Singh & 6 others v Management Committee of Veterinary Laboratory Sports Club & another (Environment & Land Case 303 of 2018) [2024] KEELC 4312 (KLR) (23 May 2024) (Judgment)

Neutral citation: [2024] KEELC 4312 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 303 OF 2018

OA ANGOTE, J

MAY 23, 2024

BETWEEN

GURDIAL SINGH ..... 1ST PLAINTIFF

CHARAN KAUR PANESAR ..... 2ND PLAINTIFF

SWARN JIT KAUR BANSAL ..... 3RD PLAINTIFF

DR. KAMALJEET SINGH ..... 4TH PLAINTIFF

MANJIT KAUR GIDDIE ..... 5TH PLAINTIFF

HARBANS SINGH ..... 6TH PLAINTIFF

TARSEM KAUR MURBAH ..... 7TH PLAINTIFF

AND

THE MANAGEMENT COMMITTEE OF VETERINARY LABORATORY SPORTS CLUB ..... 1ST DEFENDANT

THE DIRECTOR, DEPARTMENT OF VETERINARY SERVICES .... 2ND DEFENDANT

JUDGMENT

1. The Plaintiffs instituted this suit by way of a Plaint dated 25th June 2018, in which they have sought for the following orders:

    a. A permanent injunction restraining the Defendants whether by themselves or through the Veterinary Laboratory Sports Club, their employees, servants and/or agents from trespassing, encroaching, alienating, interfering with and/or dealing in any manner whatsoever and howsoever with all that parcel of land

measuring 0.7996 hectares or thereabouts known as LR No. 21715, Grant No. I.R. 72264 Nairobi.

b. An eviction order directed to the Defendants by themselves, through the Veterinary Laboratory Sports Club, their employees, servants and/or agents requiring them to immediately evacuate and vacate all that parcel of land measuring 0.7996 hectares or thereabouts known as LR No. 21715, Grant No. I.R. 72264 Nairobi.

c. General damages for trespass on devaluation and destruction of the suit property.

d. Mesne profits.

2. The Plaintiffs assert that they are the lawfully registered owners of the suit property measuring 0.7996 hectares known as LR No. 21715, Grant No. LR 72264 Nairobi and delineated on Land Survey Plan Number 206080 (the suit property); that the suit property was initially part of LR No. 2952/R belonging to the Government of Kenya but the same was lawfully subdivided following a survey commissioned by the Kenya Agricultural Research Institute (KARI) and that the resultant portions of the subdivision were subsequently allocated to 133 allottees.

3. The Plaintiffs claim that in April 1996, Mary Nyai Njeru t/a Nyai Enterprises acquired the suit property by way of allotment from the Government of Kenya under a lease for a term of ninety-nine years commencing 1st April 1996, for consideration of Kshs. 200,000 and that an assignment was duly executed by the Commissioner of Lands on 17th January 1997 and title was issued on 6th February 1997.

4. The Plaintiffs assert that they jointly purchased the property from Mary Nyai Njeru t/a Nyai Enterprises by way of a transfer instrument dated 1st September 2005 for a consideration of Kshs. 5,600,000; that on 14th December 2007 an entry for transfer of title was duly entered in favour of the Plaintiffs as tenants in common in equal shares equivalent to one quarter of the whole and that the Plaintiffs have exercised their legal obligations and paid all the outgoings on the suit property.

5. The Plaintiffs averred in the Plaint that in May 2009, the club purportedly with the authority of the 2nd Defendant, wrongfully and without justifiable cause trespassed by entering the suit property and has extended its golf course to include the entire suit property without their authority and consent and that the Defendants have held themselves out as the owners of the suit property.

6. They aver that when they took issue with the club's trespass, the Defendants caused the Registrar of Titles to revoke land titles in respect of several parcels, including the suit property, on the ground of public need and interest through *Gazette Notice No. 16531* of 24th December 2010.

7. It was averred that the gazette notice purported that the parcels of land had been reserved for public purposes by the Ministry of Livestock and that prior to the said publication, they had never been informed of the intention to revoke their titles.

