



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MUSINGA, GATEMBU & MURGOR, J.J.A)

CIVIL APPEAL NO. 50 OF 2019

BETWEEN

MANGROVE INVESTMENTS LIMITED.....APPELLANT

AND

THE ATTORNEY GENERAL.....1ST RESPONDENT

**NATIONAL WATER CONSERVATION & PIPELINE CORPORATION.....2ND
RESPONDENT**

(Being an appeal from the Judgment of the Environment & Land Court

at Mombasa (A. Omollo, J.) delivered on 20th September, 2018

in

ELC Civil Case No. 103 of 2009)

JUDGMENT OF THE COURT

1. At the core of this appeal is a property known Land Reference No. MN/VI/3615 situate in Mombasa, Mombasa County measuring approximately 0.9800 hectares or 2.42 acres (the property) the ownership of which is claimed by Mangrove Investments Limited, the appellant and by National Water Conservation & Pipeline Corporation, a state corporation, the 2nd respondent.
2. According to the appellant, the property which is private property was allotted to Scleraca Limited by the Commissioner of Lands on 5th July 1997. Subsequently, a Grant over the property dated 8th February 2002 and registered on 13th February 2002 was issued to the said Scleraca Limited, which soon thereafter transferred the property to the appellant by a Transfer dated 22nd February 2002 registered on 27th February 2002 whereupon the appellant became the owner of the property.
3. On the other hand, the respondents assert that the property was set aside, planned and reserved as a public utility, specifically for the Ministry of Water in 1986; that it was, surreptitiously and in unclear circumstances, allotted to Scleraca Limited in 1997 when that company did not exist; that a grant was subsequently issued to Scleraca Limited, upon its incorporation on 13th February 2002; that soon after the issue of the grant to the said Scleraca Limited, it quickly transferred the property to the appellant which ought to have known that the property was public property.
4. In its suit filed before the High Court at Mombasa on 8th April 2009 and subsequently amended on 25th September 2014, the appellant averred that it was at all material times the registered proprietor of the property which it held on a 99 year lease with effect from 1st July 1997; that on 19th August 2008, the Commissioner of Lands purported to issue a new grant, over the property in favour of the 2nd respondent being Grant registered on 27th August 2008 as No. 44221/1 and granted it a lease for a term of 99 years from 1st February 2003; and that by a letter dated 27th August 2008, the Commissioner of Lands purported to inform the appellant that the Government of Kenya had re-entered and taken back the property.

5. The appellant averred that, under the Government Lands Act, the purported forfeiture was wrongful and without due process. It sought judgment against the respondents jointly and severally for a declaration that the purported forfeiture or re-entry and taking back of the property is null and void; a declaration that the Grant No. C.R. 44221 issued in favour of the 2nd respondent is null and void; a declaration that the appellant is the lawful owner of the leasehold interest in the property for a term of 99 years from 1st July 1997; an order directing the Commissioner of Lands and the Registrar of Titles Mombasa to cancel Grant No. C.R. 44221 registered at the Land Titles Registry Mombasa on 27th August 2008 as C.R. 44221/1; a permanent injunction to restrain the 2nd respondent from entering, using, occupying, or otherwise dealing with the property. In the alternative, the appellant prayed for an award of “Kshs.100,000,000.00 or such other proved value of the leasehold interest in the suit premises.”

6. In its defence, the 1st respondent denied the claim asserting that the action by the Government was proper and in accordance with good public policy in view of the fraud and misrepresentation by which the Grant in favour of the appellant was issued; that the appellant was never in possession of the property as “*the same is a public utility plot on which the nerve centre of water supply to the entire Mombasa town region and its outskirts is located*”; that the allocation of the property to the appellant could not have been effected without fraud or misrepresentation.

7. In its defence, the 2nd respondent pleaded that even if the appellant was at some point registered as the proprietor of the property, such registration “*was irregular, unlawful and therefore null and void ab initio as it was procured through fraud and misrepresentation to the Commissioner of Lands*” in that: at the time of allocation to the appellant, the property was set aside, reserved and planned specifically for the 2nd respondent and affiliated bodies; that the appellant knew or ought to have known that the 2nd respondent was already in occupation of the property on which stands staff quarters for its employees and offices for monitoring water supply/reservoir, control and all logistics in respect of Mainland West, Municipality Mombasa; and that at the time of allocation the appellant ought to have known that the property is a public utility and any transfer of the same was illegal, null and void.

