



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 479 OF 2012

TIMOTHY INGOSI AND 87 OTHERS.....PLAINTIFFS

VERSUS

KENYA FORESTRY SERVICES.....1ST DEFENDANT

HON. ATTORNEY GENERAL.....2ND DEFENDANT

COMMISSIONER OF LANDS.....3RD DEFENDANT

JUDGMENT

Timothy Ingosi and 87 Others went to the High Court before the establishment of this court by way of plaint claiming that they are beneficiaries of Land Parcel Block No. 7561/R issued to them by a grant of Presidential Decree in accordance with the Government Lands Act. The 1st defendant is a state corporation established by an Act of Parliament to administer Forest Reserves. The 2nd defendant is the Government Chief Legal. The 3rd defendant is is described as the Legal Depository of all land matters in the Republic of Kenya then before the advent of the new constitution, and so used to execute all instruments and instructions on land matters in the Republic of Kenya.

The plaintiffs claim to be residents of Likuyani Serekenya Scheme Operationalized after East African Tanning Company sold its interest in Turbo to the Government of Kenya for distribution amongst former employees, purchasers and workers of one Presidential west king then the former legal and lawful registered owner. The subject matter is between Turbo Police Station, the National Youth Service, Turbo Quarry, the Anglican Church, PCEA Church, Health Centre and the Eldoret-Uganda road.

Pursuant to the President's grant the plaintiffs' did ballot for individual plots and were allotted plots for a limited share of acreage. The plaintiffs proceeded to survey and consolidate the area for mutation through the district surveyor; pursuant to the Presidential Grant herein and prepared the part development plan for approval.

The plaintiffs' complaint and claim is that they are unable to process titles to their allotted individual land parcels as the director of adjudication has granted the Kenya Gazette but the government press has yet to publish the de-gazettement notice hence the suit.

The plaintiff's claim against the 1st defendant is for a prohibitory order restraining the defendant from harassing the plaintiff's peaceful occupation of the land parcel and any order compelling the 2nd defendant to issue the land titles to the plaintiffs pursuant to the balloting and surveyors as done. Notice has been issued and several meetings held between the provincial administration and the plaintiffs yielding a non-published de-gazettement order.

The land is at Turbo within the court's jurisdiction and is currently occupied by the plaintiffs in part who cannot fully utilize their interest in the land as they lack the documents of title that can enable them develop the land or utilize the titles as collaterals elsewhere.

The plaintiffs pray for judgment against the defendants jointly and severally for a declaration that the plaintiffs are lawful owners of all those parcels of land through a presidential decree and an order compelling the Director of adjudication to prepare the legal notice to degazette the parcels of land and an order compelling the 3rd defendant to register and issue the plaintiffs with titles accordingly. The plaintiffs further pray for an order of Prohibition restraining the defendants from harassing, trespassing or in any other manner disturbing the plaintiffs' peaceful occupation of the suit land.

The 1st defendant filed amended defence and counterclaim on 11.9.2014 stating that the plaintiffs are not in occupation of the suit property. Moreover the existence of Presidential grant alluded to in paragraph 8 of the plaint is denied and the 1st defendant avers that if there was such a grant, then it is illegal as the President is only allowed to alienate un-alienated government Land through the Procedure set out in the Government Land Act and not otherwise.

In the view of the foregoing, the 1st defendant avers that the plaintiffs' claim is untenable and that if there was any gazette then the same must be done in compliance with the provision of the Forest Act No. 7/2005. The 1st defendant further avers that the suit land herein is gazette forest land vide gazette notice No. 145 of 17.5.64 and legal Notice 167 of 12.8.1971. Consequently, the plaintiffs are stopped from claiming it. That the suit land is forest land and as admitted by the plaintiff the same has never been degazetted. Notice of intention to sue has never been served upon the 1st defendant. The plaintiffs' suit is statutory time barred. The jurisdiction of this Honourable court is admitted.

COUNTERCLAIM

In counter claim the 1st claims against the plaintiffs that the land parcel Block No. 7561/R belongs to the Kenya Forest Service pursuant to the Kenya Forest Service pursuant to the Kenya Gazette Notice No. 145 of 1715/64 and Legal Notice No. 167 of 12.8.1971. The grant of the land parcel 7561/R by the president to the plaintiffs was illegal, null and void. The allocation of the land parcel 7561/R by the 3rd defendant to the plaintiffs was concluded through fraud and illegality.

