



IN THE COURT OF APPEAL

AT NYERI

(SITTING AT MERU)

(CORAM: VISRAM, KOOME, & OTIENO - ODEK, J.J.A.)

CIVIL APPEAL NO. 8 OF 2014

BETWEEN

HENRY MUTHEE KATHURIMAAPPELLANT

AND

COMMISSIONER OF LANDS1ST RESPONDENT

THE DIRECTOR NATIONAL YOUTH SERVICE2ND RESPONDENT

(An appeal from the Ruling and Decree of the High Court of Kenya at Meru (Lesiit, J.) dated 30th May, 2013

in

H.C. Petition No. 3 of 2010

JUDGMENT OF THE COURT

1. The property in dispute in this appeal is **Land Parcel No. Meru Municipality/Block 1/167**. The appellant's claim to the suit property is premised on the following facts: the suit property was allocated to the appellant vide a letter of allotment dated 19th February, 1998; a Certificate of Lease signed on 8th December, 1998, by the 1st respondent granted the appellant a lease to the suit property for 99 years with effect from 1st March, 1998. By a letter dated 18th September, 2009, the 1st respondent asked the appellant to surrender the title document of the suit property to facilitate transfer of the property to the 2nd respondent.
2. Upon receipt of the letter dated 18th September, 2009, the appellant filed a Petition before the High Court at Meru seeking *inter alia* the following declaratory orders:
 - a. ***that the act of the 1st respondent of asking the appellant to surrender his title documents be declared unconstitutional, null and void;***

- b. *that an order of declaration to issue stating that the appellant is constitutionally entitled to the suit property and to occupy and develop the same without any interference from the respondents or anybody else;*
 - c. *An order directing the 2nd respondent to remove their camp now erected on the suit property and in default, the Officer Commanding Police Station in Meru to assist in effecting the Court order to ensure that the 2nd respondent's camp is removed from the suit property;*
 - d. *that the 1st respondent be ordered not to cancel or whatsoever interfere with the appellant's title documents and or records of the suit property.*
3. The respondents opposed the appellant's petition. The 2nd respondent's claim to the suit property is based on the following facts as deposed to in the Replying Affidavit of Albert Gilbert Arap Too, described as a Commandant at the National Youth Service. That the suit property has at all material times been a public utility land and it is unclear under what circumstances the public utility land came to be alienated and transferred from public land to private property and a Certificate of Lease issued in the appellant's name. In the replying affidavit, it is deposed that since 30th October, 1989 to date, the 2nd respondent has been in physical, quiet and uninterrupted enjoyment and possession of the suit property after the said land was reserved for use by the National Youth Service (NYS) vide PDP No. 167/89/8 prepared on 30th October, 1989, and endorsed by the Director of Survey on 20th July, 2000, and approved by the Minister of Lands and Settlement on 31st July, 2000. The 2nd respondent annexed the said documents to the replying affidavit. It is the respondent's case that the 2nd respondent has been in physical occupation and possession of the suit property and initially used the same as a parking garage for the Nyayo Bus Unit, the 2nd respondent also used the suit property as staff quarters and NYS barracks among other uses; that the 2nd respondent under the directive of the Permanent Secretary to the Office of the President was allocated the land and a National Youth Service Camp was erected on the suit property. That the 2nd respondent upon allocation of the land paid the requisite allotment fee. It is the 2nd respondent's case that the 1st respondent as Commissioner of Lands had no authority to alienate the suit property to the appellant and the said 1st respondent acted in bad faith when he signed a Certificate of Lease and granted a public utility land to the appellant. That the 1st respondent had full knowledge that the suit property was public land in possession and occupation of the 2nd respondent. It was further submitted that the suit property is one of the public lands mentioned in the Ndung'u Land Commission Report as having been grabbed.
 4. The trial Judge having considered the Petition, the Supporting and Replying Affidavits and oral submissions by counsel declined to issue the orders sought in the Petition. In dismissing the Petition, the learned Judge in an extensive judgment dated 30th May, 2013, at paragraphs 15 and 20 expressed as follows:

