



**Cabin Crew Investments Limited v Kenya Medical Training College & 4 others
(Civil Appeal 441 of 2019) [2021] KECA 49 (KLR) (23 September 2021) (Judgment)**

Neutral citation: [2021] KECA 49 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 441 OF 2019
W KARANJA, AK MURGOR & F SICHALE, JJA
SEPTEMBER 23, 2021**

BETWEEN

CABIN CREW INVESTMENTS LIMITED APPELLANT

AND

KENYA MEDICAL TRAINING COLLEGE 1ST RESPONDENT

PRINCIPAL SECRETARY MINISTRY OF LANDS 2ND RESPONDENT

REGISTRAR OF TITLE 3RD RESPONDENT

NATIONAL LAND COMMISSION 4TH RESPONDENT

ATTORNEY GENERAL 5TH RESPONDENT

*(An Appeal against the Judgment of the Environment and Land Court at
Nairobi (K. Bor, J.) delivered on 24th May, 2019 in ELC Case No. 1162 of 2013)*

JUDGMENT

- 1 This is an appeal against the judgment and decree of the Environmental and Land Court at Nairobi (ELC), dated and delivered on 24th May, 2019 (K. Bor J.) where the learned Judge found in favour of the 1st respondent herein, Kenya Medical Training College (KMTC), and issued two declaratory orders. First, that the property known as LR No. 209/14277 (the suit property) is part of land known as parcel 61 to 64 measuring 12.3 hectares of land on Kenyatta Hospital Land Area (the unsurveyed parcel of land), and secondly, that the title Grant No IR 85965 dated 1st September, 2000 (the grant) in respect of the suit property was irregularly and/or illegally issued to the appellant herein, Cabin Crew Investments Limited (Cabin Crew). In addition, the court issued an order compelling the appellant to surrender the grant to court for cancellation and for the 4th respondent herein, Registrar of Titles, and the 3rd respondent herein, National Land Commission (NLC), to issue a fresh letter of allotment and title in respect thereof to the 1st respondent.



2 KMTTC is a statutory institution established under the *Kenya Medical Training College Act*, Cap 261 Laws of Kenya, charged with, inter alia, the responsibility:-

- (a) to provide consultancy services in health related areas;
- (b) to develop health trainers who can effectively teach, conduct operational research, develop relevant and usable health learning materials and manage health training institutions;
- (c) to undertake research in disciplines and matters approved by the Academic Board either directly or through the medium of connected universities, or other colleges, schools or institutions;
- (d) to conduct examinations for and to grant diplomas, certificates, and other awards of the College;
- (e) to determine who may teach and what may be taught and how it may be taught in the College; and
- (h) to examine and make proposals for the establishment of campuses and faculties

The evidence before the trial court was that by a letter dated 19th December, 1996 the Commissioner of Lands allotted to KMTTC land comprising of the unsurveyed parcel of land, including the suit property, pursuant to the Government Lands Act (now repealed) for public purposes of advancement of its mandate as outline above. The offer was acknowledged vide a letter of acceptance dated 29th January, 1997 which was followed up with payment of the requisite fees vide Cheque No.9656612 on 6th February, 1997. The 1st respondent then left the matter to the relevant authorities to process the Grant. It is worth of note that some KMTTC's staff members physically occupied the suit property.

