



REPUBLIC OF KENYA



Luthra & 5 others v Laly & 11 others (Environment and Land Case Civil Suit 133 of 2019) [2024] KEELC 3317 (KLR) (24 April 2024) (Judgment)

Neutral citation: [2024] KEELC 3317 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 133 OF 2019**

JA MOGENI, J

APRIL 24, 2024

BETWEEN

**SITARANI H.S LUTHRA 1ST PLAINTIFF
JOSEPH KARIUKI 2ND PLAINTIFF
SEMA HEALTH PRODUCTS LIMITED 3RD PLAINTIFF
AZTECH BUSINESS SYSTEMS LTD 4TH PLAINTIFF
WESTON KAMAU 5TH PLAINTIFF
ESTHER MURUNGI MATHENGE 6TH PLAINTIFF**

AND

**SUKHDEV SINGH LALY 1ST DEFENDANT
P. NGANGA T/PETRIEND AUCTIONEERS 2ND DEFENDANT
MEGH SINGH KENTH 3RD DEFENDANT
JASWANTRAI KIBALAL SHAH 4TH DEFENDANT
NARENDRA KIBALAL SHAH 5TH DEFENDANT
HEMANT KIBALAL SHAH 6TH DEFENDANT
SILAS KIBALAL SHAH 7TH DEFENDANT
KEDE ENTERPRISES LIMITED 8TH DEFENDANT
KENYA NATIONAL HIGHWAYS AUTHORITY 9TH DEFENDANT
CHIEF LAND REGISTRAR 10TH DEFENDANT
NAIROBI CITY COUNTY 11TH DEFENDANT
HON ATTORNEY GENERAL 12TH DEFENDANT**



JUDGMENT

1. “In medieval England, rights to real property meant more than ‘ownership’; such rights conferred jurisdiction. The lord of the manor was a little sovereign in his domain, as well as the person who had title to houses, fields, and growing crops. Only people with land or land rights really mattered: the gentry, the nobles, the upper clergy. Land was the source of their wealth and the source and seat of their power. Well into modern times, power and wealth were concentrated in the hands of great landlords. The social system of the kingdom turned on rights in land.” Lawrence M. Friedman, *A History Of American Law* 186 (3d Ed. 2005).
2. This case was commenced by way of plaint dated 13/11/2013 which was later amended on 27/10/2023 and a further amended plaint was filed by the 1st plaintiff dated 7/12/2013. The plaintiff in the further amended plaint sought the following orders:
 - a. A permanent injunction to be issued restraining the 1st and 2nd defendants/respondents by themselves, their agents, servants or employees or any other person claiming under them from trespassing upon, interfering with the Plaintiffs/Applicants properties, quiet possession and occupation of land parcels Nairobi Block 93/1246, Nairobi Block 93/1247, Nairobi Block 93/1248, Nairobi Block 93/1249, Nairobi Block 93/1250 and Nairobi Block 93/1392.
 - b. A mandatory injunction compelling the 10th and 13th Defendants jointly and or severally to cancel or revoke Certificates of Leases numbers Nairobi Block 93/1427 and Nairobi Block 93/1405.
 - c. A mandatory injunction compelling the 9th and 13th Defendants to protect as custodians of all that piece of land in respect of which Certificate of Leases number numbers Nairobi Block 93/1427 and Nairobi Block 93/1405 which is a road reserve/buffer zone at the frontage of the Plaintiffs properties.
 - d. Any other relief that this Honorable Court shall deem fit to grant.
3. It is the plaintiffs’ case that the 1st to 6th plaintiffs are the registered owners of Nairobi Block 93/1246, Nairobi Block 93/1247, Nairobi Block 93/1248, Nairobi Block 93/1249, Nairobi Block 93/1250 and Nairobi Block 93/1392 situated in Nairobi South B along Mombasa Road.
4. That the 1st defendant has sought to levy distress on the plaintiffs alleging to be the proprietor of Nairobi/Block 93/1249 yet the plaintiffs have no Landlord/Tenancy relationship with the 1st defendant and therefore the issue of rent distress against the plaintiffs is baseless.
5. They contend that the 3rd and 7th defendants also hold a Certificate of Lease for the same stretch being Nairobi/ Block 93/1405 and that the 8th Defendant Certificate of Lease is similar to that of the 1st defendant being Nairobi Block 93/1249.
6. Further that Alfa Motors parcel of land is registered as Nairobi Block 93/1247 the same narrow stretch of land right on the frontage and between the properties/developments on Mombasa Road.
7. That despite protests about the legality of the Nairobi Block 93/1247 and Nairobi Block 93/1249 which is a buffer zone or road reserve between the plaintiffs and Mombasa Highway the 10th Defendant has failed or refused to cancel or revoke the said titles.