The particulars of fraud and illegality by the 3rd defendant are:-

- (a) Irregularly allocating land parcel 7561/R and issuing title to the plaintiffs knowing that the said land was public land reserved as forest land.***
- (b) Illegally and irregularly registering the suit property to the plaintiffs.***
- (c) Illegally issuing title deeds to the plaintiffs knowing or ought to have known that the said parcel was hived off irregularly as it was excised from forest land.***

The 1st defendant claims a declaration that all that titles over land parcel Block No. 7561/R were irregularly acquired by the plaintiffs. The 1st defendant seeks a declaration that the land parcel Block No. 7561/R is forest land and therefore the suit should be dismissed with costs and judgment entered in favour of the 1st defendant.

When the matter came for hearing, the 1st plaintiff testified that they are 37 in court but those affected are more. He testified that he is the chairman of Seregea Residents of Likuyani Group, a voluntary group of settlers at Turbo Seregea Area. The plaintiffs are beneficiaries of Land parcel Block No. 7561/R issued to them by a grant of Presidential Decree in accordance with the Government Lands Act. That pursuant to the President's grant, the plaintiffs did ballot for individual plots and were allocated

the plots for a limited share of acreage as shown:-

| ENTRY NO. | NAME OF ALLOTTEE | BALLOT PLOT NO. | ACREAGE (HA) |
|------------------|-------------------------|------------------------|---------------------|
| 1. | Charles Agalo | 320 | 1.2790 |
| 2. | Ephraim Lanoka | 226 | 0.5033 |
| 3. | James Ombima | 323 | 0.7700 |
| 4. | Salome Kagoitsa | 316 | 0.2690 |
| 5. | Alice Khalibwa | 310 | 0.5890 |
| 6. | Timothy Ingosi | 213 | 0.6280 |
| 7. | John Muswanyi | 307 | 0.2613 |
| 8. | Francis Masongo | 259 | 0.4710 |
| 9. | Hassan Noor | 240 | 0.3764 |
| 10. | Ingati Cyrus | 334 | 0.3450 |
| 11. | Florence Lugalia | 317 | 0.3868 |
| 12. | Wilfred Ondeche | 318 | 0.4225 |
| 13. | Til Quarry | 214 | 9.4560 |
| 14. | Vicky Khadaka | 311 | 0.6142 |
| 15. | Raphael M. Kahi | 295 | 1.4157 |
| 16. | Elijah Isiye | 315 | 0.3019 |
| 17. | Flavia Kageha | 321 | 0.4142 |
| 18. | Phisca M. Lubanga | 219 | 0.5005 |
| 19. | Steward Kabala | 243 | 1.1700 |
| 20. | Julius O. Buyeka | 314 | 6.6340 |
| 21. | Samson Maina | 319 | 8.8340 |
| 22. | George Tindi | 313 | 9.9900 |
| 23. | Benjamin Seven | 308 | 1.2495 |
| 24. | Seth Liyayi | 305 | 1.2495 |
| 25. | Edward Kagira | 212 | 1.2495 |
| 26. | Rabin Khavosi | 324 | 1.2495 |

| | | | |
|-----|-------------------|-----|--------|
| 27. | Joseph Likuyani | 219 | 1.0600 |
| 28. | Terlica Iramwenya | 168 | 1.2935 |
| 29. | Joash Ingatitsa | 221 | 3.3220 |
| 30. | Vincent Idagasi | 239 | 3.3950 |
| 31. | Vamatete Group | 261 | 2.4000 |
| 32. | Mourice L. Ingati | 259 | 4.1195 |
| 33. | Pius Muteti | 326 | 2.6000 |
| 34. | Amai Chaglin | 325 | 1.0800 |
| 35. | Phoebe Chaoko | 293 | 1.7550 |
| 36. | Naboth Kombe | 303 | 1.9660 |
| 37. | Betty Mutai | 326 | 1.2710 |
| 38. | Meshack Shitakwa | 290 | 1.2660 |
| 39. | Richard Isiaho | 300 | 1.5050 |
| 40. | John Mwangi | 260 | 1.5050 |
| 41. | Joash Mwenje | 279 | 1.2420 |
| 42. | Janet Khasandi | 262 | 1.2720 |
| 43. | John M. Muturo | 221 | 1.5630 |
| 44. | Floise A. Bosco | 223 | 1.4730 |
| 45. | Felistus A. Mbaso | 224 | 3.1350 |
| 46. | Caroline Khavele | 226 | 1.3820 |
| 47. | Ester Lusangula | 120 | 1.2770 |
| 48. | Moses Kombe | 225 | 2.9380 |
| 49. | Samson Andambi | 280 | 9.7710 |
| 50. | Larry Muhanji | 328 | 7.1420 |
| 51. | Apilly Wawire | 331 | 2.371 |
| 52. | John Chira | 330 | 2.0040 |
| 53. | Moses O. Ayira | 156 | 3.6440 |
| 54. | John Chepkirui | 333 | 3.6520 |

