Case Number:	Civil Appeal 555 of 2019
Date Delivered:	09 Jul 2021
Case Class:	Civil
Court:	Court of Appeal at Nairobi
Case Action:	Judgment
Judge:	Wanjiru Karanja, Fatuma sichale, Agnes Kalekye Murgor
Citation:	Robert Mutiso Lelli v Kenya Medical Training College & 2 others [2021] eKLR
Advocates:	Mr. Kitonga for the Appellant Mr. Tiego for the 1st Respondent Mr. Eredi for the 3rd Respondent
Case Summary:	-
Court Division:	Environment and Land
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	ELC Case No. 354 Of 2009)
Case Outcome:	Appeal dismissed
History County:	Nairobi
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, MURGOR & SICHALE, JJ.A)

CIVIL APPEAL NO. 555 OF 2019

BETWEEN

ROBERT MUTISO LELLI.....APPELLANT

AND

KENYA MEDICAL TRAINING COLLEGE.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

THE COMMISSIONER OF LANDS.....3RD RESPONDENT

(An appeal from the judgment of the Environment and Land Court at Nairobi (K. Bor, J.) dated 24th May 2019

in

ELC Case No. 354 Of 2009)

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JUDGMENT OF THE COURT

Robert Mutiso Lelli, the appellant, instituted a suit against ***the 1st respondent, the Kenya Medical Training College*** claiming that he was the registered owner of all that land known as LR No. 209/14272, which was one of three plots allotted to him, the others being, LR No. 209/14270 and LR No. 209/14271 (*the subject plots*) situated off Matumbato Road, Nairobi. He claimed that the 1st respondent and its employees had occupied and built a perimeter wall around it and also erected a board warning trespassers of possible prosecution; that the 1st respondent's acts amounted to trespass, illegal occupation and unauthorized entry into private property which had caused him great stress, anxiety loss and damages.

It was the appellant's case that as the registered owner of the subject plots he was charged in *Criminal Case No 7060 of 2002* and convicted of abetting a nuisance in the subject plots and ordered to demolish the structures existing after they were condemned; that the demolition orders were violently resisted by the 1st respondent, but todate they have never been executed. The appellant sought further orders of eviction in *Misc. Application No. 439 of 2008* which orders were also disregarded. He further prayed that the structures be demolished under the supervision of the Police Commissioner and for subject plots to be declared as lawfully belonging to him.

The 1st respondent denied the appellant's claims and in a counterclaim wherein it joined ***the Attorney General*** and ***the Commissioner of Lands,*** as interested parties, who are ***the 2nd respondent,*** and ***3rd respondents*** in this appeal, it asserted that the registration of the appellant as owner of the subject plots by the Commissioner of Lands was irregular as they were illegally carved out from the 1st respondent's unsurveyed Plot Nos. 61 to 64 measuring 12.3 hectares.

It was contended that unsurveyed Plot Nos. 61 to 64 measuring 12.3 hectares of land located in the Kenyatta National Hospital area were allocated to the 1st respondent by a letter of allotment dated 18th December 1996 following recommendations of the Standing Committee on the Kenyatta Hospital Complex with special reference to research, teaching and healthcare; that the 1st respondent had been in occupation of the land since 1960, during which time it had erected structures on it where its members of staff resided; that pursuant to the issuance of the letter of allotment it paid the Stand Premiums and awaited issuance of the Grant. To their surprise in reliance on a letter dated 22nd October 2001, the appellant sought to lay claim to the subject plots. However, later inquiries into the allocations revealed that 10 plots including the subject plots were carved out of Plot Nos. 61 to 64, whereupon, the Ministry of Lands was directed to repossess the titles issued for the 10 plots. As a result, 7 out of 10 plots were successfully recovered, but the subject plots issued to the appellant and LR No. 209/14277 issued to Cabin Crew investments Limited had yet to be surrendered.

The 1st respondent concluded by stating that unless restrained, the appellant would continue to terrorize its members of staff with a view to dispossessing it of the subject plots.

As such it prayed for the suit to be dismissed and judgment in its counterclaim to be entered for it for:

a. a permanent injunction restraining the appellant and his agents from entering into, disconnecting, alienating or interfering with the 1st respondent and its employees peaceful occupation of the suit land;

b. a declaration that the subject plots comprised of the land reserved for and belonging to the 1st respondent;

c. a declaration that the titles of the subject plots were irregularly and illegally issued to the appellant;

d. an order compelling the appellant to surrender to the 1st respondent the Grants and or titles issued to him for suit land;

e. An order directed at the Commissioner of Lands to cancel the titles issued to the appellant for the subject plots and to issue letters of allotment in respect thereof to the 1st respondent.

f. Costs and interests thereon; and

g. Any other or further order deemed necessary and just to grant in the circumstances.