“The Petitioner claims that the 1st respondent issued him with a letter of allotment dated 19th February, 1998. That he was issued a 99 year lease effective 1st March, 1998, and a Certificate of Lease on 11th January, 1998. That on 18th September, 2009, the 1st respondent wrote to him asking him to surrender the title documents of the subject plot to facilitate the 1st respondent to do documentation of the title for the 2nd respondent. The respondents' position is that the suit land was a public utility parcel of land and could, therefore, not have been fully alienated from public land to private land as the Petitioner did not attach the Gazette Notice which advertised the operation and neither has he shown compliance with the Government Disposal Act for disposal of Government properties. (See Republic – v- Kisumu District Lands Officer & Another, Misc. Application No. 80 of 2010 eKLR). The question that arises is whether the Commissioner of Lands has the power to alienate the suit land to the Petitioner? Section 3 of the Government Lands Act, Cap 280 vests the power to alienate un-alienated land in the President. Section 3 of the Government Lands Act provides that:

3. The President in addition to but without limiting any other right, power or authority vested in him under this Act may:

(a) subject to any other written law, make grants or dispositions of any estate, interests or rights in over an un-alienated Government Land.

(b).....

(c)

Section 7 of the same Act stipulates what the powers of the Commissioner of Lands and officers in that office are. It reads:

The Commissioner may or an officer at the Lands Department subject to special directions from the President, execute for and on behalf of the President any conveyance, lease, or license 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 Section 3, 12, 20 and 128.

The Petitioner has not placed before the court any evidence to show that the suit property was alienated from public utility to private property by the President of the Republic of Kenya. It is only where the President alienated the land that the Commissioner would have the power to issue a lease over the suit property and would do so on behalf of the President. Without any evidence of alienation of the suit land by the President, the only conclusion that court can make is that the Petitioner obtained the suit property through the intervention of the Commissioner of Lands... The Commissioner of Lands had no power to alienate the suit property and issue title to the Petitioner. The Commissioner of Lands cannot have purported to pass any valid title under the Governments Land Act or Registered Land Act and in so doing he was acting contrary to the express constitutional provisions and in particular Section 75 of the repealed Constitution.

It has been shown that the Commissioner of Lands note to the Petitioner to surrender the title to the suit property to the 2nd respondent was the basis of the Petitioner filing this suit. The way to look at it is that the Commissioner of Lands has since gone back on his word and has realized his mistake. He has realized that his action to alienate public utility land as he did depriving a Government institution which was in occupation of the land was illegal....It has been shown that the suit land was public utility land on which the 2nd respondent has been in occupation. The Petitioner has not been in occupation at any time. I find and hold that he stands to suffer no prejudice if he does not get the land as claimed herein....The conclusion is that the issuance of the title to the Petitioner on the basis of the evidence presented before the court was irregular and a nullity....His title is a nullity and the suit land never passed to him. It still belongs to the Government for public use. It would be absurd to ask the owner of the property to compensate a person who irregularly obtained title. The Petitioner cannot succeed in his claim under Section 75 (1) of the Constitution (repealed) because the suit land being public utility land cannot be compulsorily taken possession of. The Petitioner is a trespasser and what the owner is doing is to repossess his property. In conclusion, I find and hold that the suit land is public land held by the government on behalf of the public. The Commissioner of Lands could not purport to pass any title to the Petitioner under the Registered Land Act. The Petitioner is not entitled to any of the declaratory prayers sought. The Petition is accordingly dismissed with costs”.

5. Aggrieved by the decision of the learned Judge dismissing the Petition, the appellant has lodged the instant appeal. The appellant in his memorandum of appeal raises several grounds as

follows:

- a. *the learned Judge erred in law and fact in dismissing the appellant's case despite him tendering all materials to support the same;*
- b. *the trial court erred in law and fact in not finding that the appellant having acquired the subject parcel of land lawfully and even expended in its requisition, he could not have been deprived the same without his property rights being violated;*
- c. *the trial court erred in law and fact in not finding the 1st respondent could not deprive the appellant the subject herein without following due process of the law;*
- d. *the trial court failed to find that the appellant was and is validly registered owner of the subject herein and thus his ownership remains un-impeached;*
- e. *the trial court failed to find that the 2nd respondents documentation and possession were preceded by the appellant's allocation of the subject matter and thus the 2nd respondent could not get valid ownership of the parcel subject herein;*
- f. *the trial Judge decision is unfair and unconstitutional in all the circumstances of the case.*

6. At the hearing of this appeal, learned counsel **Ms L. G. Kiome**, appeared for the appellant while the respondents were represented by learned counsel **Mr. J. M. Kiongo**.

7. Counsel for the appellant filed written submissions and in oral highlight elaborated the grounds of appeal emphasizing that the High Court erred in law by failing to protect the Certificate of Lease granted to the appellant; that the appellant applied for land and was allotted a plot in Meru Municipality; that the Commissioner for Lands issued a Certificate of Lease and the plot was surveyed and a beacon certificate issued; that the 2nd respondent entered the land illegally and the allotment of the land to the 2nd respondent was illegal as this amounted to a double allocation of land; that the appellant's allotment being first in time and a first registration should prevail.

