



Kenya Revenue Authority v Said & 4 others (Environment & Land Case 101 of 2018) [2024] KEELC 6145 (KLR) (25 September 2024) (Judgment)

Neutral citation: [2024] KEELC 6145 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 101 OF 2018
NA MATHEKA, J
SEPTEMBER 25, 2024**

BETWEEN

KENYA REVENUE AUTHORITY PLAINTIFF

AND

OSMAN SAID 1ST DEFENDANT

NATIONAL BANK OF KENYA LIMITED 2ND DEFENDANT

**JOSEPH MUNGAI GIKONYO T/A GARAM INVESTMENTS
AUCTIONEERS 3RD DEFENDANT**

CHIEF LAND REGISTRAR 4TH DEFENDANT

NATIONAL LAND COMMISSION 5TH DEFENDANT

JUDGMENT

1. The plaintiff claimed that it is the registered proprietor of a parcel of land known as L.R 2415/I/MN and the house HG No. 18 erected thereon hereafter referred to as the suit property. The suit property is part of the plaintiff's staff quarters commonly known as Bamburi Senior Estate. The plaintiff narrated that before its creation in 1995, the suit property was vested in its predecessor the Customs and Excise Department and an approval Plan No. 38 dated 7th February 1975 shows that the suit property was reserved for the Customs Department. That the said house was erected sometime and in 1978 and that by operation of the law was vested on the plaintiff on 1st July 1995 by virtue of Section 22 of the Kenya Revenue Authority without the need of a certificate of title. Further, that the house has been in possession of various senior officers and currently in possession by one Anne Nasirumbi by virtue of a letter of offer to lease the suit property dated 2nd September 2005. That the arrangement has always been that such officers would vacate the house upon leaving employment with the plaintiff.



2. The plaintiff pleaded that the 1st defendant has claimed ownership by virtue of grant no. 37286 issued in favour of David Gikonyo Ndung'u on 18th February, 2003 and a transfer thereof registered in favour of the 1st defendant on 5th July 2005. Further, that the said grant was obtained unprocedurally as it was developed public land. There were previous suits filed with respect to the suit property where the 1st defendant and the plaintiff were parties and they are as follows:
 - i. Mombasa CMCC 4015 of 2005 where the 1st defendant sued one Chris Were but later joined the plaintiff herein and the said Anne Nasirumbi as defendants but the suit was stayed by the High Court pursuant to an application by the 1st defendant.
 - ii. The registrar of titles by a Gazette Notice No. 6332 dated 6th June 2011 revoked the said grant which caused the 1st defendant to file Mombasa High Court Constitutional Petition No. 65 of 2012 where the plaintiff was cited as an interested party. The plaintiff alleges that the petition was dismissed on 28th September 2017 but before then the suit property was charged to banks of which the latest charge by National Bank for Kshs. 42,000,000 on 8th September 2015 and its variation on 25th September 2015. It is the plaintiff's allegation that upon the foundation of the charge, the 2nd defendant has commenced the process of statutory power of sale and it was to be conducted on 30th April 2018 by the 3rd defendant which has already been overtaken and the plaintiff only found out about the existing charges when an advertisement was placed in a daily newspaper on 23rd April 2018. He faulted the 1st, 2nd and 4th defendants for fraud. He alleged that the 2nd defendant did not conduct due diligence and violated the doctrine of lis pendens as the Petition 65 of 2012 was ongoing.
3. For these reasons stated above the plaintiff sought the following prayers;
 - a. A declaration that Grant Number 37286 issued on 18th February 2003 in respect of Land Reference Mainland North/I/2415, Mombasa and all entries thereto stand revoked.
 - b. A declaration that the charge dated 19th March 2015 made in favour of the 2nd defendant National Bank of Kenya Limited and registered against Land Reference Mainland North/I/2415, Mombasa on 8th April 2015 is hereby cancelled.
 - c. A declaration that the variation of charge dated 18th September 2015 made in favour of the 2nd defendant National Bank of Kenya Limited and registered against Land Reference Mainland North/I/2415, Mombasa on 25th September 2015 is hereby cancelled.
 - d. An order directed at the 4th Defendant requiring him to effect the cancellations in prayers (b) and (c) herein above.
 - e. A declaration that the plaintiff is the lawful owner of Land Reference Mainland North / I/2415, Mombasa.
 - f. That the 4th defendant be directed to issue a new grant in favour of the Plaintiff as the lawful and legitimate proprietor of Land Reference Mainland North/I/2415, Mombasa.
 - g. A permanent injunction be issued restraining the defendants, their agents, servants, employees or any other person from selling, disposing of, transferring, leasing, entering, trespassing, constructing, using, interfering with the Plaintiff's possession and quiet enjoyment or in any other way dealing with Land Reference Mainland North/I/2415, Mombasa.
 - h. Costs of the suit.
 - i. Interest on (h) above at court rates