| | | | |
|-----|--------------------|-----|--------|
| 55. | John Muswanyi | 337 | 19.080 |
| 56. | Phlister A. Ngache | 336 | 3.1480 |
| 57. | Robinson Lusichi | 327 | 2.7740 |
| 58. | Mary Gavagi | 334 | 2.9260 |
| 59. | Philis A. Lukwa | 332 | 5.1930 |
| 60. | Salome Minyada | 335 | 4.3400 |
| 61. | E. Ekonya | 305 | 6.7500 |
| 62. | John Misole | 302 | 9.7270 |
| 63. | Alice Assis | 301 | 9.4580 |
| 64. | Charles Ongina | 300 | 1.9500 |
| 65. | Joashi Dolia | 299 | 2.7040 |
| 66. | Faith Ramwea | 296 | 2.8670 |
| 67. | George K. Kamu | 215 | 2.9010 |
| 68. | John Omwanda | 216 | 3.2860 |
| 69. | Joseph Ayora | 218 | 7.7120 |
| 70. | Joseph Omulipi | 338 | 7.2670 |
| 71. | Rebecca Gasale | 217 | 2.6760 |
| 72. | Sammy G. Boit | 159 | 2.2150 |
| 73. | Kennedy Otunga | 155 | 3.1310 |
| 74. | Gracious Ingaita | 157 | 8.6460 |
| 75. | Shadrack Rotich | 222 | 5.5440 |
| 76. | Festus Khayambi | 160 | 4.6870 |
| 77. | Safina Zinjenga | 154 | 3.3250 |
| 78. | Alfred O. Letepen | 154 | 2.8700 |
| 79. | Chemesis Tavevi | 154 | 3.1710 |
| 80. | J. Rotea Muswanyi | 167 | 9.7270 |
| 81. | D. Ongaro | 213 | 5.6500 |
| 82. | Mary Iramwenya | 213 | 5.6500 |

| | | |
|-----|------------------------|-----|
| 83. | Aseka Miriamu | 213 |
| 84. | Edward Kagira | 213 |
| 85. | J. Tanui | 213 |
| 86. | F. Sirma | 213 |
| 87. | F. Ndambuki | 213 |
| 88. | Patrick M. Lindambitsa | 171 |
| 89. | Emily Jumba | 169 |
| 90. | Hellen N. Auka | 172 |
| 91. | Dennis Kheitsi | 70 |

The plaintiffs' claim is therefore for a prohibitory order restraining the defendants from harassing the plaintiff's peaceful occupation of the land parcel and an order compelling the 2nd defendant to issue the land titles to the plaintiff's pursuant to the balloting and survey as done.

The plaintiffs proceeded to survey and consolidate the area for mutation through the District surveyor pursuant to the Presidential Grant and prepared the part development plan for approval.

Some of the plaintiffs have been issued with title Deeds. Titles have not been issued in respect to the other plaintiffs as the government press is yet to publish a degazettment notice.

The plaintiffs' claim is therefore for a prohibitory order restraining the defendants from harassing the plaintiffs' peaceful occupation of the land parcel and an order compelling the 2nd defendant to issue the land titles to the plaintiffs pursuant to the balloting and survey as done.

The plaintiffs also pray for a declaration that they are lawful owners of the parcel of land under Block No. 7561/R through a Presidential Decree.

The plaintiffs also pray for an order compelling the director of adjudication to prepare the Legal notice to degazzete the parcels of land.

The plaintiffs also pray for costs of the suit.

Sarah Mwhaki Kamau testified that she is a beneficiary of land parcel Block No. 7561/R having been issued with the same by way of a grant of Presidential Decree in accordance with the then Government Land Act. That she has been in occupation of the parcel of land and do not have any other place of abode. That upon being issued with the parcel of land, they proceeded to survey and consolidate the area for mutation through the District Survey or pursuant to the presidential grant and prepared the part development plan for approval. Some of the plaintiffs have been issued with the Title Deeds but the same have not been issued in respect to the other plaintiffs as the government is yet to publish a degazettment notice. She prays for an order that they are the lawful owners of the parcel of land under Block No. 7561/R through a Presidential Decree.

She further prays for a prohibitory order restraining the defendants, from harassing the plaintiff's peaceful occupation of the land parcel and an order compelling the 2nd defendant to issue the land titles to the plaintiffs pursuant to the balloting and survey as done and and for an order compelling the Director of adjudication to prepare the Legal Notice to degazzete the parcels of land.