8. In the written submissions, counsel for the appellant submitted that where there is a conflict between public and private rights, the interests ought to be balanced one against the other and in the instant case; the appellant is a private citizen while the respondents are governmental bodies. Citing *Halsbury's Laws of England 4th Edition Vol. 11* at **page 805** paragraph **1508**, the appellant urged this Court to weigh one thing against another to see whether or not the remedy sought is the most efficacious in the circumstances; counsel submitted that the Certificate of Lease issued to the appellant is a document under the **Registration of Titles Act** and **Section 23** of the **Act** requires the court to consider the title issued under the **Act** as conclusive. Citing the case of **Punda Milia Cooperative Society –v- Savings & Loan (K) Limited, Nairobi JCCC No. 273 of 2008** wherein Kimaru, J., expressed that **Section 23** of the **Registration of Titles Act** requires the court to consider a certificate of title issued under the **Act** as conclusive evidence that the person named therein is the absolute and indefeasible owner thereof subject to any encumbrances, easements and restrictions contained therein. The appellant further relied on **Article 40 (3)** of the **Constitution** which provides that the State shall not deprive a person property of any description. It was submitted that the appellant's certificate of title for the suit property is protected under **Article 40** of the **Constitution**; that the 1st respondent's action in requiring the appellant to surrender his documents of title is a violation of the **Bill of Rights** in **Article 24 (1)** of the **Constitution**. It was emphasized that **Section 26** of the **Land Registration Act** stipulates that a certificate of title issued under the **Act** is *prima facie* evidence of absolute and indefeasible ownership. It was submitted that there was no evidence on record to show that the appellant acquired his title illegally, un-procedurally or through a corrupt scheme. The appellant submitted that in the instant case, what we have is a double allocation of the suit property. The case of

M'Ikiara M'Rinkanya & Another –v- Gilbert Kabeere M'Mbijiwe, (1982-1988) 1KAR 196, was cited to support the principle that where there is a double allocation of land, the first allotment prevails and there is no power to allot the same property again. (See also *Kariuki –v- Kariuki (1982-88) KAR 26/79 and Otieno and Matsanga, (2003) KLR 210*). The appellant raised the issue of estoppel and urged this Court to find that the 1st respondent was estopped from denying that the appellant had a good certificate of title. **Section 120** of the *Evidence Act* was cited in support of the doctrine of estoppel. It was the appellant's further submission that the 1st respondent violated the doctrine of legitimate expectation; that the appellant having acquired a good title to the land, he had a legitimate expectation that he would enjoy exclusive proprietary rights over the suit property. (See *Joel Nyabuto Omwenga & 2 Others – v- IEBC & Another (2013) eKLR*).

9. Counsel for the respondents in opposing the appeal submitted that the 2nd respondent has been in occupation of the suit property since 1989; that the Commissioner of Lands had no power to alienate public land to private land; that the provisions of **Sections 3, 7, 9 and 12** of the *Government Land Act* clearly delimit the powers of the Commissioner; that it is only the President who had power to alienate government land and the Commissioner could only prepare and sign a conveyance as an agent of the President; that in the instant case, the President did not alienate the suit property and there was no authorization by the President to the Commissioner to prepare a conveyance or sign the Certificate of Lease; that the Commissioner of Lands purported to alienate the suit property without authority and the Commissioner as an agent for the President could not exceed the powers and authority given to him by Statute. That **Article 40 (6)** of the *Constitution* does not protect the appellant's title; the Article expressly provides that the right to property does not extend to any property that has been found to have been unlawfully acquired. In reply, counsel for the appellant urged this Court to be guided by the provisions of **Section 26** of the *Land Registration Act*.

10. We have considered the rival submissions by counsel and examined the record of appeal. As this is a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions in the matter. (See *Selle -vs- Associated Motor Boat Co. [1968] EA 123*; *Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E. A. C. A. 270*; *Jabane –vs- Olenja, [1986] KLR 661, 664*; *Ephantus Mwangi -vs- Duncan Mwangi Wambugu (1982-88) 1 KAR 278 and Mwanasokoni -vs- Kenya Bus Services (1982-88) 1 KAR 870*).

