



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
Civil Case 151 of 2003

GEOFREY MAKANA ASANYO.....PLAINTIFF

-VERSUS-

KENYA AGRICULTURAL RESEARCH INSTITUTE...DEFENDANT

JUDGEMENT

By a plaint dated 6th October, 2003 and lodged in court on the even date through **Messers Kagwimi Kangethe, & Co. Advocates**, the plaintiff sought from the defendant the following reliefs:-

- (a) *A permanent injunction restraining the Defendant, its employees, servants and or agents and any other person acting or purporting to act on behalf of the Defendant from trespassing, occupying, alienating or otherwise interfering or dealing in any manner, whatsoever, with the plaintiff's properties being LR NOS. 16757 and 16758.*
- (b) *A permanent injunction restraining the Defendant, its employee, servants and or agents and any other person acting or purporting to act on behalf of the Defendant from stopping, barring, interrupting and or interfering in any manner, whatsoever, with the plaintiff's possession, ownership and or development of the properties known as LR NO.S 16757 and 16758.*
- (c) *Damages for hiring the contractor and the cost of material confiscated by the Defendant, together with interests thereon at court rates.*
- (d) *General damages for trespass.*
- (e) *Costs of the suit plus interest.*
- (f) *Any other relief as the Honourable court may deem fit and just to grant.*

According to the plaint, the suit was necessitated by the fact that the plaintiff was the registered owner of land

parcel numbers LRNO. 16757 and 16758 situate in Kisii Municipality respectively, hereinafter referred to as “***the suit premises***”. On or about 15th August, 2003, the plaintiff commenced development of the same by engaging a contractor to erect a perimeter fence. For that exercise or purpose he had purchased substantial building materials. However on or about 20th August, 2003 while the contractor was undertaking the project the defendant, its employees, servants and or agents invaded the suit premises, stopped the contractor from carrying out any further work under the pretext that the suit premises belonged to the defendant. The contractor was thereafter physically ejected therefrom and the building materials confiscated. By a letter dated 22nd August, 2003, the defendant re-asserted its claim to the suit premises and demanded that the plaintiff restores the same to it, and expressly ordered him to stop fencing or developing them any further. As far as the plaintiff was concerned the defendant’s actions aforesaid amounted to trespass to his property. He accordingly suffered loss and damage. Despite Notice to the defendant to stop the trespass by the plaintiff, the defendant had refused to honour the plaintiff’s claim .

Upon the defendant being served with the suit papers it entered appearance and filed a defence and counterclaim through **Messers Oguttu-Mboya & Co. Advocates** on 21st October, 2003. The defendant essentially denied that the plaintiff’s claim that he was the registered proprietor of the suit premises. In the alternative it pleaded that if indeed the plaintiff was such was so registered, was procured through fraud and or mistake. It proceeded to give the particulars of the alleged fraud on the part of the plaintiff. The defendant further denied that the plaintiff was in the process of developing the suit premises. In the alternative it pleaded that if indeed there was such development it was in perpetuation of the fraud aforesaid. As far as the defendant was concerned therefore the suit premises was its property and the plaintiff had no legal interest over the same and could not thus have suffered any loss, damage or at all.

In the counterclaim, the defendant averred that the suit premises were originally part of the public land that was allocated to it wherein its offices were situate. Upto and including 1992, It was was the lawful owner of all that parcel of land that hitherto included the suit premises subsequently acquired by the plaintiff through fraud. Upon discovering the fraud, it reported the same to the District Development Committee, Kisii which confirmed that the alienation of the suit premises was without its consent and therefore fraudulent and ordered that the same to revert to the defendant. By way of counterclaim, the defendant claimed against the plaintiff for an order cancelling the certificates of title issued in respect of the suit premises to the plaintiff, rectification of the Registrar and also for an order of injunction against the plaintiff.

Upon the close of the pleadings the hearing of the case commenced before me on 20th April, 2010.

The plaintiff was the only witness who testified in the case on his side. On the other side, the defendant through the Centre Director based at Kisii was also the sole witness.