- j. Any other relief as the court may deem fit
4. In reply the 1st defendant, denied all the allegations and reiterated that he bought the suit property which was registered in his name on 5th July 2005. He further pleaded that the aforementioned revocation by the land registrar was declared null and void. However, he contended that the charges were procured fraudulently and that he never executed any charge instrument which necessitated him to file a complaint at the Central Police Station. That he took extra steps of instructing a forensic document examiner to examine the signatures in the charge and the variation whose results were that the signatures were different from each other. In counterclaim, the 1st defendant claimed that he never took possession as the plaintiff has been in possession to date and he therefor claims mesne profits of 14,280.000 at the rate of Kshs. 70,000 per month for not using the suit property since 5th July 2005 to date and the 1st defendant prays that:
- a. That the suit be dismissed with costs
 - b. That the counterclaim be allowed and decreed that:
 - i. A declaration that the 1st defendant is the registered owner of the property known as L.R No.MN/I/2415 Mombasa.
 - ii. A declaration that the Plaintiff's suit is barred by limitation having been filed after twelve years.
 - iii. An order of eviction be issued against the Plaintiff
 - iv. Mesne profits of Kshs. 14,280,000
 - v. Costs.
5. The 2nd defendant pleaded that the suit property is registered in the name of the 1st defendant and narrated how the charges came into existence which is by a charge dated 19th March 2015 and a variation of charge dated 18th September 2015 for a loan facility of Kshs. 42,000,000. That the previous charge was to KAAB Enterprises Limited but was later changed to Kel Enterprises Limited by the said variation. That the suit property had previously been charged to Bank of Africa by KAAB investments and hence it is not true that the bank failed to conduct due diligence as they obtained the certificate of title, as well as land rent clearance certificates, a valuation report, physical site visit and finally a consent to charge from the commissioner of lands. The 2nd defendant further compared the root of title of the 1st defendant stating that it had been issued to David Gikonyo Ndungu on 1st February 1998 vis-a-vis to the plaintiff's lack of title as proof of ownership and no sufficient proof of allocation.
6. Further, the 2nd defendant pleaded that a development plan has the ominous effect of not granting proprietary rights and explained that registrar's revocation was declared void by the late Majanja J. in *Petition 217 of 2011 Satima Enterprises Limited vs The Registrar of Titles, Commissioner of Lands, Kenya Revenue Authority*. They also held that since *Petition 65 of 2012* was struck out, but the court did not make positive orders of ownership in favour of the plaintiff. In admission, the 2nd defendant states that in the event that the ownership of the 1st defendant is fraudulent, they did not participate in the 1st defendant's acquisition of the suit property. The 2nd defendant also deemed it necessary to remind the court that the longer the bank is restrained from realizing its securities, the larger the debt is due and owing.
7. The 3rd and 5th defendant never entered appearance nor filed any pleadings but state counsel Mrs. Waswa entered appearance for the 4th defendant who denied all allegation by the plaintiff and pleaded that the suit is bad in law and the prayers sought are not available nor merited.



