

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CIVIL SUIT NO. 209 OF 2017

PRESYBYTERIAN FOUNDATION,

TRUSTEES OF P.C.E.A KITENGELA TOWNSHIP CHURCH.....PLAINTIFF

-VERSUS-

EXPORT PROCESSING ZONES AUTHORITY.....DEFENDANT

COUNTERCLAIM

BETWEEN

EXPORT PROCESSING ZONES AUTHORITY.....1ST DEFENDANT

P.C.E.A. KITENGELA TOWNSHIP CHURCH.....2ND DEFENDANT

DIRECTOR OF SURVEY.....3RD DEFENDANT

CHIEF LAND REGISTRAR.....4TH DEFENDANT

NATIONAL LAND COMMISSION.....5TH DEFENDANT

JUDGMENT

1. The Plaintiff in the main suit, Presbyterian Foundation, Trustees of Kitengela Township Church seek the following reliefs against the Defendant in the same suit, Export Processing Zone Authority.

- (a) A permanent injunction restraining the Defendant, its employees, agents, servants and or officers from evicting or in any way interfering with the quiet possession enjoyed by members of the Plaintiff church over all that parcel of land known as KAJIADO/KAPUTIEI-NORTH/13552, suit land, pending the hearing and determination of the suit.
- (aa) A declaration that the Plaintiff is the legal and bonafide owner of the suit land and that the title is succinct (sic) (maybe sacrosanct).
- (ab) A declaration that the Defendant is a trespasser and an illegal occupant of a portion of the suit land since the Plaintiffs' purchase of the land.
- (ac) an order of eviction to issue against the Defendant and an order for supervised removal of the Defendant's one stroke diesel pump and hyped massive unused water tower.
- (ad) a declaration to estop the Defendant or any other entity or institution from interfering with the Plaintiff's quiet possession of the suit property.
- (ae) A declaration that the Defendant's existence, operations and cosmetic improvement on a portion of the suit land was illegal and not supported by an agreement with the Plaintiff or any other ownership claim and or legal basis.
- (af) General damages and a declaration that the Defendant do compensate the Plaintiff for illegal occupation of the suit land at a cost of Kshs. 300,000/- per month from the time of ownership.

- (ag) Mesne profits against the Defendant.
- (ai) A declaration that the Plaintiff is a bonafide 3rd party purchaser for value without notice.
- (aj) A reimbursement/restitution/compensation for the cost of land and buildings as per the valuation report of Accurate Valuers Limited.
- (b) A permanent injunction be issued restraining the Defendant its employees, agents, servants and or officers from evicting or in any way interfering with the quiet possession enjoyed by members of the Plaintiff church over the suit land, pending the hearing and determination of this application.
- (c) A permanent injunction be issued restraining the Defendant, its employees, agents, servants and officers from arresting or instigating the arrest of the committee members of the church pending the hearing and determination of this suit.
- (d) A permanent injunction be issued restraining the Defendant its employees, agents, servants and officers from arresting and instigating the arrest of the committee members of the church pending the hearing and determination of this application.
- (e) General damages.
- (f) Costs.
- (g) Any other relief that this court will deem fit to grant.
- (h) Interest on (ah) and (d) above.

This is as per the amended plaint dated 16th December, 2014.

2. The Plaintiffs' case is as follows. They are the registered owners of the suit land situated in Kitengela Township. They purchased the land from Minyi Virji Varsani, Menghj Manji Varsani and Vinod Hanji Varsani and the transfer was effected on 30/10/2002. The Plaintiff now holds the title to the suit land. In July 2008, the Plaintiff lost the title deed but was later issued with another one after procedurally raising the issue with the Land Registrar, Kajiado who gazetted the loss vide Notice No. 5712 of 4/7/2008.
3. The Plaintiff has over the years developed the suit land by building a place of prayer and worship, a primary school and other development all valued at Kshs. 245,000,000/- as per a valuation report by Accurate Valuers Limited.
4. Before purchasing the suit land, the Plaintiff carried out a thorough search and due diligence and established that the seller had a good title. The original land was *KAJIADO/KAPUTIEI-NORTH/70* measuring *200 hectares*. It was later subdivided into several portions which included *KAJIADO/KAPUTIEI-NORTH/1787* measuring *80.94 hectares* which mutated to *L.R. Kajiado/Kaputiei-North 2162* among others which mutated to the suit land among other parcels.
5. Contrary to the averments by the Defendant that the suit land was compulsorily acquired by the Government, the relevant gazette notice No. 2802 did not indicate that L.R. No. 2162 or the suit land would be compulsorily acquired. Further to this, the Defendant seems to confuse two distinct parcels namely *Kajiado/Kaputiei/70* and *Oloolokitikoshi/70*. There is no relationship between the two parcels. Furthermore, there is no evidence that an inquiry was held on

