been delegated power to alienate unalienated government land for purposes set out under the Government Lands Act. From the reading of Sections 3 and 7 of the Government Lands Act, it was only the President who had the sole discretion to alienate unalienated government land. Where the President delegated the powers to alienate government land to the Commissioner of land, these powers were limited to certain circumstances such as religious, charitable, educational or sports and other purposes set out in the said Act. None of the circumstances set out there apply to this case as none have been demonstrated by the plaintiff.
11. The plaintiff has not established that the President authorized the Commissioner of Lands to alienate the suit property to Neema Gardens Flats Limited. The Commissioner of Lands could not purport to pass any valid title to Neema Garden Flats Limited that could be registrable as a Certificate of Lease under the Registered Land Act Cap 300 (repealed). It is the finding of this court that the alienation of the suit property to Neema Gardens Flats Limited who later transferred their interest to the plaintiff was unlawful and unprocedural. In James Joram Nyaga & Another v The Hon. Attorney General & Another (2007) eKLR, it was held;

“The above section clearly limits the power of the Commissioner to executing leases or, conveyances on behalf of the President and the proviso to the section specifically limits the power to alienate unalienated land to the President. We find and hold that the Commissioner of Lands had no authority to alienate the disputed plot to the Applicants as he purported to do vide the letter of 18th December, 1997. That was the preserve of the



President. It follows that the Commissioner of Lands could not have made any grant under the *Government Lands Act* Cap 280 Laws Of Kenya nor could he pass any registerable title under the *Registration of Titles Act* Cap 281 Laws of Kenya.”

12. The suit property was government land, held in trust by the Commissioner of Lands for the public, the principle of trust required the Commissioner not to use the suit property for any other purpose other than that which would benefit the public such as roads, schools or parks. As a trustee of the public, the Commissioner of Lands could not use the presidential powers delegated to him of alienating unalienated land to allocate land for any use other than for the public good. I have examined the evidence on record and there is nothing to prove that the president had authorized the Commissioner of Lands to alienate the suit property to Neema Gardens Flats Limited. I wish to reiterate that Sections, 3, 7, 9 and 12 of the *Government Land Act*, did not warrant the Commissioner of Lands with any powers or authority to alienate the suit property and issue the Certificate of Lease. It is therefore the finding of this court that the Commissioner of Lands had no powers to allocate the suit property to private individuals or confer any title, the purported allocation of the suit property to Neema Gardens Flats Limited was an illegality and cannot be sustained. The Court of Appeal in *Henry Muthee Kathurima v Commissioner of Lands & another* (2015) eKLR held,

“We have considered the submissions by the appellant in this appeal and have no hesitation to state that we concur with the findings and decision of the trial court. The Commissioner of Lands had no power to alienate public land and any action taken without due authorization is a nullity. We cite the case of *Said Bin Seif v. Shariff Mohammed Shatry*, (1940)19 (1) KLR 9, and reiterate that an action taken by the Commissioner of Lands without legal authority is a nullity; such an action, however, technically correct, is a mere nullity, and not only voidable but void with no effect, either as legitimate expectation, estoppel or otherwise.”

13. The transfer of the suit property to Neema Gardens Flats Limited was unlawful, as the same was contrary to the *Government Land Act* (repealed). The Commissioner of Lands could not have passed a valid title to Neema Gardens Flats Limited. The issuance of title was irregular and a nullity and must be cancelled. Section 26 of the *Land Registration Act* which guarantees the concept of indefeasibility of title does not extend to any property that has been found to have been unlawfully acquired. The Court of Appeal in *Attorney General v Torino Enterprises Limited* (Civil Application 84 of 2012) (2022) KECA 78 (KLR) (4 February 2022) (Judgment) held;

“We have considered the provisions of section 26 of the *Land Registration Act* (repealed) in light of the provisions of Article 40 of the *Constitution* which guarantees protection of right to property and it is our considered view that the concept of indefeasibility of title is subject to Article 40 (6) of the *Constitution* which states that:

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

Guided by the provisions of Article 40 (6) of the *Constitution*, we hold that the concept of indefeasibility or conclusive nature of title is inapplicable to the extent that title to the suit land was unlawfully acquired. See *Denis Noel Mukbulu & Another v. Elizabeth Murungari & Another* [2018] eKLR.”

14. For those reasons I find that the issuance of the lease by the Commissioner of Lands to Neema Gardens Flats Limited over Mombasa/Block XXVI/408 on 15th October 1985 was null and void *ab initio* and ineffectual to confer any right, interest or title upon Neema Gardens Flats Limited in the first instance.



I also find that the subsequent transfer of lease issued in respect of Mombasa/Block XXVI/408 by Neema Gardens Flats Limited to the plaintiff on 24th April 1996 was null and void ab initio and ineffectual to confer any right, interest or good title upon the plaintiff. I find that the plaintiff has failed to prove their case on a balance of probabilities and is dismissed with costs to the defendants.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 27TH DAY OF FEBRUARY 2024.

N.A. MATHEKA

JUDGE