The plaintiff testified that in 1992 he applied to be allocated the suit premises for industrial and commercial purposes within Kisii Municipality. The application was successful and he was issued with a letter of allotment, accompanied with Part Development Plan (PDP), in respect of the suit premises. At the time of the issuance of the letter of Allotment, he did not know the exact location of the suit premises on the ground. He went on to fully comply with the terms and conditions in the letter of allotment and thereafter the District Physical Planner, Kisii District, took him to the alienated suit premises using the Part Development Plan (PDP). It was the plaintiff's further evidence that at the time of being shown on the ground the suit premises, there was no development or other activities thereon to show that there was any other person or body with interest in the suit premises. He thereafter obtained a Certificate of Title in respect of the suit premises under the Registration of Title Act. He went on to testify that after being granted the Titles he applied for and obtained Loan facilities, using the same as securities, in favour of National Bank Limited, and Delphis Bank Limited, respectively. In the year 2003, he deposited building materials and hired a contractor to commence developments of the suit premises by putting up a perimeter wall. However, the defendant blocked him from doing so. Indeed the defendant destroyed the fence, confiscated and took away the said materials alleging that the suit premises belonged to it. It followed up that action with a letter to the plaintiff reiterating its ownership.

On cross-examination, the plaintiff reiterated that at the time of applying to be allocated the suit premises he did not know the exact location of the same on the ground. He was taken there after they had been alienated and allocated to him by the Commissioner of Lands. He did not find any evidence of occupation or possession of the same by any other person (s) as there was no fence nor coffee trees. The suit premises were open and undeveloped. He could not tell whether the defendant's offices were on the suit premises and did not know whether it owned the suit premises. He had deposited on the suit premises fences and poles in readiness for development. However, the defendant took them away. He obtained the loans aforesaid to develop the suit premises. However the defendant had stopped him from using the money for that purpose. He categorically stated that the commissioner of lands could not have issued two part development plans over the same parcel of land. He came to know of the defendant's interest in the suit premises through its letter dated 22nd August, 2003. He conceded that he had been shown minutes of the District development committee. According to those minutes, the suit premises were found to belong to the defendant. However those minutes did not affect his titles to the suit premises. He was also aware that after the titles were issued to him, defendant's land was gazetted on 2nd October, 1992 and allocated to individuals.

That marked the close of the plaintiff's case.

On the part of the Defendant, it was the Centre Director's evidence that the suit premises, fell within its land. Besides, the witness conceded that at the time of alienation and allocation of the suit premises, in favour of the plaintiff, the defendant did not have any Titles to the whole land in question because Government Institutions were never issued

with title deeds. Their land was secured by a fence. She knew as a fact that the plaintiff had been issued with a title over the suit premises. However she had stopped him from utilizing the same. It was her further testimony that the defendant discovered the alienation and allocation of the suit premises in favour of the plaintiff in the year 2003. Consequent upon that discovery she lodged a complaint with the District Commissioner, Kisii District, for investigations. The District commissioner called a District Development Committee meeting, to address the allocation of the defendant's land. Prior to that she had written and issued a letter to the plaintiff dated 22nd day of August, 2003, stopping him from developing the suit premises any further. The committee was to investigate the matter and if possible relocate the defendant to Kegati. The recommendation reached was however that, the relocation was not possible. The defendant then protested the commissioner of lands as well as the permanent secretary.

Under cross-examination, the witness admitted that it had not been issued with Title (s), in respect of the suit premises. Besides, the witness conceded that the suit premises had been allocated and Titles thereto issued in favour of the plaintiff, by the commissioner of lands. Though the defendant protested to the District Commissioner, she was nonetheless aware that the District Commissioner does not issue title deeds. He recommended that any allocation be stopped. The Gazette Notice came after his letter. The witness further admitted that as at the time of her testimony, the Titles in favour of the plaintiff, had not been cancelled and/or revoked. With that the defendant closed its case.

Thereafter respective counsel for the parties agreed to file and exchange written submissions. This was subsequently done. I have carefully read and considered them as well as cited authorities.

What then are the issues for determination in this case?

Each of the parties framed their respective issues for determination in their written submissions. However they all boil down to:-

- (i) Whether or not the plaintiff acquired a valid title to the suit premises.**
- (ii) Whether the plaintiff's acquisition of the suit premises was fraudulent and illegal.**
- (iii) Whether the plaintiff is entitled to damages for trespass, and costs of hiring the contractor as well as costs of the building materials.**
- (iv) Whether the defendant's counterclaim is maintainable.**

