



REPUBLIC OF KENYA



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Ethics and Anti-Corruption Commission v Ogonji & another (Environment and Land Case Civil Suit 39 of 2020) [2025] KEELC 1446 (KLR) (20 March 2025) (Judgment)

Neutral citation: [2025] KEELC 1446 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CASE CIVIL SUIT 39 OF 2020
SO OKONG'O, J
MARCH 20, 2025

BETWEEN

ETHICS AND ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

FRED OGONJI 1ST DEFENDANT

SAMMY KOMEN MWAITA 2ND DEFENDANT

JUDGMENT

1. The Plaintiff is a body corporate established under the *Ethics and Anti-Corruption Commission Act* 2011 and brought the suit under the provisions of the said Act.
2. The Plaintiff averred that at all material times, all that parcel of land known as Kisumu Municipality/ Block 7/559 (hereinafter referred to as “the suit property”) was part of a larger parcel of land which was vested in the General Manager of the defunct East African Railways and Harbours Administration through *Legal Notice No. 440 of 1963*. The Plaintiff averred that before the said larger parcel of land was vested in the General Manager of the defunct East African Railways and Harbours Administration, the land was surveyed in 1935, assigned L.R No. 1148 Section LV and set apart as a railway reserve (hereinafter referred to as “the railway reserve”). The Plaintiff averred that the survey plan for the railway reserve was registered at the Survey of Kenya as F/R No. 43/53.
3. The Plaintiff averred that the railway reserve was vested in the defunct East African Railways Corporation through *Legal Notice No. 20 of 1969*. The Plaintiff averred that following the dissolution of the East African Community in 1977, all the assets of the East African Railways Corporation including the suit property which was part of the railway reserve was vested in Kenya Railways Corporation (hereinafter referred to as “Kenya Railways”) through *Legal Notice No. 24 of 1986*.
4. The Plaintiff averred that in 1999, the 1st Defendant unlawfully and fraudulently obtained a lease of the suit property from the 2nd Defendant for private purposes. The Plaintiff averred that the purported



lease was registered at the Land Registry at Kisumu on 30th June 2000 and a certificate of lease was issued in favour of the 1st Defendant on under the Registered Land Act, Chapter 300 Laws of Kenya. The Plaintiff averred that the 2nd Defendant acted illegally in issuing the said lease to the 1st Defendant. The Plaintiff averred that the registration of the suit property in the name of the 1st Defendant and the issuance of a certificate of lease in his favour was unlawful, fraudulent, null and void, and could not confer any estate, right or interest upon the 1st Defendant or any other person.

5. The Plaintiff averred that the Defendants were aware of Kenya Railways' interest in the suit property. The Plaintiff averred in the alternative that the 1st Defendant held the suit property as a constructive trustee for Kenya Railways and as such the register of the suit property should be rectified to reflect that position.
6. The Plaintiff averred that the illegal alienation of the suit property for private purposes was contrary to the intended public purpose for which the property was vested in Kenya Railways.
7. The Plaintiff prayed for judgment against the Defendants for;
 - a. A declaration that the issuance of a lease by the 2nd Defendant to the 1st Defendant over Kisumu Municipality/Block 7/559(the suit property) was null and void ab initio and ineffectual to confer any right, interest or title upon the 1st Defendant.
 - b. A declaration that the registration of the lease and issuance of a certificate of lease over the suit property to the 1st Defendant was null and void and ineffectual to confer a good title upon the 1st Defendant.
 - c. In the alternative to (a) and (b) above, a declaration that the 1st Defendant holds the suit property in trust for Kenya Railways and the land register should be rectified by deleting the name of the 1st Defendant and substituting it with the name of Kenya Railways as the proprietor of the property.
 - d. An order for the rectification of the register of the suit property by the cancellation of the lease registered over the suit property and the certificate of lease issued to the 1st Defendant and restoration of the property to Kenya Railways.
 - e. An order for a permanent injunction restraining the 1st Defendant by himself, his agents, servants or assigns from leasing, transferring, charging, entering upon, developing, or in any manner howsoever dealing with the suit property.
 - f. General damages for fraud.
 - g. Costs of the suit.
8. The 1st Defendant did not enter appearance while the 2nd Defendant entered appearance but did not file a statement of defence. At the trial, the Plaintiff called Geofrrey Wekesa Nyongesa (PW1) as its first witness. PW1 stated that he was working with Kenya Railways as a Senior Cartographer and had held that position for 10 years. He stated that he was giving evidence to assist in the recovery of the suit property which belonged to Kenya Railways but was illegally acquired. He adopted his witness statement dated 2nd September 2019 as part of his evidence in chief.
9. PW1 referred the court to the survey map dated 19th July 1902 which showed Kenya Railways boundaries in 1902. He stated that the map showed Port Florence Station now known as Kisumu. He stated that the map defined Kenya Railways' land in Kisumu as at 1902. He pointed out the location of the suit property on the map. He produced the map as P.EXH.1. PW1 also referred the court to