8. That the 1st defendant has demanded rent of Kesh 16,800,000 against each plaintiff yet the plaintiffs are lawfully registered owners of the suit property.
9. The suit is opposed by the 1st defendant and the 3rd to 7th defendants. The 1st defendant filed a defence and counter-claim dated 11/03/2022. In the counter claim the 1st defendant has stated that the plaintiffs have continued to occupy, encroach, trespass, collect parking fees, gain proceeds from the suit property Nairobi Block 93/1429.
10. That the 1st defendant has been paying rates and rent to the 11th defendant and that the illegal actions of the plaintiffs have led to the loss of income, business and profits. That the plaintiffs have been served with eviction notices and demands to vacate or pay rent but they have ignored the said notices.
11. The 1st defendant has stated that he is apprehensive that the plaintiffs might sell the suit property since he has noticed strangers viewing the parcel of land and indicating that they had come to purchase. It is his contention that he purchased the suit property with his life savings and he would suffer irreparable loss if the plaintiffs were left to gain from an illegal transaction.
12. That due to the plaintiffs' illegal action of occupying the suit property illegal the 1st defendant has lost the opportunity to put up a commercial building which would have earned him Kesh 400,000 per month.
13. It is the averment of the 1st defendant that he is not occupying a buffer zone nor a road reserve and that branding his parcel of land as being a buffer zone/road reserve is a ploy to defraud him of his property. Further that the 11th defendant had not cancelled his title and therefore he continues to be the proprietor of the suit property.
14. The 1st defendant therefore prays for the following:
 - a. A declaration that the 1st defendant is the owner of the said property known as Nairobi Block 93/1429 Mombasa Road.
 - b. A declaration that the plaintiffs have been illegally, jointly and severally illegally occupying, using gaining mens-profit at the expense of the 1st defendant on the said property known as Nairobi Block 93/1429 Mombasa Road.
 - c. An order of permanent injunction restraining the plaintiffs from selling, assigning, transferring, alienating, continue to possess or otherwise dealing with the property or part of the property known as Nairobi Block 93/1429 Mombasa Road.
 - d. An order to move from this court evicting the plaintiffs herein from the suit premises and all that pertain to it.
 - e. Injunctive orders as sought above.
 - f. General and special damages for loss of business to be paid jointly and severally by the plaintiffs to the 1st defendant.
15. On their part, the 3rd to the 7th defendants also filed an amended defence dated 24/07/2023 and opposed the plaint. They denied all the averments by the plaintiffs. They stated that they are the proprietors of the suit property Nairobi Block 93/1405 currently valued at Kesh 50,000,000.
16. The parties in this suit agreed on 10/02/2022 to have ELC 231 of 2019 stayed so that the ELC 133 of 2019 is heard. The plaintiffs were then directed to amend the plaint and serve all the parties. Consequently, the 1st Interested Party was enjoined as the 11th defendant. However, on 8/02/2023 the



plaintiffs' suit was dismissed for want of prosecution and non-attendance following the application made by the counsels for the defendants when they attended court for hearing of the plaintiffs' suit and neither the plaintiffs nor their counsel attended court.

17. The plaintiffs filed an application for reinstatement dated 15/06/2023 which was heard ex parte on 19/06/2023 and the plaintiffs were directed to serve all parties for an inter partes hearing of the application on 11/07/2023. On the date of having the application heard inter partes, neither the plaintiffs nor their counsels attended court to prosecute their application. Counsel for the 1st defendant who attended court moved the court to dismiss the application dated 15/06/2023 for reinstatement of the plaintiffs' suit in view of the non-attendance and failure to prosecute the suit.
18. The 1st defendant's counter-claim was therefore scheduled for hearing on 18/10/2023.