The 1st defendant called Stanley Irungu Mwangi who states that he hails from Kahawa West Division Kasarani District, Nairobi County. He is employed by the Kenya Forest Service as the Zonal Forest Manager for the Lugari Zone, where disputed parcel of land (forest) is part of the Turbo Forest. According to this witness, what the plaintiffs are is part of the gazetted forest. It was gazetted in 1971 vide legal notice No. 167 of 1971. Being the forest manager of that area, to the best of his knowledge, this gazette notice has not been revoked nor has any excision been done, therefore, for all practical purposes, it is still part of the Turbo forest, within Lugari Zone.

The plaintiffs submit that they have proved their case on a balance of probability as they were allocated the plots by the Plot Allocation Committee. They received letters of allotment and title deeds as evidence of ownership of the plot. They argue that having obtained registration of some of the parcels of land, they have an absolute and indefeasible title to the suit parcels. There was no proof of fraud or illegality on the part of the plaintiffs.

The 1st defendant submits that under the Government Land Act, Cap. 280 (***now repealed***) Section 3 thereof provides that the President is given the powers to make grants and dispositions of un-alienated government land. Under the repealed Constitution and the Government Land Act, the government could allocate to individuals un-alienated government land and such alienation could only be effected legally after the planning process was completed. The Physical Planner is supposed to ascertain if indeed the land in question is available for allocation and advise the Commissioner of Lands accordingly. In this case your honour, there is no evidence adduced before this Honourable Court that the same was carried out before the said allocation.

The respondents rely on the case of ***Norbixin Kenya Limited V The Attorney General Hccc No. 1814 of 2002***, the court stated that the Commissioner of Lands must bear the blame for the predicament that has befallen the plaintiff as the said office issued it with title to the suit property despite full knowledge that the property was reserved for a public utility. The court declined to make orders in favour of the plaintiff even though he had been given title to it because the plaintiff's allotment was irregular as the land was not available for allotment.

In the case of ***Niaz Mohamed Jan Mohamed Vs Commissioner for Lands & 4 Others Hccc No. 423 of 1996***, the court held that land acquired in public interest cannot be alienated and allocate to private individuals, even a portion thereof.

In another case of ***Kenya Industrial Estates Limited Vs Anne Chepsiror & 5 Others E & L No. 71 of 2013***, it was stated that the Commissioner of Lands ought not to have offered such land to private individuals if the public purpose for which the land was reserved still existed.

Under the Constitution of Kenya, 2010, it is only the National Land Commission that has the constitutional mandate to manage, alienate and allocate public land. All un-alienated government land is classified as Public land and ought to vest and be held by the County Government in trust for the people resident in the county and administered on their behalf by the National Land commission as provided for under Article 62.

The procedure for de-gazettement of a forest land before allocation is provided for under the Forest Act. A notice of variation of boundaries or revocation of State or local authority forests shall only be published where the proposal is recommended by the Service and subsequently approved by resolution of Parliament as provided for under Section 28 of the Forest Act, Cap. 385, Laws of Kenya. The suit land Block No. 7561/R belongs to the 1st defendant pursuant to Kenya Gazette Notice No. 145 of 1715/64 and Legal Notice No. 167 of 12.8.1971. On this issue, the 1st defendant submits that it has never recommended any proposal to have the above parcel of land be varied in any way. The suit land is forest land and as admitted by the plaintiffs in paragraph 10 of the plaint and even in evidence, it has never been degazetted. It is therefore, a public land and the same cannot be alienated and allocated to private individuals.

The respondents argue that while the plaintiffs were seeking orders to compel the adjudication

officer to degazette of the suit land from being a forest land so that titles can be issued, they actually went ahead and procured titles during the pendency of the suit. No degazettement had been done and there has been no government resolution to have the suit parcel degazetted for purposes of allocation. Titles issued over the suit land are therefore tainted with illegality and thus cannot be allowed to pass any interest and should be cancelled. They were obtained illegally and thus they are a nullity. They pray that this honourable court orders for the cancellation of all the titles issued over the suit parcel.

I have considered the evidence on record and do find that the plaintiffs are registered as owners of parcels of land that fall within a Gazetted forest which has never been degazetted to-date.

The main issue in this matter is whether the Suit Property Herein was Lawfully and Legally Acquired. In the plaint, the plaintiffs have stated that the suit properties herein were lawfully acquired and that the title deeds issued to the plaintiffs in accordance with the law.