16/7/1991 at Athi River Chief's Camp and that the late Simion Likimani, the original owners of Kajiado/Kaputiei-70 participated in the inquiry.

6. In support of its case, the Plaintiff filed the following evidence.
 - (i) Witness statement by Raphael Kapai Lerionka.
 - (ii) Valuation report by Accurate Valiers Limited.
 - (iii) Copies of title deeds for L.R. Kajiado/Kaputiei-North/2162 and 13552.
 - (iv) Copies of gazette Notices 2802, 2803 and 5712 dated 13/6/1991 and 4/7/2008.
 - (v) Copy of confidential letter dated 20/9/1991.
 - (vi) Copy of the register for Land Parcels Kajiado/Kaputiei-North/332, 1787 and 790.
 - (vii) Other relevant documents.
7. The Defendant in the main suit filed an amended statement of defence dated 20/2/2015 together with a counterclaim dated 27/11/2014. In the defence the Defendant avers as follows. Firstly, the Defendant contends that the Plaintiff does not have a clean title to the suit land because the same was compulsorily acquired by the Government of Kenya on behalf of the Defendant vide Gazette Notice No. 2802 of 13/6/1991. It measures *one (1) hectare* and it was part of *Olooloitikoshi/Kitengela/70*.
8. Secondly, the requisite notice was duly given to the owner of the land namely, Simon Sayalel Likimani, who was duly compensated and paid Kshs. 142, 600/-. The error in referring to the suit land as *Olooloitikoshi/Kitengela/70* instead of *Kajiado/Kaputiei-North/70* is well explained in a letter dated 20/9/1991 by the

chief valuer. In addition to the one hectare acquired, there are several other portions in the neighbourhood.

9. The Defendant constructed a Treated Water Trunk Mains, reinforced Concrete Reservoir, Elevated Water Steel Tank, Distribution Mains as well as a Booster Pumping Station and Ancillary Works on the one hectare acquired from Simon Sayalel Likimani in the year 1991 as part of its infrastructure. The costs was Kshs. 166 million.

In the year 2007, a borehole was constructed on the fenced portion of the Defendants one hectare. The said borehole was constructed with the approval of and is solely managed by the Defendant. The Plaintiff did not at any time complain or object to its construction. The water supply infrastructure has existed since 1991 and no one has challenged its legality on the suit land for all this time.

10. The process of surveying and subdivision of the Defendant's one (1) hectare from L.R. Kajiado/Kaputiei -North/70 took time due to budgeting constraints on the part of the Government of Kenya. Eventually when funds became available it was found out that Mr. Likimani's land in which the Defendant's land was, had been subdivided into seven (7) parcels. Six of them had been sold to other parties leaving only one which is Kajiado/Kaputiei-North/13552 measuring approximately 0.94 hectares. The Defendant's water supply infrastructure, a pit latrine and security guard room were properly fenced and occupied an area measuring approximately 0.4556 acres.

When the Defendant learnt that its land had been wrongly registered in favour of the Plaintiff, it sought an amicable settlement of the dispute but this failed. The dispute between the Plaintiff and the Defendant became violent when the Plaintiff pulled down and destroyed the Defendant's customer care office. The value of the damaged property has been quantified at Kshs. 4 million.

