



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT ELDORET**

**E&L CASE NO. 179 OF 2012**

**KAREN ROSES LIMITED.....PLAINTIFF**

**VERSUS**

**ATTORNEY GENERAL.....1<sup>ST</sup> DEFENDANT**

**DISTRICT COMMISSIONER UG DISTRICT.....2<sup>ND</sup> DEFENDANT**

**DIVISIONAL CRMINVEST OFFICER DCIO.....3<sup>RD</sup> DEFENDANT**

**PUBLIC WORKS OFFICER.....4<sup>TH</sup> DEFENDANT**

**OFFICER COMMANDING POLICE STATION (OCS)....5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

By a plaint dated 23rd November 2004 the plaintiff herein sued the defendants jointly and severally seeking for the following orders of:

- a) Eviction
- b) Permanent injunction,
- c) Damages for trespass,
- d) Costs of the suit
- e) Any other relief the court may deem fit to grant

The defendants filed an amended defense and counterclaim denying the allegations in the plaint and also claiming ownership of the suit property. This matter being an old matter was listed for dismissal for want of prosecution and the same was dismissed on 7<sup>th</sup> December 2017. Counsel later filed a consent to reinstate the dismissed suit.

**PLAINTIFF'S CASE**

The plaintiff called one witness, Sammy Kiptoo Chesiyana who is the Group Procurement Manager of the Plaintiff company who

testified that the plaintiff purchased the suit property in 1993 from a company called Toloch Enterprises Ltd. He confirmed that the property was owned by Toloch Enterprises at the time of purchase and produced an allotment letter as PEXH 5. He also produced a copy of transfer dated 4<sup>th</sup> June 1993 as PEXH 6 and testified that the transfer was done for a consideration of Kshs. 2,000,000/-

PW1 further testified that the plaintiff paid stamp duty of Kshs. 120,150/- and produced a copy of the receipt as PEXH 7. That the suit property had an outstanding rates at the time of purchase which were paid by Toloch Enterprises on 25<sup>th</sup> May 1993 and he produced a rates clearance certificate as PEXH 8(a) and a receipt for Kshs. 16,815/- as PEXH 8(b).

It was PW1's evidence that the suit property was transferred to the Plaintiff and the original certificate of lease was issued which he produced as PEXH 9, the lease as PEXH 10. He further produced a bundle of receipts for payments of land rates demand, and a search certificate.

PW1 further testified that on 7<sup>th</sup> December 2014 the plaintiff obtained an order of injunction from the court restraining the defendants from handling the suit property and the same was ignored. It was also his evidence that there has never been any challenge to the legality of the title deed to the property or the allocation of the suit property to Toloch Enterprises Ltd who were the original allottees by the Government.

PW1 also testified that the Plaintiff's General Manager Mr. Kipngetch Tesot was charged with malicious damage to property but was acquitted by the court vide Eldoret Criminal case No. 461 of 2005. He further maintained that the plaintiff is a bonafide purchaser for value and the suit land was rightfully acquired.

It was PW1's evidence that at the time the plaintiff bought the suit property at the consideration of Kenya shillings 2Million, and the same registered in the name of the plaintiff, the property was not in the name of the government. That nobody has written to the plaintiff recalling the title. The plaintiff therefore prayed for a permanent injunction and the eviction of the defendants from the suit property with costs.

On cross examination by the defendant's Counsel, PW 1 confirmed that he was present during the time when this land was procured. He also stated that he has visited the suit land on several occasions and confirmed that there are some buildings thereon. He therefore closed the plaintiff's case.

### **DEFENCE CASE**

DW1, who was a Surveyor from the State department of Housing and Urban development at the Headquarters Nairobi, testified that the suit property belonged to the government and there were two main houses and two servant quarters built in 1949.

DW1 stated that there are 4 government houses and 2 servant quarters on the suit land. It was DW1's further testimony that the suit property could only be allocated to a private company in two instances, under the repealed Government Lands Act section 3(a) which allowed the President to make a grant or disposition of estates, interests or rights to unalienated government land and there is no evidence that the President authorized the Commissioner of Lands to alienate the property herein.