1st Defendant's/Plaintiff's Counter Claim

19. PW1- Sukhadev Singh Laly, testified that he had filed the counter claim dated 11/03/2022 and a bundle of documents numbering 1-10 via a list dated 13/02/2023 which he stated should be adopted as his list of documents. He stated that he was the registered proprietor of LR 93/ 1429. Further that he pays rent and rates to the Nairobi City County the 11th defendant.
20. He testified that had no dispute with the 9th defendant, KENHA. That the 10th defendant has not produced any documents in court against his property. It was his testimony that he was not occupying part of the 1st to 6th plaintiff's property and that he was not on the road reserve.
21. He stated that the four plaintiffs namely, Joseph Kariuki, Esther Murungi Mathenge, Sitarani Luthra and Aztech Business Systems occupy the 1st defendant's/Plaintiff (in CC) property and they use it a car wash and a parking bay. He urged the court to use all his documents as evidence in the instant case.
22. There was no cross-examination from the defendant counsels, Mr Mbogori for the 3rd to 7th defendants stated that they will complement the 1st defendant/plaintiff's submissions. Counsel for the plaintiffs/defendants in the counter-claim stated that he had no questions for cross-examination. With this the 1st defendant's/plaintiff (in c.c) Mr Odhiambo closed his case. Directions were issued on filing of submissions and a judgment date was reserved.

Analysis and Determination

23. The parties filed their submission and I have perused the pleadings, the cited authorities and the documents produced in court. From my perusal I am of the view that the following are the issues for determination:
 - a. Whether the 1st defendant and the 3rd to 7th defendants are entitled to the reliefs sought in their counter-claim.
 - b. Who is liable for the costs of this suit?
24. I have considered the evidence adduced by the plaintiff in the counter-claim. He did not call any witnesses. The claim by the plaintiff is that he is the proprietor of the suit property Title Number 93/1429 but that the 1st to 6th plaintiffs who are the 1st to 6th defendants in the counter claim continue to occupy the plaintiff's suit property illegally. That despite eviction notices being issued to the defendants and demands made for them to pay rent or vacate, they have neglected the said notices.



25. The plaintiff in the counter-claim testified on oath that if he had rented the suit property he could have earned an equivalent of KSh 4.8 million in a year. He further stated that he was apprehensive that the defendants in the counter-claim were about to sell, transfer and or alienate the suit property.
26. He produced in court a list of documents dated 13/02/2023 which allegedly was used to lend credence to his claim to the suit property. He produced a copy Certificate of Lease, he produced an official search dated 01/11/1983 showing that he was the owners of the suit property parcel Number Nairobi/Block 93/1429, rent and rate payment receipts for several years the earliest being 2008 to 2019. The plaintiff from all the documents presented did not produce any Letter of Allotment to show how he gained ownership of the suit property.
27. The claimant did not also produce a copy of a sale agreement, transfer documents, stamp duty payments or even an advertisement to attest to having acquired public land that was advertised in the Kenya Gazette and people having been given a chance to bid or show interest for purchase. The root of title is not clear.
28. Further the replying affidavit of the 9th defendant who the plaintiff/1st defendant claims to have no case against clearly states the suit property is located on the buffer zone and road reserve on Mombasa Road and that the plan for the road was prepared in 1974 whereby the road reserve had been indicated to be 88 meters. That in 1978, a Part Development Plan (PDP) was prepared did not indicate any allocation of parcels along the stretch of Mombasa road.
29. Further the report that was attached to the replying affidavit for Nairobi Town Planning Liaison Committee of May 1995 noted that the buffer zone had been created by the Physical Planning Department in the 1970s in keeping with good planning principles and international standards of a major highway serving an international airport. The report recommended revocation of allocations in the Plainview Buffer Zone/strip where the suit property for the plaintiff/1st defendant lie which is Nairobi Block 1429. Thus the creation and registration of the said title is fraudulent and consequently null and void and cannot confer good title.
30. The Gazette Notice No. 9229 of 29th July, 2011 (Vol. CXIII-No. 72) cancelled the plaintiff's/1st defendant's title which abuts within the buffer zone and the two parcels which lie side by side on the buffer zone were affected. That the said suit property ins on a road reserve and buffer zone.
31. The plaintiff produced a letter from City Council of Nairobi dated 8/10/2009 which was written to the 1st plaintiff/defendant in the counter claim. This was an Allocation of Temporary Occupation for the suit property Nairobi Block 93/1246 which Licence was subsequently cancelled vide the letter dated 23/06/2010 from the City Council of Nairobi allegedly because the Temporary Occupation Licence encroaches on to private property LR No. Nairobi Block 93/1429 the suit property claimed by the plaintiff in the counter-claim.
32. Despite all these it is still not clear how the plaintiff/1st defendant acquired the said suit property it is not possible to trace the root of title with certainty. This casts doubt to the authenticity of the said title.
33. Land registration in Kenya is based on the Torrens system wherein indefeasibility of title is the basis of land registration. The state guarantees the accuracy of the register of the land title and that is why a person whose name appears on the title is guaranteed ownership of the property. Indefeasibility of title is however impeachable in circumstances of fraud, illegality interalia.