- 3 It was averred that sometime in 2001 one Robert Mutiso Lelli issued notices to it to vacate some portions of the unsurveyed parcel of land on the grounds that he had procured titles for the same from the NLC. This triggered investigations which revealed that the Registrar of Titles had caused the unsurveyed parcel of land to be sub-divided into 10 plots, being L.R No. 209/14269 to L.R No. 209/14278, with a view of alienating them to private developers, including Cabin Crew, which was allotted the suit property and Robert Mutiso Lelli who was allotted L.R No. 209/14269, 209 14270 and 209/14272.
- 4 It was KMTTC's case that in a bid to resolve the dispute over the ownership of the unsurveyed parcel of land, including the suit property, it notified the Ministry of Health, the Ministry of Lands, the Commission of Inquiry into the illegal allocation of public land (Ndung'u Land Commission) and the Public Investment Committee of Parliament of the illegal and/or fraudulent allocations. Further, that the Commission of Inquiry recommended that the plots resulting from the sub-division be surrendered, titles be revoked, and ownership of the land revert to KMTTC while the Public Investment Committee confirmed that the 10 plots had been reserved for Kenyatta National Hospital even though title had not been issued to it.
- 5 It was KMTTC'S case that following recommendations by the Ndung'u Land Commission and deliberations by the Public Investment Committee of Parliament it was resolved that the Ministry of Lands be directed to repossess and cancel the allotments of the 10 plots and that one title with respect of the whole of the unsurveyed parcel of land be issued to KMTTC. It was urged, that the Commissioner of Lands conceded that title over the suit property was issued in error and instructed the Attorney General to have the title to the suit property cancelled.



- 6 Vide a statement of defense dated 25th November, 2013, Cabin Crew opposed KMTC's claim. It averred that it was allocated a plot within the unsurveyed parcel of land as an alternative to L.R NO. 209/13314 which was allocated to it earlier but which later turned out to be a double allocation. The said re-allocation followed a consent in Judicial Review proceedings vide Nairobi High Court Misc. Civil Application No. 324 of 2000, as a condition for the appellant withdrawing the suit. It was pursuant to the said consent that the appellant was given an allotment letter dated 22nd August, 2000 for the suit property. It is worth noting however that KMTC was not a party to the Judicial Review proceedings or the consent that appears to have divested it of its property.
- 7 It was averred that despite KMTC being issued with the letter of allotment dated 19th December, 1996 with respect to the unsurveyed parcel of land, it had not established compliance with the terms and conditions set out therein. Further, that it failed to follow up on the processing of its title over the same. The appellant urged that the letter of allotment issued to KMTC was merely an invitation to treat or at best a conditional offer hence it did not confer any rights on it with regard to either the unsurveyed parcel of land or the suit property.
- 8 It was Cabin Crew's case that the suit property had never been the subject of any inquiry by the Ndung'u Commission, that it was never served with summons to appear before either the Ndung'u Committee or the Public Investment Committee in violation of his right to a fair hearing. Further, that neither the Ndung'u Commission nor the Public Investment Committee had the jurisdiction to direct rectification of the land register or cancellation of titles.
- 9 The appellant strongly asserted that KMTC's claim was statute barred having been filed on 27th September, 2013 yet the cause of action arose in 2001 when KMTC as per its pleadings, became aware of the issues therein.
- Further, that Cabin Crew was an innocent purchaser for value without notice hence once the consent was reached between the parties in the Judicial Review case and an allotment done, survey conducted, and title issued, the property ceased to be 'unalienated government land' and was no longer available for re-allotment to KMTC.
- 10 It was submitted that in light of Article 40 of the *Constitution* and the doctrine of sanctity of title, the legal rights arising from Cabin Crew's ownership supersedes any equitable or wishful desire of claim by KMTC. Cabin Crew argued that having followed the required formalities for the acquisition and registration of the land, it had a legitimate expectation to the allocation and ownership of the suit property. That it was improper for the respondents to seek to benefit from their own wrongdoing. It was submitted that in line with the doctrine of estoppel, the Commissioner of Lands was bound by his decisions and could not go back on them and lay claim on the suit land on behalf of the 1st respondent, having voluntarily allocated the same to the appellant.
- 11 The Principal Secretary Ministry of Lands and Urban Development, (the 2nd respondent) conceded that indeed Cabin Crew had been allotted the suit land as an alternative to an earlier allocation of plot, L.R No. 209/13314, which was registered in favour of Maywood Limited, and that a title in respect of the suit property was ultimately registered on 23rd April, 2001 in Cabin Crew's favour. Further, that at that time there was no indication that the suit property had existing developments occupied by KMTC's employees. However, that in compliance with the directive from Public Investments Committee, the Commissioner of Lands issued letters of allotment to KMTC which offer was accepted, necessary payments made, and amalgamation of the parcels ensued resulting in one title being issued in favour of KMTC, namely, L.R. No.209/18535.