- the 1908 survey map which also showed the boundaries of Kenya Railways' land at that time. PW1 pointed out to the court the location of the suit property on the map which he produced as P.EXH.2.
10. PW1 also referred the court to the Survey Plan No. F/R No. 43/53 of 1935. He stated that this survey plan showed the boundaries of Kenya Railways' land in Kisumu within L.R No. 1148. He produced the map as P.EXH. 3. He stated that L.R No. 1148 was the larger parcel of land that covered the entire Kisumu Municipality. He stated that the map showed Kenya Railways' interests which were on the sections marked LV, LVIII and LX. He stated that the map showed Kenya Railways' boundaries as at 1935. PW1 showed the court the location of the suit property on the map.
 11. PW1 referred the court to Kisumu Municipality Part Development Plan (PDP) of 1964 for L.R No. 1148. He stated that the PDP was divided into blocks. He stated that Kenya Railways' interest was in block 7 where the suit property is situated. He pointed out to the court the location of the suit property on the PDP which he produced as P.EXH.4. PW1 also referred the court to Kenya Railways' land Part Development Plant (KRPDP) of 1962 which showed Kenya Railways' land within L.R No. 1148. He produced this KRPDP as P.EXH. 5. PW1 also referred to the Kenya Railways & Harbours layout plan of 1966 which defined Kenya Railways' interest in Block 7 and partly Block 3 within L.R No. 1148. PW1 stated that the suit property appeared in this layout plan within Kenya Railways Staff Quarters. He produced the layout plan as P.EXH. 6. PW1 also referred the court to the Registry Index Map (RIM) for Block 7. He pointed out to the court the location of the suit property which he said was within Kenya Railways' land.
 12. The Plaintiff's next witness was Hassan Zacharia Mososi (PW2). PW2 told the court that he was working with the Ministry of Lands as a land surveyor. PW2 stated that the suit property belonged to Kenya Railways but the same had been allocated to a third party. PW2 adopted his witness statement dated 18th September 2019 as his evidence in chief. He produced the Registry Index Map for Block 7 as P.EXH.7 and Survey Plan No. F/R 291/18 as P.EXH. 8. He stated that P.EXH.8 was the survey plan that gave rise to the suit property. He stated that land parcel No. 560 shown in the survey plan was Kenya Railways' land.
 13. The Plaintiff's next witness was Margaret Wambeti Ngare (PW3). PW3 told the court that she was employed by the Plaintiff as an investigator and that she was a member of the team that investigated the allocation of the suit property to the 1st Defendant by the 2nd Defendant. She adopted her witness statement dated 15th October 2019 as her evidence in chief. PW3 produced a certificate of official search dated 8th August 2019 as P.EXH.9, the extract of the register for the suit property as P.EXH.10, the documents listed in the Plaintiff's list and bundle of documents as numbers 5 to 16 as P.EXHS. 11 to 22 respectively, and the documents listed in the same list of documents as numbers 20 to 32 as P.EXHS. 23 to 35 respectively. PW3 stated that the finding of their investigation was that the suit property was irregularly leased to the 1st Defendant by the Commissioner of Lands. PW3 stated that the suit property was created from land that was reserved for Kenya Railways and as such was not available for allocation. PW3 stated that the Ministry of Lands could not legally issue a 99-year lease over Kenya Railways' land without the consent of Kenya Railways. PW3 stated that the suit property was within the land that was vested in Kenya Railways and the vesting order had not been lifted. PW3 urged the court to cancel the title held by the 1st Defendant. On examination by the court, PW3 stated that the suit property was not developed.
 14. The Plaintiff's last witness was Joseph Kiragu Kariuki (PW4). PW4 told the court that he worked with the Ministry of Lands from 1988 until 2015 when he joined the National Land Commission(NLC) where he worked until he retired in 2022. PW4 adopted his witness statement dated 2nd September 2019 as his evidence in chief. He stated that the suit property belonged to Kenya Railways from the