8. The 2nd respondent also contended that no transfer was lodged in favour of Scleraca Limited the purported original allottee of the property. It pleaded further that the appellant’s interest in the property, if any, was properly determined; that the Grant in its favour is valid; that it has been in occupation of the property since 1986; and that the appellant’s claim to the property is unfounded.

9. At the trial which commenced before **Mukunya, J.**, in September 2014, Ashok Labshanker Doshi, a director of the appellant and Edwin Mtwiri Ngungu, a land valuer testified for the appellant. A site visit of the property was undertaken by the court on 23rd October 2014. **A. Omollo, J.**, took over the conduct of the hearing thereafter and heard the testimony of Jean Francis Mitio Mutisya, the legal officer of the 2nd respondent and that of Samuel Kariuki Mwangi, the Registrar of Titles Mombasa.

10. After reviewing the evidence and considering the written submissions by counsel for the parties, **A. Omollo, J.**, delivered the impugned judgment on 20th September 2018 holding that the title to Scleraca Limited, the original allottee of the property from whom the appellant purchased the property was irregular since the property was in use by the 2nd respondent as a public utility; and that the appellant failed to establish that it exercised due diligence or took steps to authenticate the title to the property prior to purchasing the same;

11. The learned Judge found that the appellant ought to have presented to the court the completion documents on the basis of which it acquired the property from Scleraca Limited; that the appellant could not in the circumstances claim to have been an innocent purchaser for value without notice; that considering the appellant owned the property adjacent to the suit property, it cannot be excluded from the provisions of Section 26(a) of the Land Registration Act, which protects innocent purchasers; and that the letter of allotment issued to Scleraca Limited in 1997 when that company was not in existence is null and void.

12. The Judge concluded that the prayers sought by the appellant in its suit were not available “*since the allocation to Scelera was the one that was null and void and the [appellant] having failed to prove that it was an innocent purchaser for value without notice is not entitled to the declaration as owner of leasehold interest in the suit premises.*” The Judge went on to direct “*the Registrar of Titles Mombasa to record and entry of cancellation of title in the plaintiff’s parcel file under grant No. 356200*” and to order that the appellant’s “*interest and title in plot No. MN/VI/3615 is hereby cancelled.*” Ultimately, the court dismissed the appellant’s suit with costs to the respondents.

13. Aggrieved, the appellant lodged the present appeal complaining that the Judge erred in: holding that it was not an innocent purchaser for value of the property; failing to hold that the appellant’s title to the property was indefeasible and could only be challenged on the ground of fraud or misrepresentation to which the appellant was proved to be a party; ordering the cancellation of the appellant’s title when it was neither pleaded nor established that the appellant was privy to any fraud or misrepresentation; admitting into evidence a copy of certificate of incorporation of Scleraca Limited contrary to Sections 858(3) of the Companies Act and Section 83 of the Evidence Act; failing to determine the appellant’s suit; failing to hold that the 2nd respondent’s title was illegally procured and is a nullity; in conjuring up a counterclaim that was not pleaded; and in awarding costs of the suit to the respondents.

14. Urging the appeal before us learned counsel for the appellant, **Mr. Willis Oluga**, submitted that the court dismissed the appellant’s claim on the ground that it was not an innocent purchaser for value, a matter that had not been raised for determination by the court; that the plea that appellant was an innocent purchaser for value without notice would only have been arisen had the respondents made a counterclaim; that even if the issue had been raised, the Judge was wrong in failing to appreciate that Scleraca Limited, whose title to the property was in effect being challenged, was not a party to the suit; and that the Judge failed to appreciate that by the time title was issued to Scleraca Limited on 8th February 2002, it was in existence.

15. Counsel submitted that the appellant was not under any obligation, prior to purchasing the property from Scleraca Limited, which had a valid title, to investigate the title beyond conducting a search. The decision of this Court in **Elizabeth Wambui Githinji & 29 others vs. Kenya Urban Roads Authority & 4 others [2019] eKLR** was cited to support the proposition that a party seeking to acquire interest in land

has no obligation to go beyond the register to establish ownership and the history of the past transactions involving the land.

16. It was submitted that there was no prayer for cancellation of the appellant's title and the court did not therefore have a basis for so ordering; that Section 80 of the Land Registration Act, 2012 which confers power on the court to order cancellation of titles was not in existence at the time.