On 24th November 2009, the appellant's suit was dismissed for want prosecution thus paving way for the 1st respondent to prosecute its counterclaim. In its judgment the trial court found in favour of the 1st respondent having concluded that the appellant's title was illegally acquired since the Commissioner of Lands had no power to allocate the already alienated subject plots to the appellant or to issue him with titles. The court found as a consequence that the appellant did not acquire good title to the subject plots.

The appellant was dissatisfied with the judgment of the trial court dated 24th May 2019 and appealed to this Court on 18 grounds

which in summary are that the learned judge wrongly found that the appellant's titles were illegally and unlawfully acquired; that the appellant was allocated land which was public land not available for allocation; in contravening the mandatory provisions of the Civil Procedure Act by allowing the 2nd and 3rd respondents to participate in the suit when they had not filed defences; in finding that the 1st respondent was issued with a title for the alleged surrendered plots similar to those of the appellant when there was no such proof or evidence; in holding that the appellant had surrendered one of his titles; in finding that the 3rd respondent did not have the power and or capacity to allocate the subject plots to the appellant; in finding that the 1st respondent had proved its case on a balance of probabilities when the evidence did not meet the required legal threshold; in finding that the appellant's remedy was available elsewhere and in holding the appellant responsible for costs of the suit whilst at the same time finding that the 3rd respondent was at fault in allocating the appellant the subject plots.

In the submissions that were highlighted before us on a virtual platform owing to the Covid-19 pandemic, ***Mr. Kitonga***, learned counsel for the appellant, submitted that the appellant purchased Plot No. 9707 Malindi as a innocent purchaser for value without any notice of defect on the PDP survey or the title; that he was later discovered that the property he purchased was located in the Indian Ocean. On being sued the Commissioner of Lands, 3rd respondent admitted liability and offered the subject plots to the appellant in exchange. It was further submitted that that the trial judge failed to appreciate that the respondents' evidence to the effect that the 1st respondent was allocated the subject plots at any time or at all was contradicted, and in addition, the finding that the subject plots were carved out of unsurveyed plots Nos. 61 and 64 was not supported by the evidence, particularly as it was previously occupied by Kenya Police dog section.

It was further argued that contrary to the requirements of the Registered Land Act and the Registration of Titles Act (both repealed), the 1st respondent did not plead fraud or misrepresentation on the appellant's part, and fraud or misrepresentation was not established by the trial court; that therefore there was no basis for cancellation of the appellant's titles; that furthermore, parties are not obligated to go behind the titles register to investigate any title. Counsel cited the case of ***Gibbs vs Messer [1891] AC 247*** for the contention that the title of a bonafide purchaser for value from a registered proprietor acquires an indefeasible right.

It was argued that the appellant had been allocated three titles for the subject plots, and despite clear and uncontroverted evidence that the appellant did not surrender its titles, the court wrongly found that the appellant had surrendered the title over LR No. 209/14271 which was not the case; that as a consequence, the appellant remained the registered owner and it was his legitimate expectation to own the land.

In response, learned counsel ***Mr. Tiego*** for the 1st respondent submitted that it was not disputed that the 1st respondent is a creature of statute having been established under the Kenya Medical Training College Act, Cap 261 Laws of Kenya. It was further submitted that the 1st respondent was allocated Plot Nos. 61 to 64, by a letter dated 18th December 1996 comprising PDP No. 42/21/95/04A; that the appellant was subsequently issued with PDP No. 42/15/94/13 dated 9th November 1999; that DW1, IPW 2 and IPW 3 confirmed that the official records held by the Survey and Physical Planning departments as well as the Registrar of Lands confirmed that the subject plots were within the 1st respondent's Plots Nos. 61 and 64; that the appellant was aware that the 1st respondent's staff members were residing on the subject plots evinced by the various attempts he had made to have them evicted.

Mr. Eredi learned counsel for the 3rd respondent sought to address three issues i) whether the appellant's titles over the subject plots were legally acquired; ii) whether the 1st respondent had powers to allocate the subject plots to the appellant and iii) whether the titles of the subject plots should be cancelled and the plots returned the 1st respondent.

