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| Case Number:   | Environment and Land Case 561 of 2018<br>(Formerly High Court Civil Suit 1205 of 2005)      |
| Date Delivered:  | 17 Dec 2020   |
| Case Class:  | Civil   |
| Court:   | Environment and Land Court at Nairobi   |
| Case Action:   | Judgment  |
| Judge:   | Loice Chepkemai Komingoi  |
| Citation:  | Horticultural Crops Development Authority v Sakir Properties Limited & 2 others [2020] eKLR |
| Advocates:   | -   |
| Case Summary:  | -   |
| Court Division:  | Environment and Land  |
| History Magistrates:   | -   |
| County:  | Nairobi   |
| Docket Number:   | -   |
| History Docket Number:   | -   |
| Case Outcome:  | Permanent injunction is hereby issued restraining the 1st defendant or 3rd defendant        |
| History County:  | -   |
| Representation By Advocates:   | -   |
| Advocates For:   | -   |
| Advocates Against:   | -   |
| Sum Awarded:   | -   |
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**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. 561 OF 2018**

**(FORMERLY HIGH COURT CIVIL SUIT NO 1205 OF 2005)**

**HORTICULTURAL CROPS DEVELOPMENT AUTHORITY.....PLAINTIFF**

**- VERSUS -**

**SAKIR PROPERTIES LIMITED.....1<sup>ST</sup> DEFENDANT**

**THE HONOURABLE ATTORNEY GENERAL.....2<sup>ND</sup> DEFENDANT**

**DOUBLE ESS DEVELOPMENT COMPANY LTD.....3<sup>RD</sup> DEFENANT**

**JUDGEMENT**

1. By a plaint dated 6<sup>th</sup> October 2005, amended on 23<sup>rd</sup> May 2007 and further amended on 31<sup>st</sup> July 2007 and on 8<sup>th</sup> March 2010, the plaintiff seeks judgement against the defendants jointly and severally for:-

**a. A declaration that the grant to the 1<sup>st</sup> defendant by the 2<sup>nd</sup> defendant and subsequent transfer to the 3<sup>rd</sup> defendant was fraudulent null and void and that the plaintiff is the bonafide allottee of the parcel presently known as LR No 209/12490.**

**b. A permanent injunction restraining the 1<sup>st</sup> defendant or 3<sup>rd</sup> defendant either by itself, servant and or agent from developing, wasting, disposing of, alienating an dor in any way dealing with all that piece or parcel of land known as LR NO 209/12490.**

**c. A mandatory injunction compelling the 2<sup>nd</sup> defendant to order the Registrar of Titles, Nairobi to cancel the grant to the 1<sup>st</sup> defendant and transfer to the 3<sup>rd</sup> defendant and the parcel revert back to the plaintiff.**

**d. In the alternative to (a) and (b) above, an award of damages for the loss of the value and use of the parcel of land presently known as LR No 209/12490.**

**e. Costs.**

**f. Any other relief that this honourable court may deem fit and just to grant.**

2. By a chamber summons dated 14<sup>th</sup> November 2005, the plaintiff sought and was granted leave to serve the 1<sup>st</sup> defendant by way of advertisement in one of the local dailies. The same was granted by an order issued on 7<sup>th</sup> December 2005.

3. The 1<sup>st</sup> defendant then entered appearance through the firm of Wamwayi & Co. Advocates and filed a statement of defence.

4. The 2<sup>nd</sup> defendant entered appearance and filed statement of defence dated 13<sup>th</sup> July 2007. In paragraph 8 of the said statement of defence it is stated:-

**“Further in the alternative and without prejudice the foregoing the 2<sup>nd</sup> defendant avers that if there was a Grant to the 1<sup>st</sup> defendant, which is denied then the same was fraudulently acquired by the 1<sup>st</sup> defendant and hence null and void ab inito.”**

**Particulars of Fraud**

- a. **The 1<sup>st</sup> defendant knew the land was not available for alienation.**
- b. **The 1<sup>st</sup> defendant did not carry out a survey of the suit land.**
- c. **The 1<sup>st</sup> defendant knowingly presented a deed plan that was meant for the Grant to the plaintiff.**

The 2<sup>nd</sup> defendant also filed an Amended Statement of Defence dated 29<sup>th</sup> November 2007.

5. The 3<sup>rd</sup> defendant, Double Ess Development Limited entered appearance through the firm of P. M. Kamaaru & Associates on the 18<sup>th</sup> March 2010. It also filed a statement of defence dated 6<sup>th</sup> April 2010.

6. The matter was set for hearing on 10<sup>th</sup> February 2020. There was no appearance for the 1<sup>st</sup> and 2<sup>nd</sup> defendants. The court was satisfied that they had been served and directed that the matter proceeds ex parte.

7. The plaintiff called one witness. PW1 Isaac Cherwon Meto told the court he is the head of audit at the Agricultural Food Authority. That the plaintiff is one of the directorates within Agricultural Food Authority. He adopted his witness statement dated 24<sup>th</sup> February 2012. He told the court he worked with the plaintiff as an internal auditor for sixteen (16) years. He also relied on the plaintiff's list of documents dated 14<sup>th</sup> June 2007. He produced the documents in the list of documents as exhibits P1 to P12 respectively. He further stated that the suit land is now valued at Kshs.400,000,000/-.