34. In the case of *Munyua Maina V Hiram Gathiha Maina* (2013 EKLR the Court of appeal held as follows;

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

35. In this case neither the plaintiff /1st defendant nor the defendants/plaintiffs have explained the root of the title they allege to hold. The Court has made a finding that there was no valid title received by the plaintiff/1stdefendant. None of the parties received valid titles and the government noting the anomalies created cancelled all titles which were purportedly issued vide the Gazette Notice Number 9229 of 29th July, 2011 (Vol. CXIII-No. 72) and consequently no party has any claim to the suit property since it is a buffer zone.

36. Section 143 of RLA which is replicated in section 80 of the LRA empowers this Court to cancel title if satisfied that the same was acquired improperly. In this case I am satisfied that the title was acquired through fraud and an illegal and corrupt scheme.

37. In the case of *Samuel Kamere Vs Land Registrar* (2015) EKLR the Court of Appeal held that;

“in Order to be considered a bonafide purchaser for value, a person must prove that he had acquired a valid and legal title, secondly that he carried out the necessary due diligence to determine the lawful owner from whom he acquired legitimate title and thirdly that he paid valuable consideration for the purchase of the suit property.” (emphasis is mine).

38. The plaintiff/1st defendant cannot be afforded the defense of a bonafide Purchaser for the reason that the title was illegal abinitio. The report of the government shows that the land being claimed was already allocated in 1978 as a buffer zone and was not available for alienation at all.

39. Going by section 26 (b) of the RLA (repealed) I am satisfied that the title was acquired illegally through a corrupt scheme and unprocedural manner. There was no legal title that was conveyed to the plaintiff/1st defendant. There is also no evidence that the suit land has been alienated to either of the contestants in this suit. Infact there is no Part Development Plan produced to show how the land was alienated for allocation neither a survey plan not a deed plan. It all boils down to collusion to defraud the public of tax payers money where those with questionable Certificates of Lease from none other than our Chief Land Registrar’s Office will seek compensation.

40. I am in agreement with my brother Justice Lucas Naikuni in the case of *Hamran Ahmed Salim vs The Co-operative Bank of Keny Ltd. Gram Investments Auctioneers & The Registrar of Lands, Kilifi*, where he stated that:

“That this Honorable Court also awards the Plaintiff exemplary and aggravated damages (acts of Misfeasance in Public Office) to the tune of Kesh 7 million to be paid by the 1st and 3rd defendant.....specifically the two land registrars.....” .

41. The reason why I agree with his reasoning is because the custodians of all land documents in Kenya is the office of the Chief Land Registrar. Therefore, questionable titles emanate from that office and the officers who make these falsified documents should be held personally responsible for this deliberate negligent performance of public duty that is deserving of reverence especially if it is proven that the



titles were issued by these officers. In this case however it is clear that the said titles were revoked although the damage had already been caused.

42. Final Orders and disposal;

- a. The plaintiff/1st defendant's counterclaim is dismissed for avoidance of doubt the suit property reverted back to the government on 29th July, 2011
- b. Each party to bear their costs of the suit.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 24TH DAY OF APRIL 2024.

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MOGENI J

JUDGE

In the virtual presence of:-

Mr. Odhiambo for the 1st Defendant

Ms. AOL for the 11th Defendant

None attendance for the 1st – 10th and 12th Defendants

Court Assistant: Caroline Sagina

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MOGENI J

JUDGE