8. The Plaintiffs averred that they thereafter instituted judicial review proceedings in Nairobi HC Misc JR Application No. 61 of 2011 *Republic vs The Minister of Lands & 2 others*, which was heard together with JR Application No. 49 of 2011 and that in a ruling dated 16th April 2013, the learned Judge declined to grant the orders sought as serious allegations had been raised that required evidence to be adduced in support thereof.

9. While the learned Judge noted that there was a pending suit being Milimani ELC Case No. 627 of 2009, which related to the 133 allotments including the suit property, they averred that they are not

parties to that suit which is at an advanced stage and the parties in that suit have sought orders in respect of selected properties excluding theirs.

10. It is the Plaintiffs' case that *Gazette Notice No. 16531* of 24th December 2010 was quashed by the Court of Appeal on 12th May 2017 in Nairobi Civil Appeal No. 360 of 2014, *Anhalt Holdings Limited vs Registrar of Titles & 3 others* and that the said Gazette Notice is therefore invalid, null and void, exemplifying the club's illegal and unlawful trespass on the suit property.

11. In the statement of Defence dated 3rd August 2018, the Defendants asserted that the suit against the management committee of the club is incompetent, bad in law and fatally defective; that the acquisition and registration of the suit property by the Plaintiffs did not take place and that Mary Nyai Njeru had no legal or *bona fide* proprietary rights to the suit property and could not pass clean title to the Plaintiffs.

12. The 1st Defendant averred that LR No. 2952/R was not lawfully sub divided as alleged or at all; that the Kenya Agricultural Research Institute was not the registered owner of LR No. 2952/R hence could not authorise the said Mr. James Kamwere to survey the land and that the suit land was never de-gazetted from public to private use.

13. The 1st Defendant averred that no part-development plan was ever given or approved as required by law; that the procedure of changing use of public land to private use did not take place and that the survey of LR No. 2939/R and 189/R was commissioned by the Ministry of Agriculture (subsequently Ministry of Livestock and Fisheries Development) and instructions given to Mr. James Kamwere to carry out extensive survey.

14. The 1st Defendant assert that Mr. Kamwere, instead of undertaking a survey exercise, proceeded to fraudulently subdivide and create titles; that the circumstances of the subdivision were a fraud perpetuated for purposes of land grabbing and no *bona fide* right of ownership could accrue to private individuals and that the 1st Defendant took possession and occupation of the land before 2009 on express authority of the Ministry of Livestock and Fisheries, through the Department of Veterinary Services.

Hearing and Evidence

15. PW1, the 4th Plaintiff, relied on his statement dated 25th June 2018, in which he reiterated the facts as set out in the Plaint, which I have summarized above. PW1 also produced a bundle of documents dated 25th June 2018. Amongst the documents produced is a copy of the original transfer and the grant for LR No. 21715.

16. During cross-examination, PW1 stated that the 1st Defendant is a Managing Committee and not a company; that when he bought the land, he was a member of the Golf Club and that the club was set up on government land and it is a private club.

17. DW1, Timothy Waita Mwangi, Deputy Director of Physical Planning from the Department of Physical Planning in the Ministry of Lands, Public Works, Housing and Urban Development relied on his statement. He also produced a bundle of documents dated 14th February 2023 as Dexb1-12.

18. In his statement, DW1 averred that the Director of Physical Planning has never prepared a Part Development Plan for alienation of public land to private individuals on the suit land known as 189/R and LR 295/R and that the Director of Physical Planning could not prepare a PDP for private individuals on land which under Section 11(3)(k) of the *Government Lands Act* was government land and was reserved for public purpose.

19. DW1 asserted that the subdivision scheme alleged to have been carried out by J. Kamwere and Associates, the Director of Physical Planning did not make comments on the scheme as required by Section 15(1)(c) and (d) of the *Land Planning Act*; that no letter has been adduced forwarding the subdivision scheme to any government office for approval; that the suit land is public land known as 189/R and LR 295/R and that the title referred as LR 21715, IR 72264 in the Plaintiff's name is fraudulent and should be cancelled/ revoked to protect public land.