- 12 The Attorney General on behalf of the 2nd, 3rd and 5th respondents submitted that the assertion by the appellant that the suit property was allotted as an alternative to L.R No. 209/13314 was not true since there was no surrender produced as is required by law. Further, that Cabin Crew's assertion that L.R No. 209/13314 which it sought to purchase from Maywood Limited was a subject of double registration was false as the register at the requisite Land registry revealed that the property was registered solely in the name of Maywood Limited, hence it was available for transfer to Cabin Crew.
- 13 It was averred that according to the Part Development Plan (PDP), and the fact that the unsurveyed parcel of land including the suit property was indeed un-surveyed, the whole was reserved for KMTC. It was submitted in conclusion, that the appellant's root of title over the suit property was marred with illegalities, undue influence and procedural flaws and it could not therefore confer good title to the appellant.
- 14 The learned Judge in her decision deciphered that the dispute in the matter largely revolved around the propriety of the allocation of the suit property to Cabin Crew by the Commissioner of Lands, who could only have allotted the land in strict adherence to section 3 of the Government Lands Act (now repealed) which empowered the President to make grants over unalienated government land.
- 15 Ultimately, she held that land held or occupied by a government agency, like KMTC did not constitute unalienated government land even where no title had been issued; that under the *Government Land Act* (now repealed) the Commissioner of Lands had no power to allocate unalienated government land as such power was reserved for the President. Therefore, that the Commissioner of Lands had no power to allot the suit property to the appellant and issue a grant to it; that the right to protection of property did not extend to illegally acquired property; and that the contention was not tenable since Section 41 of the Limitation Act stated that the Act did not operate in such a way as to enable a person to acquire any title to Government land or land otherwise enjoyed by the Government.
- 16 Aggrieved by the above findings, the appellant proffered the instant appeal by filing a Memorandum of appeal dated 9th September, 2018. The appeal is premised on twenty two (22) grounds the main grounds being that the learned Judge erred: by failing to find that the 1st respondent's claim was time barred; by misapprehending the evidence before her hence reaching an erroneous finding that the allocation of the suit property to the appellant was marred with irregularities; by failing to find that the issue of ownership of the suit property was res judicata having been dispensed with in the Judicial Review proceedings in Nairobi High Court Misc. Civil Application No. 324 of 2000; and by misapprehending the evidence before her and the provisions of section 2 of the Government Lands Act hence reaching an erroneous finding that the suit property was unalienated government land.
- 17 The appeal was canvassed through written submissions which were highlighted at the virtual plenary hearing by learned Counsel Mr. Nyaoga (SC), lead counsel for the appellant and Mr. Tiego and Mr. Eredi for the respondents respectively.
- 18 In support of the appeal, Mr. Nyaoga (SC) submitted that that the trial court lacked jurisdiction to entertain the 1st respondent's claim as the same was statute barred, by virtue of section 7 of the *Limitation of Actions Act*, having been filed on 27th September, 2013 yet the cause of action arose in 2001 when KMTC became aware of the issues therein. (See: *Divecon v. Samani* (1995-1998) 1EA 48). In the same breath, he argued that the learned Judge misdirected herself by holding that the suit property was not unalienated government land hence that the 1st respondent's claim was not time barred by virtue of section 41 of the same Act which excluded unalienated government from the ambits of section 7.