11. The Defendant contends, from the foregoing, that the title held by the Plaintiff was not acquired lawfully hence it does not confer a good title and it is not better than that of the Defendant. In contrast, the Defendant acquired a good title way back in the year 1991 and the Government paid the owner for the land and the Defendant occupied it by building the water infrastructure and auxiliary works. At the time of the purported purchase of the suit land by the Plaintiff all this massive and imposing structure was on the land and the Plaintiff should have sought to know about its owner before proceeding with the land transaction. The Defendant adds that the church building and other Plaintiff's structures have been constructed and are accessed separately from the Defendant's infrastructure and the reason why the Defendant did to interfere is because it sought an amicable settlement of the dispute. There is therefore no doubt that the suit land belongs to the Defendant and not the Plaintiff. The massive and multimillion water infrastructure that benefits millions of Kenyas directly as well as through the support of expansive export processing zone at Athi River is in the best interest of the public as opposed to the Plaintiff's interest which are only for a few members.

For the above and other reasons, the Defendant prays that the Plaintiffs suit be dismissed with costs.

12. In addition to the defence the Defendants seeks the following reliefs against the Plaintiff, the Director of Survey, the Chief Land Registrar and the National Land Commission (referred to as the first, second, third and fourth Defendants in the counterclaim) in a counterclaim dated 27/11/2014.

- (a) The Plaintiff's claim against the Defendant in the main suit (and Plaintiff in the counterclaim) to be dismissed with costs.*
- (b) A declaration that one (1) hectare out of L.R. Kajiado/Kaputiei-North/70 belongs to the Defendant in the main suit and the Plaintiff in the counterclaim.*
- (c) A declaration that Title No. Kajiado/Kaputiei-North/13552 (suit land) was fraudulently carved out of one (1) hectare out of L.R. Kajiado/Kaputiei-North/70 and hence not a good title.*
- (d) An order of eviction do issue against the Plaintiff in the main suit and the first Defendant in the counterclaim from the premises unlawfully referred to as Title No. Kajiado/Kaputiei-North/13552.*
- (e) A declaration that demolition of the Defendant's private property by the Plaintiff in the main suit and the first Defendant in the Counterclaim or cross suit was unlawful.*
- (f) The Plaintiff in the main suit and the first Defendant in the counterclaim do refund the Defendant in the main suit and Plaintiff in the counterclaim a*

sum of Kshs. 4 million as special damages for the demolished structures plus interest thereon at commercial rates.

(g) General damages and or appropriate compensation to be paid by the 1st, 2nd and 3rd defendants for the demolished structures belonging to the Defendant in the main suit and Plaintiff in the counterclaim.

(h) A declaration that the subdivision of one (1) hectare out of L.R. Kajiado/Kaputiei- North/ 70 by the second Defendant in the counterclaim was unlawful.

(i) A declaration that the registration of subsequent parcels out of one (1) hectare out of L.R. Kajiado/Kaputiei-North/ 70 by the third Defendant in the counterclaim was unlawful.

(j) Mesne profits against the first, second and third Defendants in the counterclaim jointly and severally for the duration that the Plaintiff in the counterclaim has been kept out of using a portion of its land.

(k) An order of cancellation of the title to the suit land and issuance of an appropriate title in favour of the Plaintiff in the counterclaim.

(l) An intervention by the 4th Defendant in the counterclaim in exercise of its mandate as outlined under **Article 67** of the **Constitution of Kenya**.

(m) Costs and interest at court rates.

(n) Such further or other relief as the court may deem just and fit to grant.

13. In support of its case, the first Defendant filed the following evidence.

(i) Witness statements by Maria Ouya, Cyrille Nabutola and Andrew Njunu.

(ii) *Twenty Eight documents which include the following, a Government of Kenya document outlining the land requirements for EPZA infrastructure, copy of gazette notice No. 2802 of 13/6/1991, copy of gazette notice No. 2803 of the same date, Chief Valuers letter dated 20/9/1991, copy of payment voucher for Kshs. 142,600/- payable to Simon Kayalel Likiman as compensation for the suit land, notice of taking possession dated 13/1/1992, copy of contract for service for the water infrastructure between the Defendant and Margat, I.B. Patel and Partners dated 1994, correspondence between the Defendant and Ministry of Land Officials over the suit land and other relevant documents.*

14. The second and third Defendants in the counterclaim filed a written statement of defence dated 20/9/2017 in which they aver that the subdivision of L.R. Kajiado/North Kaputiei/70 without excluding the one (1) acre (sic) previously acquired by the Government was done through misrepresentation, malice, bad faith and with intent to defraud the public of its public utility. They add that the acquisition and alleged registration of the first Defendant as the owner of the suit land is illegal, unlawful, fraudulent, null and void. They further accuse the previous owners of fraud and collusion with the first Defendant with intent to defraud the public. They both pray for the dismissal of the suit by the first Defendant in the counterclaim.
15. In support of their case, the second and third Defendants in the counterclaim filed two witness statements by Kebaso Wycliffe Maenge Land Surveyor Kajiado County and Nyandoro Nyambaso, District Land Registrar, Kajiado. They also

filed four documents namely; a copy of letter dated 30/1/2017, copy of surveyors letter dated 24/7/2017, sketch map for the suit land and a mutation form.