It is important to note that the Forest Act, Cap 385 was repealed by The Forest Act, 2005, No. 7 of 2005. (See section 64 of the foregoing Act, No. 7 of 2005). However, in the instant suit the applicable law is the repealed Act, Cap 385. Section 4 of the said Cap 385 states as follows;

“4. (1) The minister may, from time to time, by notice in the Gazzete-

(a) declare any unalienated Government land to be a forest area;

(b) declare the boundaries of a forest and from time to time alter those boundaries;

(c) declare that a forest area shall cease to be a forest area.

(2) Before a declaration is made under paragraph (b) or paragraph (c) of subsection (1), twenty -eight days notice of the intention to make the declaration shall be published by the minister.” (See section 4 of the Forest Act, Cap 385, now repealed).

The sad situation in this case is that due process was not followed. In my view, without altering the boundaries of the forest by degazettement the and following the due process, the land in dispute was not available for allocation and therefore the title deeds issued over the suit land were and remain null and void.

The Minister concerned was supposed to delineate the suit land from the Kapkurere Forest, it is my humble view that by dint of the provisions of the Government Land Act, Cap 280, (now Repealed) and the Physical Planning Act, Cap 286 Laws of Kenya, the said land was to become unalienated Government land after delineation. This is so because section 2 of the said Government Land Act defines Government land as follows;

“Government land” means land for the time being vested in the Government by virtue of sections 204 and 205 of the Constitution (as contained in Schedule 2 to the Kenya Independence Order in Council, 1963), and sections 21, 22, 25 and 26 of the Constitution of Kenya (Amendment) Act, 1964;” (See section 2 of Cap 280)

On the other hand, the foregoing Act defines unalienated government land as;-

“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 ”

While section 3 of the Physical Planning Act defines unalienated Government Land as;

“unalienated Government land” means Government land which is not for the time being leased to any person, or in respect of which the Commissioner of Lands has not

issued any letter of allotment or reservation.” (See section 3 of Cap 286)

It follows therefore that since the suit land had not been excised from the Kapkurere Forest, by the Minister in charge by virtue of section 4 of the Cap 385, it remained government land. The question to be answered is therefore ***How was the government land allocated and or re-allocated.***

Section 3 of the Government Land Act states as follows;

“3. 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; ” (See section 3 of the Government Land Act)

In view of the foregoing provision of the law, The powers of the President under paragraph (a) above are delegated to the Commissioner of Lands. It follows therefore that the Commissioner of Lands by then had powers to make grants or disposition of any interests in land.

It is submitted that the suit property was illegally acquired and that the same was public property belonging to the Kenya forest services as the forest had not been degazetted.

Article 40 of the Constitution states as follows;

“40. (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

(a) of any description; and

(b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the State or any person—

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).

(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—

(a) results from an acquisition of land or an interest in land

or a conversion of an interest in land, or title to land, in

accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried

out in accordance with this Constitution and any Act of

Parliament that—

(i) requires prompt payment in full, of just compensation to

the person; and

(ii) allows any person who has an interest in, or right over,

that property a right of access to a court of law.

4) Provision may be made for compensation to be paid to

occupants in good faith of land acquired under clause (3) who may not

hold title to the land.

(5) The State shall support, promote and protect the intellectual

property rights of the people of Kenya.

(6) The rights under this Article do not extend to any property

that has been found to have been unlawfully acquired. ” (See Article 40 of the Constitution)

In my earlier findings i have noted that the suit land in question was irregularly allocated without due regard to lawful procedure. It follows therefore that by dint of the provisions of Article 40(6), the plaintiffs cannot seek refuge and any protection under the provisions of Article 40(1)-(5) that seeks to protect property rights.

The suit is dismissed with costs and the counterclaim by the 1st defendant is allowed thus a declaration is hereby issued that parcel No. 7561/R is forest land and therefore not available for allocation. This court finds that the allocation of the land parcel 7561/R by the 3rd defendant to the plaintiffs was conducted through an illegality and therefore all titles issued over the land parcel Block No. 7561/R were irregularly acquired by the plaintiffs. I do order that each party to bear it's own costs as the plaintiffs appear to have been victims of machinations of the defendants. I do further direct that the National Land Commission and, Ministry of Environment and Natural Resources and the Kenya Forestry services to consider the plight of the plaintiffs, who have settled on the suit land, with a view of completing the due process of allocation which appears to have been improperly fast tracked. In the meantime the declaration that land parcel no 7561/r is forestland is suspended for two years as the plaintiffs wait for the consideration by the government of Kenya. Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 6TH DAY OF NOVEMBER, 2015.

ANTONY OMBWAYO

JUDGE