17. For the 1st respondent, *Ms. Angela Munyony* holding brief for *Ms. Kiti Namukika* relied entirely on written submissions urging that the property was not, from the onset, available for allocation having been set apart as a public utility for the 2nd respondent. It was further submitted that the evidence clearly demonstrated that Scleraca Limited from which the appellant purportedly purchased the property came into existence on incorporation on 23rd January 2001 while the letter of allotment in its favour was purportedly issued on 5th July 1997; and that the allotment to Scleraca Limited was therefore not only irregular but illegal.

18. It was urged that the property was not procedurally and lawfully alienated and the claim by the appellant that it acquired an indefeasible title that is protected under Article 40 of the Constitution does not hold; that the appellant could not derive title from an irregular, improper and null transfer. In that regard, reference was made to the case of *Republic vs. Senior Registrar of Title, Mombasa & 2 others Ex Parte Comen Ltd, H.C. at Mombasa Misc Application No. 70 of 2010*.

19. Counsel also made reference to the case of *Funzi Island Development Limited & 2 others vs. County Council of Kwale & 2 others, Civil Appeal No. 252 of 2005 [2004] eKLR* for the proposition that where it is apparent that the setting apart of land was obtained by misrepresentation, no good title can be conferred.

20. It was urged that the appellant, as the owner of the property adjoining the suit property, cannot deny that the 2nd respondent was and is in occupation; that the record shows that Scleraca Limited had been called upon to surrender its title upon realization that the property was allotted to it in error; that as held by the Court in *Henry Muthee Kathurima vs. Commissioner of Lands and another [2015] eKLR*, the Commissioner of Lands had no power to alienate public land; that the appellant cannot claim to be a bona fide purchaser for value without notice of the fraudulent transaction; that public interest is a matter of paramount consideration and it was within the mandate of the court under Section 80 of the Land Registration Act, 2012 to order rectification of the register as the Judge did.

21. Learned counsel for the 2nd respondent *Mr. Apollo Muinde* submitted that the question whether the appellant is a bona fide purchaser of the property was raised and properly before the Judge for consideration; that evidence was led that the suit property, a centre for water distribution, was not available for allotment; that the appellant's witnesses acknowledged that there were developments on the property; that the appellant had a duty to undertake due diligence prior to purchasing the property; that perusal of the correspondence file at the lands office would have revealed to the appellant that the property is a public utility serving Mombasa Island; that it would have been absurd and against public policy to uphold the appellant's title; that the protection accorded to private property under Article 40 of the Constitution presumes a valid title; that the decision of the lower court is therefore well founded and the appellant's remedy would be against Scleraca Limited that purportedly sold the property to the appellant.

22. In his brief reply, counsel for the appellant maintained that the appellant's obligation to exercise due diligence did not entail going behind the title; that the correspondence file at lands office was not available; that the appellant would not have known that the property was reserved as a public utility; that the avenue that was available to the Government would have been to compulsorily acquire the property and compensate the appellant in terms of the appellant's alternative prayer.

23. We have considered the appeal, the submissions and authorities cited by counsel. As this is a first appeal, we have the task of re-assessing and analyzing the evidence on record to reach our own conclusion. As stated by the Court in the often-cited decision in *Selle vs. Associated Motor Boat Co. [1968] EA 123*:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif -v- Ali Mohamed Sholan (1955), 22 E. A. C. A. 270).”

24. Bearing that in mind, the broad question we have to determine is whether the learned Judge was right in declining to uphold the appellant's title to the property on the basis that the appellant is not an innocent purchaser for value without notice having failed to investigate title to the property prior to purchasing it.

25. We have reviewed the evidence from which the following facts emerge: based on the Certificate of Incorporation produced at the trial in respect of Scleraca Limited, the initial allottee of the property to which a Grant for a leasehold interest for a term of 99 years from 1st July 1997 was issued was not incorporated until 23rd January 2001. The Grant over the property to Scleraca Limited dated 8th February 2002 was registered under the now repealed Registration of Titles Act on 13th February 2002. In rapid succession after the registration of the Grant in its favour, Scleraca Limited transferred the property to the appellant for a consideration of Kshs.6,000,000.00 by an instrument of Transfer dated 22nd February 2002 and registered on 27th February 2002.