- 19 He maintained that following the consent we alluded to earlier, between the appellant and the 5th respondent on behalf of the 2nd and 3rd respondents and an allotment letter dated 22nd August, 2000 issued in the appellant's favour, the suit property ceased to be unalienated government land within the meaning of section 2 of the Government Lands Act. Therefore, that it was not available for re-allotment to the 1st respondent by the Commissioner of Lands. Placing reliance on the case of *Serah Njeri Mwobi v. John Kimani Njoroge* (2013) eKLR counsel argued that the Commissioner of Lands, and the 4th and 5th respondents were thus estopped from cancelling the appellant's title over the suit property and reverting the same to the 1st respondent.
- 20 He maintained that the learned Judge erroneously disregarded the principle of sanctity of title hence furthering a fraudulent deprivation of the suit property from the appellant in violation of his constitutional right to property. (See: *R. G. Patel v. Lalji* (1957) EA 314). Citing among other cases the case of *Kenya Ihenya Company Limited & Another v. Njeri Kiriba* (2019) eKLR, it was argued that having been issued with a title preceding the 1st respondent's title, and according to the doctrine of sanctity of the title holder it held an absolute and indefeasible title, and the same could only be challenged on grounds of fraud or misrepresentation. Counsel argued that the 1st respondent's right over the suit property extinguished within 30 days, from the date of issuance of the allotment letter in its favour, when it failed to fulfil the requisite conditions.
- 21 Counsel submitted that the learned Judge misapprehended the evidence before her hence reaching an erroneous finding that the 1st respondent had been in possession of the suit property since 1960 yet it as not in existence then.
- 22 He contended that the learned Judge erred by admitting evidence adduced by the 2nd, 3rd and 5th respondents without leave of court and by allowing the 5th respondent to testify before Court despite not having filed a statement of defence was in violation of the appellant's right to a fair trial.
- 23 He urged the Court to allow the appeal.
- 24 Urging the Court to dismiss the appeal, Mr. Tiego learned counsel for the 1st respondent submitted that the learned Judge correctly addressed the issue of limitation reaching a proper finding in law that its claim was not time barred. He maintained that section 7 of the Government Lands Act is not coached on mandatory terms posing evidence of exceptions to its application as was articulated by the learned Judge that the 1st respondent's suit was subject to the statutory limitation under section 41 of the said Act as the suit property is government land.
- 25 Counsel argued that the allegations of fraud weighed heavily on the appellant as the process through which it acquired the suit property was marred with illegalities as the appellant failed to prove the alleged double allocation which necessitated compensation by the Commissioner of Lands.
- Further, that the conduct of the Commissioner of Lands in allotting the suit property to the appellant on the alleged ground of compensation was questionable. Citing *Henry Muthee Kathurima v. Commissioner of Lands & Another* (2015) eKLR he submitted that it was incumbent on the appellant to prove validity of his title which he failed to. He maintained that the right to property did not extend to illegally acquired property.
- 26 Counsel submitted that it was not in dispute that the 1st respondent was in occupation of the suit property at the material time. In addition, that based on the evidence on record it was evident that the suit property formed part of the unsurveyed parcel of land and that it was undisputed that the 1st respondent's employees had been in occupation of the same since 1960.



- Consequentially, that the amalgamation of the 10 plots and issuance of the sole title in respect of the same to the 1st respondent was proper. He argued that it was clear that the suit property was not unalienated government land therefore, the Commissioner of Lands had no authority to allot it to the appellant on an alleged remedy of compensation.
- 27 Counsel submitted that the appellant's argument that the 1st respondent's claim was res judicata was unattainable as it was clear that it was not party to the Judicial Review proceedings instituted by the appellant. (See: *Pop-In (Kenya) Limited & 3 Others v. Habib Bank AG Zurich* (1990) eKLR).
- 28 He contended that the on the issue of inadmissible evidence, the same was never raised by the appellant during trial. Therefore, that for this Court to entertain the said arguments subject to an appeal would be prejudicial to the 1st, 2nd 3rd, 4th and 5th respondents having not had an opportunity to respond to the same before the trial Court.
- 29 He urged that the appeal be disallowed.
- 30 Also urging for dismissal of the appeal was Mr. Eredi counsel for the 2nd, 3rd, 4th and 5th respondents who echoed the 1st respondent's arguments. In sum, he submitted that the 1st respondent's suit was not time barred; that the allotment of the suit property to the appellant was illegal therefore its argument that the title it held with respect to the suit property superseded that issued to the 1st respondent was unfounded; and that the suit property was undeniably unalienated government land.
- 31 This being a first appeal, this Court is tasked with the duty to re-analyze and re-evaluate the evidence before it and draw its own conclusions, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses firsthand. (See: *Selle & Another v. Associated Motor Boat Co. Ltd. & Others* (1968) EA 123). Having considered the record in its entirety, the evidence on record and rival submissions by counsel, we have compacted the issues falling for the determination as:-
- a) Whether the suit property was unalienated government land and therefore whether the 1st respondent's claim over the suit property was subject to section 7 of the Limitation of Actions Act and therefore time barred.
 - b) Whether the allocation of the suit property to the appellant by the commissioner of Lands was illegal and/or unlawful hence invalidating its title in respect of the same.
- 32 Before we get into the merit interrogation we need to address the jurisdictional issue as to whether the 1st respondent's claim was time barred by statute. The appellant's position is that the learned Judge erred in finding that the 1st respondent's claim was not statute-barred on the basis that the suit property was unalienated government land and therefore that a claim over the same was not subject to the statutory time limitation under section 7 of the Limitation of Actions Act by virtue of being exempted under section 41 of the same Act.
- 33 On the other hand, it was the 1st respondent's argument that the provisions of section 41 of the Limitation of Actions Act exempted the 1st respondent's claim from the statutory time period under section 7 on arguments that the suit property was not unalienated government land as the 1st respondent was a bona fide allottee of the same.
- 34 Section 7 and section 41 of the Limitation of Actions Act provide as follows:-