20. In cross-examination, DW1 testified that under the *Physical Planning Act*, there was a requirement for the publication of a PDP in a newspaper after which the Minister would give his approval and that there was no PDP in the record and that a letter of allotment could not be issued without a PDP.

Submissions

21. Counsel for the Plaintiff submitted that Section 24(a) of the *Land Registration Act* 2012, provides that registration of a person as a proprietor of land vests in that person the absolute ownership of that land together with all rights and privileges belonging and appurtenant thereto. They also relied on the case of *Mike Maina Kamau vs Attorney General* [2017] eKLR.

22. Counsel submitted that the Plaintiffs acquired a good and valid title from Mary Nyai Njeru t/a Nyai Enterprises, and the same was approved by the then Commissioner of Lands by affixing his signature on the title. Counsel argued that the Defendants have not produced any evidence to challenge the sanctity of the Plaintiffs' title and have not demonstrated that the Plaintiffs were involved in any irregularities of fraud in the acquisition of the title.

23. Counsel relied on Sections 108 and 109 of the *Evidence Act* and submitted that fraud has not been particularized or proved to the standard set out in the law. He relied on the Court of Appeal case of *Moses Parantai and Peris Wanjiku Muuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) vs Stephen Njoroge Macharia* [2020] eKLR and *Kinyanjui Kamau v George Kamau* [2015] eKLR.

24. With respect to the 1st Defendant's capacity in these proceedings, Counsel submitted that the club is the main party against which the Plaintiffs have sought relief, as its office bearers change office from time to time and that in any event, this is a technical procedure that does not go to the substratum of the suit and is curable under Article 159(2)(d) of the *Constitution* of Kenya.

25. Counsel for the 1st Defendant submitted that the Veterinary Laboratory Sports Club is not a body corporate capable of suing or being sued; that the club can only be sued in a representative capacity through its officials who constitute the Board of Directors and that the Plaintiffs ought to have sued the Chairman, Vice Chairman and Treasurer of the club. Accordingly, he urged the court to dismiss the suit against the 1st Defendant.

26. Counsel relied on the cases of *Veronica Maringa & Others vs ACK Buxton Diocese of Taita Taveta & Another*, *Islamia Madrasa Society v Zafar Niaz & Others*, *Trustees Kenya Redeemed Church & another vs Samuel M'Obiya & 5 Others* [2011] eKLR and *African Orthodox Church of Lenya vs Rev. Charles Omuroka & another* [2014] eKLR.

27. It was Counsel's further submission that PW1 admitted that the entire suit land was unalienated government land; that instructions were given to a surveyor to hive a portion for alienation to another government entity; that there is no evidence to show that the remaining portion was surrendered by the Ministry of Agriculture through the Department of Veterinary Services and that the Plaintiffs have not tendered any evidence to show that the government land was available for alienation to private persons.

28. Counsel argued that the alienation of the suit property to private persons was void ab initio; that no clean title could issue in the circumstances; that subsequent transfer and registration in the Plaintiff's favour cannot give legality to what was void from the beginning and that indefeasibility of title cannot come to their aid in these circumstances.

Analysis and Determination

29. The following issues arise for this court's consideration:

    a. Whether the 1st Defendant has legal capacity to be sued.

    b. Whether the Plaintiffs obtained lawful title to the suit property.

    c. Whether the 1st Defendant has trespassed on the suit property.

30. The subject matter of this suit concerns the legality of the ownership of the suit property, LR No. 21715, Grant No. I.R. 72264 Nairobi. The Plaintiffs assert that they lawfully purchased the property from Mary Nyai Njeru t/a Nyai Enterprises by way of a transfer instrument dated 1st September 2005 for a consideration of Kshs. 5,600,000 and that on 14th December 2007, an entry for transfer of title was duly entered in their favour.