8. PW 1 Simon Mutua produced the PDP stating that it was issued under the Ministry of Finance and reiterated that there is a 3 bedroomed bungalow and servants quarters constructed in 1978. He testified that in 2005 the 1st defendant sued the plaintiff's staff the tenant then; Mr. Chris Were which resulted in the case being dismissed and title was revoked by the registrar. In cross examination he produced a title deed issued in 2018 for a different parcel number and explained that No. 2415 was revoked. He further testified that its predecessors did not hand over any title deed to then during handover in 1995. He reiterated how the petition was dismissed and that after seeing the advertisement in the newspaper for statutory sale, the plaintiff sought an injunction in this suit. He further stated that they reported to the Ndungu Commission which resulted in the said grant being revoked and they therefore started the title of obtaining title. In further cross examination he admitted that the revocation of the grant was declared null and void and that the Ministry of Finance was in charge of title to the suit property and that the 1st defendant's title was illegal. However, in re exam the nullification by the late Majanja J. was for a different property. He further stated ELC 1341 of 2007 declared KRA as the owner of the suit property and he alleged that the plaintiff's title for the different parcel is one and the same for the suit property and also referred to the fact that a government agency does not need to have title as shown by the letter dated 27th July 2004 page 3. He also referred to all properties that were transferred to KRA and the suit property is No. 6 on the list.
9. DW1, the 1st defendant reiterated his witness statement and narrate how he bought the suit property on 5th July 2005 and how the suit property was charged to Bank of Africa in 2008 but that he never authorized a further charge in 2010 to Bank of Africa and then later to the 2nd defendant. He admitted that he did not know how the said Gikonyo obtained title and that he never took possession of the house as there was someone in it called Chris Were. He remembered that he sued the said Chris Were but does not remember if it was dismissed. He was also aware of the Ndungu Report but did not know whether the suit property was therein. Furthermore, he added that he was not aware of the revocation of his grant and the outcome of the case challenging the said revocation. Interestingly he testified that the 2nd defendant has the original title and that he learnt of the sale from the newspaper and that is when he reported to the police station. He further admitted to charging the suit property in 2008 without informing the plaintiff or the bank about CMCC 4015 of 2005. He said that after discharging the 2008 loan, his title was given to Awas Mohamed to deliver to him, that Mr. Awas and himself are directors of KAAB Investments and continued to vehemently deny the charge to the 2nd defendant. He was also categorical that he has not sued Mr. Awas Mohamed and did not conspire with him. He also disputed the consent to charge and the search of 2018 in the 2nd defendant list of documents page 109. DW1 testified that he did not place any restriction on the property and that he does not know the advocate Jane Gagure who witnessed the signatures in the charge to the 2nd defendant.
10. DW2, Paul Chelaya an employee of the 2nd defendant reiterated all the due diligence they conducted as afore mentioned; that the person in possession of the house was at the time a caretaker. He testified that the revocation by the Registrar was quashed by the late Majanja J. but it was in regard to another title. No further cases were filed with regard to that issue. DW 3 Sheila Soila the land registrar stated that L.R MN/I/2415 CR No. 36286 was allocated to David Gikonyo Ndungu on 20th February 2004 and on 5th July 2005 was transferred to the 1st defendant. She reiterated the encumbrances as they appear in the plaint and agreed that there was a gazette notice that the grants were revoked. She explained that revocation is normally registered against the title and that there is no entry on the parcel file and that there is no indication in their records that the charges were a forgery. Further that the variation of charge in 2015 from KAAB Enterprises to KEL enterprises is valid as the stamp duty was paid and concluded by stating that the said gazette notice of 2011 was never registered.