The defendant produced government building registers for the two houses namely, Eldoret /HG/12 and Eldoret /HG/16 as exhibits in court of which the original document was done in 1949. DW1 stated that the house was originally known as Eldoret/House/European/26 but after independence the classification was changed officially to Eldoret/ House /HG/16. He stated that the suit plot has houses belonging to the government. DW1 further explained to the court the procedure of acquisition of government property known as board of survey who meet to remove government property from the register. He stated that they have to sit, deliberate on the issue and if it is agreeable, then it recommends the building to be struck off the register. It was his evidence that when a building is struck off the register, then it ceases to be government property.

DW1 confirmed that there was no such board of survey that deliberated on this issue. He further stated that HG/12 is occupied by a Deputy County Commissioner Soy Sub County and HG/16 is occupied by Deputy County Commissioner Ainabkoi Sub County. He further produced documents for allocation of the houses to civil servants from 2004 and that the houses have been in the possession of the government since 1949.

DW1 also stated that the titles to the suit land were irregularly acquired by the plaintiff and therefore the same should be cancelled and revoked as they were acquired fraudulently.

On cross examination by the plaintiff's Counsel, DW 1 confirmed that the alterations in the register were done after independence in 1963 and that the houses were constructed in 1949. He also stated that the parcels were allocated by the Commissioner of Lands but did not know when the same was done. He also stated that he does not know how many times the parcels have changed hands and that they placed a caveat to safeguard government property.

The defendant also confirmed that the Commissioner of Lands did not have powers to alienate government land with government houses. The defense therefore closed their case.

### **PLAINTIFF'S SUBMISSIONS**

Counsel for the plaintiff submitted that the documents produced as evidence of the purchase and transfer were not challenged by the defendants and that there were no documents produced to counter them or show that the suit land belonged to the government.

Counsel for the plaintiff listed the following issues for determination:

- a) Whether the plaintiff is the proprietor of parcel of land known as ELDORET MUNICIPALITY BLOCK 4/100.
- b) Whether the title was obtained fraudulently by the plaintiff.
- c) Whether the 1<sup>st</sup> 2<sup>nd</sup> 3<sup>rd</sup> 4<sup>th</sup> and 5<sup>th</sup> defendants their servants, agents and / or employees should be evicted from their aforesaid parcel of land known as ELDORET MUNICIPALITY BLOCK 4/100.
- d) Whether the plaintiff is entitled to a permanent injunction sought for in the plaint.
- e) Whether the plaintiff is entitled to damages for trespass to land asserted for in the plaint.
- f) Whether the counterclaim is sustainable.
- g) Whether or not the plaintiff is entitled to costs of the suit and counterclaim.

It was Counsel's submission that the plaintiff holds a good title to the land because the leasehold title is traceable.

Counsel relied on the case of Machakos HCCC no. 180 of 2011 – **David Peterson Kiengo & 2 others vs Kariuki Thuo** to buttress the point of indefeasibility of title. There is no evidence of irregular registration of the property by the plaintiff. On the traceability of title as proof of ownership the plaintiff relied on the case of Court of Appeal Civil Appeal No. 239 of 2009 – **Munyu Maina & Others v Hiram Gathitha Maina**.

Mr. Omwenga submitted that the defendants did not give any evidence on how irregular or fraudulent the plaintiff's title was. The defendants were unable to prove that the suit property as acquired by Toloch Enterprises was irregular and illegal. They did not enjoin them either despite claiming that they were responsible for alienating government Land.

Counsel submitted that the actions of the defendants amount to trespass and should be paid damages for trespass and relied on the case of **Nakuru Industrial Ltd vs Mehta & Sons (2016) eKLR** where it sought Kshs. 1,000,000/- in general damages for trespass.

He therefore urged the court to allow the plaintiff's claim as prayed in the plaint and dismiss the defendants' counterclaim with costs to the plaintiff.

### **Defendants' Submissions**

Counsel for the defendants submitted that the issues for determination in this case are as to whether the plaintiff is lawfully registered as proprietor of this land and in the alternative whether the plaintiff is a bona fide purchaser for value without notice, who is the lawful proprietor of the premises, whether the government, the defendant is in lawful occupation of the suit premises, and whether the defendants are entitled to the prayers in the counterclaim.

On the first issue Counsel submitted that the registration of Toloch Enterprise Ltd as a proprietor of the suit land was unprocedural, irregular and therefore an illegal certificate of lease. That there was no good title to be passed to the plaintiff therefore the plaintiff's title is also illegal.