16. The fourth Defendant, in a written statement of defence dated 22/6/2017 took the same position as the second and third Defendants namely that the suit land was compulsorily acquired by the Government of Kenya for the benefit of the Plaintiff in the counterclaim and that it is not available for any other purpose. It prays for the dismissal of the Plaintiff's case in the counterclaim with costs.
17. In support of its case, the fourth Defendant filed a witness statement by Charles Moemi, a registered valuer and a deputy director of valuation with the Ministry of Lands and Physical Planning. It also filed a couple of documents all of which have been filed by other parties. The fourth Defendant's witness emphasizes that no valid title could pass to the first Defendant in the counterclaim over land that had already been compulsorily acquired by the Government many years before the purported acquisition.
18. At the trial only the church and the EPZA called witnesses. The church called Geoffrey Gathanu Njuguna a valuer and Raphael Lerionka Kapai, its Chairman Land and Property Committee. The two witnesses reiterated the already pleaded averments of the value of the land and the buildings thereon and the legality of the registration of the church as the owner of the land.

On the other hand, the Defendant in the main suit called only one witness named Andrew Njuru, its assistant property Manager who reiterated the Defendant's position that the suit land was compulsorily acquired by the Government on behalf of EPZA and it was not therefore available for purchase by the church.

19. Counsel for EPZA filed written submissions on 12/1/2023 while the church's counsel filed his on 15/3/2023. The other counsel on record did not file any submissions. The issues identified by the church are as follows.

- (i) Whether the land acquisition process initiated by the commissioner of land through gazette Notices 2802 and 2803 was successful or illegal, null and void.*
- (ii) Whether the Government could acquire land that was the subject of succession litigation and riddled with restrictions and cautions?*
- (iii) Whether the Plaintiff/Church is the registered owner of L.R. Kajiado/Kaputiei-North/ 13552?*
- (iv) Whether the Defendant authority has been trespassing on the Plaintiff's land and the remedies available to the Plaintiff?*
- (v) Whether the Plaintiff should be granted the order of permanent injunction and eviction of the authority from the suit land?*
- (vi) Whether the church is entitled to mesne profits for the illegal occupation of 32 years on a quarter of its land?*
- (vii) Who pays the costs?*

20. On the other hand, the counsel for the Defendant identified the following seven issues for identification.

- (a) Whether the Government acquired Kajiado/North Kaputiei-70 on behalf of the Defendant?*
- (b) Whether the land in question, Kajiado/Kaputiei-North/ 70, was mistaken for another land known as Oloolotikoshi/Kitengela/ 70?*

- (c) *Whether the Plaintiff was a bona fide purchaser for value without notice?*
- (d) *Whether it is in the public interest to cancel the Plaintiff's title?*
- (e) *Whether the Plaintiff acquired the suit land for valuable consideration?*
- (f) *Whether the Defendant is entitled to the prayers sought in the counterclaim?*

21. I have carefully considered all the evidence adduced by all the parties including the witness statements, documents, testimony at the trial, the written submissions and the law cited therein and I make the following findings by the counsel for the parties.

22. On the first of the Plaintiffs issues, I find that the process of compulsory land acquisition initiated by the commissioner of land through *gazette notices number 2807 and 2803* was valid and successful. The procedure set out in the **Land Acquisition Act (CAP 295)**, now repealed was carried out to the letter. There was the justification for the acquisition, followed by the gazette notices, the inquiry and finally the compensation to the owner of the suit land. The acquisition has never been nullified by any court or tribunal. There was no complaint by Simon Sayalel Likimani either during the process of acquisition or even after he was not compensated. It is only him and his successors in title who could complain.