31. It is the Plaintiffs' case that the said Mary Nyai Njeru t/a Nyai Enterprises was allotted the suit property in April 1996, following the lawful subdivision of LR No. 2952/R, and that the said sub division was commissioned by the Kenya Agricultural Research Institute; that the original allottee was issued with a lease for a term of ninety-nine years commencing 1st April 1996, for consideration of Kshs. 200,000 per annum and that an assignment was duly executed by the Commissioner of Lands on 17th January 1997 and the title was issued on 6th February 1997.

32. The Plaintiffs' claim is that the 1st Defendant, which is chaired by the 2nd Defendant, has trespassed and encroached upon the suit property. They are consequently seeking for a permanent injunction against the Defendants, eviction orders from the suit property and general damages for the said trespass.

33. The 1st Defendant on its part, has raised a preliminary objection against the joinder of the management committee, as it does not have legal personality and is incapable of being sued. The Defendants further assert that LR No. 2952/R was not lawfully subdivided and that the Kenya Agricultural Research Institute was not the registered owner of LR No. 2952/R hence could not commission the said Mr. James Kamwere to survey the land.

34. It is the Defendants' case that the suit land was never de-gazetted from public to private use; that there was no cabinet or ministerial approval for change of use from public to private and that there was no approved part-development plan for the suit property before the purported allocation to the person who sold the land to the Plaintiffs. They therefore claim that Mary Nyai Njeru had no legal title that she could pass to the Plaintiffs in this matter.

35. Before delving into the substance of this suit, it is prudent to consider the preliminary objection that has been raised by the 1st Defendant, that the 1st Defendant is a society which has no capacity to sue or be sued; that the Plaintiffs ought to have sued the officials of the society and that the suit should accordingly be dismissed.

36. The definition of a preliminary objection was canvassed in the case of *Mukisa Biscuits Manufacturing Ltd vs West End Distributors* (1969) EA 696 where their Lordships observed thus:

> " ...a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration"

37. In the same case Sir Charles Newbold, P. stated as follows:

> " a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop."

38. The preliminary objection herein concerns the 1st Defendant's capacity to be sued in this suit. The Defendants have asserted that the 1st Defendant is not a body corporate capable of suing or being sued; that the club can only be sued in a representative capacity through its officials who constitute the Board of Directors and that the Plaintiff ought to have sued the Chairman, Vice Chairman and Treasurer.

39. It is trite that a society cannot be sued in its name, and any legal suit must instead be instituted against the officials of the society. In the case of *Trustees Kenya Redeemed Church & Another vs Samuel M'Obiya & 5 Others* [2011] eKLR it was held thus:

> " It is trite law that a society under the *Societies Act* is not a legal person with capacity to sue or be sued. A society can only sue or be sued through its due officers orders. It has not been pleaded that the 2nd defendant has been sued in the capacity of an official of Kenya Redeemed Church nor has it been pleaded that he has been sued in his personal capacity."

40. In this case, the officials of the Veterinary Laboratory Sports Club are identified in Clause 4 of the Club's Constitution, which the 1st Defendant has produced in his bundle of documents dated 12th January 2024, together with the Certificate issued to the Club under the *Societies Act*.

41. The Constitution of the Club identifies its officials as including a Chairperson, who is the Director of Veterinary Services, the Vice Chairperson, Secretary, Treasury, directors from general membership, Golf Captain, Lady Captain and Green Keeper.

42. It is therefore apparent that while the 1st Defendant, as a Society, lacked the legal capacity to be sued in this matter, the 2nd Defendant, the Director of Veterinary Services was sued in his representative capacity as the Chairman of the Veterinary Laboratory Sports Club. This is evident from paragraph 3 of the Plaint, where the Plaintiffs have averred that the Director of Veterinary Services in the Ministry of Agriculture is also the Chairman of the Veterinary Laboratory Sports Club.

43. This court therefore finds that the 1st Defendant ought to be discharged from this suit, but the suit against the 2nd Defendant, as Chairman of the Club still subsists.