Miss Lungu learned State Counsel further submitted that the suit property being public property, could only be allocated to a private company in two instances. First under the now repeated Government Lands Act, section 3 (a) allowed the President subject to any other written law to make a grant or disposition of estates, interests or right in or on unalienated government land. It was further her submission that there is no evidence that the President authorized the Commissioner of Lands to alienate the suit property. Relying on sections 3,7,9 and 12 Counsel submitted that the Commissioner of Lands had no power to alienate the suit property and issue the certificate of lease. He could only prepare a conveyance as an agent of the President with authorization.

It was Counsel's submission that section 3 of the Government Lands Act could not apply in this case because the suit property had government houses. She relied on the case of **Beatrice Mbuli Vs Rispa N. oduwo & 3 other (2017) eKLR**. Further that government land with houses could only be allocated to a private company upon application by the allottees after which a board of surveyors is constituted to facilitate the condemnation of the public premises on the suit property to facilitate its allocation. She submitted that the plaintiff did not produce any evidence to show that the prescribed procedure for boarding of government premises as prescribed in the government financial regulations and procedures and the Ministry of Works and housing circular no. 2/58 of 1958 was followed. She cited the case of **Chemey Investment Limited Vs Attorney General & 2 Others (2018)**

Counsel for the defendants submitted that with due diligence on the part of the plaintiff it would have been easy to discover the irregularities in the bad title passed to them but they went ahead and purchased government houses with occupants who are civil servants. Counsel relied on the case of **Flemish Investment Limited vs Town Council of Mariakani CA No. 30 of 2015** where it was held that :

*"a bona fide purchaser exercising due diligence would be expected to inspect the property he is buying was attain its physical location, persons, if any in occupation, developments, buildings and fixtures thereon."*

That government has been in occupation since 1949 to date the rights are binding on the suit property and even if the plaintiff had a claim to the property, the governments' possessory rights are overriding.

Counsel therefore submitted that the defendants are entitled to the prayers in the counterclaim having demonstrated that the title was created in breach of statute and procedure and urged the court to direct the plaintiff to surrender the original title document to the Chief Land Registrar for cancellation.

### **Analysis and determination**

The issues for determination in this case are as to who the rightful owner of the suit land is, whether the plaintiff acquired the suit land regularly, whether the plaintiff is a bona fide purchaser for value and whether the defendants counterclaim has merit.

On the first issue on who is the rightful owner of the suit premises the plaintiff produced documents to show ownership and certificate of title to the suit land. The defendants also produced a register indicating that the houses belong to the government since 1949 and were not available for alienation.

The Government Lands Act Cap 280 Laws of Kenya (now repealed), gives the Commissioner of Lands power to allocate 'unalienated Government land.' The said Act goes on to provide the procedure for the same. Unalienated Government land is

defined in the Act as: ‘Government land which is not for the time being leased to any other person, or in respect of which the Commissioner had not issued any letter of allotment.’ There was evidence from the defendant that this land was not available for alienation and that the land has government houses which are occupied by Civil servants who include Deputy County Commissioners of Soy Sub County and Ainabkoi and other civil servants. The defendant established that the houses were built in 1949 and have been government houses since then.

In the Court of Appeal **Civil Appeal No. 288 of 2010; Kipsirgoi Investment Ltd – vs – Kenya Anti-Corruption Commission**, where the court found that there was uncontested material that as early as 1974, the suit property was planned as an ‘open space’ and held that the subsequent lease to the Appellant was on the face of section 3 of the Government Lands Act irregular. Quoting from section 3 of the Physical Planning Act CA. 286, the court concluded that reservation for a particular purpose renders that land alienated. This is similar to the present case as there are government houses on the suit land which are occupied by civil servants. This means that the land is alienated and not available for further alienation.

There are laid down procedures under the Act for alienation of government land which if followed properly then there would be no challenges as to the alienation.

Section 7 of the Government Lands Act provides that:

*“The Commissioner or an officer of the Lands Department may, subject to any general or special directions from the President, execute for an on behalf of the President any conveyance, lease or licence of or for the occupation of Government lands, and do any act or thing, exercise any power and give any order or direction and sign or give any document, which may be done, exercised, given or signed by the president under this Act:*

*Provided that nothing in this section shall be deemed to authorize the Commissioner or such officer to exercise any of the powers conferred upon the President by sections 3, 12, 20 and 128.”*

No Presidential authority to alienate the suit property was given and that the plaintiff has not tendered any such authority to show that they acquired the land procedurally therefore this point is unchallenged. The foregoing Section clearly limits the power of the Commissioner of Lands to executing leases on behalf of the President. It is the President who had sole discretion to alienate unalienated Government land under Section 3 of the Government Lands Act.