records held by the NLC. He stated that he wrote to the 1st Defendant on 10th March 2009 to surrender the title that he held for the suit property to the Land Registrar for cancellation because the land was allocated to the 1st Defendant in error. He stated that in the letter, he informed the 1st Defendant that the suit property belonged to Kenya Railways. He stated that by that letter, the allotment of the suit property to the 1st Defendant was cancelled.

15. As mentioned earlier, the Defendants did not defend the suit. They did not therefore give evidence at the trial. After the close of evidence, the parties were directed to make closing submissions in writing. The Plaintiff filed submissions dated 23rd October 2024.
16. From the plaint, the evidence and submissions on record, the following in my view are the issues arising for determination in this suit;
 - a. Whether the allocation of the suit property to the 1st Defendant was lawful;
 - b. Whether the lease and certificate of lease issued to the 1st Defendant in respect of the suit property conferred upon the 1st Defendant any lawful interest in the suit property;
 - c. Whether the Plaintiff is entitled to the reliefs sought in the plaint, and
 - d. Who is liable for the costs of the suit?

Whether the allocation of the suit property to the 1st Defendant was lawful

17. This suit was not defended. The averments in the plaint were not rebutted. The evidence adduced by the Plaintiff's witness was not challenged. I am satisfied from the evidence on record that the suit property was created from the land reserved for Kenya Railways. The Defendants did not challenge the evidence presented to the court by the Plaintiff which showed that the suit property was within the land reserved for Kenya Railways. The land was initially vested in the East African Railways and Harbours Administration through [Legal Notice No. 440 of 1963](#). The land was subsequently vested in the East African Railways Corporation through [Legal Notice No. 20 of 1969](#). Following the dissolution of the East African Community, the land was vested in Kenya Railways Corporation, through [Legal Notice No. 24 of 1986](#).
18. There is no evidence that the land from which the suit property was created was de-gazetted from being part of the land that was vested in Kenya Railways through [Legal Notice No. 24 of 1986](#) before the same was allocated to the 1st Defendant on 12th October 1998. It is my finding that the suit property was reserved for Kenya Railways when it was allocated to the 1st Defendant as Uns. Residential Plot No. 8 Kisumu Municipality. I agree with the Plaintiff that since the suit property was reserved for Kenya Railways, the same was not available to the Commissioner of Lands for allocation.
19. The Commissioner of Lands could only allocate unalienated government land. Section 3(a) of the Government Lands Act, Chapter 280 Laws of Kenya (now repealed) provides that:

“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 estates, interests or rights in or over unalienated government land;”



20. Unalienated government land is defined in section 2 of the Government Lands Act, Chapter 280 Laws of Kenya (now repealed) as:

“Government land which is not for the time being leased to any other person, or in respect of which the Commissioner has not issued any letter of allotment”.

21. The land from which the suit property was created was not unalienated government land. The land was reserved for Kenya Railways. The same could not be allocated as unalienated government land unless surrendered to the Government of Kenya by Kenya Railways or the reservation is revoked or cancelled. There is no evidence that Kenya Railways surrendered the suit property to the Government or that the same was de-gazetted from being part of Kenya Railways’ land. This means that the suit property remained reserved for Kenya Railways at the time it was allocated to the 1st Defendant.

22. It is my finding arising from the foregoing that the suit property was allocated to the 1st Defendant unlawfully and unprocedurally. The property having been reserved for Kenya Railways was not available for allocation by the 2nd Defendant to the 1st Defendant.

Whether the lease and certificate of lease issued to the 1st Defendant conferred upon the 1st Defendant any lawful interest in the suit property

23. The suit property was registered under the Registered [Land Act](#) Chapter 300 Laws of Kenya (now repealed). Sections 27 and 28 of the Registered [Land Act](#) provide as follows:

27. Subject to this Act -

- (a) a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;
- (b) b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.