“7. Actions to recover land



An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

“41. Exclusion of public land

This Act does not—

(a) enable a person to acquire any title to, or any easement over—

(i) Government land or land otherwise enjoyed by the Government;”

In view of the above provisions, it is evident that for section 41 of the said Act to be applicable, the subject property must be “government land or land otherwise enjoyed by the government”. It then begs the question as to whether the suit property was government land or land otherwise enjoyed by the government. There is no doubt in our minds that from the record before us, the suit land was occupied by the 1st respondent as at the time the letter of allotment was issued to the appellant. That is borne by the fact that it is in evidence that the appellant immediately on obtaining the title documents attempted to evict the 1st respondent’s members of staff from their official staff quarters. It was, therefore, “land enjoyed by the Government”. This being so, section 41 of the Limitation of Actions Act comes into play. This inevitably means that the 1st respondent’s suit was not statute barred and the learned Judge cannot be faulted for so finding.

35 On the second issue, the elephant in the room is whether the suit property was available for alienation when the same was allocated to the appellant. As stated earlier, it is common ground that the 1st respondent was allocated the suit property and was supposed to comply with the terms stipulated in the letter of offer. The 1st respondent accepted the offer and paid the required monies albeit outside the thirty days stipulated in the letter of offer.

Having done so, responsibility to process and issue the title documents rested with the 3rd respondent. Although the acceptance and payment of the premium was done outside the stipulated time, the 3rd respondent accepted the money and issued a receipt for the same and never informed the 1st respondent that the offer had been withdrawn or had lapsed. In the circumstances, the Commissioner of Lands could not purport to deem the suit property as unalienated and purport to allocate the same to another party.

36 This in our view is not a question as to which party held a more superior title to the suit property. It is not a question as to whether the Title Deed or Grant issued to the appellant superseded the letter of allotment issued to the 1st respondent. The appellant claims title over the suit property by virtue of an allotment letter dated 22nd August, 2000 and a resultant Certificate of Title issued on 23rd April, 2001. In our view, by 22nd August, 2000 when the said letter of allotment was issued, the suit land was not available for alienation.

37 We need not belabor this issue. The crux of the matter is that the allocation of the suit property to the appellant after the Commissioner of Lands had already validated the 1st respondent’s allocation by accepting the requisite payment, and without revoking the allotment letter was invalid. Neither the letter of allotment dated 23rd April, 2001 nor the resultant Certificate of Title could confer good title of the suit property to the appellant.

38 Ultimately therefore, we are not persuaded on the merits of this appeal.

Accordingly, we dismiss it with costs to the 1st respondent. The 2nd to 5th respondents are not entitled to costs as their officers were one way or another to blame for the mess necessitating this appeal.



DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 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