8. PW1 relied on the letter of allotment dated 29<sup>th</sup> January 1987 addressed to Horticultural Crops Development Authority (the plaintiff herein). It refers to an unsurveyed industrial plot NO “C” opposite Firestone Nairobi. This was produced as exhibit P1. There is a sketch attached showing the said Plot “C”. by a letter dated 25<sup>th</sup> February 1987, the Managing Director of the plaintiff wrote to the Commissioner of Lands the plaintiff accepting the offer and enclosed a cheque of Kshs.152,608/30 being rent for 1<sup>st</sup> February 1981 to 31<sup>st</sup> December 1987. The receipt is attached. Thereafter a title was issued to the plaintiff with effect from 1<sup>st</sup> February 1987. There is also a letter from the 1<sup>st</sup> defendant claiming the suit property as theirs. They claimed to have purchased from the allottees in January 1999. The suit property is given as LR No. 209/12490. There is a valuation report dated 30<sup>th</sup> April 2004, showing that the suit property was then valued at Kshs.80,000,000/-.

9. The plaintiff's evidence has not been controverted. I find that the 1<sup>st</sup> defendant's defence amounts to a mere denial. It claims to be a purchaser for value having bought from the allottees in January 1999. The letter to the plaintiff dated 15<sup>th</sup> June 2005 is signed by Jacob Juma Managing Director Sakir Properties Limited. The 1<sup>st</sup> defendant did not file any list of documents.

10. The 2<sup>nd</sup> defendant's case is that no grant was issued to the 1<sup>st</sup> defendant and that if there was, then the same was fraudulently acquired. The same is therefore null and void *ab initio*. This confirms the plaintiff's case that the 1<sup>st</sup> defendant acquired the suit property fraudulently. PW1 prays that the suit property reverts back to the plaintiff. He further stated that a public body must seek consent from the parent ministry and the Treasury before disposing of land. No such consent was sought and/or obtained. There was also no board resolution to surrender interest in the suit property.

11. I agree with the plaintiff's submissions that the plaintiff has shown the procedure it followed in acquiring the suit property. That it is not enough for the 1<sup>st</sup> defendant to flash a title deed. It should go further to demonstrate how the land was acquired.

12. The 1<sup>st</sup> defendant's title cannot be protected by Article 40 of the Constitution. **Article 40(6)** provides that:

**“The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”**

In the case of **Chengo Katana Koi vs Protus Evans Masinde [2013] eKLR**. It was held that:-

**“..... a title deed is an end product and where there are competing interests over the same land, it is not enough for one to just state that he holds a title deed which is absolute and indefeasible. One has to show the processes that were followed on the acquisition of the title deed so as to entitle him/her to the land to the exclusion of the other claimants”**

13. From, exhibit P7 which is the unregistered Grant, the same has a deed plan No. 193909. This is the same Deed Plan that was used to prepare a fraudulent grant to the 1<sup>st</sup> defendant. No other documents were presented by the 1<sup>st</sup> defendant to show that they had a different Deed Plan. The suit property was therefore not available for allocation to the 1<sup>st</sup> defendant.

14. I note that the plaintiff has an alternative prayer for compensation, PW1 stated that the land is now worth over Kshs.400,000,000. It would be untenable to order the 2<sup>nd</sup> defendant to compensate the plaintiff. It would be a waste of public resources. Allowing the 1<sup>st</sup> defendant to keep the suit property at the expense of the public is an abuse of the spirit of the Constitution of Kenya. In the case of **Agnes Wanjiku Kamweti vs Thamia Investment & 2 Others [2009] KLR** it was held that:-

**“indeed the 1<sup>st</sup> defendant can compensate the plaintiff by way of damages. However, in a situation where the mode of acquisition of the said property is suspicious and cannot be defended, allowing payment of damages will be tantamount to condoning illegality, a task a court of law cannot be party to”.**

I am guided by the above authority.

15. All in all, I find that the plaintiff has proved its case on a balance of probabilities as against the defendants.

16. Accordingly judgment is entered for the plaintiff as follows:-

**a. That a declaration is hereby issued that the grant to the 1<sup>st</sup> defendant by the 2<sup>nd</sup> defendant and a subsequent transfer to the 3<sup>rd</sup> defendant was fraudulent, null and void and that the plaintiff is the bonafide allottee of the parcel of land Known as LR NO. 209/12490.**

**b. That a permanent injunction is hereby issued restraining the 1<sup>st</sup> defendant or 3<sup>rd</sup> defendant either by itself, servants and/or agents from developing, wasting, disposing of, alienating and or in any way dealing with all that parcel of land known as LR No. 209/12490**

**c. That a mandatory injunction is hereby issued compelling the 2<sup>nd</sup> defendant to order the chief Land Registrar Nairobi to cancel the Grant to the 1<sup>st</sup> defendant and transfer to the 3<sup>rd</sup> defendant and the parcel revert back to the plaintiff.**

**d. That the plaintiff shall have costs of the suit.**

It is so ordered.

**Dated, signed and delivered in Nairobi on this 17<sup>th</sup> day of December 2020.**

.....

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

No appearance for the plaintiff

No appearance for the 1<sup>st</sup> defendant

No appearance for the 2<sup>nd</sup> defendant

No appearance for the 3<sup>rd</sup> defendant

Kajuju – Court Assistant



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