26. Just over six years later, the Commissioner of Lands issued a Grant dated 19th August 2008 and registered on 27th August 2008 over the same property in favour of the National Water Conservation and Pipeline Corporation, the 2nd respondent to hold for a term of 99 year from

1st February 2003.

27. On the same date when the Grant in favour of the 2nd respondent was registered, the Commissioner of Lands wrote a letter dated 27th August 2008 to the appellant informing it that the Government had “*re-entered and taken back the land and the grant issued to [it] deemed to have lapsed*” on account of the appellant’s alleged breach of a special condition of the Grant in its favour requiring it to submit development plans for approval and for failing to develop the land within 24 months of registration of the Grant. The appellant protested by a letter dated 1st December 2008, and demanded cancellation of the Grant in favour of the 2nd respondent.

28. On 24th March 2009, the appellant wrote a letter to the 2nd respondent demanding that it should “*immediately vacate and hand over the property*” to it on the basis that prior to the Grant in favour of the 2nd respondent being issued by the Commissioner of Lands, the Grant in favour of the appellant

“had not been lawfully terminated by the Commissioner of Lands” and the property was therefore not available for alienation to the 2nd respondent.

29. The appellant’s witness, Ashok Labshanker Doshi, maintained that the appellant did not breach any terms of the Grant in its favour; the Government had no right in law or under the lease to re-enter or take back the property; and the Grant in favour of the 2nd respondent is invalid, null and void.

30. In an endeavor to explain how it came to be that one property was the subject of two separate Grants, Samuel Kariuki Mwangi, the Registrar of Titles, Mombasa Lands Office stated in his testimony that he established that there were two parallel files maintained at the Lands Office in respect of the property; that based on the records at the Lands Office and the survey map prepared by the Director of Physical Planning, the plot that was ultimately registered as the suit property was reserved as a public utility for the 2nd respondent and was not available for allocation to any person; that the appellant, the registered owner of the adjacent properties knew that the suit property was not available for allocation but used its proximity to have it registered in its name; that the Commissioner of Lands had recalled the Grant issued to Scleraca Limited for cancellation but the same was not surrendered. It was also his testimony that there are water reservoirs and semi-permanent houses on the property.

31. The legal officer of the 2nd respondent testified that the property is a public utility previously used by the 2nd respondent

“and now used by Coast Water Services”; that it houses the water infrastructure to provide water to coast residents.

32. Based on those facts, the learned trial Judge found that the title of Scleraca Limited was questionable and the appellant was capable of knowing the same by virtue of being owner of neighbouring plots as well as seeing the structures on the land; and that the appellant did not exercise due diligence “*to authenticate the title before purchasing the land*”; that the appellant could not rely on the provisions of Section 23 of the Registration of Titles Act which provides that certificate of title is conclusive evidence subject to challenge on grounds of fraud or misrepresentation to which he is proved to be a party as it did not satisfy the court that it was an innocent purchaser by demonstrating the it undertook due diligence. Was the Judge right in so concluding?

33. The contest over the property between the appellant and the 2nd respondent in effect begged the question which of the two titles prevailed. In deliberating on a similar issue in Munyu Maina vs Hiram Gathiha Maina, Civil Appeal Number 239 of 2009, [2013] eKLR this Court stated that:

“... when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and 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.”

34. In Richard Kipkemoi Limo vs. Hassan Kipkemboi Ngeny & others [2019] eKLR this Court considered the effect of an irregular or illegal allotment of land as distinct from situation of double allocation and expressed thus:

“We are cognizant of the decisions such as M’Ikiara M’Rinkanya & Another -v- Gilbert Kabeere M’Mbijiwe, (1982-1988) 1KAR 196, where it was held that where there is a double allocation of land, the first allotment prevails and there is no power to allot the same property again. (See also Kariuki -v- Kariuki (1982-88))

KAR 26/79 and Otieno and Matsanga, (2003) KLR 210.

56. On our part, we have considered whether the two certificates of title that were issued over the suit property are a case of double allocation. Double allocation arises when there are two or more otherwise valid certificates of title issued erroneously and in good faith by the lands office. When there is fraud, misrepresentation, deliberate mistake, irregularity or unlawfulness in the procedure for registration, double allocation does not arise. The 1st respondent has demonstrated the procedure and root of title that he followed to obtain title to the property. The appellant purchased the suit property from a person who was not the registered proprietor. His certificate of title has no legal foothold.”