Further on the issue as to whether the plaintiff acquired the suit land irregularly, DW1 highlighted the irregularities in the allocation of land to the plaintiff which included the fact that there was no Board of survey to remove the suit premises from the government register as was required. That the Commissioner of lands did not have powers to alienate land.

In the case of **Milankumarn Shar & Two others –vs- City Council of Nairobi & Others, Nairobi HCCC No. 1024 of 2005** the Court found that the Commissioner of Lands did not have authority under Section 3 of the Government Lands Act to make any grant or disposition of any estate, interest or right in or over a portion that was a part of a public road and therefore not unalienated Government Land. The learned Judges in this case quoted with approval the case of **Paul Nderitu Ndung’u & 20 Others –V- Pashito Holdings Limited & Another (Nairobi HCCC No. 3063 of 1996)** where it was held that the Commissioner of Lands had no legal authority to allocate the two pieces of land which had been reserved for a Police Post and a Water Reservoir as they had already been alienated.

In the case of **Munyu Maina.Vs.. Hiram Gathiha Maina, Civil Appeal No.239 of 2009**, the Appeal Court held that: -

*“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.”*

Further in the case of **Elijah Makeri Nyangw’ra –vs- Stephen Mungai Njuguna & Another (2013) eKLR** where the court held that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme. Hon Justice Munyao Sila in the case while considering the application of section 26(1)

(a) and (b) of the Land Registration Act rendered himself as follows:-

*“the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme*

The plaintiff dangled the certificate of lease of the suit property as proof of ownership. It did not go further to prove the legality of the title by even calling the person who sold the land to them. Section 26 of the Land Registration Act provides that 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, it also provides that such title can be impeached on the grounds of having been acquired fraudulently, through misrepresentation or illegally or unprocedurally.

The court is also empowered under Section 80 (1) of the Land Registration Act, 2012 to order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

On the issue as to whether the plaintiff is a bona fide purchaser for value, the plaintiff had no valid title as the land belonged to the government of Kenya and as such the plaintiff held a bad title and therefore any subsequent transactions to that land were null and void. In the case of **Alice Chemutai Too –vs – Nickson Kipkurui Korir & 2 Others (2015) eKLR**, in which the trial court held

*‘that having analysed the totality of the evidence adduced, having found that the title of the 1st defendant was acquired fraudulently, the onus was on the 2<sup>nd</sup> defendant to challenge the claim of the plaintiff that the title upon which they advanced the loan is tainted with fraud. It did not discharge that duty. It then follows that there was no valid title that was charged to the 5<sup>th</sup> defendant capable of conveying a legal interest in the suit land by way of a realizable security’.*

Therefore when a title is bad, a party cannot claim indefeasibility of title as was held in the case of **Republic –vs- District Land Registrar, Mombasa & 5 Others Ex-Parte Super Nove Properties Ltd [2016] eKLR** where the court found that there can be no indefeasibility of title as against Article 40(6) of the Constitution.

On whether the defendants are entitled to the counterclaim, the evidence adduced by the defendant proves that the Commissioner of Lands did not have powers to alienate the suit land which belonged to the government whose officers have been using the houses over a long period of time.

I find that the Plaintiff has not proved its case against the defendants and that the alienation of the suit property was illegal, fraudulent, null and void and conferred no interest or estate in the plaintiff and that in any event it is in the interest of justice and public policy that the remedies sought by the plaintiff herein are declined and the orders granted in favour of the defendants as per the counterclaim. I therefore direct that the plaintiff do surrender the original title document to the Chief Land Registrar for cancellation within 30 days.

**Dated and delivered at Eldoret this 2<sup>nd</sup> day of May, 2019**

**M.A ODENY**

**JUDGE**

**JUDGMENT** read in open court in the presence of Miss.Lungu for defendants and in the absence of Mr.Omwenga for Plaintiff.

Mr. Mwelem – Court Clerk



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