28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject -

- (a) a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
- (b) b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.

24. Sections 24, 25 and 26 of the [Land Registration Act](#) 2012 provide as follows:

24. Subject to this Act—



- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

25.

- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
 - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

26.

- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
 - (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

25. I have found above that the allocation of the suit property to the 1st Defendant was irregular and illegal. This means that the 1st Defendant did not have a proprietary interest in the suit property. The title held by the 1st Defendant was null and void and could not confer upon the 1st Defendant any interest in the suit property. In *Macfoy v. United Africa Co. Ltd.*[1961] 3 All E.R 1169, Lord Denning stated as follows at page 1172 concerning an act which is a nullity:

“If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without much ado, though it is sometimes convenient to have the Court to declare it to be so. And every



proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse”.

26. In *Wambui v. Mwangi & 3 others*, (Civil Appeal 465 of 2019) [2021] KECA 144 (KLR) the Court of Appeal stated as follows:

“70. Sixth, the title was also tainted with nullity in that the court process on the basis of which the title to the suit property was anchored was subsequently declared null and void ab initio. The position in law as we have already highlighted above is that anything founded on nullity is also null and void and of no consequence. The title allegedly vested in the 3rd respondent and subsequently passed on to the appellant having stemmed from court proceedings that were subsequently declared null and void also stood vitiated by the same nullity and of no consequence. The Judge cannot therefore be faulted for stating the correct position in law in the manner done.

71. Seventh, section 80 of the Act is explicit that any title founded on irregularity, unprocedurally or a corrupt scheme stands vitiated. The title purportedly acquired by the 3rd respondent and subsequently passed on to the appellant having been demonstrably shown to have been tainted with fraud, deceit and nullity fits the description of title that has been acquired not only irregularly and unprocedurally but also through a corrupt scheme. The corrupt scheme herein arises from the facts informing the vitiated High Court proceedings which we find no need to rehash but adopt as already highlighted above.

72. In light of all the above, we reiterate that the Judge’s reasoning as to why appellant’s title to the suit property was vitiated was well founded both in fact and in law and is therefore unassailable.”

27. Due to the foregoing, it is my finding that the lease and certificate of lease issued to the 1st Defendant did not confer upon the 1st Defendant any proprietary interest in the suit property.

Whether the Plaintiff is entitled to the reliefs sought in the plaint

28. I am satisfied from the foregoing findings that the Plaintiff has proved its claim against the Defendants on a balance of probabilities. I have set out earlier in the judgment the reliefs sought by the Plaintiff against the Defendants. The Plaintiff has established a case for the grant of prayers (a) to (e) of the plaint. The Plaintiff did not lead evidence in support of the claim for general damages for fraud sought in prayer (f) of the plaint. I will not award general damages to the Plaintiff. On the issue of costs, each party shall bear its costs of the suit since the suit was not defended.

29. In conclusion, I hereby enter judgment for the Plaintiff against the Defendants for;

- a. A declaration that the issuance of a lease by the 2nd Defendant to the 1st Defendant over all that property known as Kisumu Municipality/Block 7/559 (the suit property) was null and void ab initio and was ineffectual to confer any right, interest or title in the property upon the 1st Defendant.
- b. A declaration that the registration of the lease and issuance of a certificate of lease over all that property known as Kisumu Municipality/Block 7/559 to the 1st Defendant was null and void and was ineffectual to confer a good title in the property upon the 1st Defendant.



- c. An order directing the Land Registrar Kisumu to rectify the register of the suit property by cancelling the registration of the 1st Defendant as the leasehold proprietor of all that property known as Kisumu Municipality/Block 7/559 and the certificate of lease that was issued to the 1st Defendant and restoring the property in the name of Kenya Railways Corporation as the leasehold proprietor thereof.
- d. An order of a permanent injunction restraining the 1st Defendant by himself or through his agents, servants or assigns from leasing, transferring, charging, entering upon, developing, or in any manner howsoever dealing with all that property known as Kisumu Municipality/Block 7/559.
- e. Each party shall bear its costs of the suit.

DELIVERED AND DATED AT KISUMU ON THIS 20TH DAY OF MARCH 2025

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Kakuvi for the Plaintiff

N/A for the 1st and 2nd Defendants

Ms. J. Omondi-Court Assistant