With regard to the 1st issue, there is evidence that the plaintiff applied to the commissioner of lands to be allocated industrial and commercial plots within Kisii Municipality. As the law currently stands and as it was at the material time, it was only the President and Commissioner of lands who could allocate or alienate Public land. There is no evidence on record that in making the application, the plaintiff impressed upon the commissioner of lands to allocate him specifically the suit premises. If anything the evidence suggests that in fact he did not know at all where the plots he

sought for would come from. He simply made an application like anybody else seeking to be allocated plots in Kisii municipality for industrial and commercial purposes without specifically stating or pinpointing the suit premises. Had the contrary been the case then perhaps the defendant's complaint would have been valid. His application was duly considered and approved by the commissioner of lands. There is no evidence that he brought pressure to bear on the commissioner of lands to specifically allocate him the suit premises. Infact the letter of Allotment from the commissioner of lands dated 9th June, 1992 is telling. It is referenced **".....UNS Light Industrial Plot Kisii Municipality....."** It does not at all make reference to the defendant's land. That letter was copied to the ministry of lands and Housing Nairobi, the town clerk Kisii, The District commissioner, Kisii, the District Land officer Kisii amongst others. These people, I want to assume, they would if they had known that the land, the subject of allotment was defendant's land have said so and or even objected. Indeed there is no way that they can feign ignorance, particularly the officers from Kisii District. If these officials had the information that the land belonged to the defendant and chose to close their eyes as the commissioner of lands went about alienating, the same the plaintiff cannot be held accountable for their inaction. In any event, the defendant has admitted that though it was their land, it was infact Government land. What she calls Government land is actually public land which the President and or Commissioner of lands had authority to alienate. I therefore do not see anything wrong when the commissioner of lands elected to alienate the suit premises to the plaintiff. The letter of allotment had the details of the suit premises. Those concerned and in the know cannot therefore plead ignorance as to where the suit premises were located. Further the said letter of allotment was issued subject to some conditions being fulfilled by the allottee. The plaintiff duly complied with the terms of the letters of allotments. One would have been entitled to query the mode of acquisition of the suit premises by the plaintiff if at all he had not complied with the terms in the letter of allotment or any or them or indeed overlooked or avoided them. However this is not the case here. Having fulfilled the conditions required of him; the plaintiff was duly issued with certificates of Title dated 28th August, 1992 respectively for the suit premises. Those Titles were prepared, executed and issued by the commissioner of lands. The issuance of those titles under the Registration of Titles Act, conferred on the plaintiff indefeasible rights on the plaintiff. The defendant's rights if any were thereby ousted and or extinguished. That is the essence of section 23(1) of the Registration of Titles Act. That section provides interlia:-

".....The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party."

As it can be seen that section is not absolute. The title can still be challenged on the grounds of fraud and

misrepresentation as long as the registered proprietor is proved to be a party

No doubt, the defendant appreciates that the plaintiff is the registered proprietor of the suit premises. However, it contends that his acquisition of the suit premises was through fraud and or misrepresentation. However even if the defendant was to prove the foregoing, its remedy does not lie in the declaration that such registration and issuance of the title in respect of the suit premises in the name of the plaintiff was fraudulent, null & void, or cancellation of the titles or rectification of the Register in respect of the suit premises as prayed for in the defence and counterclaim. Rather its remedy lies in bringing and prosecution of an action at law for the recovery of damages against the person upon whose application the suit premises was brought under the operation of the Registration of Titles Act, or the erroneous registration was made, or who acquired title to the interest through fraud, error or misdescription. That is my understanding of the provisions of section 24 of the Registration of Titles Act.

In the final analysis it is my holding that the plaintiff followed due process in acquiring the suit premises. He was issued with the certificate of registration of title which conferred on him indefeasible rights that are not liable to be defeated by the alleged overriding and or equitable interests of the defendant. Further even if the plaintiff's Title could be impugned on account of fraud or misrepresentation as claimed by the defendant in its defence and counterclaim, its remedy does not lie in the cancellation and or rectification of the register. Rather its remedy is in a suit for damages. The counterclaim by the defendant cannot remotely pass for a suit for damages indeed there is no such prayer. Thus my answer to the first issue framed is that the plaintiff acquired a valid Title to the suit premises.

The same reasoning actually applies to issue number two as framed. There is undisputed evidence that the suit premises were the subject of the part development plans prepared and authenticated by the authorized officers. There is also evidence undisputed as well that the plaintiff never personally identified the suit premises to the commissioner for lands before they were alienated to him. Indeed he never knew where they were until they were pointed out to him by the District Physical Planner. Had the contrary been true then perhaps one would have rightly accused him of fraud for he would have seen and or discovered that the suit premises were being occupied by the defendant and gave it a wide berth. Allegations of fraud were made in the defence and counterclaim and particulars given. As stated in the case of **VIRAN t/a KISUMU BEACH RESORTE .V. PHOENIX OF EAST AFRICA ASSURANCE COMPANY LTD (2004) 2 KLR 269** “..... *Fraud is a serious quasi-criminal imputation and it requires more than proof on a balance of probability though not beyond reasonable doubt. Sufficient notice and particulars must therefore be supplied to the party charged for rebuttal of such allegations.....*” From the evidence on record, I am unable to hold that fraud and the particulars thereof were proved to the required standard. No evidence was tendered to suggest that the plaintiff colluded with officials at the land Registry Nairobi, to have the suit premises registered in his name, or that the plaintiff alienated and registered the suit premises in his name before such alienation was suctioned. There was no