44. The law on joinder and misjoinder is set out under Order 1 Rule 10 (2) of the *Civil Procedure Rules* which provide that the court may at any stage, upon or without the application of either party, and on

such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as Plaintiff or Defendant, be struck out, and that the name of any person who ought to have been joined, whether as Plaintiff or Defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.

45. This court is also guided by Order 1 Rule 9 which provides that no suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. This suit will therefore be determined on its merits.

46. The substantive question in this suit is whether the Plaintiffs obtained a lawful title to the suit property from Mary Nyai Njeru t/a Nyai Enterprises. The Plaintiffs' case is that the root of the title of the suit property LR No. 21715, Grant No. I.R. 72264, stems from the subdivision of LR No. 2952/R following a survey by Mr. James Kamwere, a duly certified surveyor, which was commissioned by the Kenya Agricultural Research Institute.

47. The Defendant has challenged the Plaintiffs' title on the grounds that LR No. 2952/R was not lawfully subdivided; that the Kenya Agricultural Research Institute was not the registered owner of LR No. 2952/R hence could not commission the said Mr. James Kamwere to survey the land and that the suit land was never de-gazetted from public to private use. Further, it is the Defendants' case that there was no approved part-development plan as required by law.

48. It is a well accepted legal principal that a registered proprietor must prove the legality of how he acquired his title. This was held by the Court of Appeal in *Munyu Maina vs Hiram Gathiha Maina*, Civil Appeal No.239 of 2009 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."

49. This position was upheld by the Supreme Court in *Dina Management Limited vs County Government of Mombasa & 5 Others* (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR).

50. Under Section 107 of the *Evidence Act*, the Plaintiff bears the legal burden of proof. In this case, the Plaintiffs had a duty to establish the root of their title, that the suit property was lawfully subdivided and allotted to their predecessor, who then passed good title to them.

51. The process of obtaining title through allocation was well-laid out by this court (Angote J) in the case of *Nelson Kazungu Chai & 9 Others vs Pwani University* [2014] eKLR:

> " 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 unalienated 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 allotees. 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."

52. It was thus incumbent on the Plaintiffs to present evidence of a duly issued letter of allotment, an approved part development plan attached to the letter of allotment and proof of compliance with the

conditions set out in the letter of allotment, and that the stand premium and ground rent were paid, within the specified timeline. This was never done.

53. In their bundle of documents, the Plaintiffs have attached letters to Kamwere and Associates written by the Kenya Agricultural Research Institute (KARI) dated 7th October 1988 and 8th November 1988. From these letters, Mr. James Kamwere was commissioned to survey LR No. 2952/R, and curve out a piece of land for the construction of KARI's headquarters.

54. In a letter to the Commissioner of Lands dated 2nd September 2009, Mr. Kamwere states that he surveyed Plot LR Nos 21697-21732, which were surveyed hived out of the original LR No. 2952 which was unalienated government land.

55. While the Plaintiffs have annexed copies of the title issued to Mary Nyai Njeru, they have not annexed the Letter of Allotment, which should have been accompanied with an approved PDP, to enable this court hold that the said title was lawfully issued to Mary Nyai Njeru.

56. Consequently, it is the finding of this court that the Plaintiffs have failed to establish that the suit property was lawfully made available for allocation under the *Government Land Act (repealed)*.

57. In the absence of a duly approved PDP, the survey of LR No. 2952, which created the suit property was unlawful and unprocedural. The consequent subdivision, creation and allotment of the suit property to Mary Nyai Njeru was therefore illegal, null and void ab initio. Mary Nyai Njeru t/a therefore did not have a good title to the suit property and could not pass the purported title to the Plaintiffs.

58. This court having found that the suit property belongs to the government, and was not available for allocation to private persons, The Veterinary Laboratory Sports Club, which is a registered society affiliated to the Ministry of Livestock, cannot be said to be a trespasser.

59. This court therefore finds that the Plaintiffs' suit is unmerited and is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 23RD DAY OF MAY, 2024.

O. A. ANGOTE

JUDGE

In the presence of;

Ms Ochieng for Orege for 1st Defendant

Mr. Nyacholi for Plaintiff

Court Assistant: Tracy