The Plaintiff cannot be heard to complain in this suit because it was not privy to the facts of the land acquisition process. A lot has been said about the description of the land to be acquired as Olooitikoshi/Kitengela/70 instead Kajiado/Kaputiei-North/70 but the correction of 30/9/1991 was sufficient.

23. On the second of the Plaintiff's issues, I find that the Government acquired one hectare of L.R Kajiado/Kaputiei-North/70 and if there were restrictions and cautions, they ought to have been dealt with during the acquisition process. No evidence has been adduced to demonstrate that the process was nullified by any court order at the time. The fact that Mr. S.S. Likimani was paid compensation means that the process was successfully concluded.
24. Regarding the third issue, I find that the Plaintiff is the registered owner of L.R. Kajiado/Kaputiei-North/13552 as per the land records held by the District Land Registrar, Kajiado. However, I find that this registration has been successfully challenged in the counterclaim for the following reasons.

Firstly, it has been proved that the Government of Kenya lawfully acquired this land in the year 1991. This being the case, the same land could not lawfully be registered in the names of Meghji Manji Varsani, Manji Virji Varsani and Vinod Manji Varsani the predecessors of the Plaintiff in title.

Secondly, it has been proved that the Defendant built a water infrastructure on the land between 1991 and 1994. When the Plaintiff purported to purchase the suit land, this infrastructure was on the land. Yet the sale agreement dated 20/3/2002 provides that the property is sold with vacant possession. It was incumbent upon the Plaintiff to ensure that the land was vacant. The Plaintiff failed in this regard.

Section 30(g) of the **Registered Land Act (now repealed)** provided as follows.

30. "Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as

may for the time being subsist and affect the same, without their being noted in the register –

(g) The rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed”

What this means is that the Defendant not only owned the suit land but also enjoyed overriding interests superior to the Plaintiff's registration of the same land.

25. **Under Section 26(a)** of the **Land Registration Act, (Act No. 3 of 2012)** where a certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme, then it can be challenged. In this case, the land in question was acquired unprocedurally by the Plaintiffs predecessors in title because it had already been acquired and occupied by the Defendant.

26. The fourth issue has already been decided because the Defendant has already been found to be the lawful owner of the suit land. It is therefore the Plaintiff which is the trespasser.

The answer to the fifth issue flows from the finding in the third issue and it is that the orders of permanent injunction and eviction of the authority from the suit property should not be granted.

Finally on the Plaintiff's sixth issue, I find that it is not entitled to mesne profits because the suit land belongs to the Defendant.

27. Having decided on the Plaintiff's issues, I think that I should only decide on the third of the Defendant's issues. I find that the Plaintiff was not a bona fide purchaser for value without notice because at the time of purchase of the suit land, there was an existing Defendant's water infrastructure on the land.

Secondly, under **Article 40 (6)** of the **Constitution** it is provided as follows.

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

I have already found that the Plaintiffs' property was unlawfully acquired. It is not therefore protected under **Article 40** of the **Constitution of Kenya**".

Finally, in the case of **Dina Management Limited -versus- County Government of Mombasa and 5 others Petition No. 8 (E010) of 2021, the Supreme Court of Kenya** had this to say about **Article 40** of the **Constitution** at **paragraph 111** of its **judgment dated 21/4/2023**.

111"Article 40 of the Constitution entitles every person the right to property subject to limitations set out therein. Article 40 (6) limits the rights as not extending to property that has been found to have been unlawfully acquired. Having found the 1st registered owner did not acquire title regularly, the ownership of the suit property by the appellant thereafter cannot therefore be protected under Article 40 of the Constitution. The root of the title having been challenged, as already noted above the Appellant could not benefit from the doctrine of bona fide purchaser".

I need not say more because the facts of this case are similar to those of the ***Dina Management Case.***

28. For the foregoing reasons, ***I dismiss the Plaintiffs suit against the Defendant with costs.***

Secondly, ***I enter judgment for the Plaintiff in the counterclaim against the first Defendant only in terms of prayers (b), (c), (d), (h), (i), (k) and (m) only. The other prayers were either superfluous or not proved.***

It is so ordered.

Dated Signed and Delivered at Kajiado Virtually this 21st Day of September, 2023.

JUSTICE M. N. GICHERU
KAJIADO ENVIRONMENT &
LAND COURT


M.N. GICHERU
JUDGE