11. In the case of *Galaxy Paints Co. Ltd. –vs - Falcon Guards Ltd.- EALR (2000)2 EA 385*; it was stated that the issues for determination in a suit generally flow from the pleadings and a court can only pronounce judgment on the issues arising from the pleadings or such issues as the parties have framed for the court's determination. In the instant case, issues relating to estoppel and legitimate expectation as urged by the appellant were neither raised in the pleadings nor canvassed before the trial court. However, since the appellant has argued the issues before us, with the foregoing caveat we shall consider them. The suit property in contention in this appeal raises the issue of allocation of land as a resource. In the case of *R – v- Lancashire County Council Ex p Gayer, (1980) 1 WLR 1024*, it was stated that courts should be acutely conscious that they do not usurp the role of the administrator by assuming the task of deciding how resources are to be allocated as between competing claims.

12. The *ratio decidendi* of the judgment dismissing the appellant's Petition is that the suit property was a public utility land and the procedure for alienating public land was not followed; the trial court held that it was only the President who could alienate public land and in the instant case, the Commissioner of Land had no authority to alienate the suit property and issue a Certificate of Lease to the appellant. The gravamen and foundation of the appellant's appeal is that he has a Certificate of Lease which this Court should consider as an absolute and indefeasible title to the suit property. It follows that the pivotal argument in the appellant's case is the concept of indefeasibility of title.

13. The appellant urged this Court to find that the provisions of **Section 26** of the *Land*

Registration Act make the Certificate of Lease issued to him as conclusive evidence of proprietorship. **Section 26** of the **Land Registration Act** stipulates that the Certificate of Title issued by the Registrar upon registration shall be taken by all courts as *prima facie* evidence that the person named is proprietor of the land and is the absolute and indefeasible owner. On our part, we find no good reason to fault the trial court's finding that the appellant unlawfully acquired title to the suit property. The appellant's certificate of lease is under challenge; the procedure that the appellant followed that led him to be registered as proprietor of the suit property, which is a public utility land, is a fact within the peculiar and special knowledge of the appellant. The respondent's case is that the procedure for alienating the suit property as a public land was not followed; under the provisions of **Section 112** of the **Evidence Act**, it is incumbent upon the appellant to demonstrate the procedure he followed to get public land registered in his name. Our re-evaluation of the evidence on record shows that the appellant attempted to do this through an illegally obtained internal communication letter dated 21st March, 1997, which the trial court held could not be relied upon to support ownership of the suit land. It is clear to us that the appellant appreciated he had the legal and evidential burden to prove how a public utility land came to be registered in his name. He failed to discharge this evidential burden. The evidential burden that is required of the appellant; he had to demonstrate that the provisions of the **Government Land Act** were followed in alienating the suit property and the subsequent registration in his name. We have considered the provisions of **Section 26** of the **Land Registration Act** in light of the provisions of **Article 40 (6)** of the **Constitution** and it is our considered view that the concept of indefeasibility of title is subject to **Article 40 (6)** of the **Constitution**. Guided by the provisions of **Article 40 (6)** of the **Constitution**, we hold that the concept of indefeasibility or conclusive nature of title is inapplicable to the extent that title to the property was unlawfully acquired. Further, it is our view that the Government's title to an un-alienated public land stems from the concept of radical title or eminent domain. Based on radical title, the government has superior title to all un-alienated public land and the appellant cannot challenge radical or eminent title.

14. In this appeal, the appellant submitted that he has a legitimate expectation that his title to the suit property is absolute and indefeasible. An illuminating consideration of the concept of "legitimate expectation" is found in the South African case, **South African Veterinary Council - v- Szymanski, 2003(4) S.A. 42 (SCA)** at [paragraph 28] the Court held as follows:

"The law does not protect every expectation but only those which are 'legitimate'".

15. In the instant appeal, one of the issues for our consideration is whether the appellant can legally be said to have legitimate expectation to have quiet possession of the suit property. As we have stated above, we concur with the trial court's finding that the appellant un-procedurally and thus unlawfully acquired title to the suit property. A relevant excerpt from **Republic -v- Nairobi City County & Another ex parte Wainaina Kigathi Mungai, High Court Judicial Review Misc. case No. 356 of 2013; [2014] eKLR thus reads [paragraph 33]:**

"...the legal position is that legitimate expectation cannot override the law.