11. The court has perused the pleadings, the testimonial evidence, the rival submissions and the superior court decisions and the issues for determination are as follows:
 1. Who is the owner of the suit property?
 2. Whether the 1st defendant had capacity to charge the suit property to the 2nd defendant?
 3. Who bears the costs?
12. Section 24 of the *Land Registration Act* Cap 300 states that the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto. Section 25 of the said Act provides that the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—to encumbrances charges or leases shown on the register and the overriding interests as stated in Section 28 of the Act.
13. In essence what has been challenged is the history of the suit property especially the first registration of the grant CR 37286 which was issued to David Gikonyo Ndungu and which DW4 confirmed as such. The only way to challenge title is provided under section 26 (1) of the *Land Registration Act* Cap 300 which states;
 - “(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
 - (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”
14. The plaintiff claims that they inherited the suit property from its predecessor Customs and excise department in 1995 and that it was being used by the same to house its senior staff. It is their testimony that all they had at the time is an approved development plan 38 dated 7th February 1975. That one David Gikonyo Ndungu was granted the suit property in 1998 and sold it a year later to the 1st defendant and all this happened without the knowledge of the plaintiff. The 1st defendant has admitted in testimony that he does not know whether the title by the said Gikonyo was valid. The plaintiff only became aware of the 1st defendant after they were joined in a suit against its employee in CMCC 4015 of 2005. The plaintiff claims that the suit was dismissed but the land registrar had revoked the grant through a gazette notice number 6332 dated 6th June 2011 but which revocation was nullified by the late Majanja J. in Pet 65 of 2015.
15. I agree with counsel for the plaintiff’s submissions that the then commissioner of lands had no authority to issue developed public land as was the case here. Section 2 of the repealed Government Act states that the commissioner of lands only had jurisdiction to issue titles in respect of unalienated public land. It is not lost on this court that the suit property was investigated under the Ndungu Commission



of Inquiry on Public land where the suit property is listed as no 170 in the annexures. I find that the 1st defendant does not have a valid title and hence it cannot transact with the same in any manner whatsoever.

16. From the evidence before me, I find that the suit property was vested in the Government for use by the Customs and Excise Department, the Plaintiff's immediate predecessor in title, which had acquired indefeasible proprietary interests and rights over the Suit Property. At all material times the suit property was in possession of the Customs Department and was never available for allocation to any party. The approved Plan Number 38 dated 7th February, 1975 shows that the Suit Property was indeed reserved for the Customs Department way back in 1975. The Customs Department developed the Suit Property by erecting thereon House HG. No. 18 as aforesaid and the said House was erected in 1978. The Suit Property subsequently by operation of the law vested in the Plaintiff on 1st July 1995, by virtue of Section 22 of the Kenya Revenue Authority Act Number 2 of 1995. I find that since 1975 and at all material times, the Plaintiff and the Customs Department have been in possession of the Suit Property which has been used over the years for housing some of its senior staff members. The Plaintiff itself has been in possession of the suit property since 1995. For these reasons I find that the 1st defendant has failed to prove his counterclaim on a balance of probabilities and I dismiss it with costs. The plaintiff has proved his case on a balance of probabilities and I grant the following orders;

1. A declaration that Grant Number 37286 issued on 18th February 2003 in respect of Land Reference Mainland North/I/2415, Mombasa and all entries thereto stand revoked.
2. A declaration that the charge dated 19th March 2015 made in favour of the 2nd defendant National Bank of Kenya Limited and registered against Land Reference Mainland North/I/2415, Mombasa on 8th April 2015 is hereby cancelled.
3. A declaration that the variation of charge dated 18th September 2015 made in favour of the 2nd defendant National Bank of Kenya Limited and registered against Land Reference Mainland North/I/2415, Mombasa on 25th September 2015 is hereby cancelled.
4. The 4th Defendant to effect the cancellations in prayers (2) and (3) herein above.
5. A declaration that the plaintiff is the lawful owner of Land Reference Mainland North / I/2415, Mombasa.
6. The 4th defendant to issue a new grant in favour of the Plaintiff as the lawful and legitimate proprietor of Land Reference Mainland North/I/2415, Mombasa.
7. A permanent injunction be issued restraining the defendants, their agents, servants, employees or any other person from selling, disposing of, transferring, leasing, entering, trespassing, constructing, using, interfering with the Plaintiff's possession and quiet enjoyment or in any other way dealing with Land Reference Mainland North/I/2415, Mombasa.
8. Costs of the suit to the Plaintiff.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 25TH DAY OF SEPTEMBER 2024.

N.A. MATHEKA

JUDGE