evidence that the plaintiff knew that the suit premises belonged to the defendant for research purposes when they were alienated it to him nor was there evidence that he deceived the commissioner of lands that the suit premises had hitherto not been allocated to anybody. Finally there was no evidence that the suit premises were alienated without the permission or approval of the District Development Committee, Kisii. The issue of this development committee, surfaced long after the plaintiff had acquired the suit premises. It is also instructive that though the defendant made serious allegations of fraud against the office of commissioner of lands and the Land Registry, it made no efforts at all to enjoin them in these proceedings. Neither did it attempt to call them as witnesses to back up its story if indeed it was true. The defendant is a Government Institution. The offices accused of collusion with the plaintiff and fraud are also Government Institutions. Why then should it be difficult to summon them as witnesses. The irresistible inference that one can draw in the circumstances is that the allegations of fraud were not made bonafides. Perhaps this is a classic example of where the left hand of the Government does not know what the right hand is doing. However, the confusion cannot be blamed on or attributed to the plaintiff.

According to the plaintiff, the suit premises were alienated and allocated by the Commissioner of Lands to him after compliance with the due process of the law. In this respect, the plaintiff contended that the suit premises were captured vide the part Development Plans (PDP's) prepared and authenticated by the relevant officers. It was also the plaintiff's evidence that he did not participate in the identification of the suit premises, the preparation of the PDP's and the allocation of same. According to the plaintiff, all the processes were done by the designated officers. Consequently, the plaintiff contended and rightly so in my view that there was no fraud in the alienation, allocation and subsequent issuance of the Title to him.

In any event the issue of fraud can only be addressed as against the Commissioner of Lands and the Attorney General, where necessary. However, in so far as no suit was brought against the said officers, the Defendants' claim, premised on fraud is mistaken. Further the suit premises were alienated and allocated to plaintiff in the year 1992. It is trite law that any claim based on fraud, can only be ventilated within 3 years. In this regard the Defendant's claim if any is actually statutorily barred pursuant sections 4(1) of the **Limitation of Actions Act**.

The answer to issue two framed therefore is that the plaintiff acquisition of the suit premises was not fraudulent or illegal

The plaintiff's Titles having been issued under the Registration of Titles Act the, same are indefeasible. In the premises and as already stated if the Defendant was to prove its claim, it would only be entitled to Damages pursuant to the provisions of section 24 of the Act, which is in terms that:-

“.....Any person deprived of land or of any interest in land in consequence of fraud or through the bringing of that land under the operation of this Act, or by the registration of any other person

as proprietor of the land or interest, or in consequence of any error or misdescription in any grant or certificate of title or any entry or memorial in the register, or any certificate of search, may bring and prosecute an action at law for the recovery of damages against the person upon whose application the land was brought under the operation of this Act, or the erroneous registration was made, or who acquired title to the interest through the fraud, error or misdescription.....”

In view of the foregoing, the plaintiff's Title is not amenable to revocation. Consequently, the Defendant's counter claim, has no legal basis.

Is the plaintiff entitled to damages? He may have been. However no credible evidence was led on this aspect of the case. It would appear that he even abandoned the claim. Accordingly I am unable to make such an award. The same reasoning applies to the claim for hiring the contractor and the value of the building materials confiscated. There was no credible evidence that the plaintiff had actually hired a contractor. There was also no evidence that he had bought building materials and the value thereof.

As for the defendants counterclaim, I find that the it has failed to prove it. In any event the claim is not legally tenable in view of the provisions of section 24 of the Registration of Titles Act aforesaid.

In conclusion, I find that the plaintiff has on the balance of probabilities proved his claim. Accordingly I enter judgment in his favour in terms of prayers (a) (b) and (e) in the plaint. The counterclaim is dismissed with costs as well to the plaintiff.

Dated, signed and delivered at Kisii this 31st May, 2010.

ASIKE MAKHANDIA

JUDGE