16. **Article 40 (6)** of the **Constitution** clearly stipulates that the right to property does not extend to property that has been found to have been unlawfully acquired. The appellant relied on the doctrine of estoppel urging that the Commissioner of Lands is estopped from denying that he has a good title. It is our view that estoppel cannot be used as shield to protect unlawfully acquired property; estoppel cannot be used to circumvent Constitutional provisions and estoppel cannot override express statutory procedures; there can be no estoppel against a statute. (See **Tarmal Industries Ltd. - v- Commissioner of Customs & Excise, (1968) E.A. 471**; see also **Maritime Electric Co. Ltd. v General Dairies Ltd. (1937) 1 All ER 748**). The trial court made a finding of fact that the suit property was unlawfully acquired. Guided by the provisions of **Article 40 (6)** of the **Constitution**, it is our finding that the doctrine of legitimate expectation cannot be used to protect property that has been unlawfully acquired. We find that the appellant cannot rely on this doctrine to circumvent the provisions of **Article 40 (6)** of the **Constitution**. Further, the doctrine of legitimate expectation cannot oust clear statutory provisions of the **Government Lands Act** on how

to alienate public land. It is our view that **Sections 3, 7, 9 and 12** of the **Government Lands Act** cannot be ousted by estoppel and the doctrine of legitimate expectation. Due process must be followed to alienate public land before legitimate expectation can arise. There cannot be a legitimate expectation without adherence to statutory or constitutional provisions. It has been held in several persuasive authorities, ***R. v. Devon County Council, ex parte Baker & Another, [1995] 1 All. E.R. 73***; ***R. v. Durham County Council, ex parte Curtis & Another, [1992] 158 LG Rev R 241 (CA)*** and ***R. v. DPP ex p. Kebilene [1993] 3 WLR 972***, that no legitimate expectation can override clear statutory provisions.

17. A further argument by the appellant is that the Commissioner for Land issued him the Certificate of Lease which is indefeasible. On the part of the respondents, it was submitted that the Commissioner of Land had no authority to alienate the suit property and issue the Certificate of Lease. We have examined the evidence on record; there is nothing on record to show that the President had authorized the Commissioner of Lands to alienate the suit property. We have examined the provisions of **Sections, 3, 7, 9 and 12** of the **Government Land Act** and we are satisfied that the Commissioner of Lands had no power or authority to alienate the suit property and issue the Certificate of Lease. In ***Republic vs. Kenya Revenue Authority, ex parte Aberdare Freight Services Limited, [2004] 2 eKLR 530*** it was held:

“...a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others.... Purported authorization, waiver, acquiescence and delay do not preclude a public body from reasserting its legal rights or powers against another party if it has no power to sanction the conduct in question or to endow that party with the legal right or inventory that he claims...”

18. We have considered the submissions by the appellant in this appeal and have no hesitation to state that we concur with the findings and decision of the trial court. The Commissioner of Lands had no power to alienate public land and any action taken without due authorization is a nullity. We cite the case of ***Said Bin Seif v. Shariff Mohammed Shatry, (1940)19 (1) KLR 9***, and reiterate that an action taken by the Commissioner of Lands without legal authority is a nullity; such an action, however, technically correct, is a mere nullity, and not only voidable but void with no effect, either as legitimate expectation, estoppel or otherwise.

19. We note that it is not in dispute that the 2nd respondent has always been in actual and physical occupation of the suit property from 1989 to-date. The appellant must have known of this fact when he applied for the suit property to be allotted to him. In his application for allotment of a commercial plot made by letter dated 21st March, 1997, the appellant identified the suit property and marked it red in the attachment. The inference to be drawn is that the appellant identified and knew the specific plot he desired and knew that the 2nd respondent was in physical possession; it was the appellant's clear intention not only to dispose of the 2nd respondent of the suit property but to acquire a public utility land that was in possession of a public entity. The *bona fides* of the appellant in applying for the specific suit property knowing that it was in possession and occupation of a public entity is put in issue. In ***Mwangi & Another -v- Mwangi, (1986) KLR 328***, it was held that the rights of a person in possession or occupation of land are equitable rights which are binding on the land. It is our view that the 2nd respondent having been in possession of the suit property since 1989 to date, its rights are binding on the suit property and even if the appellant had any claim to the suit property, the 2nd respondent's possessory rights are overriding.

20. For the various reasons stated, the totality of our evaluation of the evidence and the law relevant in this matter is that the learned Judge did not err in dismissing the appellant's Petition. This appeal has no merit and is hereby dismissed. The judgment of the trial court dated 30th May, 2013, is hereby confirmed and upheld. The costs of this appeal shall be paid by the appellant.

Dated and delivered at Meru this 12th day of March, 2015.

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

MARTHA KOOME

.....

JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

*I certify that this is a
true copy of the original.*

DEPUTY REGISTRAR