Addressing the first question it was submitted that vide the PDP dated 1st August 1995 reference 42/21/95/04A Plot Nos. 61 to 64 were reserved for the 1st respondent and as a consequence it became public land that was not available for allocation or alienation to any other person or entity; that following a survey undertaken by the Commissioner of Lands it was discovered that the subject plots were carved out of Plot Nos. 61 to 64 and allocated to the appellant and other persons and entities; that as a result of the illegal allocation, the Commissioner of Lands was instructed to seek surrender of the allocations.

With regard to the second issue, it was submitted that the Commissioner of Lands had no power to allocate Government land which was already reserved for public purpose, and therefore the subject plots designated for public use were not available for alienation to the appellant.

As to whether the subject plots should be returned to the 1st respondent, relying on the case of ***Republic vs Ministry for Transport & 15 others Ex parte Waa Ship Garbage Collector & 15 others*** ***1 KLR (E & L) 563; Mureithi & 2 others (for Mbari ya Marathim clan vs Attorney General & 5 others*** ***(2006) 1 KLR 43***3 and ***Kenya Guards Allied Workers Union vs Security Guards Services & 38 others, Misc 1159 of 2003,*** where it was submitted that where public land has been illegally allocated against public interest courts should endeavor to ensure that such property reverts back to the public.

In reply Mr. Kitonga submitted that since the land was already allocated to the appellant, the Commissioner did not have power to reallocate to the 1st respondent the subject plots that was already alienated; that in any event nothing demonstrated that the 1st respondent was in occupation of the subject plots.

We have considered the record, the grounds of appeal and the rival written parties' submissions. This being a first appeal, its duty as set out in ***Selle vs Associated Motor Boat Company Ltd*** ***[1968] E.A. 123*** is to consider the evidence, evaluate it and draw its own conclusions. In so doing, we must however bear in mind that we neither heard nor saw the witnesses and should therefore make due allowance for that. Whilst adhering to these principles, it is evident that the issues for consideration are;

i. whether the subject property was legally and procedurally acquired by the appellant

ii. whether the titles to the subject properties should be surrendered or cancelled;

iii. whether the 2nd and 3rd respondents were properly joined as parties to the proceedings;

iv. whether the learned judge rightly awarded costs to the 1st respondent.

At the core of this appeal is the question of whether the appellant acquired the subject plots regularly and lawfully. To address this issue, we begin by considering the evidence that was before the trial court.

The 1st respondent called one witness namely, ***David Omino Ondeng DW1*** who stated that the 1st respondent commenced its operations sometime in 1991; that by a letter dated 18th December 1996 it was allocated Plot Nos. 61 and 64 which measured 12.3 hectares in an area located within the Kenyatta National Hospital Complex. Subsequent thereto, the allocated land was subdivided, and 10 plots were allocated to various individuals and entities including the appellant. After the 1st respondent objected, 7 plots including Plot no. 14721 allocated to the appellant were surrendered back to the Commissioner of Lands, but the appellant refused to surrender the subject plots. He further stated that though the 1st respondent was in occupation as its staff members resided in existing structures, the appellant had demolished their houses in an attempt to take over possession, but was unable do so.

The 3rd respondent called 3 witnesses. ***Timothy Waiya Mwangi*** was ***IPW 1,*** the Deputy Director of Physical Planning. He stated that the 1st respondent had been in occupation of Plot Nos. 61 and 64 since the 1960's. He further stated that the appellant's PDP No. 42/15/94/13 was with reference to land located in the Pangani area, and did not relate to the 1st respondent's land specified in PDP No. 42/21/95/04A. Further, that the records at Physical Planning did not show that approvals were given for subdivision of the Kenyatta National Hospital Complex into 10 portions. He confirmed that PDP No 42/21/95/04A denoting Plots No. 61 and 64 was not therefore available for alienation as it was reserved for the 1st respondent.

Gordon Odeka Ochieng IPW 2, was a Senior Assistant Director in the Ministry of Lands. He contended that the area was initially occupied by the Kenya Police who were relocated to another site, whereupon, the entire area was re-planned vide Plot Development Plan No. 42/21/95/04A dated 1st August 1995. He went on to state that;

"…according to the plot development plan 42/21/95/04A LR No. 207/14272 falls in an area marked as zone Nos. 6_1 and 6_4 which zone was reserved for the Kenya Medical Training Institute"

Priscilla Njeri Wango, IPW 3 a Land Surveyor in the Ministry of Lands and Planning also confirmed that PDP No. 42/21/95/04A indicated that Plots No. 61 and 64 were reserved for the 1st respondent, and that as a consequence the land was not available for alienation to the appellant.

Only the appellant testified as he did not call any other witnesses. He relied on his witness statement, and contended when cross examined that following allocation, he was issued with titles in respect of the subject plots. He relied on the PDP dated 9th November 1999, and asserted that when he visited the subject plots he found existing structures that he described as being dilapidated.

In interrogating who between the 1st respondent was entitled to ownership of the subject plots, it is apparent from the evidence of DW 1, IPW 1, 2 and 3's that, the 1st respondent, a public institution established under the Kenya Medical Training Colleges Act Cap. 261, Laws of Kenya whose functions included the provision of education for national health manpower requirements was by a letter of allocation dated 18th December 1996, allocated Plots No. 61 to 64 for the advancement of its mandate. The land allocated was delineated on PDP No. 42/21/95/04A.

The evidence clearly showed that it formed part of the Kenyatta Hospital Complex whose occupation dated back to the 1960s. Plots No. 61 and 64 were subsequently allocated to the 1st respondent for public use to enable it carry out its mandate, with the result it was reserved for the 1st respondent for public purposes and they thereafter were no longer available for alienation.

This position prevailed until 2001 when the appellant claimed that the Commissioner of Lands had allocated the same land, delineated under PDP No. 42/15/94/13 dated 9th November 1999 to him. He asserted that the allocation was made in exchange for Plot No. 9707 that he had purchased and which he later discovered was situated in the Indian Ocean. He was never in occupation and admitted having tried severally to evict the 1st respondent's staff that resided there so as to take over possession of the subject plots. Needless to say, unlike the 1st respondent, he thereafter acquired titles and it is on this basis that he is claimed ownership.

Our analysis of the evidence up to this point satisfies us, as it did the learned judge, that the 1st respondent was indeed allocated Plot

Nos. 61 to 64 comprising the subject plots for public purpose. This is because though the appellant produced various letters and documents to show that he was lawfully allocated the subject plots, and that they were not part of the land allocated to the 1st respondent, it came out clearly that the 1st respondent was first in time allottee of Plots No. 61 to 64 that also comprised the subject plots. It is the same subject plots occupied by the 1st respondent and claimed by the appellant, that were on several occasions reduced to a vicious battleground whenever the appellant sought to evict the 1st respondent's members of staff so as to take over possession.

This being the case it begs the question whether the Commissioner of Lands was right in subsequently allocating the subject plots to the appellant. The applicable provisions of law are to be found under the Government Lands Act (repealed). *Section 3* vests absolute power to allocate land that has not been alienated in the President. The provision makes it clear that it is the President and not the Commissioner of Lands that has the power to allocate unalienated land. But in this case, the subject plots having already been allocated to the 1st respondent, could the Commissioner of Lands reallocate the same land to the appellant"

The record does not disclose that the 1st respondent's allocation was at any time superseded by a revised PDP. And neither was evidence produced to show that the PDP in respect of that allocation was cancelled so as to pave way for re planning and subdivision of the area into new plots from which the appellant's PDP was derived. Instead, the evidence points to allocation of the subject plots that came much later. Timothy Mwangi's exidence is supportive of this where, he, recalled that, the records at Physical Planning did not disclose that the subdivision of the Kenyatta National Hospital Complex into 10 plots was approved. Also uncontroverted, was his evidence that the appellant's PDP was with reference to land situated in Pangani, and so did not relate to the subject plots lends further support to a deficient allocation process. It would mean that the appellant's titles, if indeed extracted from the appellant's PDP, would have related to land in Pangani, and not the subject plots.

Of more significance however is that, Plots No. 61 to 64 were reserved for public purpose for the 1st respondent way back in 1996. As such *section 9* of the same Act becomes relevant. It specifies that the Commissioner of Lands may cause any portion of a township which is not required for public purpose to be divided into plots and disposed of in the prescribed manner.

The allocation to the 1st respondent concerned land already reserved for public purpose. Once again, there is no evidence demonstrating that the subject plots reverted to unallocated land status thereby rendering them available for conversion to private usage. In our view, Plots No. 61 to 64 having been allocated and reserved for public purpose meant that they were placed beyond the Commissioner's reach for reallocation to other individuals or private entities. In effect, he was estopped from overstepping his powers to convert land reserved for public purpose into private usage. Hence, we find that the allocation of the subject plots by the Commissioner of Lands to the appellant and subsequent issuance of titles to him was in contravention of the law which rendered the appellant's acquisition of the subject plots to be unlawful.

This finding brings us to the next issue of whether the appellant's titles are liable for cancellation. The appellant argues that since the 1st respondent did not plead that there was fraud or misrepresentation on the appellant's part and the trial court did not establish fraud or misrepresentation in the allocation and registration process as stipulated by *section 23 (1)* of the *Registration of Titles Act (now repealed)*, the order of cancellation of the appellant's titles was unwarranted. The appellant further submits that ***Article 40*** of the ***Constitution***, guaranteed the right of every person to acquire and own property.

We have found that the allocation and issuance of titles to the subject plots to the appellant was irregular and unlawful. And though

Article 40 guarantees the right of every person to acquire property, ***Article 40 (6)*** qualifies this right to exclude *"…any property that has been found to be unlawfully acquired."* Indeed, it was the learned judge's conclusion that ***Article 40 (6)*** was applicable to the circumstances of this case.

In the case of ***Chemey Investment Limited vs Attorney General & 2 Others [2018] eKLR*** this Court rendered itself on this subject thus;

*"**Decisions abound where courts in this land have consistently declined to recognise and protect title to land, which has been obtained illegally or fraudulently, merely because a person is entered in the register as proprietor.** See for example Niaz Mohamed Jan Mohamed v. Commissioner for Lands & 4 Others [1996] eKLR; Funzi Island Development Ltd & 2 Others v. County Council of Kwale (supra); Republic v. Minister for Transport & Communications & 5 Others ex parte Waa Ship Garbage Collectors & 15 Others KLR (E&L) 1, 563; John Peter Mureithi & 2 Others v. Attorney General & 4 Others [2006] eKLR; Kenya National Highway Authority v. Shalien Masood Mughal & 5 Others (2017) eKLR; Arthi Highway Developers Limited v. West End Butchery Limited & 6 Others [2015] eKLR: Munyu Maina v Hiram Gathiha Maina [2013] eKLR and Milan Kumar Shah & Others v. City Council of Nairobi & Others, HCCC No. 1024 of 2005.**The effect of all those decisions is that sanctity of title was never intended or understood to be a vehicle for fraud and illegalities or an avenue for unjust enrichment at public expense."***

The 1st respondent having been allocated the subject plots was entitled to issuance of titles. Instead, the Commissioner undertook to irregularly allocate and issue titles in respect of the same land to the appellant. Though the appellant argues that it was though no fault of his own that he was issued with titles, and therefore they are not liable to be cancelled, *"…Article 40 (6) of the Constitution of Kenya which provides that the right to acquire and own property enshrined thereunder does "not extend to any property that has been found to have been unlawfully acquired." See **Peter Njoroge Ng'ang'a vs Statutory Manager for United Assurance Company Limited & Another [2020] eKLR.***

So that even though the appellant had acquired titles to the subject plots, their having been acquired unlawfully would render them liable for cancellation or surrender in view of the defective process through which they were acquired, and we so find.

The next issue that is peripheral, is whether the trial court should have allowed the 2nd and 3rd respondents, to call or adduce evidence their having failed to file any pleadings. From the record it is clear that on 3rd May 2018 the court issued the following order;

"Interested parties given leave to file and serve its written statements and documents within 10 days of today. Mention on 22nd May 2018…"

There was no objection raised by the appellant. Then on 30th May 2018, Mr. Kamau for 2nd and 3rd respondents indicated that he would file the written statements and documents within 3 days, whereupon hearing was fixed for 17th October 2018. On the material day the hearing proceeded within no objection from the appellant's counsel. Having conceded to filing of 2nd and 3rd respondents witness statement and related documents in compliance with the orders of the court, we find it too late in the day for the appellant to now raise such complaint before this Court.

Finally, on the question of costs, it is trite that costs follow the event. See ***section 27*** of the ***Civil Procedure Act***. In view of the 1st respondent having succeeded against the appellant in the trial court, it would follow that the 1st respondent was entitled to an award of costs.

In sum, the appeal is without merit and is dismissed with costs to the respondents.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF JULY, 2021.

W. KARANJA

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

Signed

DEPUTY REGISTRAR