35. There is ample authority therefore to support the view taken by the learned trial Judge that considering that the appellant’s root of title was impeached, it was under an obligation to demonstrate that it had undertaken due diligence.

36. Clearly, the manner in which the Government went about remedying the untenable situation where one property was the subject of two separate Grants was disjointed and contradictory. Initially it sought to “take back” the property on the basis that the appellant had breached the special conditions of the Grant but subsequently asserted that the Grant issued to the appellant is a nullity. Nonetheless, the staccato manner in which the Government approached the matter, did not in our view negate the obligation on the part of the appellant to prove the legality of how he acquired the title. As the Supreme Court of Kenya stated in Rutongot Farm Ltd vs. Kenya Forest Services & 3 others [2018] eKLR the protection of proprietary rights under Article 40 of the Constitution is premised on the proprietary interest having been lawfully acquired.

37. In Elizabeth Wambui Githinji & 29 others vs. Kenya Urban Roads Authority & 4 others (above) to which we were referred for the argument that a party seeking to acquire interest in land has no obligation to go beyond the register to establish ownership and the history of the past transactions involving the land, Ouko, JA (P) cited with approval an earlier decision of this Court in Chemey Investment Limited vs. Attorney General & 2 others, Civil Appeal No. 349 of 2012 and noted that in that case:

“...the Court rejected the invitation to uphold the sanctity of title of the allottees upon finding that allottees applied and were allocated the suit property, which was Government land on which was erected buildings used for public purposes. The allottees had a (sic) deliberately represented that the suit property was vacant. This, no doubt was a clear case of fraud in which the allottees fully participated.”

38. The circumstances in the present case are, as noted by the trial Judge, that the appellant owned the land adjoining the property. The record shows that the property was not vacant. It was said to be housing employees of the Ministry of Water and that water supply infrastructure is located on the property. Alive to the physical status of the property, it is not surprising that although the property was hastily transferred to the appellant by Scleraca Limited in February 2002 only a few days after Scleraca Limited was itself registered as owner, the appellant does not appear to have taken steps to take possession of the same soon after becoming registered as owner. Indeed, it would appear that it was not until the year 2008, after it learnt that a Grant had been issued to the 2nd respondent, that it wrote a letter of demand, demanding vacant possession of the property.

39. In the foregoing circumstances, we are in agreement with the learned trial Judge, beyond waving the Grant, the appellant was duty bound to demonstrate that it had exercised due diligence prior to acquiring the property.

40. As to the complaint that the Judge granted reliefs that were not sought, it is correct that judicial determination should as a general rule be based on pleadings. In Galaxy Paints Co. Ltd vs. Falcon Guards Ltd EALR (2000)2 EA 385 it was held that the issues for determination in a suit generally flow from the pleadings and a court can only pronounce judgment on the issues arising from the pleadings or such issues as the parties have framed for the court’s determination.

41. Likewise, in Odd Jobs -v- Mubia (1974) EA 476 it was stated as follows:

“A court may base a decision on an unpleaded issue where, it appears from the course followed at the trial, that the issue has been left to the court for decision....”

42. In the present case the court was called upon to determine which of two titles prevailed. The appellant sought a declaration that it is the registered owner of the property. A similar issue arose in Richard Kipkemoi Limo vs. Hassan Kipkemboi Ngeny & others, (above) on which the Court expressed:

“In our considered view, the prayers for the trial court to declare the title held by the appellant valid and that held by the 1st respondent a nullity put in issue the validity of the two certificates of lease held by the parties. Arising from the prayers sought in the petition, it was proper and incumbent upon the learned Judge to make a determination as to which of the two certificates of lease was valid. We find that the Judge did not err in making such a determination as the petition by the appellant was a pleading that put in issue the validity of the two certificates of lease.”

43. That was precisely the situation here. The Judge did not therefore err in ordering the cancellation of the appellant’s title having concluded that the same was irregularly obtained. As already stated, the protection of the right to property under Article 40 of the Constitution does not extend to any property found, as is the case here, to have been unlawfully acquired.

44. The upshot of the foregoing is that we find no merit in this appeal. The conclusion reached by the learned Judge is well supported by the evidence and we have no basis for interfering with it. Accordingly, this appeal is dismissed with costs to the respondents.

Dated and delivered at Nairobi this 3rd day of April, 2020.

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR